

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Wm G. White to Elena Kagan re: Draft HHS Language (partial) (1 page)	07/23/1997	P6/b(6)
002. fax	Renee Landers to Elena Kagan re: phone number (partial) (1 page)	07/23/1997	P6/b(6)
003. email	Nancy Min to Barbara Chow re: Conversation with Karen Nelson on Hyde Provisions (2 pages)	06/25/1997	P5
004. memo	Charles Ruff and William Marshall to the President (4 pages)	06/10/1998	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Abortion [Binder] [1]

2012-0254-S

rc652

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Abortion

Abortion-General

1998 Act did not include provisions regarding parental consent or advance notification. Other provisions regarding compliance certification, and adherence to State laws are current law included in the FY 1998 Act).

- Senate. No action to date.

- o Hyde-Amendment Language:

- House. Both sections 508 and 509 of the bill include provisions maintaining current law "Hyde" language barring the use of funds in the Act for abortions. New language extends this ban to all trust fund appropriation accounts in the Act. The bill contains language that prohibits the use of Medicaid funding for abortions except in cases of rape, incest, or when the life of the mother is endangered.

- Senate. No action to date.

TREASURY/GENERAL GOVERNMENT

Status:

- o Senate Floor debate on the bill began 7/28/98 but was postponed on 7/30/98 until after the August recess. Passed the House 7/16/98, 218-203.

Provisions:

- o Federal Employees Health Benefits Program (abortion):

- House. The House-passed bill includes language (section 508) that prohibits Federal Employees Health Benefits Program (FEHBP) coverage of abortions, with no exceptions. DeLauro (D-CT) amendments to strike the restrictive language were defeated during Committee and Floor consideration. Section 515, the provision of the Committee bill that included exceptions to the restriction (rape, incest, life of the mother), was struck on the House Floor on a point of order for lack of authorization.

- Senate. The Senate bill includes an amendment adopted on the Senate Floor that would reinstate objectionable current law restrictions on FEHBP coverage for abortion services. This amendment also includes a provision allowing for rape, incest, life-of-the-mother exceptions.
- o Federal Employees Health Benefits Program (contraceptives):
 - House. A Lowey (D-NY) amendment (section 624 – similar to section 516 language of the Committee bill but written only as a funding issue) to require FEHBP insurers to cover prescription contraceptives (with exceptions for certain religiously oriented plans) was adopted on the House Floor, 224-198. A Smith amendment to exclude abortion-inducing chemical contraceptive prescriptions from the Lowey amendment was defeated 198-222.
 - Senate. A Snowe (R-ME)/Reid (D-NV) amendment requiring FEHBP coverage of prescription contraceptives was adopted during Senate Floor consideration, including a second-degree amendment to clarify that nothing in the amendment is to be construed to apply to abortion or abortion-related services.

ABORTION - BUDGET PREVISIONS

THE CLINTON ADMINISTRATION: STANDING UP FOR A WOMAN'S RIGHT TO CHOOSE

The new steps the Clinton Administration took today build on the Administration's longstanding commitment to provide American women with safe, high quality family planning services and assure access to choice. This Administration has worked hard to protect a woman's right to choose and to promote safe reproductive health services for women.

- **Creating of the National Task Force on Violence Against Health Care Providers.** Last November, the Justice Department's launched a National Task Force on Violence Against Health Care Providers to coordinate the investigation of violence against women's health care clinics nationwide. The Task Force works closely with local authorities and U.S. Attorneys investigating acts of violence against clinics by: coordinating national investigative efforts; creating an investigative clearinghouse for information related to clinic violence; and providing training to federal, state and local law enforcement personnel.
- **Provided Contraceptive Coverage to More than a Million Women.** The FY99 Omnibus Appropriations Act contains an important policy breakthrough on reproductive choice. The final bill requires the 300 Federal Employees Health Benefits Plans (FEHBP) to cover contraceptive drugs and devices, providing coverage to approximately 1.2 million women of childbearing age. Until now, only 19% of federal health plans covered prescription contraceptives and 10% of the plans offered no contraceptive coverage at all. The Republican Leadership tried to remove this measure, but President Clinton and pro-choice members remained firm.
- **Providing family planning services to low income women.** The Administration has granted Medicaid waivers to expand access to family planning services in 11 states in order to reduce the number of women with mistimed or unwanted pregnancies. These waivers extend family planning services to low-income women of childbearing age who would not otherwise be eligible for Medicaid family planning services, including low-income women who are eligible for Medicaid while pregnant but who lose their eligibility at the end of pregnancy, and low-income women who would become eligible for Medicaid if pregnant, even if they've never been pregnant or Medicaid eligible.
- **Stopped the Coburn Amendment Prohibiting the FDA from Approving RU-486.** On January 22, 1993, President Clinton reversed the ban on the importation of Mifepristone or RU-486; RU-486 is currently under review by the Food and Drug Administration (FDA). Unfortunately, the FDA's scientific drug approval process became under assault in the 105th Congress. President Clinton threatened to veto a provision that would have prevented the FDA from using government funds to test, develop or approve drugs that may induce medical abortion, including RU-486. Because of the President's veto threat, Republicans backed down and decided not to attach this provision to any funding bill.

- **Defeated Parental Consent Restrictions on Contraceptives for Minors.** The House voted to require minors to obtain parental consent prior to receiving any Title X family planning services (this has also been referred to as the Istook amendment). The President's veto threat helped to keep it out of the final bill.
- **Stopped the So-Called "Child Custody Protection" Act.** Senior Clinton Administration Advisers recommended a veto of this bill which would have made it illegal to transport a minor across State lines for the purpose of avoiding parental consent or notification laws. The Clinton Administration, as detailed in the Statement of Administration Policy, was very concerned that the bill did not protect close family members --including grandmothers, aunts and siblings --from criminal and civil liability. Family members could face criminal charges for aiding a relative in distress. The bill also did not protect persons that only provide information, counseling, referral or medical services to the minor from liability. Under a veto threat, the Senate failed to invoke cloture (or end debate) on the Child Custody Protection Act.
- **Upheld the Late Term Abortion Veto.** This year, the House of Representatives voted to override President Clinton's veto of a bill banning certain late-term abortions, known by proponents of the ban as "partial birth abortions." While the House voted to override the President's action, the Senate sustained the veto by a vote of 36-64 --just three votes short of the required two-thirds majority needed to override the veto. President Clinton vetoed the measure in October 1997 because it did not contain an exception that protected the health or life of the woman.
- **Continued to Fight Restrictions on International Family Planning.** The FY99 Omnibus Appropriations Act does not contain the so-called "Mexico City" policy, a provision that denies U.S. funds to international family planning organizations that use their own resources to perform abortions or lobby on abortion policy. The Mexico City restrictions were also included in the Foreign Affairs Reform and Restructuring Act. President Clinton vetoed this legislation because it contained these unacceptable restrictions.

Abortion - general

President Clinton And Vice President Gore: Standing Up For a Woman's Right to Choose

"I'm committed to keeping abortions safe, legal, and accessible -and to making it more rare...I will continue to do everything I can to make sure that every child in America is a wanted child, raised in a loving, strong family."

President Bill Clinton, January 22, 1998

Throughout his Presidency, President Clinton and Vice President Gore have worked hard to protect a woman's right to choose and to promote safe reproductive health services for women.

Provided Contraceptive Coverage to More than a Million Women. The FY99 Omnibus Appropriations Act contains an important policy breakthrough on reproductive choice. The final bill requires the 300 Federal Employees Health Benefits Plans (FEHBP) to cover contraceptive drugs and devices, providing coverage to approximately 1.2 million women of childbearing age. Until now, only 19% of federal health plans covered prescription contraceptives and 10% of the plans offered no contraceptive coverage at all. The Republican Leadership tried to remove this measure, but President Clinton and pro-choice members remained firm.

Increased Funding for Family Planning. In the FY99 Omnibus Appropriations Act, the President won an increase of \$12 million over FY98 levels for family planning services or Title X Family Planning grants. The House-version would have denied any additional funds.

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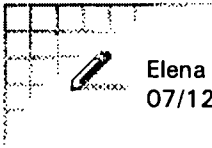
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Elena Kagan
07/12/98 04:15:01 PM

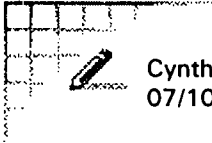
Record Type: Record

To: Melissa G. Green/OPD/EOP

cc:

Subject: upcoming reproductive choice activity

----- Forwarded by Elena Kagan/OPD/EOP on 07/12/98 04:19 PM -----



Cynthia Dailard
07/10/98 06:10:59 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP, Jennifer L. Klein/OPD/EOP

cc:

Subject: upcoming reproductive choice activity

The schedule below is from Planned Parenthood. I hear that Ag approps and possible RU-486 amendment in the Senate may occur Tuesday.

----- Forwarded by Cynthia Dailard/OPD/EOP on 07/10/98 06:13 PM -----



clare_coleman @ ppfa.org
07/10/98 07:11:04 PM

Record Type: Record

To: Cynthia Dailard/OPD/EOP

cc:

Subject: this week and next week

Here's the update:

Labor-HHS Appropriations -- HOUSE: Full Appropriations Committee mark-up is Tuesday, July 14. We expect Rep. Istook (R-OK) to offer an amendment on parental consent for Title X that is identical to the one

Istock offered in 1997. We also may see amendments related to abortion provision in the Medicare + Choice program, as well as a broadly-drafted "anti-discrimination" amendment related to abortion provision.

CCPA/Teen Endangerment Act -- HOUSE: CCPA is listed on the House floor schedule for Wednesday, July 15. The Democratic motion to recommit is expected to deal with prohibiting coercion of a minor's abortion decision. SENATE: The Senate Judiciary Committee mark-up is expected to resume Thursday, July 16, at which time pro-choice members will attempt to amend the bill.

Child Custody

Treasury/Postal Appropriations -- SENATE: Full Appropriations Committee mark-up is Tuesday, July 14. We expect that Senator Reid (D-NV) will attempt to attach contraceptive coverage to the Federal Employees Health Benefits (FEHB) program. HOUSE: The bill may be on the floor on Thursday, July 16 or Friday, July 17. It is unclear whether an attempt to strike the Lowey provision adding contraceptive coverage to FEHB will be made or if Rep. Coburn (R-OK) will try to weaken the Lowey provision. Rep. DeLauro (D-CT) will attempt to strike the abortion restriction in FEHB.

What?

OTHER IMPORTANT ACTION

Foreign Operations Appropriations -- HOUSE: Subcommittee mark-up of the FY 99 bill is Wednesday, July 15. It is unclear how population programs will be funded.

Civil advocacy and the RICO statute -- HOUSE Crime Subcommittee hearing on the use of RICO in the court case NOW v. Scheidler on Friday, July 17.

Ag Appropriations - SENATE: Floor consideration of this bill may be scheduled this week. It is unclear if a restriction on the FDA's ability to approve mifepristone, similar to the provision in the House bill, will be offered.

Ru486

EPICC - Senate Labor and Human Resources hearing is scheduled for Tuesday, July 21.

Ban on Abortion Procedures - HOUSE: An attempt to override President Clinton's veto of the so-called "Partial-Birth" Abortion Ban has been scheduled for the House floor on Thursday, July 23. The unexpected scheduling of this override attempt was apparently in response to published reports of an incident in Arizona.

What?

According to news reports, on June 30, 1998, a physician at A-Z Clinic in Phoenix, Arizona, began an abortion on a 17-year old woman carrying a fetus estimated to be at 23 weeks. As the procedure began, the doctor recognized that the fetus was significantly more mature than ultrasound appeared to indicate. A six-pound, two-ounce girl was delivered; the woman and baby were transferred to a local hospital. The baby had a fractured skull and facial lacerations. The identities of the woman and baby have remained confidential to date. For more information about the incident, see the media alert emailed to affiliates on July 9, 1998.

Following media reports on this incident, House sponsors of HR 1122, the so-called "Partial-Birth" Abortion Ban, announced that the House will attempt to override President Clinton's veto of HR 1122 on

Thursday, July 23. There are sufficient votes in the House to obtain the two-thirds vote necessary to override a presidential veto. Action in the Senate is not expected until after Labor Day.

We have talking points on the Arizona incident prepared, if you want them.

Abortion-general

The White House Office of Presidential Messages

Telephone 202-456-7487

Fax 202-456-2806



Facsimile Transmittal Sheet

No. of pages (including Cover): 2 Date: 1/21Fax Number: 6-2878To: Elana KaganComments: The following is the text for theRoe v. Wade message with editsfrom Neera Tanden. Please let meknow if it looks ok. Thank youFrom: Shannon Hinderliter 6-5526

January 20, 1998

Warm greetings to all those gathered in Richmond for Pro-Choice Lobby Day.

This year marks the 25th anniversary of *Roe v. Wade*, the landmark Supreme Court decision that affirmed every woman's right to choose whether and when to have a child. In doing so, it affirmed two of our nation's most deeply held values: personal privacy and family responsibility.

Over the past 25 years, *Roe v. Wade* has had a major positive impact on the health and well-being of American women and their families. Safe, legal abortion has all but eliminated the dangerous conditions that claimed too many lives when the procedure was illegal. I am committed to keeping abortion safe, legal, and accessible ^{for every woman} and to making it more rare. ^{swb} Over the last five years, we have led the way on policies to prevent unintended pregnancy by making comprehensive family planning programs more widely available. We have dramatically increased support for Title X family planning services, and these efforts have brought real results: both the teen pregnancy rate and the abortion rate are down.

I fought to continue funding for international family planning, bringing much-needed health care to women all around the world. Here at home, by working together with health care professionals, community groups, schools, and family planning agencies, we've made real progress in reducing teen pregnancy. And I was proud to sign legislation to safeguard the rights Roe established by protecting women's clinics from violence. We have enforced that law to its full extent.

I will continue to do everything I can to make sure that every child in America is a wanted child, raised in a loving, strong family. Ultimately, that idea is what the anniversary of *Roe v. Wade* celebrates.

Hillary and I join all of you in commemorating this milestone and in pledging ourselves anew to protecting the right to choose. Best wishes for a memorable observance.

BC/SMH/MAH/pw (Corres. #3793756)
(1.prochoice.msg)

(Event: 1/28)

cc: Presidential Messages, 91 OEOB

SENT TO:

and that
business
the freedom
& Access
to Clinic
Entrances
Act

Abortion - general

The White House Office of Presidential Messages

Telephone 202-456-7487

Fax 202-456-2806



Facsimile Transmittal Sheet

No. of pages (including Cover): 5 Date: 1/20Fax Number: 6-2878To: Elena Kagan

Comments: Would you please clean the text
of the following message for us. The language
is based on videotaped Remarks by the President
which I have attached. Thank You.

From: Shannon Hinderlitz 6-5526

January 20, 1998

Warm greetings to all those gathered in Richmond for Pro-Choice Lobby Day.

This year marks the 25th anniversary of *Roe v. Wade*, the landmark Supreme Court decision that affirmed every woman's right to choose whether and when to have a child. In doing so, it affirmed two of our nation's most deeply held values: personal privacy and family responsibility.

Over the past 25 years, *Roe v. Wade* has had a major positive impact on the health and well-being of American women and their families. Safe, legal abortion has all but eliminated the dangerous conditions that claimed too many lives when the procedure was illegal. I am committed to keeping abortion safe, legal, and accessible -- and to making it more rare. Over the last five years, we have led the way on policies to prevent unintended pregnancy by making comprehensive family planning and sex education programs more widely available. We have increased support for Title X family planning services every year in our budget. And I'll do so again this year.

I fought to continue funding for international family planning, bringing much-needed health care to women all around the world. Here at home, by working together with health care professionals, community groups, schools, and family planning agencies, we've made real progress in reducing teen pregnancy. And I was proud to sign legislation to safeguard the rights *Roe* established by protecting women's clinics from violence. We have enforced that law to its full extent.

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2

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BC/SMH/MAH/pw (Corres. #3799756)
(1.prochoice.msg)

(Event: 1/28)

cc: Presidential Messages, 91 OEOB

SENT TO:

Ms. Judith S. Castleman
Legislative Liaison
Virginia Affiliate of the National
Abortion and Reproductive Rights
Action League
Post Office Box 489
Falls Church, Virginia 22040

DO NOT MAIL -- RETURN TO CARMEN FOWLER, 91 OEOB, FOR DISPATCH

So, on behalf of all Americans, I wish the Israeli people and the friends of Israel everywhere a joyous anniversary. Fifty years ago, my predecessor, Harry Truman, made the bold decision that the United States would recognize the new state of Israel, and America became the first nation to do so. President Truman was deeply proud of that decision. Today we know it was one of his wisest ones. It laid the cornerstone for a relationship between the United States and Israel that has grown stronger with every passing year.

I'm proud that our friendship is broader, deeper, and more firmly rooted than at any time in Israel's history, and I'm determined that it will remain so. Our commitment to Israel's security remains rock solid. The relationship is not just between governments; Israel has always been a particular source of pride to our nation's Jewish community. And today all parts of American society feel a close tie to the people of Israel. The extraordinary friendship between our nations and its strategic importance have guided my efforts to bring peace to the Middle East, which the people there so richly deserve.

My deepest wish for Israel is that it should enjoy in the next 50 years what it has been denied in its first 50 years -- an end to conflict, to wars, to terror; a real peace with all its Arab neighbors and full security for all its people.

On this remarkable occasion let me say to the people of Israel and all Israel's friends around the world, Mazel Tov. Congratulations. My heartfelt best wishes for the next 50 years.

* * * * *

THE WHITE HOUSE

Office of the Press Secretary

VIDEOTAPED REMARKS BY THE PRESIDENT IN MESSAGE ON THE 25TH ANNIVERSARY OF ROE V. WADE

THE PRESIDENT: On January 22, we marked the 25th anniversary of Roe v. Wade, the landmark Supreme Court decision that affirmed every woman's right to choose whether and when to have a child, and in doing so, affirmed two of our nation's most deeply-held values, personal privacy and family responsibility.

Over the past 25 years, Roe v. Wade has had a major positive impact on the health and well-being of American women and their families. Safe, legal abortion has all but eliminated the dangerous, clandestine conditions that claim too many women's lives when the procedure was illegal.

I'm committed to keeping abortion safe, legal, and accessible -- and to making it more rare. Over the last five years we've led the way on policies to prevent unintended pregnancy by making comprehensive family planning and sex education programs more widely available. We've increased support for Title X family planning services every year in our budget. And I'll do so again this year.

I fought to continue funding for international family planning, bringing much needed health care to women all around the world. Here, at home, by working together with health care professionals, community groups, schools and family planning agencies, we've made real progress in reducing teen pregnancy. And I was proud to sign legislation to protect the rights Roe established by protecting women's clinics from violence. We have enforced that law to its full extent.

I will continue to do everything I can to make sure that every child in America is a wanted child, raised in a loving, strong family. Ultimately, that idea is the anniversary of Roe v. Wade celebrates.

Hillary and I join with all of you in commemorating this milestone and pledge ourselves anew to protecting the right to choose.

Thank you and God bless you.

.....

THE WHITE HOUSE

Office of the Press Secretary

VIDEOTAPED REMARKS BY THE PRESIDENT
TO THE 1998 U.S. OLYMPIC TEAM

THE PRESIDENT: Congratulations to all of you. You've earned a place on Team USA for the Winter Olympic Games in Nagano, and Americans everywhere are very, very proud of you. The example you're setting for our young people is invaluable. You're showing them that if you believe in hard work and discipline, if you have the will, the courage, the heart, you can live out your dreams.

Status as of: August 5, 1998

ABORTION-RELATED PROVISIONS IN FY 1999 APPROPRIATIONS BILLS

AGRICULTURE/RURAL DEVELOPMENT

Status:

- o Passed the Senate on 7/16/98, 97-2. Passed the House 6/24/98, 373-48.

Provisions:

- o FDA Drug Research Restrictions:
 - House. Section 739 prohibits the FDA from using funds for the testing, development, or approval of any drug for the chemical induction of abortion (the Coburn (R-OK) amendment). This provision would intervene in the drug safety practices of the FDA and place restrictions on scientific research that can protect women's health and offer safe medical choices. (This is a new provision in the FY 1999 bill.)
 - Senate. The Senate bill contains no similar provision.

COMMERCE/JUSTICE/STATE

Status:

- o Passed the Senate 7/23/98, 99-0. House Full Committee reported the bill 7/15/98.

Provisions:

- o Abortions for Federal Prisoners:
 - House. Section 103 of the House bill would prohibit the Department of Justice (DOJ) from funding abortions except in the case of rape or where the life of the mother is endangered. (This provision is current law contained in the FY 1998 Act.) A DeGette (D-CO) amendment to strike the provision was defeated on the House Floor, 148-271.

- Senate. Section 102 of the Senate bill contains the same prohibition as the House bill on the use of DOJ funds regarding abortions.
- o U.N. Arrears/Mexico City:
 - House. The House bill includes the requested arrears payment of \$475 million, but the funds remain unavailable subject to authorization. The authorization conference report contains Mexico City family planning language that prohibits international family planning organizations that receive Federal funding from performing or lobbying for abortions even if these organizations use their own funds. (Arrearage payments contained in the FY 1998 Act were also subject to authorization.)
 - Senate. The Senate bill contains similar language.

DEFENSE

Status:

- o Passed the Senate 7/30/98, 97-2. Passed the House 6/24/98, 358-61.

Provisions:

- o Forced Abortion:
 - House. The House bill does not address this issue.
 - Senate. An amendment to prohibit visas to Chinese officials involved in forced abortions, forced sterilizations, or religious persecution was adopted on the Floor. (This is a new provision.)

DISTRICT OF COLUMBIA

Status:

- o The bill was reported by the House Committee on July 30th. The bill was reported by the Senate Committee on July 21st.

Provisions:

o Use of Federal and District Funds:

- House. Section 132 of the House bill prohibits any of the funds under the Act (Federal or District) from being used for any abortion except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy is the result of an act of rape or incest. (This is current law contained in the FY 1998 Act.)

- Senate. Section 129 of the Senate Committee bill contains language identical to the provision of the House bill.

NOTE: The language of the FY 1999 bill is the same language used since FY 1996. In FY 1994 and FY 1995, the restriction on funding for abortions only applied to Federal funds, not local funds.

FOREIGN OPERATIONS

Status:

- o Senate Full Committee reported the bill 7/21/98. House Subcommittee marked up the bill on 7/15/98.

Provisions:

o "Mexico City" Language:

- House. As in previous years, it is anticipated that Rep. Chris Smith (R-N.J.) will offer an amendment on the House Floor that would prohibit Federal funding to organizations that perform or lobby for or against abortions, even if these organizations use their own funds.

Last year, the President threatened to veto the FY 1998 Foreign Operations bill if it included the "Mexico City" provision. The enacted bill did not include the provision but had a limitation of \$385 million on total population spending from foreign aid accounts and "metering" of obligation of the funds at one-twelfth of the total available per month.

- Senate. The Senate Committee bill has no comparable provision.
- o Other Family Planning:
 - House. In section 518 of the General Provisions, the House bill contains language that bars the use of funds appropriated in the bill for performance of abortion or involuntary sterilization as a method of family planning, or for lobbying for or against abortion. (This is current law contained in the FY 1998 Act.) The Administration supports this language. There is, however, a limitation of \$385 million on family planning funding.

In Subcommittee, a Pelosi (R-CA) amendment was adopted, 8-7, restoring language to the bill that has been included for many years, concerning "natural family planning." The amendment restores language that requires family planning organizations that do not offer certain types of family planning services to provide referrals for or information on access to such services to any client seeking such information.

- Senate. Section 518 of the Senate Committee bill contains language identical to that of section 518 of the House bill. The Senate bill also contains appropriations language (under the "Development Assistance" heading) requiring that not less than \$435 million of Development Assistance funds be spent on family planning.
- o Peace Corps:
 - House. The Subcommittee bill would bar any Peace Corps funds from being used to pay for abortions. (This provision is current law contained in the FY 1998 Act.)
 - Senate. The Senate Committee bill includes the same language.

LABOR/HHS/EDUCATION

Status:

- o House Full Committee reported the bill on July 14th. Senate action expected in September.

Provisions:

- o Medicare + Choice program:
 - House. A manager's amendment offered by Rep. Porter (R-IL) was adopted in Committee that would prohibit funding for the Medicare + Choice program if HHS excludes health care providers that do not offer abortion services from participating in the Medicare + Choice program. The provision would require the plan to inform enrollees where to obtain information about all Medicare-covered services and would reduce payments to Medicare + Choice program plans not providing these services. (This is a new provision in the FY 1999 bill.)
 - Senate. No action to date.
- o Use of Federal Funds for Embryo Research:
 - House. Funds are prohibited for creation of embryos for research purposes, i.e., research in which a human embryo is destroyed, discarded, or knowingly subjected to risk or injury. (This provision is current law contained in the FY 1998 Act.)
 - Senate. No action to date.
- o Family Planning:
 - House. The House Committee bill requires family planning grantees either to receive written parental consent or provide advance notification to parents before giving contraceptives to minors. Participating clinics are required to certify compliance to HHS. The House bill also requires clinics to follow State laws regarding notification or reporting of child abuse, incest, rape, or other sexual abuse. (The FY

 Martha Foley
07/17/98 02:11:27 PM

Record Type: Record

To: Tracey E. Thornton/WHO/EOP
cc: See the distribution list at the bottom of this message
Subject: Re: Latest Abortion letter- Please Review ASAP 

I share Tracey's reluctance and have two specific points. First, there is NO amendment pending on international family planning. It will, in all likelihood, be offered when For Ops goes to the floor in about two weeks, but there is currently no such amendment. I think it is odd to criticize something that does not exist. There are also technical problems with the description of what is being referenced is language in the State Dept Conference Rept. and not an amendment. Second, we have the odd situation that the Treasury Postal bill, while it contains Lowey, also bans all abortions - EVEN those to save the life or in rape and incest cases, due to a point of order made by Obey. (He made the point of order for other political purposes but it struck the exceptions.) Right now, there is a great deal of stirring and crankiness within the House Dem Caucus over whether Dems should have voted yes or no on final passage, in light of the Lowey and Obey issues.

Message Copied To:

Laura Emmett/WHO/EOP
Jennifer L. Klein/OPD/EOP
Cynthia Dailard/OPD/EOP
Sylvia M. Mathews/OMB/EOP
Maria Echaveste/WHO/EOP
Ann F. Lewis/WHO/EOP
Peter G. Jacoby/WHO/EOP
audrey t. haynes/ovp @ ovp
Sean P. Maloney/WHO/EOP
Phillip Caplan/WHO/EOP
William P. Marshall/WHO/EOP
Linda Ricci/OMB/EOP
Janet Murguia/WHO/EOP
Maureen T. Shea/WHO/EOP
Stacie Spector/WHO/EOP
Neera Tanden/WHO/EOP
Peter D. Greenberger/WHO/EOP
Janet L. Graves/OMB/EOP
Marjorie Tarmey/WHO/EOP
Leslie Bernstein/WHO/EOP
Ruby Shamir/WHO/EOP
Tania I. Lopez/WHO/EOP
Jessica L. Gibson/WHO/EOP
Janelle E. Erickson/WHO/EOP
Carolyn E. Cleveland/WHO/EOP
Mindy E. Myers/WHO/EOP

~~Tell~~

Abortion - budget provisions

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
LEGISLATIVE AFFAIRS

PHONE: 395-4790 / FAX: 395-3729

TO:

Elana Kagan

DATE:

FROM:

☒ CHUCK KIEFFER☐ CHUCK KONIGSBERG☐ LISA KOUNTOUPES☐ KATE DONOVAN☐ NANCY BRANDEL

Comments:

Please call Danny Mendelson (5578) about the attached language which may be added to Treasury posted in the House. The language is a bit counter intuitive but it is the author's intent to prohibit OPM from ~~amplifying~~ promulgating a FEHBP regulation that would have the effect of requiring a doctor to describe abortion options to a patient ~~if~~ ever

FAX #:

PAGES:

PHONE NUMBER:

(includes cover page)

if, in good conscience, the doctor, opposes the abortion option.

**AMENDMENT TO TREASURY AND GENERAL
GOVERNMENT APPROPRIATIONS BILL, 1999**

At the appropriate place in the bill, insert the following:

1 SEC. ____ No funds appropriated for the Office of
2 Personnel Management under this Act may be expended
3 by such Office to promulgate or carry out, in connection
4 with the health benefits program under chapter 89 of title
5 5, United States Code, any regulations prohibiting prac-
6 tices that restrict physician-patient communications about
7 medically necessary treatment options.

Daniel N. Mendelson

06/10/98 10:23:12 AM

Record Type: Record

To: Sylvia M. Mathews/WHO/EOP
cc: See the distribution list at the bottom of this message
Subject:

As we discussed, there is a draft amendment to the treasury/postal bill, which would prohibit OPM from using FY 99 funds for **promulgating** and **carrying out** regulations prohibiting practices restricting doctors from counseling patients about "medically necessary treatment." Although the language is convoluted, this would basically prevent OPM from requiring that physicians counsel patients about abortion options. It would probably also restrict our ability to direct physicians in HMOs to inform their patients about treatment options in other areas.

The background on this is that on May 21, 1998 OPM published an NPRM prohibiting "gag clauses" in the FEHBP, in order to comply with the presidential directive in the Patient Bill of Rights. The notice and comment period extends to July 20, 1998. This could mean that OPM could promulgate the final rule in FY 1998. However, since the draft amendment also appears to prohibit the use of appropriated funds from enforcing the regulation, it could render the rule without effect in FY 1999.

OPM is aware of the draft amendment, and has been working with Colby's (R-AZ) staff to get their concerns on the table. OPM will also be contacting Hoyer's staff. OPM suspects that Ishtook will be pushing the amendment.

Please call to discuss.

Message Copied To:

Bruce D. Long/OMB/EOP
Chris Fairhall/OMB/EOP
Christopher C. Jennings/OPD/EOP
Elena Kagan/OPD/EOP
Charles E. Kieffer/OMB/EOP
Gina C. Mooers/OMB/EOP

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ED FLYNN

Abulia - budget
provisions
H.L.C.

Danny Mendelson
wanted you to
review ASAP -
call him @ 55178

**AMENDMENT TO TREASURY AND GENERAL
GOVERNMENT APPROPRIATIONS BILL, 1999
OFFERED BY MR. ISTOOK**

At the appropriate place in the bill, insert the follow-
ing:

1 Sec. _____. No funds appropriated for the Office of
2 Personnel Management under this Act may be expended
3 by such Office to promulgate or carry out, in connection
4 with the health benefits program under chapter 89 of title
5 5, United States Code, any regulations requiring physi-
6 cian-patient communications about medically necessary
7 treatment options that the provider would not ordinarily
8 discuss in their normal course of practice because such
9 options are against their professional judgment or ethical,
10 moral, or religious beliefs.

JUNE 10, 1998

ELENA KAGAN
224-0291

[Federal Register: May 21, 1998 (Volume 63, Number 98)]

[Proposed Rules]

[Page 27902-27903]

From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr21my98-39]

OFFICE OF PERSONNEL MANAGEMENT

48 CFR Part 1609

RIN 3206-A127

Prohibition of "Gag Clauses" in the Federal Employees Health
Benefits Program

AGENCY: Office of Personnel Management.

ACTION: Notice of proposed rule making.

SUMMARY: The Office of Personnel Management (OPM) is proposing to amend the regulations to prohibit health benefit carriers participating in the Federal Employees Health Benefits (FEHB) Program from entering into contractual provisions with health care providers or health care workers that would include a provision for incentive payments as an inducement to reduce or limit communication with, or the delivery of health care services to, FEHB enrollees. The rule is intended to ensure providers' and health care workers' ability to communicate with, and advise patients of, any medically necessary treatment options.

DATES: Comments must be received on or before July 20, 1998.

ADDRESSES: Comments should be directed to Abby L. Block, Chief, Insurance Policy and Information Division, OPM, Room 3425, 1900 E Street, NW., Washington, DC 20415-0001.

FOR FURTHER INFORMATION CONTACT: Michael W. Kaszynski, (202) 606-0004.

SUPPLEMENTARY INFORMATION: You may submit comments and data by sending electronic mail (E-mail) to: MWKASZYNGOPM.Gov.

On February 20, 1998, the President signed an Executive Memorandum directing the Office of Personnel Management (OPM) to take the necessary steps to bring the FEHB Program into contractual compliance with the Consumer (Patient) Bill of Rights and Responsibilities by no later than year end 1999. The Memorandum specifically directed OPM to propose regulations within 90 days to prohibit practices that restrict physician-patient communications about medically necessary treatment options. This action will prohibit FEHB participating carriers

[[Page 27903]]

from placing incentives in contracts with health care providers or health care workers that would limit providers' or health care workers' ability to discuss medically necessary treatment options with federal enrollees. We are aware that a proposal to enact a "gag clause" regulation raises three broad areas of concern regarding: (1) potential impairment of a health plan's ability to review utilization against appropriate treatment protocols, (2) potential conflict with providers' (including carriers') ethical or moral beliefs, and (3) impact on providers' or workers' ability to discuss non-covered or high cost

treatment options. This regulation is not intended to limit a health plan's ability to perform utilization review nor is it intended to cause providers or health care workers to discuss treatment options that they would not ordinarily discuss in their normal course of practice because such options are against their professional judgement and/or ethical, moral or religious beliefs. The regulation will ensure that providers or health care workers have the ability to communicate fully and openly with patients regarding medically necessary treatment options regardless of cost or whether the benefits are covered by their health plan. Simply stated, the amended regulation is intended to remove any contractual impediment to a candid and open physician-patient relationship.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect health insurance carriers under the Federal Employees Health Benefits Program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 48 CFR Part 1609

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professionals, Hostages, Iraq, Kuwait, Lebanon, Reporting and record keeping requirements, Retirement.

Office of Personnel Management,
Janice R. Lachance,
Director.

For the reasons set forth in the preamble OPM proposes to amend 48 CFR Part 1609 as follows:

Subpart 1609.70--Minimum Standards for Health Benefit Carriers

1. The authority citation for 48 CFR Part 1609 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

2. In Sec. 1609.7001 new paragraph (c)(7) is added to read as follows:

Sec. 1609.7001 Minimum Standards for Health Benefits Carriers

* * * * *

(c) * * *

(7) Entering into contracts with providers or health care workers that include incentive plans that directly or indirectly create an inducement to limit communication of, or reduce, medically necessary services to any individual covered under the FEHB Program.

[FR Doc. 98-13792 Filed 5-19-98; 2:20 pm]
BILLING CODE 6325-01-P

Abortion - budget provisions

 Elena Kagan
01/07/98 04:21:02 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc:

Subject: Treatment of Abortion Provisions in the President's Budget

please print

----- Forwarded by Elena Kagan/OPD/EOP on 01/07/98 04:21 PM -----

**JOSHUA
GOTBAUM**
01/07/98 08:38:00 AM



Record Type: Non-Record

To: Elena Kagan/OPD/EOP, Jennifer L. Klein/OPD/EGP, FOLEY_M @ A1@CD@LNGTWY, Christopher C. Jennings/OPD/EOP

cc: Ann Kendall/OMB/EOP, Barry T. Clendenin/OMB/EOP, Thomas Reilly/OMB/EOP, Jill M. Pizzuto/OMB/EOP

Subject: Treatment of Abortion Provisions in the President's Budget

Attached is a comprehensive table on abortion provisions in appropriations language that will require policy decisions in order to print the FY 1999 Budget Appendix. Traditionally, the Budget shows the prior year's (i.e., FY 1998 enacted) appropriations language, brackets language proposed for deletion, and italicizes any new or revised language.

One issue we need to consider is whether, in light of recent history, again to propose deletion of the AID abortion language in the Foreign Ops bill (see page 4 of the file below). AID is now suggesting we not do so. We would appreciate your views, either directly to me or to Ann Kendall of the Health Division staff (who prepared the table).

Due to the FY 1999 Budget print schedule, we are requesting your views/comments on these provisions **by noon, Friday, January 9th**. Please let me know by then whether or not you agree with the recommendations in the attached file or if you think we need to meet on any of these provisions.

Thanks.

[Please note: the file labeled "abortion.wpd" is Corel WordPerfect 7, legal size. In case you have problems with your Corel7, I have attached the file (abort6.wpd) as a WordPerfect6.1, also legal size.]

"Side-by-Side" Comparison for Abortion Provisions

Appropriations Bill/Provision.	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
DC Ban on Use of Funds for Abortion	Sec. 129. No funds appropriated under this Act shall be expended for any abortion except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy is the result of an act of rape or incest.	The Administration proposed deleting this provision and added a footnote that the Administration would work with Congress on this issue.	Sec. 132. Repeated FY 1997 Enacted language.	Repeat the FY 1998 Budget, i.e., the Administration proposes to delete this provision and add the footnote that the Administration will work with Congress on this issue.
C/J/S Ban on Use of Justice Funds for Abortion	Sec. 103. None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape: Provided, That should this prohibition be declared unconstitutional by a court of competent jurisdiction, this section shall be null and void.	The Administration proposed deleting this provision and added a footnote that the Administration would work with Congress to address this issue.	Sec. 103. Repeated FY 1997 Enacted language	Repeat the FY 1998 Budget i.e., the Administration proposes to delete this provision and add a footnote that the Administration will work with Congress on this issue.
C/J/S Ban on the Use of Justice Funds for Performing Abortion	Sec. 104. None of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of any abortion.	Repeat same provision as enacted in FY 1997.	Sec. 104. Repeated FY 1997 Enacted language	Repeat FY 1998 Enacted Language.
C/J/S Bureau of Prisons duty to provide escort services for female inmates seeking a privately funded abortion.	Sec. 105. Nothing in the preceding section shall remove the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate to receive such service outside the Federal facility: Provided, That nothing in this section in any way diminishes the effect of section 104 intended to address the philosophical beliefs of individuals employees of the Bureau of Prisons.	Repeat same provision as enacted in FY 1997.	Sec. 105. Repeated FY 1997 Enacted language	Repeat FY 1998 Enacted Language.

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
L/HHS/Ed Hyde Amendment	Sec. 508. None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.	Proposed deletion with a footnote that the Administration will work with Congress to address this issue.	Sec. 509. (a) None of the funds appropriated under this Act shall be expended for any abortion. (b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion. (c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.	Repeat FY 1998 Budget, i.e., propose deletion and add footnote: "The Administration proposes to delete this footnote and will work with Congress to address this issue."

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
L/HHS/Ed Hyde Amendment			(New Provision) Sec. 510. (a) The limitations established in the preceding section shall not apply to an abortion-(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. (b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds). (c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds).	Delete provision and add footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."

Appropriations Bill/Provision	FY 97 Enacted	FY President's Budget	FY 98 Enacted	Recommended FY 99 Language
Foreign Ops	Sec. 518. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be used to pay for the performance of involuntary sterilization as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be used to pay for any biomedical research which relates in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be obligated or expended for any country or organization if the President certifies that the use of these funds by any such country or organization would violate any of the above provisions related to abortions and involuntary sterilizations: Provided, That none of the funds made available under this Act may be used to lobby for or against abortion.	Repeat FY 1997 Enacted.	Sec. 518. Same as FY 1997 Enacted language.	Repeat FY 1998 Enacted language.
Foreign Ops	Sec. 518A. Authorization for Population Planning. This section (too lengthy to print here) limited population and family planning funding to \$385 million, required monthly apportioning for this funding, did not allow obligations to begin until July 1997, authorized a Presidential certification and a Congressional vote in February to allow obligations to begin in March rather than July (the Administration, narrowly won the vote).	The Administration proposed to delete this provision.	Sec. 592. (a) Not to exceed \$385,000,000 of the funds appropriated in title II of this Act may be available for population planning activities or other population assistance. (b) Such funds may be apportioned only on a monthly basis, and such monthly apportionments may not exceed 8.34 percent of the total available for such activities.	The Administration proposes to delete this provision.

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Foreign Ops	Agency for International Development Appropriation Language: For necessary expenses to carry out ... Provided further, That of the funds appropriated under title II of this Act that are administered by the Agency for International Development and made available for family planning assistance, not less than 65 percent shall be made available directly to the agency's central Office of Population and shall be programmed by that office for family planning activities: Provided further, ... Provided further, That none of the funds made available in this Act nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization: Provided further, That none of the funds made available under this heading may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions; and that in order to reduce reliance on abortion in developing nations, funds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services: Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning; and, additionally, all such applicants shall comply with the requirements of the previous proviso: Provided further, That for purposes of this or any other Act authorizing or appropriating funds for foreign operations, export financing, and related programs, the term "motivate", as it relates to family planning assistance, shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy	The Administration proposed to delete this language.	"For necessary expenses to carry out ... Provided further, That none of the funds made available in this Act nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization: Provided further, That none of the funds made available under this heading may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions; and that in order to reduce reliance on abortion in developing nations, funds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services; Provided further, That in awarding grants for natural family planning under section '04 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning; and additionally, all such applicants shall comply with the requirements of the previous proviso: Provided further, That for purposes of this or any other Act authorizing or appropriations funds for foreign operations, export financing, and	The Administration does not propose to delete this language in the FY 1999 Budget.

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Foreign Ops	Assistance for the New Independent States of the Former Soviet Union: (r) Of the funds appropriated under this heading, not less than \$15,000,000 should be available only for a family planning program for the New Independent States of the former Soviet Union comparable to the family planning program currently administered by the Agency for International Development in the Central Asian Republics and focusing on population assistance which provides an alternative to abortion.	The Administration proposed to delete this language.	Deleted.	
Treasury/ General Government FEHB Prohibition	Sec.518. No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefit program which provides any benefits or coverage for abortion.	The Administration proposed deleting this provision.	Sec. 513. Same as FY 1997 Enacted language.	The Administration proposes deleting this provision.
Treasury/ General Government FEHB Prohibition	Sec. 519. The provision of section 518 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.	The Administration proposed deleting this provision.	Sec. 514. Same as FY 1997 Enacted language.	The Administration proposes deleting this provision.
DoD	None		None	

**JOSHUA
GOTBAUM**

01/12/98 11:11:05 PM



Record Type: Non-Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOF, Jennifer L. Klein/OPD/EOP
cc: See the distribution list at the bottom of this message
Subject: URGENT: PROPOSED ADMINISTRATION POSITION ON DOMESTIC/INTERNATIONAL
ABORTION/FAMILY PLANNING FOR FY99 BUDGET

The FY99 Budget will include Administration legislative language on several sensitive issues. One is abortion and family planning.

- In domestic programs, the Administration continues to oppose restrictions on abortion, even where the Congress has legislated them.
- In international programs, US AID now proposes to accept the limitations enacted last year, arguing that opposing them is not worth the reaction it will generate.

Martha Foley reports that she is comfortable with this approach for international programs. **If you are uncomfortable with this approach, please contact Josh Gotbaum at 5-9188 no later than 2:00 pm Tuesday.** Unless we hear from you otherwise, we will include both in the appropriations language of the FY99 President's Budget.



abortion.wp This is the comprehensive abortion side by side table. It is a legal size, Corel 7 document.

Message Copied To:

Christopher C. Jennings/OPD/EOP
Richard J. Turman/OMB/EOP
Thomas Reilly/OMB/EOP
Ann Kendall/OMB/EOP
Barbara Chow/OMB/EOP

“Side-by-Side” Comparison for Abortion Provisions

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
DC Ban on Use of Funds for Abortion	Sec. 129. No funds appropriated under this Act shall be expended for any abortion except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy is the result of an act of rape or incest.	The Administration proposed deleting this provision and added a footnote that the Administration would work with Congress on this issue.	Sec. 132. Repeated FY 1997 Enacted language.	Repeat the FY 1998 Budget, i.e., the Administration proposes to delete this provision and add the footnote that the Administration will work with Congress on this issue.
C/J/S Ban on Use of Justice Funds for Abortion	Sec. 103. None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape: Provided, That should this prohibition be declared unconstitutional by a court of competent jurisdiction, this section shall be null and void.	The Administration proposed deleting this provision and added a footnote that the Administration would work with Congress to address this issue.	Sec. 103. Repeated FY 1997 Enacted language	Repeat the FY 1998 Budget i.e., the Administration proposes to delete this provision and add a footnote that the Administration will work with Congress on this issue.
C/J/S Ban on the Use of Justice Funds for Performing Abortion	Sec. 104. None of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of any abortion.	Repeat same provision as enacted in FY 1997.	Sec. 104. Repeated FY 1997 Enacted language	Repeat FY 1998 Enacted Language.
C/J/S Bureau of Prisons duty to provide escort services for female inmates seeking a privately funded abortion.	Sec. 105. Nothing in the preceding section shall remove the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate to receive such service outside the Federal facility: Provided, That nothing in this section in any way diminishes the effect of section 104 intended to address the philosophical beliefs of individuals employees of the Bureau of Prisons.	Repeat same provision as enacted in FY 1997.	Sec. 105. Repeated FY 1997 Enacted language	Repeat FY 1998 Enacted Language.

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
L/HHS/Ed Hyde Amendment	Sec. 508. None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.	Proposed deletion with a footnote that the Administration will work with Congress to address this issue.	Sec. 509. (a) None of the funds appropriated under this Act shall be expended for any abortion. (b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion. (c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.	Repeat FY 1998 Budget, i.e., propose deletion and add footnote: "The Administration proposes to delete this footnote and will work with Congress to address this issue."

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
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Foreign Ops	Sec. 518A. Authorization for Population Planning. This section (too lengthy to print here) limited population and family planning funding to \$385 million, required monthly apportioning for this funding, did not allow obligations to begin until July 1997, authorized a Presidential certification and a Congressional vote in February to allow obligations to begin in March rather than July (the Administration, narrowly won the vote).	The Administration proposed to delete this provision.	Sec. 592. (a) Not to exceed \$385,000,000 of the funds appropriated in title II of this Act may be available for population planning activities or other population assistance. (b) Such funds may be apportioned only on a monthly basis, and such monthly apportionments may not exceed 8.34 percent of the total available for such activities.	The Administration proposes to delete this provision.

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Foreign Ops	Agency for International Development Appropriation Language: For necessary expenses to carry out ... Provided further, That of the funds appropriated under title II of this Act that are administered by the Agency for International Development and made available for family planning assistance, not less than 65 percent shall be made available directly to the agency's central Office of Population and shall be programmed by that office for family planning activities: Provided further, ... Provided further, That none of the funds made available in this Act nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization: Provided further, That none of the funds made available under this heading may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions; and that in order to reduce reliance on abortion in developing nations, funds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services: Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning; and, additionally, all such applicants shall comply with the requirements of the previous proviso: Provided further, That for purposes of this or any other Act authorizing or appropriating funds for foreign operations, export financing, and related programs, the term "motivate", as it relates to family planning	The Administration proposed to delete this language.	"For necessary expenses to carry out ... Provided further, That none of the funds made available in this Act nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization: Provided further, That none of the funds made available under this heading may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions; and that in order to reduce reliance on abortion in developing nations, funds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services; Provided further, That in awarding grants for natural family planning under section '04 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning; and	The Administration does not propose to delete this language in the FY 1999 Budget.

Appropriations Bill/Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Foreign Ops	Assistance for the New Independent States of the Former Soviet Union: (r) Of the funds appropriated under this heading, not less than \$15,000,000 should be available only for a family planning program for the New Independent States of the former Soviet Union comparable to the family planning program currently administered by the Agency for International Development in the Central Asian Republics and focusing on population assistance which provides an alternative to abortion.	The Administration proposed to delete this language.	Deleted.	
Treasury/ General Government FEHB Prohibition	Sec.518. No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefit program which provides any benefits or coverage for abortion.	The Administration proposed deleting this provision.	Sec. 513. Same as FY 1997 Enacted language.	The Administration proposes deleting this provision.
Treasury/ General Government FEHB Prohibition	Sec. 519. The provision of section 518 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.	The Administration proposed deleting this provision.	Sec. 514. Same as FY 1997 Enacted language.	The Administration proposes deleting this provision.
DoD	None		None	

Drugs - Needle exchange
and
Alcohol - Budget
and
Cloning

CLICK ON THE SECTIONS BELOW FOR BACKGROUND ON NEEDLES AND CLONING

NEEDLE EXCHANGE

Statutory Restrictions on the Use of Federal Funds for NEPs:

Since 1988, US Appropriations or Authorization law has placed a conditional prohibition on the use of Federal funds for the operation of needle exchange programs.

Currently, there are three statutory restrictions on the use of Federal funds for the operation of needle exchange programs:

The Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) Reorganization Act of 1992, prohibits the use of Substance Abuse and Mental Health Services Administration Block grant funds for needle exchange programs unless the Surgeon General determines that they are effective in reducing the spread of HIV and the use of illegal drugs. The statute does, however, allow Federal research and evaluation of existing needle exchange programs.

Section 422 of the 1996 Ryan White CARE Act reauthorization places a flat prohibition on the use of Ryan White funds for needle exchange.

Sections 505 & 506 of the FY 1998 L/HHS / Ed Appropriations bill read:

505: Notwithstanding any other provision of this Act, no funds appropriated under this Act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.

506: Section 505 is subject to the condition that after March 31, 1998, a program for exchanging such needles and syringes (referred to in this section as an "exchange project") may be carried out in a community if (1) the Secretary of Health and Human Services determines that exchange projects are effective in preventing the spread of HIV and do not encourage the use of illegal drugs; and (2) the project is operated in accordance with criteria established by such Secretary for preventing the spread of HIV and for ensuring that the project does not encourage the use of illegal drugs.

This limitation has been in Labor/ H appropriations language in some form since 1990. In the FY 1998 Appropriations bill, the Appropriators split the provision into two provisions and added the six-month moratorium on certification and the language requiring that the exchange programs must be operated in accordance with criteria established by the Secretary.

In the past, the Administration has worked to avoid an outright ban on the use of Federal funds for NEPs (like the current Section 505) and maintain the authority of the Secretary to certify that Federal funds can be used for such programs.

RECOMMENDATION:

There have been several studies done on the efficacy of NEPs in recent years, and there is current data available to meet the first requirement in this language (e.g. that NEPs are successful in preventing the spread of HIV), but HHS maintains that the data on the second provision (that NEPs do not encourage the use of illegal drugs) is still inconclusive. HHS is expecting the results of additional studies on NEPs in the coming year and wants to maintain the Secretary's authority to continue to evaluate the evolving scientific data on this issue and to certify that Federal funds can

be used for NEPs.

To maintain maximum flexibility for the Secretary, we recommend bracketing (deleting) Section 506 and modifying Section 505 by re-proposing the language that was proposed in the FY 1998 Budget on this issue:

505: Notwithstanding any other provision of this Act, no funds appropriated under this Act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug unless the Surgeon General determines that such programs are effective in preventing the spread of HIV and do not encourage the use of illegal drugs.

[Note: The words "or syringes" were added in FY 1998 enacted language -- they were not proposed in the 98 Budget. Our recommendation would repeat "or syringes" in the FY 1999 Budget.]

ALTERNATE RECOMMENDATION:

In addition to bracketing section 506, we could add a footnote similar to that placed on the Hyde language deletions: *The Administration proposes to delete this provision and will work with Congress to address this issue.*

Also, rather than repeat the language in the FY 1998 Budget that gave the authority to certify NEPs to the Surgeon General to the Secretary of Health and Human Services, we could maintain the language that was made by Congress in the FY 1997 Labor/HHS/Ed Appropriations bill that gave such authority to the Secretary of Health and Human Services. This may be something the Administration wants to consider given the upcoming confirmation hearings for Surgeon General nominee David Satcher.

Background on Human Embryos/Cloning

Both the House and Senate L/HHS bills for FY 1998 extended the FY 1996 and FY 1997 appropriations Act ban on using Federal funds on human embryo research, and modified it to include research involving "human diploid cells." NIH staff advise that in practice, this extension does not differ from the original ban on human embryo research and would have no effect on NIH's present research efforts. The words "human diploid cells" were apparently added in an attempt to address cloning.

A diploid cell is produced after fertilization occurs in humans -- it is one stage of a developing embryo. Diploid cells could theoretically be produced via somatic cell nuclear transfer, which is more commonly referred to as "cloning." The FY 1996 and FY 1997 L/HHS Acts barred Federal funding for the creation of human embryos for research purposes or performing research on human embryos that subjects them to significant risk. The prohibition on creating embryos for research purposes would, de facto, prohibit creating a human embryo through cloning technology. This is why including diploid cells in the embryo research ban does not differ practically from banning the creation of human embryos.

The FY 1998 Budget proposed to delete the embryo research ban, stating that the Administration "does not support addressing this issue in legislation." In December 1994, the President had issued a statement barring the use of Federal funds for creating human embryos for research purposes. On June 9, 1997, the President announced that he was sending proposed legislation to the Congress, the "Cloning Prohibition Act of 1997," which would prohibit any attempt to create a

human being using somatic cell nuclear transfer. The Administration did not oppose the language in the FY 1998 bill in its letters or SAP's.

Observations: Last year's budget's proposal to delete this provision came before the cloning debate of last spring (e.g., Dolly).

Given the President's proposed legislation on prohibiting cloning, and the fact that SAP's did not oppose the language during the FY 1998 appropriations process, the Administration may not want to bracket the language again, even with the footnote that says the Administration does not support addressing this issue in legislation.

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Message Copied To:

L/HHS/Ed. General Provisions for FY 1999 Budget
“Side-by-Side” Comparison for Selected Provisions
Titles II and V of L/HHS Bill

FY 1998 Enacted Section No./ Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Sec. 505. Needle Exchange	SEC. 505. Notwithstanding any other provision of this Act, no funds appropriated under this Act shall be used to carry out any program of distributing sterile needles for the hypodermic injection of any illegal drug unless the Secretary of Health and Human Services determines that such programs are effective in preventing the spread of HIV and do not encourage the use of illegal drugs.	SEC. 505. Proposed transfer of authority from the “Secretary of Health and Human Services” to the “Surgeon General”.	Sec. 505. Notwithstanding any other provision of this Act, no funds appropriated under this Act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.	OMB Staff: Repeat FY 98 Budget language. HHS: No position yet. Alternatives: (1) Give authority to Secretary as opposed to Surgeon General; (2) use footnote approach, i.e., delete provision and say the Administration will work with Congress to resolve.
Sec. 506. Condition on Needle Exchange			Sec. 506. Section 505 is subject to the condition that after March 31, 1998, a program for exchanging such needles and syringes for used hypodermic needles and syringes (referred to in this section as an “exchange project”) may be carried out in a community if - (1) the Secretary of Health and Human Services determines that exchange projects are effective in preventing the spread of HIV and do not encourage the use of illegal drugs; and (2) the project is operated in accordance with criteria established by such Secretary for preventing the spread of HIV and for ensuring that the project does not encourage the use of illegal drugs.	OMB Staff: Delete. Alternative: Footnote saying we will work with Congress. HHS: No position yet.

FY 1998 Enacted Section No./ Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Sec. 513. Use of funds for embryo research--limitations	SEC. 512. (a) None of the funds made available in this Act may be used for— (1) the creation of a human embryo or embryos for research purposes; or (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.208(a)(2) and section 498(b) of the Public Health Service Act (42 U.S.C. 289g(b)). (b) For purposes of this section, the term “human embryo or embryos” include any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes.	Proposed deletion with a footnote that states that the Administration does not support addressing this issue in legislation.	Sec. 513. Same as FY 97 enacted except end of last sentence changed to “...or more human gametes or human diploid cells.”	OMB Staff and HHS: Repeat FY 98 Budget, i.e., propose deletion with the same footnote: “The Administration proposes to delete this provision and does not support addressing this issue in legislation.”
Sec. 509. Appropriation limitations for abortion procedures (Hyde language)	SEC. 508. None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.	Proposed deletion with footnote that the Administration will work with Congress to address this issue.	Sec. 509. (a) None of the funds appropriated under this Act shall be expended for any abortion. (b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion. (c) The term “health benefits coverage” means the package of services covered by managed care provider or organization pursuant to a contract or other arrangement.	OMB Staff and HHS: Repeat FY 98 Budget, i.e., propose deletion, and add footnote: “The Administration proposes to delete this provision and will work with Congress to address this issue.”

FY 1998 Enacted Section No./ Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Sec. 510. Appropriat ion limitations for abortion procedures (Hyde language)			(New provision) Sec. 510. (a) The limitations established in the preceding section shall not apply to an abortion - (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life- endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. (b) Nothing in the preceding section shall be construed as ~~prohibiting the expenditure by a State~~ locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds). Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds).	OMB Staff and HHS: Delete provision and add footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."

FY 1998 Enacted Section No./ Provision	FY 97 Enacted	FY 98 President's Budget	FY 98 Enacted	Recommended FY 99 Language
Sec. 212. Appropriation of funds for entities under title X of the Public Health Service Act	Sec. 518. None of the funds appropriated in this Act may be made available to any entity under title X of the Public Health Service Act unless it is made known to the Federal official having authority to obligate or expend such funds that the applicant for the award certifies to the Secretary that it encourages family participation in the decision of the minor to seek family planning services.	Sec. 513 . Same as FY 97 Enacted.	Sec. 212. None of the funds appropriated in the Act may be made available to any entity under title X of the Public Health Service Act unless the applicant for the award certifies to the Secretary that it encourages family participation in the decision of minors to seek family planning services and that it provides counseling to minors on how to resist attempts to coerce minors into engaging in sexual activities.	OMB Staff: Repeat FY 98 enacted. HHS: No position yet.
Sec. 514. Use of funds for promotions of controlled substances-- limitations	Sec. 513. (a) LIMITATION ON USE OF FUNDS FOR PROMOTION OF LEGALIZATION OF CONTROLLED SUBSTANCES.—None of the funds made available in this Act may be used for any activity when it is made known to the Federal official having authority to obligate or expend such funds that the activity promotes the legalization of any drug or other substance included in schedule I of the schedules of controlled substances established by section 202 of the Controlled Substances Act (21 U.S.C. 812). (b) EXCEPTIONS.—The limitation in subsection (a) shall not apply when it is made known to the Federal official having authority to obligate or expend such funds that there is significant medical evidence of a therapeutic advantage to the use of such drug or other substance or that Federally-sponsored clinical trials are being conducted to determine therapeutic advantage.	Sec. 511. Same as FY 97 enacted.	Sec. 514. Same as FY 97 enacted and FY 98 President's Budget.	OMB Staff: Repeat FY 98 Budget language. Same as enacted.

Barbara E. Washington

08/08/97 05:00:53 PM

Record Type: Record

To: Jennifer L. Klein/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Revised Abortion Language for the L/HHS SAP - Clearance Requested

The language below is draft language that could be included in the Labor/HHS Appropriations Bill SAP in response to the Lowey/Hyde compromise abortion language. The compromise amendment was published in the July 31 Congressional Record.

The draft language states that we are pleased that the amendment includes clarification that the limits on managed care do not affect the ability of states or private people from using their own funds for abortion services. The draft language still includes the Administration's opposition to limiting the range of conditions under which a woman's health would permit access to abortion.

If you have any problems with the draft language or suggested edits, please call Josh Gotbaum.

Thanks

Language Proposed for inclusion in the L/HHS SAP:

"An amendment has been made in order that would include a prohibition on the purchase of health benefit coverage that includes abortion. The President believes that abortion should be safe, legal, and rare. However, the amendment would not only maintain, but further limit the range of conditions under which a woman's health would permit access to abortion. Furthermore, it would require a physician to make a legal determination that these conditions have been met. The Administration opposes this attempt to constrain further the availability of abortion services and strongly urges the House not to adopt the amendment. The Administration believes that it is important that any legislation in this area be clear that limitations on the use of Federal funds to provide abortion services under managed care plans do not affect in any way the ability of states to provide such coverage using their own funds, nor the ability of managed care providers to participate in Federally-funded programs while also offering other coverage paid for by state or private funds. We are pleased that the amendment includes this clarification."

Message Copied To: _____

RECONCILIATION PROVISIONS RELATING TO ABORTION

Child Health

- ◆ House: [Section 2104(b)(9)] Payment shall not be made to States to pay for any abortion or to assist in the purchase, (in whole or in part,) of health benefit coverage that includes abortion. Exceptions are provided for pregnancy that is result of an act of rape or incest or in the case of a woman who suffers from a physical disorder, illness or injury that would place the woman in danger of death. (Note: Same language as Istook rider to appropriations bill)
- ◆ Senate: [Section 2106(d)] Health insurance coverage provided with child health funds may include coverage of abortion only if necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest.

Medicaid Managed Care

- ◆ Senate: [Section 1949(a)(2)] States can impose intermediate sanctions against a managed care entity if the entity fails to provide medically necessary services that are required to be provided to an enrollee. The term "medically necessary" cannot be construed as requiring an abortion be performed for any individual, except if necessary to save the life of the mother or if a pregnancy is the result of an act of rape or incest.

Medicaid - Conscience clause

- ◆ House: [Section 3463] HMOs cannot prohibit or otherwise restrict a health care professional from advising patients on treatment regardless of whether benefits are covered under the plan. An exception is provided for an HMO that (1) objects to the provision of such service on moral or religious grounds; and (2) makes available information on its policies regarding such service to prospective enrollees before or during enrollment and to the enrollees within 90 days after the date that the plan's benefit package is modified or changed.

Medicare - Conscience clause

- ◆ House: [Ways and Means - Section 10001; Commerce - Section 4001] HMOs cannot prohibit or otherwise restrict a health care professional from advising patients on treatment regardless of whether benefits are covered under the plan. An exception is provided for an HMO that (1) objects to the provision of such service on moral or religious grounds; and (2) makes available information on its policies regarding such service to prospective enrollees before or during enrollment and to the enrollees within 90 days after the date that the plan's benefit package is modified or changed.

NARAL Promoting Reproductive Choices

BUDGET RECONCILIATION CONSCIENCE CLAUSE TALKING POINTS

- It is often appropriate for legislation to include a conscience clause to allow individuals to decline to provide health services because of personal religious beliefs or moral convictions.
- If an individual opts-out of providing a service to which he or she is religiously or morally opposed, then health care personnel must make an appropriate referral for the requested care. A conscience clause must not operate to deny access to abortion, family planning, sterilization, or information about these services.
- A health plan does not have a "conscience." Extending a conscience clause to health plans would be a major departure from current law and a major step backward for women. Current federal conscience clause language applies to individuals and institutions with religious or moral objections to performing certain reproductive health services, not health plans or health insurers.
- The conscience clause provisions included in the House-passed FY 98 Budget Reconciliation package — in the Commerce Committee-passed bill and in the Ways and Means-passed bill — are the most far-reaching conscience clauses ever considered by Congress, surpassing current law.

In 1973, Congress enacted an amendment proposed by then-Senator Frank Church (D-ID), that was added to the Health Programs Extension Act covering programs under the Public Health Services Act, Community Mental Health Centers Act and the Development Disabilities Services and Facilities Construction Act. The Church Amendment states that no individual or entity has to perform or assist in the performance of an abortion or sterilization procedure or make facilities available for an abortion or sterilization if it is contrary to the religious beliefs or moral convictions of an individual or entity. An amendment was added a year later that allows individuals involved in any program funded by the Department of Health, Education and Welfare (DHEW), now the Department of Health and Human Services (DHHS), to opt out of providing medical services to which he or she is religiously or morally opposed.

- No "gag rule" on counseling or referral for abortion, family planning, or other reproductive health services is acceptable. It was not acceptable during the Reagan and Bush years when there was an effort to put a "gag rule" in the Title X family planning program, and is not acceptable now.

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Medicaid guarantees that patients have coverage for a basic benefits package, including coverage for reproductive health services. If, for example, an HMO does not want to provide family planning information or services because of religious beliefs, at a minimum the state has a responsibility to make sure that the patient has access to the requested information or services.

NARAL 7/11/97

NARAL Promoting Reproductive Choices

CONSCIENCE CLAUSES IN CURRENT LAW

Recently the House adopted two "conscience clauses" that allow individuals and managed care plans to opt out of providing certain medical information and services. These provisions were added to the Budget Reconciliation bill and the Department of Defense authorization bill (see attached fact sheets). There was virtually no debate to reach the appropriate balance that would protect both the needs of the individual who is morally opposed to providing certain medical services and the right of patients to receive the medical services they need.

It is often appropriate to allow individual providers to decline to provide certain medical services because of their personal religious beliefs or moral convictions. However, if an individual opts out of providing a service to which he or she is religiously or morally opposed, then health care personnel must make an appropriate referral for the requested care. A conscience clause must not operate to deny access to health care services.

Attached is the language of conscience clauses that are in current federal law. The first conscience clause, now known as the Church Amendment, was enacted in 1973 and has been the model for subsequent provisions in federal law. The Church Amendment states that no individual or entity (such as a religious hospital) has to perform or assist in the performance of a sterilization procedure or abortion or make facilities available for these procedures if doing so is contrary to the religious beliefs or moral convictions of an individual. It also protects against discrimination in employment against any individual who has assisted or refused to assist in an abortion. This language originally applied to programs funded under the Public Health Service Act. A year later an amendment was added to include individuals involved in any program funded by DHEW (now DHHS).

Existing conscience clauses in current law apply to individuals and in the case of the Church Amendment and in the Civil Rights Restoration Act also apply to entities. But nowhere in current law are conscience clauses extended to plans or institutions acting as insurers.

Additionally, the scope of the conscience clauses is limited to abortion services except in the case of the Church amendment, which also covers sterilization.

CURRENT LAW

Church (D-ID) Amendment to the Health Programs Extension Act of 1973, Pub. L. No. 93-45. (Enacted June 18, 1973)

SEC. 401 (b). The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other

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public authority to require

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to -

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(c)(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after the date of enactment of this Act may --

(A) discriminate in the employment, promotion, or termination of the employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortion.

The Church Amendment was amended by the National Research Act of 1974, Pub. L. No. 93-348. (Enacted July 12, 1974)

SEC. 214 (a)(2). Section 401 of such Act is amended by adding the following new subsection: (c)(2) No entity which receives after the date of enactment of this paragraph a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health, Education, and Welfare may --

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance or assistance in the performance of such service or activity on the grounds that his performance or assistance in the performance of such activity would be contrary to his religious beliefs or moral convictions respecting to any such service or activity.

(b) Section 401 of such Act is amended by adding at the end of the following new subsection: (d) No individual shall be required to perform or assist in the performance if any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education, and Welfare if his performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

Danforth (R-MO) Amendment to the Civil Rights Restoration Act, Pub. L. No. 100-259. (Enacted March 22, 1988)

SEC. 909. Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to any abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

Commerce, Justice, State Appropriations from FY 97 Omnibus Appropriations, Pub. L. No. 104-208. (First Enacted, October 1, 1988 - Current Language Enacted September 30, 1996)

SEC. 103. None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term or in the case of rape: Provided, That should

this prohibition be declared unconstitutional by a court of competent jurisdiction, this section shall be null and void.

SEC. 104. None of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of, any abortion.

SEC. 105. Nothing in the preceding section shall remove the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate to receive such service outside the Federal facility: Provided, That nothing in this section in any way diminishes the effect of section 104 intended to address the philosophical beliefs of individual employees of the Bureau of Prisons.

ACGME (Accreditation Council on Graduate Medical Education), Pub. L. No. 104-134. (Amendment to the permanent authorizing statute Enacted April 25, 1996)

SEC. 245 (a) In general — The Federal Government and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that

- (1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions or to provide referrals for such training or such abortions;
- (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or
- (3) the entity attends (or attended) a post-graduate physician training program or any other program of training in the health professions that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(b) Accreditation of Postgraduate Physician Training Programs. --

(1) In General — In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standards that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortion or make arrangements for such training regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulation or other mechanisms or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.

(2) Rules of Construction --

(A) In General - With respect to subclauses (I) and (II) of section 705 (a) (2) (B) (I) (relating to a program of insured loans for training in the health professions), the requirements in such subclauses regarding accredited internship or residency programs are subject to paragraph (1) of this subsection.

(B) Exceptions—This section shall not--

- (i) prevent any health care entity from voluntarily electing to be trained, to train or to arrange for training in the performance of, to perform or to make referrals for induced abortions or
- (ii) prevent an accrediting agency or Federal, State or local government from establishing standards of medical competency applicable only to those individuals who have voluntarily elected to perform abortions.

(c) Definitions—for the purposes of this section:

- (1) The term 'financial assistance', with respect to government program, includes government payments provided as reimbursement for carrying out health-related activities.
- (2) The term 'health care entity' includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.
- (3) The term postgraduate physician training program includes a residency training program.

NARAL 7/13/97

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF THE GENERAL COUNSEL

FAX

DATE: July 24, 1997

TO: Elena Kagan

FAX: 456-2878

FROM: Renée M. Landers
Deputy General Counsel

PHONE: 202/690-6318

FAX: 202/690-7998

REMARKS:

Elena -

Attached is the draft language that Howard Wolfson, staff to Rep. Lowey, has accepted for the Hyde Amendment issue. I am sending it so you have a chance to review it before the 1 p.m. meeting today.

NUMBER OF PAGES: 2 (including cover sheet)

Rever

Compromise Language

Sec. ____ None of the funds appropriated under this Act shall be expended for any abortion, except when such a procedure is necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

None of the funds appropriated under this Act may be used to purchase health benefit coverage for abortions unless the financial basis of the federal contribution and the state funds eligible for matching under Title XIX are limited to those abortion services necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

Abortion - budget provisions

JOSHUA
GOTBAUM

07/30/97 12:21:27 PM



Record Type: Non-Record

To: Jennifer L. Klein/OPD/EOP, Elena Kagan/OPD/EOP, Barbara Chow/WHO/EOP, FOLEY_M @ A1@CD@LNGTWY

cc: Charles E. Kieffer/OMB/EOP, Richard J. Turman/OMB/EOP, Wm G. White/OMB/EOP

Subject: Revised Hyde Amendment Language for Labor HHS SAP -- Any comments needed by 2:00 pm

Below is language revised to take into account (a) the negotiations between Nita Lowey and Henry Hyde and (b) the fact that we've agreed to different language on Medicaid managed care to deal with the "commingling of funds" issue. If you have any difficulties with the language below, please page me. Thanks.

An amendment is made in order that would include a prohibition on the purchase of health benefit coverage that includes abortion. The President believes that abortion should be safe, legal, and rare. However, the amendment would not only maintain, but further limit the range of conditions under which a woman's health would permit access to abortion. Furthermore, it ~~and~~ would require a physician to make a legal determination that ~~the woman met~~ these conditions have been met. ~~The Hyde amendment might also be construed to curtail the availability of State-only and privately funded abortion services. Most States purchase health coverage for Medicaid beneficiaries from managed care organizations (MCOs). This amendment might be construed as prohibiting States from contracting with MCOs that offer abortion services to any woman, even using private or State funds.~~ The Administration opposes this attempt to constrain further the availability of abortion services and strongly urges the House not to adopt the Hyde amendment. For this and other ~~these~~ reasons, the Administration prefers the Lowey substitute. We understand that there may be negotiations to develop an alternative to both proposals. The Administration believes that it is important that any legislation in this area be clear that limitations on the use of Federal funds to provide abortion services under managed care plans do not affect in any way the ability of states to provide such coverage using their own funds, nor the ability of managed care providers to participate in Federally-funded programs while also offering other coverage paid for by state or private funds.

Thanks!
But only take
stage

Current law - with to like a health
This - particular threats to like a
"physical" health
specification -

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF THE GENERAL COUNSEL

Article - budget provisions

FAX

DATE: July 23, 1997

TO: Elena Kagan

FAX: 456-2878

FROM: Renée M. Landers
Deputy General Counsel

PHONE: 202/690-6318

FAX: 202/690-7998

REMARKS:

Elena -

Barbara Chow in the White House legislative affairs office asked HHS to get your approval of this language that HHS would submit to help the Hill in its desire to clarify that the Hyde Amendment covers Medicaid managed care. Of course, "time is

NUMBER OF PAGES: 2 (including cover sheet) of the essence".

Thanks. Renée

Compromise Language

Sec. ____ None of the funds appropriated under this Act shall be expended for any abortion, except when such a procedure is necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

None of the funds appropriated under this Act may be used to purchase health benefit coverage that includes coverage for abortions except those abortion services necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

Wm G. White

07/23/97 08:34:25 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Draft HHS Language on Hyde Restrictions to Medicaid Payments to HMOs

As a follow-up to my earlier e-mail, here is the Wolf Amendment language that was rejected by the House Appropriations Committee. HHS expects Sen. Craig to offer something similar in the Senate Appropriations Committee tomorrow. The draft HHS language would serve as a substitute to it.

"None of the funds appropriated under this Act shall be expended to pay for any abortion or to assist in the purchase, in whole or in part, of health benefit coverage that includes coverage of abortion.

The Limitation established in the preceding section shall not apply to an abortion ---

- (1) if the pregnancy is the result of an act of rape or incest; or
- (2) in the case where a woman suffers from a physical disorder; physical illness, or physical injury that would, as certified by a physician, place the woman in danger of death unless an abortion is performed."

----- Forwarded by Wm G. White/OMB/EOP on 07/23/97 08:27 PM -----

Wm G. White

07/23/97 07:49:37 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Draft HHS Language on Hyde Restrictions to Medicaid Payments to HMOs

Barbara Chow asked us to share the draft HHS language below with you on the Hyde Amendment in the L/HHS Appropriations bill for your clearance. HHS would like to give this language to Senator Harkin's staff so that he may offer it during tomorrow's Senate Appropriations Committee markup of the L/HHS bill. It would serve as a counter-proposal to an expected Amendment to be offered by Sen. Craig, which HHS believes will be similar to one offered by Rep. Wolf in the House. In the House L/HHS SAP, the Administration opposed the Wolf Amendment because we thought it could "curtail the availability of State-only and privately funded abortion services."

HHS believes that the language below is an acceptable alternative that would clarify the Hyde Amendment prohibition so that it would only apply to Federal funds appropriated in the L/HHS bill.

Rich Tarplin's staff would like to get this language to Harkin's staff tonight in time for tomorrow morning's (7/24) 10:00 a.m. mark-up of the bill. They are seeking OMB and your clearance

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. email	Wm G. White to Elena Kagan re: Draft HHS Language (partial) (1 page)	07/23/1997	P6/b(6)
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Abortion [Binder] [1]

2012-0254-S

rc652

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Wm G. White

07/23/97 07:49:37 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Draft HHS Language on Hyde Restrictions to Medicaid Payments to HMOs

Barbara Chow asked us to share the draft HHS language below with you on the Hyde Amendment in the L/HHS Appropriations bill for your clearance. HHS would like to give this language to Senator Harkin's staff so that he may offer it during tomorrow's Senate Appropriations Committee markup of the L/HHS bill. It would serve as a counter-proposal to an expected Amendment to be offered by Sen. Craig, which HHS believes will be similar to one offered by Rep. Wolf in the House. In the House L/HHS SAP, the Administration opposed the Wolf Amendment because we thought it could "curtail the availability of State-only and privately funded abortion services."

HHS believes that the language below is an acceptable alternative that would clarify the Hyde Amendment prohibition so that it would only apply to Federal funds appropriated in the L/HHS bill.

Rich Tarplin's staff would like to get this language to Harkin's staff tonight in time for tomorrow morning's (7/24) 10:00 a.m. mark-up of the bill. They are seeking OMB and your clearance before they give it to Harkin's staff.

Please call Holly Bode on Rich Tarplin's staff at 690-7485 or at home [redacted] with [001] clearance or questions. My office number is 5-7791 and I can be reached at home at

[redacted] P6/(b)(6)

DRAFT HHS LANGUAGE:

"None of the funds appropriated under this Act shall be expended for any abortion, except when such a procedure is necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

None of the funds appropriated under this Act may be used to purchase health benefit coverage that includes coverage for abortions unless the Federal contribution and the state funds eligible for matching under Title XIX are limited to those abortion services necessary to save the life of the woman or when the pregnancy is the result of rape or incest."

Message Copied To:

Nani A. Coloretti/OMB/EOP
Joshua Gotbaum/OMB/EOP
Barry T. Clendenin/OMB/EOP
Richard J. Turman/OMB/EOP
Mark E. Miller/OMB/EOP
Barbara E. Washington/OMB/EOP
Barbara Chow/WHO/EOP

IV-H-24

Atlantic -
budget provisions

Medicaid
managed
care.

As proposed &
as agreed.

1 tracts with such organizations or to the default enrollment
2 process described in subsection (u)(4)(C)(ii) that are at
3 least as effective as the Federal safeguards provided under
4 section 27 of the Office of Federal Procurement Policy Act
5 (41 U.S.C. 423), against conflicts of interest that apply
6 with respect to Federal procurement officials with com-
7 parable responsibilities with respect to such contracts.

8 "(4) USE OF UNIQUE PHYSICIAN IDENTIFIER FOR
9 PARTICIPATING PHYSICIANS.—Each Medicaid managed care
10 organization shall require each physician providing services
11 to enrollees eligible for medical assistance under the State
12 plan under this title to have a unique identifier in accord-
13 ance with the system established under section 1173(b).

14 "(e) SANCTIONS FOR NONCOMPLIANCE.—

15 "(1) USE OF INTERMEDIATE SANCTIONS BY THE
16 STATE TO ENFORCE REQUIREMENTS.—

17 "(A) IN GENERAL.—A State may not enter into or
18 renew a contract under section 1903(m) unless the
19 State has established intermediate sanctions, which
20 may include any of the types described in paragraph
21 (2), other than the termination of a contract with a
22 Medicaid managed care organization, which the State
23 may impose against a Medicaid managed care organiza-
24 tion with such a contract, if the organization—

25 "(i) fails substantially to provide medically
26 necessary items and services that are required
27 (under law or under such organization's contract
28 with the State) to be provided to an enrollee cov-
29 ered under the contract;

30 "(ii) imposes premiums or charges on enrollees
31 in excess of the premiums or charges permitted
32 under this title;

33 "(iii) acts to discriminate among enrollees on
34 the basis of their health status or requirements for
35 health care services, including expulsion or refusal
36 to reenroll an individual, except as permitted by
37 this title, or engaging in any practice that would

IV-H-25

1 reasonably be expected to have the effect of deny-
2 ing or discouraging enrollment with the organiza-
3 tion by eligible individuals whose medical condition
4 or history indicates a need for substantial future
5 medical services;

6 "(iv) misrepresents or falsifies information
7 that is furnished--

8 "(I) to the Secretary or the State under
9 this title; or

10 "(II) to an enrollee, potential enrollee, or
11 a health care provider under such title; or

12 "(v) fails to comply with the applicable re-
13 quirements of section 1903(n)(2)(A)(x).

14 The State may also impose such intermediate sanction
15 against a managed care entity if the State determines
16 that the entity distributed directly or through any
17 agent or independent contractor marketing materials in
18 violation of subsection (d)(2)(A)(i)(II)..

19 "(B) RULE OF CONSTRUCTION.—Clause (i) of sub-
20 paragraph (A) shall not apply to the provision of abor-
21 tion services.

22 "(2) INTERMEDIATE SANCTIONS.—The sanctions de-
23 scribed in this paragraph are as follows:

24 "(A) Civil money penalties as follows:

25 "(i) Except as provided in clause (ii), (iii), or
26 (iv), not more than \$25,000 for each determination
27 under paragraph (1)(A).

28 "(ii) With respect to a determination under
29 clause (iii) or (iv)(I) of paragraph (1)(A), not more
30 than \$100,000 for each such determination.

31 "(iii) With respect to a determination under
32 paragraph (1)(A)(ii), double the excess amount
33 charged in violation of such subsection (and the ex-
34 cess amount charged shall be deducted from the
35 penalty and returned to the individual concerned).

36 "(iv) Subject to clause (ii), with respect to a
37 determination under paragraph (1)(A)(iii), \$15,000

This was
changed
see next page.

F:\P5\HCONF\ABORTMED

1 “(B) RULE OF CONSTRUCTION.—Clause (i) of sub-
2 paragraph (A) shall not apply to the provision of abor-
3 tion services, except that a State may impose a sanc-
4 tion on any medicaid managed care organization that
5 has a contract to provide abortion services if the orga-
6 nization does not provide such services as provided for
7 under the contract.

As agreed

July 29, 1997 (9:47 p.m.)

F:\P5\HCONF\CHILD.007

[Title IV-J—Kid Care]

S.L.C/H.L.C.

IV-J-18

Child Health

Abortion —
but per
provisions

1 Act of 1974), a service benefit plan, and a health main-
2 tenance organization) would have been obligated to pro-
3 vide such assistance but for a provision of its insurance
4 contract which has the effect of limiting or excluding
5 such obligation because the individual is eligible for or
6 is provided child health assistance under the plan.

7 “(B) OTHER FEDERAL GOVERNMENTAL PRO-
8 GRAMS.—Except as otherwise provided by law, no pay-
9 ment shall be made to a State under this section for
10 expenditures for child health assistance provided for a
11 targeted low-income child under its plan to the extent
12 that payment has been made or can reasonably be ex-
13 pected to be made promptly (as determined in accord-
14 ance with regulations) under any other federally oper-
15 ated or financed health care insurance program, other
16 than an insurance program operated or financed by the
17 Indian Health Service, as identified by the Secretary.
18 For purposes of this paragraph, rules similar to the
19 rules for overpayments under section 1903(d)(2) shall
20 apply.

21 “(7) LIMITATION ON PAYMENT FOR ABORTIONS.—

22 “(A) IN GENERAL.—Payment shall not be made to
23 a State under this section for any amount expended
24 under the State plan to pay for any abortion or to as-
25 sist in the purchase, in whole or in part, of health bene-
26 fit coverage that includes coverage of abortion.

27 “(B) EXCEPTION.—Subparagraph (A) shall not
28 apply to an abortion only if necessary to save the life
29 of the mother or if the pregnancy is the result of an
30 act of rape or incest.

31 “(C) RULE OF CONSTRUCTION.—Nothing in this
32 section shall be construed as affecting the expenditure
33 by a State, locality, or private person or entity of State,
34 local, or private funds (other than funds expended
35 under the State plan) for any abortion or for health
36 benefits coverage that includes coverage of abortion.

37 “(d) MAINTENANCE OF EFFORT.—

July 29, 1997 (4:49 p.m.)

It is the Conferees' intention that Section 2105(c)(7) not restrict the ability of any provider from offering abortion coverage or the ability of a state to contract with such a provider for such coverage except, as prohibited under this section, where federal funds are used in whole or in part to obtain such coverage under this title.

Abortion - budget provisions

Potential Hyde / Lerwey
compromise 7/29/97
Labor / HHS

Sec. 508 (a) None of the funds appropriated under this Act shall be expended for any abortion.

(b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

Sec. 509 (a) The limitations established in the preceding section shall not apply to an abortion --

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State or private person of State or private funds (other than a State's contribution of Medicaid matching funds) for abortion services or coverage of abortion by contract or other arrangement.

F:\EGG\MEMPHILTH\HYDE.003
(Labor, ILLIN FY98)Abortion - Lulup
provisions

H.L.C.

2

**Amendment to H.R. 2264, As Reported
Labor, HHS, and Education
Appropriations Bill, 1998
Offered by Mr. Hyde of Illinois**

Page 94, strike lines 16 through 21 and insert the following (and redesignate the succeeding sections accordingly):

1 SEC. 508. (a) None of the funds appropriated under
2 this Act shall be expended for any abortion.

3 (b) None of the funds appropriated under this Act
4 shall be expended for health benefits coverage that in-
5 cludes coverage of abortion.

6 SEC. 509. (a) The limitations established in the pre-
7 ceding section shall not apply to an abortion—

8 (1) if the pregnancy is the result of an act of
9 rape or incest; or

10 (2) in the case where a woman suffers from a
11 physical disorder, physical injury, or physical illness,
12 including a life-endangering physical condition
13 caused by or arising from the pregnancy itself, that
14 would, as certified by a physician, place the woman
15 in danger of death unless an abortion is performed.

F:\EGG\WELM\MLTH\HYDE.003
(Labor, HHS FY98)

H.L.C.

2

1 (b) Nothing in the preceding section shall be con-
2 strued as affecting the expenditure by a State or private
3 person of State or private funds (other than a State's con-
4 tribution of Medicaid matching funds).

July 28, 1997 (9:37 a.m.)

Labor/HHS SAP - Abortion

An amendment is made in order that would include a prohibition on the purchase of health benefit coverage that includes abortion. The President believes that abortion should be safe, legal, and rare. However, the amendment would **not only maintain, but further** limit the range of conditions under which a woman's health would permit access to abortion. **Furthermore, it and** would require a physician to make a legal determination that ~~the woman met~~ these conditions **have been met**. ~~The Hyde amendment might also be construed to curtail the availability of State-only and privately funded abortion services. Most States purchase health coverage for Medicaid beneficiaries from managed care organizations (MCOs). This amendment might be construed as prohibiting States from contracting with MCOs that offer abortion services to any woman, even using private or State funds.~~ The Administration opposes this attempt to constrain further the availability of abortion services and strongly urges the House not to adopt the Hyde amendment. For **this and other** ~~these~~ reasons, the Administration prefers the Lowey substitute. **We understand that there may be negotiations to develop an alternative to both proposals. The Administration believes that it is important that any legislation in this area be clear that limitations on the use of Federal funds to provide abortion services under managed care plans do not affect in any way the ability of states to provide such coverage using their own funds, nor the ability of managed care providers to participate in Federally-funded programs while also offering other coverage paid for by state or private funds.**

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. fax	Renee Landers to Elena Kagan re: phone number (partial) (1 page)	07/23/1997	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Abortion [Binder] [1]

2012-0254-S

rc652

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF THE GENERAL COUNSEL

Abortion - budget provisions

FAX

DATE: *July 23, 1997*TO: *Elena Kagan \ Greg White*FAX: *456-2878 \ 395-3910*FROM: Renée M. Landers
Deputy General CounselPHONE: 202/690-6318 \ P6/(b)(6) *(home) [002]*

FAX: 202/690-7998

REMARKS:

This language supersedes the earlier language and has the approval of Cong. Lowey's staff.

*Renée*NUMBER OF PAGES: 2 (including cover sheet)

Compromise: Language

Sec. ____ None of the funds appropriated under this Act shall be expended for any abortion, except when such a procedure is necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

None of the funds appropriated under this Act may be used to purchase health benefit coverage for abortions unless the federal contribution and the state funds eligible for matching under Title XIX are limited to those abortion services necessary to save the life of the woman or when the pregnancy is the result of rape or incest.

Abortion - budget provisions

**JOSHUA
GOTBAUM**

07/29/97 01:11:46 PM



Record Type: Non-Record

To: Jennifer L. Klein/OPD/EOP, Elena Kagan/OPD/EC:P

cc: Nicolette Highsmith/OMB/EOP

Subject: Revised Hyde Language -- I'll Call you

Hyde Amendment prohibition on Medicaid payment for abortion services

We understand that an amendment may be made in order ...to include a prohibition on the purchase of health benefit coverage that includes abortion. The President believes that abortion should be safe, legal, and rare. However, the amendment would codify and limit the range of conditions under which a woman's health would permit access to abortion. For this reason, the Administration prefers the substitute offered by Mrs. Lowey, which would maintain the limitation as it exists in current law. The amendment could also be construed to curtail the availability of State-only and privately funded abortion services. Most States purchase health coverage for Medicaid beneficiaries from managed care organizations (MCOs). This amendment could be construed as prohibiting state from contracting with MCOs that offer abortion services to any woman, even using private or State funds. The Administration opposes this attempt to constrain further the availability of abortion services and strongly urges the House not to adopt the Hyde amendment.

O:\ERN\ERN97.415

Abortion -
S.L.C. budget provisions

54

Senate
Finance
Medicaid

1 the State for medical assistance provided under such sec-
 2 tion, for expenditures for capitation payments to a man-
 3 aged care entity that becomes insolvent or for services con-
 4 tracted for with, but not provided by, such organization.

5 **"SEC. 1949. SANCTIONS FOR NONCOMPLIANCE BY MAN-**
 6 **AGED CARE ENTITIES.**

7 **"(a) USE OF INTERMEDIATE SANCTIONS BY THE**
 8 **STATE TO ENFORCE REQUIREMENTS.—**

9 **"(1) IN GENERAL.—**Each State shall establish
 10 intermediate sanctions, which may include any of the
 11 types described in subsection (b) other than the ter-
 12 mination of a contract with a managed care entity,
 13 which the State may impose against a managed care
 14 entity with a contract under section 1941(a)(1)(B)
 15 if the entity—

16 "(A) fails substantially to provide medi-
 17 cally necessary items and services that are re-
 18 quired (under law or under such entity's con-
 19 tract with the State) to be provided to an en-
 20 rollee covered under the contract,

21 "(B) imposes premiums or charges on en-
 22 rollees in excess of the premiums or charges
 23 permitted under this title,

24 "(C) acts to discriminate among enrollees
 25 on the basis of their health status or require-

(no state can't sanction
 it mgt care entity refuse)

O:\ERN\ERN97.415

S.L.C.

55

Senate
Finance
Medicaid

1 ments for health care services, including expul-
2 sion or refusal to reenroll an individual, except
3 as permitted by this part, or engaging in any
4 practice that would reasonably be expected to
5 have the effect of denying or discouraging en-
6 rollment with the entity by eligible individuals
7 whose medical condition or history indicates a
8 need for substantial future medical services,

9 “(D) misrepresents or falsifies information
10 that is furnished--

11 “(i) to the Secretary or the State
12 under this part; or

13 “(ii) to an enrollee, potential enrollee,
14 or a health care provider under such sec-
15 tions, or

16 “(E) fails to comply with the requirements
17 of section 1876(i)(8) (or comparable require-
18 ments under part C of title XVIII) or this part.

19 “(2) RULE OF CONSTRUCTION.—For purposes
20 of paragraph (1)(A), the term ‘medically necessary’
21 shall not be construed as requiring an abortion be
22 performed for any individual, except if necessary to
23 save the life of the mother or if a pregnancy is the
24 result of an act of rape or incest.

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1 “(1) IN GENERAL.—From the amount allotted
2 to a State under section 2105(b) for a fiscal year,
3 each State shall conduct outreach activities de-
4 scribed in paragraph (2).

5 “(2) OUTREACH ACTIVITIES DESCRIBED.—The
6 outreach activities described in this paragraph in-
7 clude activities to—

8 “(A) identify and enroll children who are
9 eligible for medical assistance under the State
10 plan under title XIX; and

11 “(B) conduct public awareness campaigns
12 to encourage employers to provide health insur-
13 ance coverage for children.

14 “(b) STATE OPTIONS FOR REMAINDER.—A State
15 may use the amount remaining of the allotment to a State
16 under section 2105(b) for a fiscal year, determined after
17 the payment required under section 2105(c)(1)(A), in ac-
18 cordance with section 2107 or the State medicaid program
19 (but not both).

20 “(c) PROHIBITION ON USE FOR ABORTIONS.—

21 “(1) IN GENERAL.—Except as provided in para-
22 graph (2), no funds provided under this title may be
23 used to pay for any abortion or to assist in the pur-
24 chase, in whole or in part, of health benefit coverage
25 that includes coverage of abortion.

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1 “(2) EXCEPTION.—Paragraph (1) shall not
2 apply to an abortion if necessary to save the life of
3 the mother or if the pregnancy is the result of an
4 act of rape or incest.

5 “(d) USE LIMITED TO STATE PROGRAM EXPENDI-
6 TURES.—Funds provided to an eligible State under this
7 title shall only be used to carry out the purpose of this
8 title.

9 “(e) ADMINISTRATIVE EXPENDITURES.—Not more
10 than 10 percent of the amount allotted to a State under
11 section 2105(b), determined after the payment required
12 under section 2105(c)(1)(A), shall be used for administra-
13 tive expenditures for the program funded under this title.

14 “(f) NONAPPLICATION OF FIVE-YEAR LIMITED ELI-
15 GIBILITY FOR MEANS-TESTED PUBLIC BENEFITS.—The
16 provisions of section 403 of the Personal Responsibility
17 and Work Opportunity Reconciliation Act of 1996 (8
18 U.S.C. 1613) shall not apply with respect to a State pro-
19 gram funded under this title.

20 “SEC. 2107. STATE OPTION FOR THE PURCHASE OR PROVI-
21 SION OF CHILDREN'S HEALTH INSURANCE.

22 “(a) IN GENERAL.—An eligible State that opts to use
23 funds provided under this title under this section shall use
24 such funds to—

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(Committee Print)

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1 cause the individual is eligible for or is provided child
2 health assistance under the plan.

3 "(8) SECONDARY PAYER PROVISIONS.—Except as oth-
4 erwise provided by law, no payment shall be made to a
5 State under this section for expenditures for child health
6 assistance provided for a targeted low-income child under
7 its plan to the extent that payment has been made or can
8 reasonably be expected to be made promptly (as determined
9 in accordance with regulations) under any other federally
10 operated or financed health care insurance program, other
11 than an insurance program operated or financed by the In-
12 dian Health Service, as identified by the Secretary. For
13 purposes of this paragraph, rules similar to the rules for
14 overpayments under section 1903(d)(2) shall apply.

15 "(9) LIMITATION ON PAYMENT FOR ABORTIONS.—

16 "(A) IN GENERAL.—Payment shall not be made to
17 a State under this section for any amount expended
18 under the State plan to pay for any abortion or to as-
19 sist in the purchase, in whole or in part, of health bene-
20 fit coverage that includes coverage of abortion.

21 "(B) EXCEPTION.—Subparagraph (A) shall not
22 apply to an abortion—

23 "(i) if the pregnancy is the result of an act of
24 rape or incest, or

25 "(ii) in the case where a woman suffers from
26 a physical disorder, illness, or injury that would, as
27 certified by a physician, place the woman in danger
28 of death unless an abortion is performed.

29 "(c) ADVANCE PAYMENT; RETROSPECTIVE ADJUST-
30 MENT.—The Secretary may make payments under this section
31 for each quarter on the basis of advance estimates of expendi-
32 tures submitted by the State and other investigation the Sec-
33 retary may find necessary, and may reduce or increase the pay-
34 ments as necessary to adjust for any overpayment or underpay-
35 ment for prior quarters.

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[Committee Print]

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1 uations submitted by States under paragraph (1), contain-
2 ing any conclusions and recommendations the Secretary
3 considers appropriate.

4 "SEC. 2108. DEFINITIONS.

5 "(a) CHILD HEALTH ASSISTANCE.—For purposes of this
6 title, the term 'child health assistance' means payment of part
7 or all of the cost of any of the following, or assistance in the
8 purchase, in whole or in part, of health benefit coverage that
9 includes any of the following, for targeted low-income children
10 (as defined in subsection (b)) as specified under the State plan:

11 "(1) Inpatient hospital services.

12 "(2) Outpatient hospital services.

13 "(3) Physician services.

14 "(4) Surgical services.

15 "(5) Clinic services (including health center services)
16 and other ambulatory health care services.

17 "(6) Prescription drugs and biologicals and the admin-
18 istration of such drugs and biologicals, only if such drugs
19 and biologicals are not furnished for the purpose of caus-
20 ing, or assisting in causing, the death, suicide, euthanasia,
21 or mercy killing of a person.

22 "(7) Over-the-counter medications.

23 "(8) Laboratory and radiological services.

24 "(9) Prenatal care and prepregnancy family planning
25 services and supplies.

26 "(10) Inpatient mental health services, including serv-
27 ices furnished in a State-operated mental hospital and in-
28 cluding residential or other 24-hour therapeutically planned
29 structured services.

30 "(11) Outpatient mental health services, including
31 services furnished in a State-operated mental hospital and
32 including community-based services.

33 "(12) Durable medical equipment and other medically-
34 related or remedial devices (such as prosthetic devices, im-
35 plants, eyeglasses, hearing aids, dental devices, and adapt-
36 ive devices).

37 "(13) Disposable medical supplies.

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1 “(14) Home and community-based health care services
2 and related supportive services (such as home health nurs-
3 ing services, home health aide services, personal care, as-
4 sistance with activities of daily living, chore services, day
5 care services, respite care services, training for family
6 members, and minor modifications to the home).

7 “(15) Nursing care services (such as nurse practi-
8 tioner services, nurse midwife services, advanced practice
9 nurse services, private duty nursing care, pediatric nurse
10 services, and respiratory care services) in a home, school,
11 or other setting.

12 “(16) Abortion only if necessary to save the life of the
13 mother or if the pregnancy is the result of an act of rape
14 or incest.

15 “(17) Dental services.

16 “(18) Inpatient substance abuse treatment services
17 and residential substance abuse treatment services.

18 “(19) Outpatient substance abuse treatment services.

19 “(20) Case management services.

20 “(21) Care coordination services.

21 “(22) Physical therapy, occupational therapy, and
22 services for individuals with speech, hearing, and language
23 disorders.

24 “(23) Hospice care.

25 “(24) Any other medical, diagnostic, screening, pre-
26 ventive, restorative, remedial, therapeutic, or rehabilitative
27 services (whether in a facility, home, school, or other set-
28 ting) if recognized by State law and only if the service is—

29 “(A) prescribed by or furnished by a physician or
30 other licensed or registered practitioner within the
31 scope of practice as defined by State law,

32 “(B) performed under the general supervision or
33 at the direction of a physician, or

34 “(C) furnished by a health care facility that is op-
35 erated by a State or local government or is licensed
36 under State law and operating within the scope of the
37 license.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Abortion - budget
provisions

MEMORANDUM

January 23, 1997

TO: Distribution

FR: Nancy-Ann Min *NAM*

RE: Treatment of Abortion-Related Provisions in the FY 1998 Budget

Attached is a list of provisions from FY 1997 appropriations bills relate to abortion. As you know, the budget must indicate any changes we propose to make to these provisions. What follows is a run-down of the provisions and what the Administration proposes to do. (HHS has been consulted on the various provisions that apply to their programs and concurs with these recommendations). Please feel free to call me, or my assistant Sarah Bianchi, at 5-5178 with any questions or comments.

Section in FY1997 Provision	ISSUE	Provision in FY 1997 Budget	Recommended Position for FY 1998
Hyde Amendment -- Medicaid (Labor, HHS bill)	Prohibits funding from being expended for any abortion, except in the cases of incest, rape, or to save the life of the mother.	Proposed to delete provision but inserted footnote stating Administration will work with Congress to resolve.	Same as last year. Delete provision and include FY 1997 footnote.

Hyde Amendment - Prisons (Commerce, Justice bill)	Prohibits Federal funding for abortion for Federal prisoners, except in the cases of rape and incest, or when the life of the mother is in endangered.	Proposed to delete the provision but inserted footnote stating that Administration will work with Congress to resolve.	Delete provision and include FY 1997 footnote.
Hyde Amendment -- Federal Employees (Treasury, Postal bill)	Prohibits FEHBP health plans from covering abortion except in cases of rape, incest, and when the life of the mother is in danger.	Proposed to delete provision.	Same as last year. Delete provision.
Hyde Amendment - D.C. (D.C. Bill)	Prohibits Federal and District funding for abortion except in the cases of rape, incest, and when the life of the mother is endangered.	Proposed to delete the provision.	Same as last year. Delete provision.
International Family Planning (Foreign Ops bill)	Prohibits Federal funding for abortion. Delays obligation of population funds to July 1, 1997. Imposes monthly "metering" requirements on amount of funds provided for international family planning activities.	Proposed to increase funds from FY 1996 enacted levels and delete provisions regarding delay and metering.	Same as last year. Propose to increase funds and delete delay and metering provisions.

Embryo Research (Labor, HHS bill)	Prohibits Federal funds from being used for research purposes and subjects embryo research to the same restrictions that apply to research involving fetuses.	Footnote stating that issue should not be addressed in legislation.	Same as last year. Repeat footnote from FY 1997 Budget.
Family Planning (Labor, HHS bill)	Obeys amendment to require family planning clinics to certify that they encourage family participation in family planning decisions made by minors.	Not Applicable; new in FY 1997.	Retain (HHS says this is similar to what is already required by regulation).

cc: Pauline Abernathy, Barbara Chow, Rahm Emanuel, Debbie Fine, Martha Foley, Lyn Hogan, Elena Kagan, Janet Murguia, Betsy Myers, Greg Simon, Todd Stern, Melanne Verveer

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. email	Nancy Min to Barbara Chow re: Conversation with Karen Nelson on Hyde Provisions (2 pages)	06/25/1997	P5

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Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or
financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President
and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of
personal privacy [(a)(6) of the PRA]

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PRM. Personal record misfile defined in accordance with 44 U.S.C.
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of
an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial
information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of
personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement
purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of
financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information
concerning wells [(b)(9) of the FOIA]

"Side-by-Side" Comparison for Abortion Provisions

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
DC Ban on Use of Funds for Abortion	Sec. 132. No funds appropriated under this Act shall be expended for any abortion except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy is the result of an act of rape or incest.	Repeat the FY 1998 Budget, i.e., the Administration proposes to delete this provision and add the footnote that the Administration will work with Congress on this issue.	Sec. 131. Same as FY 1998 enacted.	Repeat FY 1999 President's Budget, i.e., <u>delete the provision</u> and add the footnote: "The Administration proposes to <u>delete this provision</u> and will work with Congress to address this issue."
C/J/S Ban on Use of Justice Funds for Abortion	Sec. 103. Repeated FY 1997 Enacted language. None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape: Provided, That should this prohibition be declared unconstitutional by a court of competent jurisdiction, this section shall be null and void.	Repeat the FY 1998 Budget i.e., the Administration proposes to delete this provision and add a footnote that the Administration will work with Congress on this issue.	Sec. 103. Same as FY 1998 enacted.	Repeat FY 1999 President's Budget, i.e., <u>delete the provision</u> and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."
C/J/S Ban on the Use of Justice Funds for Performing Abortion	Sec. 104. Repeated FY 1997 Enacted language. None of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of any abortion.	<u>Repeat FY 1998 Enacted Language.</u>	Sec. 104. Same as FY 1998 enacted.	Repeat FY 1999 Enacted Language.
C/J/S Bureau of Prisons duty to provide escort services for female inmates seeking a privately funded abortion.	Sec. 105. Repeated FY 1997 Enacted language. Nothing in the preceding section shall remove the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate to receive such service outside the Federal facility: Provided, That nothing in this section in any way diminishes the effect of section 104 intended to address the philosophical beliefs of individuals employees of the Bureau of Prisons.	<u>Repeat FY 1998 Enacted Language.</u>	Sec. 105. Same as FY 1998 enacted.	Repeat FY 1999 Enacted Language.
L/HHS/Ed Hyde Amendment	Sec. 509. (a) None of the funds appropriated under this Act shall be expended for any abortion. (b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion. (c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.	Repeat FY 1998 Budget, i.e., <u>propose deletion and add footnote: "The Administration proposes to delete this footnote and will work with Congress to address this issue."</u>	Sec. 508. Same as FY 1998 enacted except it added: "... and none of the funds in any trust fund to which funds are appropriated under this Act, ..."	Repeat FY 1999 President's Budget, i.e., <u>delete the provision</u> and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
L/HHS/Ed Hyde Amendment	Sec. 510. (a) The limitations established in the preceding section shall not apply to an abortion-(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. (b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds). (c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds).	Delete provision and add footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."	Sec. 509. Same as FY 1998 enacted.	Repeat FY 1999 President's Budget, ~~ie.~~ , delete the provision and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."
L/HHS/Ed Medicare+Choice			Sec. 216. None of the funds appropriated by this Act (including funds appropriated to any trust fund) may be used to carry out the Medicare+Choice program if the Secretary denies participation in such program to an otherwise eligible entity (including a Provider Sponsored Organization) because the entity informs the Secretary that it will not provide, pay for, provide coverage of, or provide referrals for abortions: Provided, That the Secretary shall make appropriate prospective adjustments to the capitation payment to such an entity (based on an actuarially sound estimate of the expected costs of providing the service to such entity's enrollees): Provided further, That nothing in this section shall be construed to change the Medicare program's coverage for such services and a Medicare+Choice organization described in this section shall be responsible for informing enrollees where to obtain information about all Medicare covered services.	Repeat FY 1999 President's Budget, i.e., delete the provision and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
Foreign Ops	Sec. 518. Same as FY 1997 Enacted language. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be used to pay for the performance of involuntary sterilization as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be used to pay for any biomedical research which relates in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning. None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be obligated or expended for any country or organization if the President certifies that the use of these funds by any such country or organization would violate any of the above provisions related to abortions and involuntary sterilizations: Provided, That none of the funds made available under this Act may be used to lobby for or against abortion.	<u>Repeat FY 1998 Enacted language.</u>	Sec. 518. Same as FY 1998 enacted.	Repeat FY 1999 enacted.
Foreign Ops	Sec. 592. (a) Not to exceed \$385,000,000 of the funds appropriated in title II of this Act may be available for population planning activities or other population assistance. (b) Such funds may be apportioned only on a monthly basis, and such monthly apportionments may not exceed 8.34 percent of the total available for such activities.	The Administration proposed to delete this provision.	Deleted.	

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
Foreign Ops	Sec. 543. (a) Assistance Through Nongovernmental Organizations. —Restrictions contained in this or any other Act with respect to assistance for a country shall not be construed to restrict assistance in support of programs of nongovernmental organizations from funds appropriated by this Act to carry out the provisions of chapters 1, 10, and 11 of part I and chapter 4 of part II of the Foreign Assistance Act of 1961, and from funds appropriated under the heading "Assistance for Eastern Europe and the Baltic States": Provided, That the President shall take into consideration, in any case in which a restriction on assistance would be applicable but for this subsection, whether assistance in support of programs of nongovernmental organizations is in the national interest of the United States: Provided further, That before using the authority of this subsection to furnish assistance in support of programs of nongovernmental organizations, the President shall notify the Committees on Appropriations under the regular notification procedures of those committees, including a description of the program to be assisted, the assistance to be provided, and the reasons for furnishing such assistance: Provided further, That nothing in this subsection shall be construed to alter any existing statutory prohibitions against abortion or involuntary sterilizations contained in this or any other Act. (b) Public Law 480...	Same as FY 1998 enacted.	Same as FY 1998 enacted	Repeat FY 1999 enacted.

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
Foreign Ops	"For necessary expenses to carry out ...Provided further, That none of the funds made available in this Act nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization: Provided further, That none of the funds made available under this heading may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions; and that in order to reduce reliance on abortion in developing nations, funds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services; Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning; and additionally, all such applicants shall comply with the requirements of the previous proviso: Provided further, That for purposes of this or any other Act authorizing or appropriations funds for foreign operations, export financing, and related programs, the term "motivate", as it relates to family planning assistance, shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options: Provided further, That nothing in this paragraph shall be construed to alter any existing statutory prohibitions against abortion under section 104 of the Foreign Assistance Act of 1961; Provided further ..."	Repeat FY 1998 enacted language.	<i>FY 1999 Enacted Language expanded family planning provision and the new language is bolded below.</i> For necessary expenses to carry out. . . . Provided further, That none of the funds made available in this Act nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization: Provided further, That none of the funds made available under this heading may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions; and that in order to reduce reliance on abortion in developing nations, funds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services, and that any such voluntary family planning project shall meet the following requirements: (1) service providers or referral agents in the project shall not implement or be subject to quotas, or other numerical targets, of total number of births, number of family planning acceptors, or acceptors of a particular method of family planning (this provision shall not be construed to include the use of quantitative estimates or indicators for budgeting and planning purposes), (2) the project shall not include payment of incentives, bribes, gratuities, or financial reward to (A) an individual in exchange for becoming a family planning acceptor, or (B) program personnel for achieving a numerical target or quota of total number of births, number of family planning acceptors, or acceptors of a particular method of family planning services,	Repeat FY 1999 abortion and family planning provisions.

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
			(3) the project shall not deny any right or benefit, including the right of access to participate in any program of general welfare or the right of access to health care, as a consequence of any individual's decision not to accept family planning services, (4) the project shall provide family planning acceptors comprehensible information on the health benefits and risks of the method chosen, including those conditions that might render the use of the method inadvisable and those adverse side effects known to be consequent to the use of the method, (5) the project shall ensure that experimental contraceptive drugs and devices and medical procedures are provided only in the context of a scientific study in which participants are advised of potential risks and benefits; and, not less than 60 days after the date on which the Administrator of the United States Agency for International Development determines that there has been a violation of the requirements contained in paragraph (1), (2), (3), or (5) of this proviso, or a pattern or practice of violations of the requirements contained in paragraph (4) of this proviso, the Administrator shall submit to the Committee on International Relations and the Committee on Appropriations of the House of	

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
Foreign Ops Continued			Representatives and to the Committee on Foreign Relations and the Committee on Appropriations of the Senate, a report containing a description of such violation and the corrective action taken by the Agency: Provided further, That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning; and, additionally, all such applicants shall comply with the requirements of the previous proviso: Provided further, That for purposes of this or any other Act authorizing or appropriating funds for foreign operations, export financing, and related programs, the term "motivate", as it relates to family planning assistance, shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options: Provided further, That nothing in this paragraph shall be construed to alter any existing statutory prohibitions against abortion under section 104 of the Foreign Assistance Act of 1961: Provided further, . . .	
Foreign Ops Peace Corps	For expenses necessary to carry out the provisions of the Peace Corps Act (75 Stat. 612), \$222,000,000, including the purchase of not to exceed five passenger motor vehicles for administrative purposes for use outside of the United States, Provided, That none of the funds appropriated under this heading shall be used to pay for abortions: Provided further, That funds appropriated under this heading shall remain available until September 30, 1999	Delete the sentence, "Provided, That none of the funds appropriated under this heading shall be used to pay for abortions" and add footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."	Same as FY 1998 enacted.	Repeat FY 1999 President's Budget, i.e., delete the provision and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."
Treasury/ General Government FEHB Prohibition	Sec. 513. Same as FY 1997 Enacted language. No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefit program which provides any benefits or coverage for abortion.	The Administration proposed deleting this provision.	Sec. 509. Same as FY 1998 enacted.	Repeat FY 1999 President's Budget, i.e., delete the provision and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."

Appropriations Bill/Provision	FY 98 Enacted	FY 99 President's Budget	FY 99 Enacted	Recommended FY 2000 Language
Treasury/ General Government FEHB Prohibition	Sec. 514. Same as FY 1997 Enacted language. The provision of section 518 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.	The Administration proposed deleting this provision.	Sec. 510. Same as FY 1998 enacted.	Repeat FY 1999 President's Budget, ~~i.e.~~ , delete the provision and add the footnote: "The Administration proposes to delete this provision and will work with Congress to address this issue."
Treasury/General Government			Sec. 656. (a) None of the funds appropriated by this Act may be used to enter into or renew a contract which includes a provision providing prescription drug coverage, except where the contract also includes a provision for contraceptive coverage. (b) Nothing in this section shall apply to a contract with: (1) any of the following religious plans: (a) SelectCare (b) Personal CaresHMO (c) Care Choices (d) OSF Health Plans, Inc. (e) Yellowstone Community Health Plan (2) any existing or future plan, if the plan objects to such coverage on the basis of religious beliefs. (c) In implementing this section, any plan that enters into or renews a contract under this section may not subject any individual to discrimination on the basis that the individual refuses to prescribe contraceptives because such activities would be contrary to the individual's religious beliefs or moral convictions. (d) Nothing in this section shall be construed to require coverage of abortion or abortion-related services	Repeat FY 1999 enacted language.

Abortion - Child Custody
Act

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opted not to implement a consent or notice requirement. Under S.1645, a State that has determined that minors within its sovereign reach may obtain an abortion without parental consent or notice is overridden by a federal law that elevates to federal policy the determination of a sister State. If state A chooses to require parental consent or notice and state B chooses not to, or chooses to require a different form of parental consent or notice than State A, it is hard to see what interest of the national government, consistent with federalism, supports taking sides with state A and undermining state B's policy choice.

By extending the reach of a state's policy choice into neighboring states, S.1645 also may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when State A decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister States and recognizes that its citizens may go elsewhere for those services. Under S.1645, State A's decision as to conduct within its territorial borders is given extraterritorial reach that it likely was not intended to have (even assuming, which is dubious, that it could constitutionally do so consistent with the right to travel and other constitutional checks on States' powers to impose policy determinations on sister States).

There is, moreover, a significant difference from the standpoint of federalism between S.1645 and familiar statutes, such as the Violence Against Women Act (VAWA) and the Gun Free School Zones Act, that make it a crime to cross state lines or otherwise engage in interstate commerce and then undertake certain conduct in a neighboring state: S.1645 criminalizes acts that are lawful in the state where committed. Thus, VAWA, for

⁴ This feature of S.1645 appears to be, for all practical purposes, unprecedented. The only possible exception would be the Mann Act, which makes it a federal crime to transport an individual in interstate commerce with the intent that the individual engage in prostitution or any unlawful sexual activity. Even allowing for the theoretical possibility of a prosecution under the Mann Act for conduct that is lawful in the State where it is undertaken, S.1645 is considerably more problematic as a matter of policy. First, in contrast to the Mann Act, which might permit prosecution of lawful conduct in a very few marginal cases, S.1645 categorically federalizes conduct that is by definition and in all cases lawful in the State in which it is committed. Second, prostitution, as well as the other sexual crimes at issue in the Mann Act, is nearly universally disapproved throughout the Nation. By contrast, whether to require parental consent for a minor's abortion is the kind of middle-ground policy issue as to which the diverse

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example, criminalizes acts of violence that are proscribed in all 50 States. In such circumstances, there is no (or at most a slight) sense in which the federal criminal law undermines the policy judgments of the State in which the ultimate conduct occurs. Cf. Lopez, 514 U.S. at 581 (Kennedy, J., concurring) ("While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal."). Even as to these statutes, our consistent policy has been to insist on there being some distinctive federal interest in getting at the unlawful conduct: we have defended VAWA and other similar statutes on the basis of a national interest in the underlying problem, and, conversely, have opposed proposed statutes, such as the D'Amato amendment (that would have made it a federal offense to use a gun that had passed in interstate commerce in any crime of violence), that would have federalized conduct that was criminal in all States but that we did not perceive a special federal need to address. It is difficult to identify a legitimate federal interest in ensuring that, notwithstanding state protections to the contrary, minors do not have abortions without parental consent. It is particularly difficult to frame such a federal interest given that the Court has determined that the Constitution requires State consent provisions to include judicial bypass mechanisms, and thus forbids making parental consent an absolute prerequisite to a minor's obtaining an abortion.

Finally, in its operation, S.1645 would blur the lines of accountability between the State and Federal governments -- one of the evils that federalism doctrine is designed to prevent. See New York v. United States, 112 S.Ct., at 2417-22. To what government is objection to criminal sanction for otherwise lawful conduct properly directed? The formulation of S.1645 suggests that the federal government is merely vindicating the policy of the state of origin (a government, moreover, in which a defendant in a S.1645 action may be unrepresented). The state of origin in turn looks to have no responsibility for the criminal penalty for which its policy serves as a trigger; that penalty is a determination of the federal government. The potential result is an "inability to hold either branch of government answerable to the citizens" for a controversial and highly coercive policy. Lopez, 514 U.S. at 577 (Kennedy, J., concurring).

practices of the States demonstrate that "the best solution is far from clear." See Lopez, 514 U.S. at 581 (Kennedy, J., concurring) (citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973)).

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B. Practical Problems with Enforcement

Enforcement of S.1645 would present a variety of practical problems. Compared with violations of other federal criminal statutes, violations of S.1645 would be difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, the principal targets of S.1645 are likely to be adult and teenage relatives and friends of young women seeking abortions.⁵ Such defendants would be highly sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overkill.

A few likely scenarios of prosecutions under S.1645 illustrate the point. Thus, for example, under the proposed bill, a grandmother who is raising her granddaughter but is not the legal guardian could be prosecuted for accompanying her granddaughter to a nearby state for an abortion, even if she were unaware of parental consent requirements or if the minor's parents could not be located or were unfit. Similarly, the sixteen-year old best friend of the minor could be criminally liable for accompanying her friend to the nearest clinic to provide support or for loaning her friend a car to go to the nearest clinic.

In some circumstances, the law also could criminalize behavior on the part of the parents of a minor themselves. A mother could be prosecuted for taking her daughter to a neighboring state for an abortion where the home state requires consent by two parents and makes no exception for a parent who has not been involved in his daughter's life, cannot be located or is abusive. The parents of a minor in a state that requires written parental consent could be liable for taking their daughter to the closest abortion provider, which happens to be in a neighboring state where consent need not be in writing.

It is, moreover, possible for individuals to be subject to prosecution (and thus to investigation) on an accomplice theory for acts short of taking the minor to have an abortion, for example giving her money or helping to arrange the abortion. It

⁵ Proponents of the bill frequently invoke scenarios in which prosecution looks quite reasonable and promising, for example where a young woman is coerced into traveling across state lines to have an abortion by an adult male who has impregnated the teenager, or by someone acting on his behalf. In actuality, data from the Department of Health and Human Services' National Center for Health Statistics indicate that most young teens who get pregnant have teenage partners.

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is even conceivable that abortion providers could risk liability (or become targets of an investigation) if they know that the minor is from out-of-state. It can certainly be expected that extreme anti-abortion advocates would pressure federal authorities to investigate and prosecute cases involving abortion providers.

Second, investigations and prosecutions under S. 1645 would be likely to impose a greater than ordinary burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally have required the deployment of specially constituted task forces. S.1645, however, would pose special problems because it would criminalize behavior that is lawful in the State where it is undertaken; as a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction. (Compare in this regard statutes such as VAWA, in which the assault would be subject to investigation and prosecution by state authorities.) Federal investigators could still rely on complaints from private citizens, but in the charged context of the abortion debate, this route carries its own drawbacks and practical problems. The bill could easily foment vigilantism and invasions of privacy. One can imagine, for example, the prospect that activists, asserting the sanction of the federal criminal law, will stand in front of clinics and write down out-of-state license plates, or follow and harass out-of-state cars.

The intent requirement of S.1645 will present an additional investigative hurdle: federal investigators will need to establish, typically with little or no assistance from other witnesses or local law enforcement, that the target knew and intended that the minor would obtain an abortion.

In addition, the key witness in these cases is likely to be the teenager herself. Because she will have sought the abortion and support from the alleged perpetrators, she is likely to be a hostile witness when she finds those loved ones who helped her subject to criminal investigation. Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.

Third, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that S.1645 would entail are unnecessary to counteract the main problems cited by the bill's proponents. The States have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws -- to prevent and punish the abduction or mistreatment of minors that proponents point to in making the case for a federal criminal solution. Indeed, according to testimony presented to the Senate Judiciary Committee, in one of the cases frequently cited by proponents in

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justification of S.1645, the State effectively used its custody laws to address the misconduct. In that case, the mother of a thirteen-year old girl alleged that her daughter had been raped by an 18-year old and taken by the boy's mother to another state for an abortion. The 18-year old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference with custody of children statute.⁶ The existence of this and other state tools makes it more difficult to justify the significant outlay of federal resources that S.1645 would require.

⁶ The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

Abortion - child custody act

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ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 26, 1998

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MINORITY STAFF DIRECTOR

The President
The White House
Washington, D.C. 20502

Dear Mr. President:

As Democratic Members of the House Judiciary Committee we are writing to urge you to veto H.R. 3682, the so-called "Child Custody Protection Act," if it reaches your desk.

This legislation will dramatically increase the dangers young women face in their decisions to terminate unwanted pregnancies. Since H.R. 3682 contains no prohibition against young women traveling across state lines to avoid a consent requirement, it will merely lead to more women traveling alone to obtain abortions or seeking illegal "back alley" abortions locally. To the extent young women continue to seek the involvement of close family members when they cannot confide in their parents — for example where the parent has committed incest or there is a history of child abuse — the legislation would result in the criminalization of grandparents and other relatives. Indeed at our hearings we learned of several tragic circumstances where young women who would not confide in their parents or trust the confidentiality of the judicial bypass process died as a result of illegal abortions. The number of these incidents can only be expected to multiply under H.R. 3682.

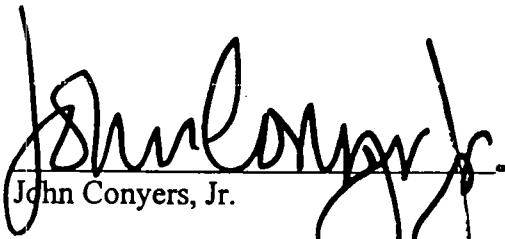
We can also inform you that none of the principal objections set forth in letters from your Chief of Staff and the Justice Department have been addressed during the Committee markup. Despite your Administration's objection to H.R. 3682's applying to close family members and persons providing counseling, referral or medical services, the legislation was not altered to respond to these concerns (other than to provide an exemption for parents). Indeed the Republican majority rejected several Democratic amendments to exempt relatives such as grandparents and siblings, and clinics from the scope of the bill. As a result, the bill continues to provide "an unintended basis for vexatious litigation against [these] individuals and organizations" as Mr. Bowles complained of in his letter.

In addition, the Majority refused to make any changes to provide exemptions for travel from states that have not established a constitutionally sufficient judicial bypass mechanism or to make clear that the bill does not mandate minors complying with the consent requirements of two separate states. As a result, H.R. 3682 would appear to be unconstitutional by the very terms laid out the by Justice Department and relevant Supreme Court precedent. Finally, we would note that the other serious problems laid out by the Justice Department, concerning the bill's overly broad strict liability requirements, federalism concerns, and enforcement difficulties, were also not resolved in the Committee passed bill.

Letter to the President
June 26, 1998
Page - 2

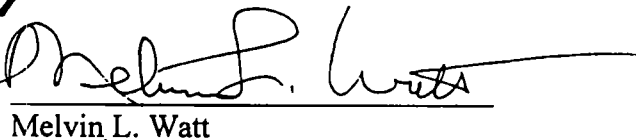
H.R. 3682 does nothing to prevent teen pregnancies, but it does make abortion far more dangerous. We appreciate the consistent and principled positions you have taken in the past on matters involving a woman's right to choose, and we therefore strongly urge you to veto this bill should it reach your desk.

Sincerely,

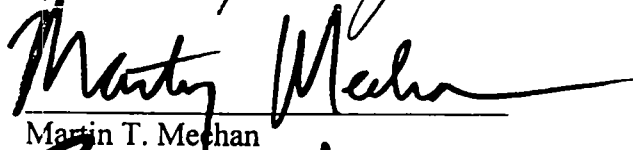

John Conyers, Jr.

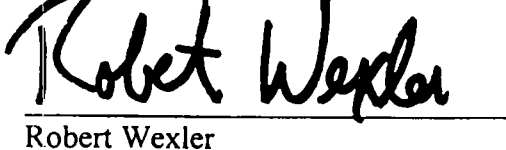

Charles E. Schumer

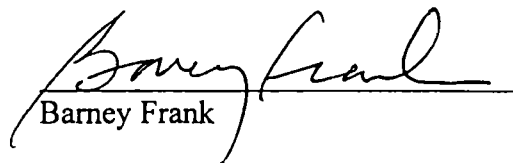

Terrold Nadler


Melvin L. Watt

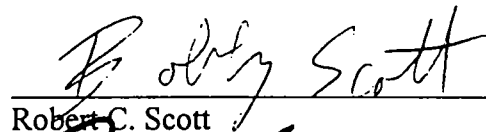

Sheila Jackson Lee

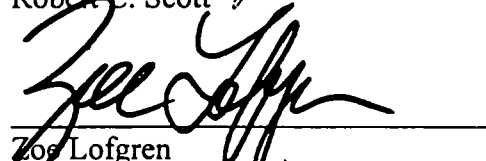

Martin T. Meahan

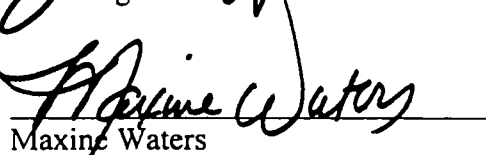

Robert Wexler


Barney Frank

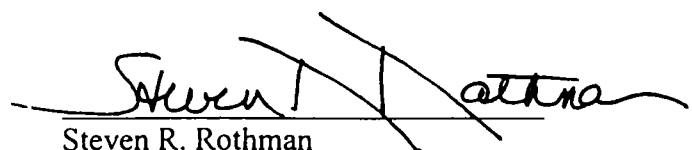

Howard L. Berman


Robert C. Scott


Zoe Lofgren


Maxine Waters

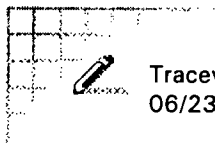

William D. Delahunt


Steven R. Rothman

cc: The Honorable Erskine Bowles
Chief of Staff to the President

The Honorable Larry Stein
Assistant to the President for Legislative Affairs

Atlantic - child custody



Tracey E. Thornton
06/23/98 05:56:39 PM

Record Type: Record

To: Ann F. Lewis/WHO/EOP, John Podesta/WHO/EOP, Sylvia M. Mathews/WHO/EOP

cc: See the distribution list at the bottom of this message

Subject: Re: Child Custody

okay gang, here's where i think we are at this point in Senate Judiciary:
D's have a series of message amendments to be offered similar to what was done in the House, all of which will fail. All the D's will vote for them. V/e will probably lose a coupla D's on final passage. Specter will be absent and we won't get his proxy. The Committee may not get to this tomorrow or thursday though because of other business.

Message Copied To:

William P. Marshall/WHO/EOP
lisa m. brown/ovp @ ovp
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Elena Kagan/OPD/EOP

Abortion-child custody



Robert J. Pellicci
06/23/98 03:03:00 PM

Record Type: Record

To: Elena Kagan

cc:

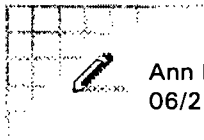
Subject: House Committee Action on HR 3682

Message Creation Date was at 23-JUN-1998 15:03:00

FYI --

The House Committee on the Judiciary voted 17-10, along party lines, in favor of HR 3682, the child custody/abortion rights bill. A vote by the full House is expected after Congress returns from its Fourth of July recess.

Abwick - child custody



Ann F. Lewis
06/23/98 02:55:08 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Child Custody

Did I just read that House Judiciary specifically refused to exempt Grandma ? I guess they don't want a bill. Peter, does that help with our legislative strategy ?

Message Sent To:

Tracey E. Thornton/WHO/EOP
William P. Marshall/WHO/EOP
lisa m. brown/ovp @ ovp
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Elena Kagan/OPD/EOP

Abortion - child custody



Robert J. Pellicci
06/23/98 01:46:00 PM

Record Type: Record

To: Elena Kagan

cc:

Subject: Senate Markup of S. 1645

Message Creation Date was at 23-JUN-1998 13:46:00

FYI --

On Thursday June 25th, the Senate Committee on the Judiciary is scheduled to markup S. 1645, the child custody/abortion bill. This bill is almost identical to HR 3682, which is currently being marked up in the House. Did a copy of the Chief-of-Staff's June 17th letter go to Senator Hatch? If not, are we planning to send the Senate Committee a letter prior to Thursday's markup? Thanks.

Abortion - child custody act

This memorandum provides the views of the Department of Justice concerning House bill H.R. 3682, the Child Custody Protection Act of 1998, as marked up by the Subcommittee on the Constitution of the Committee on the Judiciary on June 11, 1998.

If enacted, the bill would establish a new criminal law, 18 U.S.C. § 2401(a), prohibiting the knowing transportation of a minor across a state line with the intent that such individual obtain an abortion, where the minor has not "met" the "requirements" of her home state's law requiring parental involvement in her abortion decision. In addition, the bill would establish a civil liability provision, 18 U.S.C. § 2401(c), authorizing "[a]ny parent who suffers legal harm from a violation of subsection (a)" to "obtain appropriate relief in a civil action."¹

In our view, the bill's criminal and civil liability provisions are overbroad. The scope of the bill's coverage should be narrowed to ensure that family members, physicians, counselors, and medical personnel are not exposed to liability; [and the civil liability provision should be eliminated or narrowed significantly.]

Just
refer to
P's letter

7 We also have serious constitutional concerns. The proposal would constitute a novel form of federal legislation in that it would restrict travel for lawful purposes in a context that implicates a constitutionally protected right. It therefore raises difficult constitutional issues for which there is little direct precedent. Nevertheless, under the legal framework that governs the constitutionality of parental notification/consent laws, see, e.g., Hodgson v. Minnesota, 497 U.S. 417 (1990); Planned Parenthood v. Casey, 505 U.S. 833, 899-900 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.), proposed § 2401(a) would appear to be unconstitutional as applied to minors where the law of their state of residence does not itself establish a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements, or for bypassing those requirements, when an abortion is to be performed out of state. The provision also would seem to operate unconstitutionally to the extent that it would -- in order for the criminal prohibition not to apply -- in effect require the minor to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion.

We have three additional concerns. First, because of the highly technical nature of the proposed statute, it should be amended to provide for criminal liability only of those persons who "willfully violate" the statute. [Second, enactment of H.R. 3682 would be inconsistent with basic principles of federalism that Presidential Orders in effect since 1987 commit the executive branch to uphold. Third, we are concerned that violations of the criminal provision would be difficult to investigate and prosecute, and would require a large outlay of federal law enforcement resources for what will likely be few successful prosecutions.]

(NO)

¹ We understand that the full Committee is in the process of amending the bill, but we have not attempted in this memorandum to address any such amendments. We would be pleased to provide additional analysis as the bill is amended.

I. OPERATION OF H.R. 3682

H.R. 3682 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a) would read as follows:

Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent such individual obtain an abortion, if in fact the requirements of a law, requiring parental involvement in a minor's abortion decision, in the State where the individual resides, are not met before the individual obtains the abortion, shall be fined under this title or imprisoned not more than one year, or both.²

H.R. 3682 would not create a uniform nationwide consent or notice regime, nor prohibit altogether the interstate transport of minors for the purpose of obtaining abortions without parental notice or consent (or "bypass" of such notification or consent). Compare 18 U.S.C. § 2421 (1994) (uniformly prohibiting interstate transportation of persons with the intent that such persons engage in unlawful sexual activity). Instead, the restriction on interstate transport would be triggered only where the law in the state where the minor

² The referenced exception in proposed § 2401(b) would provide that "[t]he prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself."

Subsection (d)(1) would define the operative phrase: "a law requiring parental involvement in a minor's abortion decision" as:

a law--

(A) requiring, before an abortion is performed on a minor, either--

(i) the notification to, or consent of, a parent of that minor; or

(ii) proceedings in a State court; and

(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

Subsection (d)(2) would define "parent" as someone "who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required," and who also is "(A) a parent or guardian; (B) a legal custodian; or (C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides."

Subsection (d)(3) would define a "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.³ As we construe the provision, it appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites for a hypothetical abortion in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not seek to impose such restrictions on out-of-state abortions.⁴

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, H.R. 3682 would create a civil cause of action: proposed 18 U.S.C. § 2401(c) would provide that "[a]ny parent or guardian who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action."

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

We appreciate the concerns of H.R. 3682's sponsors about fostering parental and family involvement to ensure that a minor's decision to obtain an abortion is knowing, intelligent, and deliberate, and about preventing overbearing adults from improperly influencing minors to choose an abortion. However, we believe that proposed § 2401(a) would reach broadly and unreasonably beyond the circumstances that implicate these concerns. We would recommend narrowing the scope of proposed § 2401(a) at least to exempt from liability members of the minor's family, physicians, counselors, and medical personnel. [In addition, the problems with § 2401(a)'s broad scope are compounded by the civil liability provision, § 2401(c), which we would recommend eliminating entirely or restricting substantially.]

Refer to
P's letter
No

A. Members of the Minor's Family

The defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(c), could well be a member of the minor's own family. Under the statute, for example, a grandmother who is raising her granddaughter but is not her legal guardian could be prosecuted for having accompanied her granddaughter to a nearby state for an abortion. Similarly, the minor's aunt, uncle, or sibling could be criminally culpable or civilly liable for accompanying her to the nearest clinic.

Take out -
just refer
to letter

³ In section III, below, we discuss the constitutional requirements for such a state notice or consent regime.

⁴ There is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law; Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992).

It would be impractical and inequitable to impose liability on members of a minor's family. Imposing criminal and civil sanctions on family members for helping their relatives would not tend to promote healthy family communications. To the contrary, enforcement of the criminal provision is likely to require family members to testify against one another, while the civil provision raises the prospect of lawsuits by one family member against another. In either scenario, the federal law could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard for the minor's best interests. Family members also would generally be difficult to investigate and convict. In addition, the prospect of criminal or civil action against family members would discourage a minor from seeking the advice and counsel of those closest to her. We therefore would recommend that § 2401(a) incorporate an exception for family members who transport the minor.

B. Physicians, Counselors, and Medical Personnel

Although § 2401(a) would expressly single out for liability the person who knowingly transports a minor, additional criminal law theories would operate to expand its reach beyond the transporter. In particular, the threat of accessory liability under the statute could be used against individual doctors, clergy, counselors, and others who advertise or otherwise provide information concerning the availability of abortion and other medical services, counsel and refer patients, or make other routine communications. The possibility of such applications of the statute would be likely to chill speech and impair the ability of physicians, clergy, counselors, and their staffs to care for both minors and adults. In addition, the bill could encourage private citizens to invade the privacy of patients in order to generate complaints of criminal conduct.

Delete
whole
section

Physicians, counselors, medical personnel, and others who provide information or counseling to a minor are also likely targets of the extraordinarily open-ended civil liability provision, § 2401(c). The provision does not define the "legal harm" it seeks to redress, does not limit the class of persons or entities against whom a civil action may be brought or tie such an action to a finding of criminal liability, and does not indicate what relief might be "appropriate." Moreover, unlike the criminal prohibition, the operation of this provision would not be constrained by prosecutorial discretion and policy.

The civil liability provision also could serve as a ready tool to tax the financial resources of those who provide medical services. It is, for example, not difficult to imagine the use of H.R. 3682's civil liability provision to orchestrate individual and class action lawsuits that involve harassing discovery requests and seek broad injunctive relief and sizeable monetary judgments. In addition, that civil action provision would impose an unnecessary burden on the federal courts, which are forums of limited resources.

In sum, the civil liability provision is unnecessary, a potential drain of federal court resources, and susceptible to abuse. For these reasons, we first would urge that the provision be dropped from H.R. 3682. In the alternative, we would at a minimum urge that

it be reformulated to constrain its great potential for abuse, for example, by limiting it to claims against individuals convicted under the criminal provision or to claims against individuals who actually transport the minor.

To address the risk of civil or criminal liability for physicians or others who provide information, counseling, and medical services to minors, we would propose adding a provision with language along the following lines:

This section shall not give rise to liability of any person or entity based upon provision of information, advertising, counseling, provision of medical services, or referral for medical services.

III. CONSTITUTIONAL AND RELATED LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a State may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (collecting cases). Nevertheless, although a state has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

[t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (plurality opinion) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions -- such as parental notice or consent requirements -- are impermissible if they "do[] not reasonably further any legitimate state interest." Hodgson, 497 U.S. at 450; see also Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I").

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Casey, 505 U.S. at 877 ("[T]he means chosen by the State to further the interest in

potential life must be calculated to inform the woman's free choice, not hinder it." ⁵ The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

A State that requires parental notification or consent may do so in a constitutional manner if it provides a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity. ⁶

B. Constitutional Problems Raised by H.R. 3682

For some minors, out-of-state abortions might be significantly safer or otherwise medically indicated. For others, the closest facilities will be out of state. Yet it appears that proposed § 2401(a) would require -- in order for the criminal prohibition not to apply -- that a minor satisfy the requirements of her home state's parental involvement law, even when the requirements of that law would not apply to out-of-state abortions. As a result of this unique feature, proposed § 2401(a) would appear to be unconstitutional in two respects.

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases, the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when, for example, a minor's parents in a "parental

⁵ All citations to Casey herein are to the joint opinion of Justices O'Connor, Kennedy, and Souter.

⁶ The Court has held that such a bypass mechanism is required with respect to parental consent statutes. See Bellotti II, 443 U.S. at 643-44 (plurality opinion); id. at 655-56 (Stevens, J., concurring in the judgment); Lambert v. Wicklund, 520 U.S. 292, 117 S. Ct. 1169, 1171-72 (1997) (per curiam); see also Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 511-13 (1993). The Court also has held that such a bypass mechanism is required with respect to a two-parent notification statute. See Hodgson, 497 U.S. at 450-55; id. at 461 (O'Connor, J., concurring in the judgment); id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Supreme Court has not decided whether a bypass procedure is mandatory if the statute requires notification of only one parent (rather than notification of both parents or parental consent). See Lambert, 117 S. Ct. at 1171; Akron Ctr. for Reproductive Health, 497 U.S. at 510. However, the only appellate courts to have decided the issue have held that such bypass mechanisms are necessary in one-parent notification states. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997). But cf. Planned Parenthood v. Camblos, 116 F.3d 707, 715-16 (Luttig, Circuit Judge, granting motion for stay of district court judgment pending appeal) (questioning whether five Justices on current Supreme Court would conclude that bypass procedures are constitutionally necessary in a one-parent notification setting), motion to vacate stay denied, 125 F.3d 884 (4th Cir. 1997).

consent" state would have provided consent, or the minor would have been able to obtain a judicial bypass, had mechanisms for manifesting such consent or obtaining such a bypass for an out-of-state abortion been available. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state: The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack jurisdiction under state law to provide a legal bypass for an abortion to be performed out of state.⁷

Where the requirements of the state of residence could not be met for an out-of-state abortion, it would appear that proposed § 2401(a) -- unlike constitutionally permissible parental consent or notification laws -- could not be justified as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. As in Hodgson, the restriction would not appear to "reasonably further any legitimate [government] interest." Id.

In Hodgson, the Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a requirement of one-parent notification with a bypass option. Id. at 450. The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child

⁷ In Montana, for example, the legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." Mont. Code Ann. § 50-20-212(2)(a) (1997). The "notice requirement," in turn, is imposed upon the "physician" who is to perform the abortion (who may, however, rely upon notice given by the "referring physician"). Id. § 50-20-204 (1997). And "physician," in turn, is defined to mean "a person licensed to practice medicine under [Montana law]." Id. § 50-20-203 (1997). Therefore, in the case of an out-of-state abortion, there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of the requirement.

Proposed § 2401(a) also would give rise to constitutional concerns where the specified procedure for manifesting parental notice or consent, as opposed to the judicial bypass, would not be effective for out-of-state abortions. If, for example, the parental consent portion of the home state's law is directed at state-licensed physicians, it would appear to be satisfied only when the patient provides proof of consent to one of those physicians. See, e.g., S.C. Code Ann. §§ 44-41-10, 44-41-31 (Law. Co-op 1985 and Supp. 1997) (defining "physician" as "a person licensed to practice medicine in this State" and providing that the attending or referring "physician" may perform an abortion on an unemancipated minor only after "secur[ing] the informed written consent, signed and witnessed," of a parent, legal guardian, grandparent, or a person who has been standing in loco parentis for at least 60 days). It therefore would not be at all clear how a minor seeking an out-of-state abortion could satisfy even the consent portion of such a home-state law in a manner that would permit a "transporter" of that minor to avoid criminal liability under proposed § 2401(a).

make a difficult decision." *Id.* Similarly, it would appear that proposed § 2401(a) would be unconstitutional in states where there is no constitutionally adequate provision for securing consent or notice, and bypass, for out-of-state abortions. With respect to minors residing in such states for whom an abortion out of state might be safer, less expensive, or otherwise more accessible than an in-state abortion, proposed § 2401(a) would not "reasonably further any legitimate [government] interest," *id.* (emphasis added), at least insofar as the absence of available notice (or consent) and bypass mechanisms for out-of-state abortions under either federal or state law would preclude such minors from obtaining adult assistance in traveling interstate for abortions. In circumstances where no mechanism existed that would enable a minor seeking an out-of-state abortion to demonstrate that she had complied with the parental involvement requirements of her home state, proposed § 2401(a) could inhibit interstate travel for abortions even though such travel would have resulted from a knowing, intelligent, and deliberate choice of the minor.

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state or residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.⁸

The constitutional infirmities identified above could appropriately be alleviated (1) by creating an exemption for travel from states that have not established a constitutionally sufficient consent/notice and bypass mechanism for out-of-state abortions, and (2) by making clear that the prohibition effected by § 2401(a) would not apply in cases where the state in which the abortion is performed requires parental notice or consent.

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⁸ In light of both of the types of constitutional infirmities discussed above, the statute might be facially invalid (i.e., inoperative nationwide) if, in "a large fraction of the cases in which [proposed § 2401(a)] is relevant," Casey, 505 U.S. at 895, the criminal prohibition effectively would preclude minors from obtaining adult assistance in traveling interstate for abortions. *Cf. id.* (holding provision to be "invalid" as an "undue burden" because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (opinion of Stevens, J., respecting the denial of cert.). The Casey standard for facial invalidity was developed in the context of state-law abortion restrictions. It is uncertain how that standard would be applied or modified in light of a facial challenge to a congressional enactment such as H.R. 3682.

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C. Mens Rea Problem

Proposed § 2401(a) would penalize "whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent such individual obtain an abortion, if in fact the requirements of a law, requiring parental involvement in a minor's abortion decision, in the State where the individual resides, are not met before the individual obtains the abortion." This provision should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. [As the Supreme Court has recently observed, certain federal criminal statutes require such willfulness and thereby "'carv[e] out an exception to the traditional rule' that ignorance of the law is no excuse and require that the defendant have knowledge of the law." Congress has adopted a standard of willfulness as requiring knowledge of the law for "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (discussing caselaw); see, e.g., Ratzlaf v. United States, 510 U.S. 135 (1994) (applying willfulness requirement in statute prohibiting currency transactions in violation of federal reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (applying willfulness requirement in federal felony and misdemeanor tax statutes); cf. Bryan, (construing federal criminal willfulness requirement respecting sales of firearms without a license). The Child Custody Protection Act would be such a statute, and adoption of the "willfulness" standard is critical if the Act is to reach only persons who should be subject to criminal sanction.⁹

Criminal liability turns in large part on whether the state of residence's statutory requirements concerning parental consent, notification and judicial bypass when a minor seeks an abortion have been satisfied. The federal provision would give these state statutes an extraterritorial effect that even an individual aware of all requirements of his own state's abortion laws would not be able to discern from those laws. In addition, it might well require considerable legal sophistication to determine the meaning of the home state's statutes in this new federal context. Finally, as previously noted, it is novel to tie federal criminal liability to conduct that, although lawful in the state in which it occurs, is unlawful in another state.

These concerns are compounded by the fact that many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her cleric, her teenaged best friend -- will often be people with little or no experience with abortion or knowledge of

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⁹ As the Court noted in Bryan, "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." Bryan, slip op. at 6 (quoting Spies v. United States, 317 U.S. 492, 497 (1943)). In Bryan, the Court defined willfulness differently than in Cheek in Ratzlaf, where willfulness was held to require knowledge of the law, and held that "willfulness" meant that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." Id., slip op. at 6-7, but not that the defendant acted with knowledge that his conduct violated the particular federal law at issue. While given the technical nature of the Child Custody Protection Act and the nature of the behavior criminalized, the more rigorous definition of "willfulness" used in Cheek and Ratzlaf is appropriate, even the less rigorous definition of "willfulness" would redress the problems identified in the text.

the relevant law, let alone its finer points. Seeking to aid her, they might well engage in "apparently innocent conduct" -- driving a minor who is a granddaughter, a niece, a parishioner, or a friend across state lines to a place where she can legally have an abortion. Completely unwittingly, they will violate a federal criminal law and expose themselves to criminal and civil sanction.

To avoid such a result, the proposed statute should be revised to require a "willful" violation to create liability. Thus revised, those who are acting to help the minor and are unaware of the statutory regime will not be subject to prosecution.

IV. FEDERALISM CONCERNS

"Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. . . . The search for enlightened public policy is often furthered when individual States and local governments are free to experiment with a variety of approaches to public issues." Exec. Order No. 13083, 63 Fed. Reg. 27,651 (1998). This fundamental federalism principle -- which Presidential Orders in effect since 1987 commit the executive branch to uphold¹⁰ -- reflects the celebrated notion of the states as laboratories, free to devise and implement their own individual approaches to common policy problems. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

As written, H.R. 3682 appears to be inconsistent with this fundamental principle. The Supreme Court has held that a state may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. States have responded with a myriad of policy approaches. A number of states have enacted laws requiring or encouraging parental involvement in a minor's decision to terminate a pregnancy, and these laws have taken a variety of forms. Many other states have elected not to require parental involvement. In addition, some states allow physicians or other health care professionals to waive notice or consent in certain circumstances, and others allow notice to or consent by adult siblings, grandparents or stepparents. There are further differences with respect to factors such as the form of consent or notice required. The thrust of proposed § 2401(a) would be to use the coercive power of the federal criminal law to trump the policy determinations of those states that have opted not to implement a notice or consent requirement for abortions performed in that state. Under H.R. 3682, the policy of a state that has determined that minors within its borders may obtain an abortion without parental consent or notice would effectively be overridden by a federal law that elevates to federal policy the determination of a sister state.

H.R. 3682 thus would directly undermine the ability of a state to vindicate its own policy determinations within its own borders. In this respect, H.R. 3682 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular

¹⁰ See also Exec. Order No. 12612, 52 Fed. Reg. 41,685 (1987 order promulgated by President Reagan and employing language nearly identical to that quoted in text), revoked by Exec. Order 13083.

federal interest by making it a crime to engage in interstate transport or commerce for the purpose of acting unlawfully in a neighboring state. In such circumstances, the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. The civil liability provision of H.R. 3682 raises similar federalism concerns, because it would create an additional means of enforcing parental involvement laws in states that have chosen not to adopt such measures.

Moreover, by extending the reach of one state's policy choice into neighboring states, H.R. 3682 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens -- should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under H.R. 3682, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

There is, moreover, a significant difference from the standpoint of federalism between H.R. 3682 and familiar statutes, such as the Violence Against Women Act (VAWA) and the Gun Free School Zones Act, that make it a crime to cross state lines or otherwise engage in interstate commerce and then undertake certain conduct in a neighboring state: proposed § 2401(a) would criminalize travel for the purpose of engaging in conduct that is lawful in the state in which it occurs. Thus, VAWA, for example, criminalizes acts of violence that are proscribed in all 50 states. Here the federal government would not be supplementing existing state criminal prohibitions in an area of particular federal interest. Rather, it would be imposing a criminal prohibition that would in many, and perhaps most, cases cut against the grain of the policy determination of the state in which the conduct occurs.¹¹

¹¹ This feature of H.R. 3682 would appear to be virtually unprecedented. The only possible exception would be the Mann Act, which, as presently codified, prohibits the interstate transportation of an individual "with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2421 (1954). We are aware of one Mann Act case in which a defendant was convicted for transporting a woman to Nevada, where prostitution was legal. See *United States v. Pelton*, 578 F.2d 701 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978). Even allowing for the possibility of a rare prosecution under the Mann Act involving prostitution that is lawful in the state where it occurs, application of proposed § 2401(a) to cases involving otherwise lawful conduct would, for two reasons, be considerably more problematic as a matter of policy. First, whereas Mann Act cases almost always will involve travel for unlawful prostitution or for "any [other] sexual activity for which any person can be charged with a criminal offense," proposed § 2401(a) would criminalize travel for the purpose of facilitating conduct that almost invariably will be lawful in the state where it occurs. Second, whereas there is nearly universal condemnation of prostitution, there is no similar consensus here: the considerable diversity of practices among the various states amply demonstrates that whether the government should require parental notice or consent prior to a minor's abortion is a difficult policy question on which reasonable persons can and do differ.

Finally, in its operation, H.R. 3682 would blur the lines of accountability between the state and federal governments -- one of the evils that federalism principles are designed to prevent. H.R. 3682 suggests a federal interest in reinforcing the policy of the state of origin. The state of origin, however, has not enacted, and is not politically accountable for, the criminal penalty for which its policy serves as a trigger. The potential consequence is that neither government stands clearly accountable for a controversial policy determination.

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of all this?*

V. PRACTICAL ENFORCEMENT PROBLEMS

Enforcement of proposed § 2401(a) would present a myriad of serious enforcement problems. Compared with violations of other federal criminal statutes, violations of proposed § 2401(a) would be notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, for reasons discussed in section III-C, *supra*, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. H.R. 3682 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of H.R. 3682 would fall entirely to the FBI -- in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources: Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

Third, the principal targets of proposed § 2401(a) are likely to be adult and teenage relatives and friends of young women seeking abortions. Such defendants would be highly

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sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overreaching. Relatedly, a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system.

Fourth, the proof of the critical elements in these cases generally will have to come through either the defendant or the minor, both of whom would be extraordinarily problematic witnesses. To prove that the defendant had the requisite intent, the government in the run of cases would have to rely on either the minor or the defendant (who would of course have a constitutional right not to testify). Given that the minor will, in many if not most cases, have relied on the aid of the defendant, who may be her boyfriend, aunt, grandmother, sister, best friend, etc., she is likely to be a hostile and uncooperative witness. (Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.) This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution.

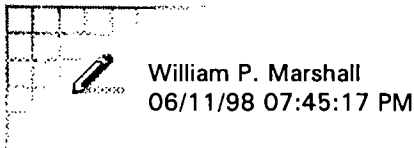
Fifth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that statute would require, of making the federal government appear overzealous and heavyhanded.¹²

Sixth, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws -- to prevent and punish the abduction or mistreatment of minors.¹³ The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that H.R. 3682 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means -- for example, hitchhiking or traveling alone -- of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors'

¹² A similar problem arises in the context of a civil action under the statute. Such an action would likely involve discovery requests for medical information. Those requests would be likely to conflict with state privacy and privilege laws concerning doctor-patient or counselor-client communications and medical records. The consequence will be either an unwelcome struggle between state and federal interests or an effective preemption of state privacy law (with the strain on federalism interests that entails).

¹³ Thus, for example, in the much-cited case in which the mother of a 13-year-old girl alleged that her daughter had been raped by an 18-year-old and taken by the boy's mother to another state for an abortion, the 18-year-old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference-with-the-custody-of-children statute. The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.



Record Type: Record

To: See the distribution list at the bottom of this message
cc: Charles F. Ruff/WHO/EOP
Subject: Child Cust re-draft. Please review by 11:00 AM Friday



The attached draft incorporates changes suggested by DOJ and HHS after the original was circulated by OMB. The re-draft does not satisfy all DOJ and HHS concerns but it does accommodate some. (DOJ, in particular, would like to add at the end of the fourth paragraph the line: "The Department also has some practical enforcement concerns that it would be pleased to detail for the members and staff." HHS would like to eliminate the suggestion that we would want to work to fix the legislation.)

Please send comments ASAP but no later than 11:00 AM on Friday. Thanks.



CCPALET2.W

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Dear

The Administration appreciates the concerns of the sponsors of S. 1645 about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about overbearing and sometimes predatory adults who improperly influence minors' abortion decisions. The Administration believes, however, that changes must be made to ensure that S. 1645 is appropriately tailored to achieve these important goals. The Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purposes of avoiding parental involvement requirements, but strongly opposes S.1645 unless these changes are made.

First, S. 1645 must be amended to exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and adult siblings could face criminal prosecution for coming to the aid of a relative in distress. Even a mother or father could be exposed to criminal penalty if she or he resides in a state that has a two parent notice or consent law. Imposing criminal and civil sanctions on family members for helping their relatives, however, would not further the interests of healthy family communications. Subjecting family members to criminal or civil sanction, moreover, would also further isolate the minor by discouraging her from seeking advice and counsel from those closest to her. Finally, creating a civil action that permits family members to sue each other when a minor within that family has an abortion would not serve the goal of fostering strong families.

Second, S. 1645 must be amended to ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability. The bill as written, for example, could potentially subject a telephone receptionist, physician, or counselor to civil or criminal liability merely for informing an unnamed caller or patient about the availability of abortion services. Exposing such persons to criminal or civil liability, however, would not further the interests in promoting family communication, would not deter those who would inappropriately transport minors across state lines to obtain abortions, and might provide an unintended basis for vexatious litigation against individuals and organizations.

Finally, S. 1645 must be amended to address constitutional concerns that the Department of Justice has identified in particular provisions of the legislation. The Department will forward their concerns subsequently and would be pleased to work with the sponsors in crafting legislation that remedies those defects and the other matters noted above.

The Administration is concerned that S. 1645, as written, raises novel and important federalism issues including the rights of states to regulate matters within their own boundaries. The Administration believes, however, that legislation that

addresses the concerns noted above, and that is carefully targeted towards punishing non-relatives who transport minors across state lines for the purposes of avoiding parental involvement requirements, would minimize the federalism concerns.

S/

Withdrawal/Redaction Marker

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004. memo	Charles Ruff and William Marshall to the President (4 pages)	06/10/1998	P5
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Abortion [Binder] [1]

2012-0254-S

rc652

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Abortion - Child Custody Act

Exclusion for advice, counseling, providing info (accomplice has)

Elim of civil liab

Rape + incest excepts -

error: Double state vegs

impose to comply it states

have no extra-benifit

intent

June G. Turner

05/28/98 11:57:34 AM

Record Type: Record

To: Nelson Reyneri/WHO/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Action Items from today's Child Custody Protection Act 

Sylvia cannot do at 10am on June 4. If June 5 is ok with everyone I will reserve a room at 10am.
Nelson Reyneri

 Nelson Reyneri
05/28/98 11:44:49 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: June G. Turner/WHO/EOP, Sylvia M. Mathews/WHO/EOP
Subject: Action Items from today's Child Custody Protection Act

From today's meeting (please contact me if I missed anything)

1. Secure more intelligence (*Leg Affairs*)
 - A. Senate member count
 - B. Republican member who would speak out on our side, e.g. Snowe?
2. Check with DOJ regarding technicalities (*Bill Marshall*)
3. Identify our real life example (*Robin Leeds*)
 - B. *Sylvia Mathews* to contact her sister for ideas
4. What do we need for outreach? (*Janelle Erickson, Robin Leeds, Ann Lewis*)
 - A. Among constituency groups
 - B. Among members
5. Reconvene same time next week (*Nelson Reyneri, June Turner*)
 - A. June 4 @ 10AM, Roosevelt Room

Robin Leeds

05/28/98

05:08:42 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: "Child Custody Protection Act"
Statistics on Relevant Issues

----- Forwarded by Robin Leeds/WHO/EOP on 05/28/98 05:07 PM -----

Robin Leeds

05/27/98

02:43:00 PM

Record Type: Record

To: Nelson Reyneri/WHO/EOP

cc: Audrey T. Haynes/WHO/EOP

Subject: "Child Custody Protection Act"
Statistics on Relevant Issues

1. **Numbers of minors getting abortions** - In 1996, the Alan Guttmacher Institute (AGI) estimated that 1.4 million abortions took place. 22% of these abortions were performed on teenage girls, while 33% were performed on women aged 20-24. In general, 55% of the 1.4 million abortions performed were on women under the age 25.

According to a 1994 AGI study, 110,890 young women between age 15 and 17 had abortions, and 12,150 young women under the age of 15 had abortions. In 1992 AGI estimated there were about 308,000 abortions among teens. In 1988, AGI estimated that 172,000 young women aged 17 or younger obtained an abortion.

2. **Other relevant statistics** -

- 28 states currently enforce parental consent or notification laws for a minor seeking an abortion: AL, AR, DE, GA, IN, KS, KY, LA, MD, MA, MI, MN, MS, MO, MT, NE, NC, ND, OH, PA, RI, SC, SD, UT, VA, WV, WI and WY.

- In 1991, AGI estimated that 61% of minors who have abortions do so with at least one parent's knowledge; 45% of parents are told by their daughter. Even in states that enforce no mandatory parental consent or notice requirements, more than 75 percent of minors under 16 involve one or both parents. An AGI study found that more than half of all young women who did not involve a parent in considering an abortion did involve an adult, including 15 percent who involved a step-parent or adult relative. Among minors who did not tell a parent of theirs, 30 percent had experienced violence in their family or feared violence or being forced to leave home. The majority

of parents support their daughter's decision to have an abortion.

- These health care professional organizations have opposed parental consent laws mainly due to concerns about preserving patient/provider confidentiality and reducing access barriers to reproductive health care for young women: College of American Academy of Family Physicians, American Academy of Pediatrics, American Obstetricians, NAACOG, Organizations of Obstetric, Gynecological and Neonatal Nurses, National Medical Association, American Medical Women's Association, American Nurses Association, American Medical Association, American Psychiatric Association, American Psychological Association, and American Public Health Association.
- Data on the number of illegal abortions is largely non-existent. By its very nature this data would not be reported by patients or providers.
- Data on the use of judicial bypass could be collected from state courts, but there is no central source that has compiled this data. A number of the pro-choice organizations are in the process of collecting this data in certain states, but this process will take some time.

Message Sent To:

Sylvia M. Mathews/WHO/EOP
William P. Marshall/WHO/EOP
Maria Echaveste/WHO/EOP
Audrey T. Haynes/WHO/EOP
Peter G. Jacoby/WHO/EOP
Ann F. Lewis/WHO/EOP
Elena Kagan/OPD/EOP
Tracey E. Thornton/WHO/EOP
Lisa M. Brown/OVP @ OVP
Nelson Reyneri/WHO/EOP

*Abortion - child
custody act***NARAL Promoting Reproductive Choices****FAX COVER SHEET**

DATE: May 13, 1998

TO: Elena Kagan, Deputy Assistant to the President

OFFICE: Domestic Policy Council

FAX: 456-2878

FROM: Betsy Cavendish, Legal Director, NARAL

PHONE: (202) 973-3012 **FAX:** (202) 973-3030

THIS IS PAGE ONE OF 28 TOTAL PAGES

COMMENTS: Elena, I spoke briefly with your assistant, Laura. Attached are materials on the Child Custody Protection Act. The Senate Judiciary Committee is holding hearings on the bill on May 20 and the House just announced that they will hold hearings the following day. In short, the bill is moving fast and we need to stop the train.

Opponents are limited in witnesses, but of course, DOJ would be a "free" witness and its voice would be of huge assistance to reproductive rights. I have spoken to Dawn about this possibility and have not received a final response.

I also include for your information a letter to the editor of the WSJ we wrote last week in response to Mary Ann Glendon's piece, in which we dispute her erroneous claim that the President has never wavered from supporting unrestricted abortion rights up to and including birth.

It would be nice to see you soon! Betsy

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NARAL Promoting Reproductive Choices

TO: Reproductive Choice & Judiciary Committee Staff
FROM: Allison Herwitt, Acting Director for Government Relations
DATE: April 16, 1998
RE: *Senate Judiciary Hearing on S. 1645, the so-called "Child Custody Protection Act"*

As early as the week of April 27, 1998, the Senate Judiciary Committee may hold a hearing on S. 1645, legislation that would make it a federal crime to transport a young woman across state lines for an abortion. The bill, sponsored by Senator Spencer Abraham, would prohibit anyone, including a step-parent, grandparent or religious counselor, from taking a young woman across state lines for an abortion if it would violate the state's parental involvement law.

While NARAL strongly believes that adolescents should be encouraged to seek their parent's advice and counsel when facing difficult choices regarding abortion and other reproductive health issues, the government cannot mandate healthy, open family communication where it does not already exist. Most young women do involve one or both parents when considering abortion. In states that enforce no mandatory parental consent or notice requirements, more than 75 percent of minors under 16 involve one or both parents. However, when a young woman cannot involve a parent, public policies and medical professionals should encourage her to involve a trusted adult.

Instead of encouraging young women to involve a trusted adult who may be able to offer much needed assistance, this bill will cause some young women to face these decisions alone, without any help. Should S. 1645 be enacted, it could endanger young women's lives and health by isolating young women who believe they cannot involve a parent.

Attached is a fact sheet on S. 1645 to help you prepare for the upcoming hearing. Please do not hesitate to call me if you have additional questions. I can be reached at 973-3047.

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NARAL Promoting Reproductive Choices

S. 1645/HLR. 3682 IS A THREAT TO YOUNG WOMEN'S HEALTH

Legislation was recently introduced in the House and Senate that would prohibit anyone, including a step-parent, grandparent or religious counselor, from taking a young woman across state lines for an abortion if it would violate the state's parental involvement law.

Adolescents should be encouraged to seek their parents' advice and counsel when facing difficult choices regarding abortion and other reproductive health issues. Indeed, most young women do involve one or both parents when considering abortion. Even in states that enforce no mandatory parental consent or notice requirements, more than 75 percent of minors under 16 involve one or both parents.¹ The government, however, cannot mandate healthy family communication where it does not already exist.

When a young woman cannot involve a parent, public policies and medical professionals should encourage her to involve a trusted adult. Indeed, one study found that more than half of all young women who did not involve a parent did involve an adult, including 15 percent who involved a step-parent or adult relative.² However, if S. 1645/HLR. 3682, the so-called "Child Custody Protection Act" is enacted, it could endanger young women's lives and health by isolating young women who believe they cannot involve a parent. Rather than making abortion more difficult and dangerous for young women, Congress should do more to create the conditions which enable women to make true choices by providing comprehensive sexuality education and ensuring that women have access to a range of effective contraceptives.

This Legislation Would Further Isolate Those Young Women Who -- For Good Reasons -- Do Not Involve A Parent In Their Decision To Have An Abortion.

Most young women find love, support and safety in the home. Many, however, justifiably fear that they would be physically or emotionally abused if forced to disclose their pregnancy. Often young women who do not involve a parent come from families where government-mandated disclosure could have devastating effects.

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- There were approximately 3.1 million cases of child abuse reported in 1996. Young women considering abortion are particularly vulnerable because family violence is often at its worst during a family member's pregnancy.³
- Among minors who did not tell a parent of their abortion, 30 percent had experienced violence in their family or feared violence or being forced to leave home.⁴
- In Idaho, a 13-year-old sixth grade student named Spring Adams was shot to death by her father after he learned she was to terminate a pregnancy caused by his acts of incest.⁵
- In addition to fear of violence, some minors do not involve a parent because they believe that the knowledge would damage their relationship with the parent, they fear that it would escalate conflict or coercion, or they want to protect a vulnerable parent from stress and disappointment.⁶

When a young woman believes that she cannot involve a parent, the law cannot mandate healthy, open family communication where it does not already exist. Indeed there is no evidence that laws like S. 1645/H.R. 3682 will do anything but isolate young women who believe -- for valid reasons -- that they cannot involve a parent. Instead of encouraging young women to involve a trusted adult who may be able to offer much needed assistance, this law will cause some young women to face these decisions alone, without any help.

This Legislation Would Endanger Young Women's Health.

Young women who determine that they cannot involve a parent often seek help and guidance from other important and trusted people in their lives such as grandparents, aunts or ministers. Such people can provide a minor with valuable advice, counsel and assistance. However, this bill would discourage young women from seeking such help or assistance and would further isolate them in their decision. As a result, the legislation could force some young women to turn to illegal or self-induced abortion or to delay the procedure.

- By discouraging -- in fact, criminalizing -- people who help young women in crisis pregnancies, the law could expose these young women to increased health risks. In one study, 93 percent of the minors who did not involve a parent in their decision to obtain an abortion were nonetheless accompanied by someone to the abortion clinic.⁷ Such company is important to provide assistance to a minor before and after the abortion. However, under this legislation, minors will be forced to go by themselves and potentially to drive long distances by themselves, thereby exposing them to greater health risks.

- When faced with parental involvement laws, young women who feel they cannot involve a parent take drastic steps:
 - The American Medical Association noted that "[b]ecause the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a 'back alley' abortion, or resort to self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973."⁸
 - In Indiana, Rebecca Bell, a young woman who had a very close relationship with her parents, died from an illegal abortion because she did not want her parents to know about her pregnancy but Indiana law required parental notice before she could have a legal abortion.⁹
- Obstacles such as parental involvement laws increase the health risks to women by increasing the gestational age at which young women obtain abortions. The American Medical Association concluded in a 1992 study that parental consent and notice laws "increase the gestational age at which the induced pregnancy termination occurs, thereby also increasing the risk associated with the procedure."¹⁰ Although a first or second trimester abortion is far safer than childbirth, the risk of death or major complications significantly increases for each week that elapses after eight weeks.¹¹ This legislation could exacerbate the time delays for young women seeking abortion and could cause young women to get later abortions.

A Parent Could Be Prosecuted Under This Legislation For Helping A Daughter Facing A Crisis Pregnancy.

Under this legislation, a parent, step-parent or grandparent could be jailed for taking his or her daughter to a neighboring state for an abortion.

- Access to abortion providers in the United States is limited. Eighty-four percent of counties do have an abortion provider.¹² For some women, a reproductive health facility in another state may be the closest to their home. For instance, a reproductive health clinic in Duluth, Minnesota serves women from Minnesota, Wisconsin, Michigan and Ontario, Canada.¹³ Under this legislation, a parent of a pregnant minor who lives in a state that requires the written consent of a parent could be subject to criminal charges for taking her minor daughter to an out-of-state facility if the parent failed to comply with the written consent of the state of residence, even if the out-of-state facility was the closest to the parent's home.

- Six states (AR, ID, MN, MS, ND, UT) have laws that require both parents to be involved in a minor's decision to terminate a pregnancy.¹⁴ Some of these statutes do not provide an exception when the parents are divorced or separated, where the non-custodial parent has not been involved in the minor's life, or where one parent fears abuse from the other parent. A parent's perception in a dysfunctional family that there will be violence if the non-custodial parent learns of the daughter's pregnancy is likely to be accurate.¹⁵
- If S. 1645/H.R. 3682 goes into effect, a parent in these states would be prohibited from taking his or her daughter to a neighboring state to obtain an abortion. For instance, in Mississippi, where the state requires that both parents consent to a minor's abortion, a parent could not take a daughter to Alabama or Louisiana even if the parent complied with the one parent consent law in Alabama or Louisiana.¹⁶

Because A Judicial Bypass Is Not A Realistic Option, Some Young Women Obtain Abortions in Neighboring States.

Many states that require parental consent or notice laws provide a judicial bypass through which a young woman can seek a court order allowing an abortion without parental involvement. For young women, it can be overwhelming and at times impossible to manage the judicial bypass procedures. Some young women cannot maneuver the legal procedures required, or cannot attend hearings scheduled during school hours. Others do not go or delay going because they fear that the proceedings are not confidential or that they will be recognized by people at the courthouse. Many young women do not want to reveal intimate details of their personal lives to strangers.¹⁷ The time required to schedule the court proceeding may result in a delay of a week or more, thereby increasing the health risks of the abortion.¹⁸

Some young women who manage to arrange a hearing face judges who are vehemently anti-choice and who routinely deny petitions, despite rulings by the U.S. Supreme Court that a minor must be granted a bypass if she is mature or if an abortion is in her best interests. As a result, minors in states with parental involvement laws frequently go to a neighboring state to obtain an abortion instead of trying to obtain a judicial bypass.¹⁹

- In Indiana, lawyers and clinics routinely refer teenagers out of state because local judges either refuse to hold hearings or are widely known to be anti-choice.²⁰
- Young women's concern about confidentiality is especially acute in rural areas. For instance, in one case a minor discovered that her bypass hearing would be conducted by her former Sunday school teacher.²¹
- The Ohio Supreme Court upheld the denial of a petition of a 17-year-old girl who testified that her father beat her. At the time, she was a senior in high school with a 3.0 average who played team sports, worked 20-25 hours a week, and paid for her automobile expenses and medical care.²²

The Legislation Contains Legal Deficiencies.

The legislation contains several legal weaknesses that could render it unconstitutional.

- Under this legislation, a young woman who determined that she could not involve her parents may have to go through a judicial bypass in two states. For instance, if the young woman lived in a state with one parent consent law, but the closest clinic was in a state that also had a one parent consent law, the minor would have to go through the judicial bypass in her state of residence as well as in the state that she obtained the abortion. Requiring a minor to juggle judicial bypasses in two different states could constitute an unconstitutional undue burden.²³
- Under the legislation, a person could be prosecuted for taking a minor to a neighboring state, even if that person does not intend -- or even know -- that the parental involvement law of the state of residence has not been followed. Such a result would violate the due process rights of a person who assists a minor facing a crisis pregnancy by creating a strict liability statute.²⁴
- The "life" exception is unconstitutionally narrow. First, the "life" exception impermissibly limits the situations that would qualify under it by enumerating certain circumstances -- but not others. As the Supreme Court has recognized, life exceptions cannot pick and choose among life-threatening circumstances.²⁵ Second, there is no exception at all for when a woman's health would be endangered. As the Court noted in *Casey*, "the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."²⁶

Making Abortion Less Necessary Among Teenagers Requires A Comprehensive Effort to Reduce Teen Pregnancy.

Abortion among teenagers should be made less necessary, not more difficult and dangerous. A comprehensive approach to promoting adolescent reproductive health and reducing teen pregnancy will require an array of components, including: age-appropriate health and sexuality education; access to confidential health services, including family planning and abortion; life options programs that offer teens practical life skills and the motivation to delay sexual activity; and programs for pregnant and parenting teens that teach parenting skills and help ensure that teens finish school.

March 1998

Notes:

1. Stanley K. Henshaw and Kathryn Kost, "Parental Involvement in Minors' Abortion Decisions," *Family Planning Perspectives*, vol. 24, no. 5 (Sept./Oct. 1992): 200, table 3.
2. Henshaw and Kost, "Parental Involvement," 207.
3. Ching-Tung Wang and Deborah Daro, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1996 Annual Fifty State Survey* (Chicago: National Committee for Prevention of Child Abuse, 1997); H. Amaro, et al., "Violence During Pregnancy and Substance Abuse," *American Journal of Public Health*, vol. 80 (1990): 575-579.
4. Henshaw and Kost, "Parental Involvement," 196.
5. Margie Boule, "An American Tragedy," *Sunday Oregonian*, Aug. 27, 1989.
6. American Academy of Pediatrics, Committee on Adolescence, "The Adolescent's Right to Confidential Care When Considering Abortion," *Pediatrics*, vol. 97, no. 5 (May 1996): 748.
7. Henshaw and Kost, "Parental Involvement," 207.
8. American Medical Association, Council on Ethical and Judicial Affairs, "Mandatory Parental Consent to Abortion," *Journal of the American Medical Association*, vol. 269, no. 1 (Jan. 6, 1993): 83.
9. Rochelle Sharpe, "Abortion Law: Fatal Effect?" Gannett News Service, Nov. 27, 1989; CBS, "60 Minutes," Feb. 24, 1991 (videotape on file with NARAL).
10. American Medical Association, "Induced Termination of Pregnancy Before and After *Roe v. Wade*, Trends in the Mortality and Morbidity of Women," *JAMA*, vol. 268, no. 22 (Dec. 1992): 3238.
11. Willard Cates, Jr. and David Grimes, "Morbidity and Mortality of Abortion in the United States," *Abortion and Sterilization*, Jane Hodgson, ed. (New York: Grune and Stratton, 1981), 158; Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?* (New York: Alan Guttmacher Institute, 1990), 29-30.
12. Stanley K. Henshaw and Jennifer Van Vort, "Abortion Services in the United States, 1991 and 1992," *Family Planning Perspectives*, vol. 26, no. 3 (May/June 1994): 103.
13. *Hodgson v. Minnesota*, 648 F. Supp. 756, 761 (D. Minn. 1986).
14. Ark. Code Ann. § 20-16-801 to -808 (Michie 1991); Idaho Code § 18-609(6) (1987); Minn. Stat. § 144.343 (West 1989); Miss. Code Ann. § 41-41-51 to -55 (1993); N.D. Cent. Code § 14-02.1-03.1 (1991); Utah Code Ann. § 76-7-304(2) (1995).
15. *Hodgson*, 648 F. Supp. at 769.
16. See, e.g., Stanley K. Henshaw, "The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi," *Family Planning Perspectives*, vol. 27, no. 3 (May/June 1995): 122.
17. *Hodgson*, 648 F. Supp. at 763-64.
18. *Hodgson*, 648 F. Supp. at 763.

19. Charlotte Ellertson, "Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana," *American Journal of Public Health*, vol. 87, no. 8 (Aug. 1997): 1371-72; Virginia G. Cartoof and Lorraine V. Klerman, "Parental Consent for Abortion: Impact of the Massachusetts Law," *American Journal of Public Health*, vol. 76, no. 4 (April 1986): 397-400.
20. Tamar Lewin, "Parental Consent to Abortion: How Enforcement Can Vary," *New York Times*, May 28, 1992, A1.
21. *Memphis Planned Parenthood v. Sundquist*, No. 3:89-0520, slip op. at 13 (M.D. Tenn. Aug. 26, 1997).
22. *In re Jane Doe 1*, 57 Ohio St.3d 135 (1991).
23. Under *Planned Parenthood v. Casey*, a restriction that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion is an unconstitutional undue burden. 505 U.S. 833 (1992).
24. *Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979); *Liparota v. United States*, 471 U.S. 419, 423-428 (1985).
25. *Casey*, 505 U.S. at 879.
26. *Casey*, 505 U.S. at 880 (citations omitted).

Melody C. Barnes

PETER J. RUBIN
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April 23, 1998

MEMORANDUM OF LAW

To: Laurie Rubiner
From: Peter Rubin *Peter Rubin*
Re: Constitutionality of the proposed Child Custody Protection Act

You have asked me to review and comment upon the constitutionality of the proposed Child Custody Protection Act, which would criminalize transporting a woman under the age of 18 across state lines for purposes of obtaining an abortion if the parental notification or consent laws of the state in which the woman resides have not been met before she obtains the abortion.

This proposed legislation violates the Constitution in at least two ways and raises at least substantial constitutional concerns in a third. First, even if the statutory ends were permissible — even if it did not violate any constitutional provision for the federal legislature to prohibit pregnant minors who wish to do so from obtaining out of state abortions without complying with regulations imposed by their home states — the means chosen in this bill to achieve those ends are unconstitutional. Government may not attempt to deter a minor from engaging in a particular activity by making it more dangerous. See *Carey v. Population Services International*, 431 U.S. 678 (1977). Here the proposed statute does not actually prohibit pregnant adolescents from obtaining out of state abortions without complying with the parental notification or consent laws of their states of residence. It seeks, rather, to deter them from doing so by denying them the assistance of any compassionate or caring adult, including family members such as grandparents, aunts and uncles, etc. Under the Due Process Clause of the Fourteenth Amendment this is not a permissible means of achieving even an otherwise legitimate governmental end.

Next, the proposed statute violates the undue burden test for abortion regulation adopted by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992). Under the analytical approach articulated by the Court in that case, the proposed statute has the unconstitutional purpose and would have the unconstitutional effect of placing a "substantial obstacle" in the path of pregnant adolescents seeking to exercise their right to choose to terminate a pregnancy. In addition, the statute as now drafted lacks a required exception for the health of the pregnant woman.

Finally, the statute raises substantial federalism concerns. Although the law in this area is less well defined, the statute appears to be unique, both in prohibiting interstate travel for a lawful purpose, in working a discrimination among citizens in the applicability of local law based only on their state of residence, and in requiring citizens to carry with them legal restrictions imposed by their state of residence regardless of where they travel within the nation.

Background

1. The Proposed Law

The proposed Child Custody Protection Act would amend the Criminal Code to add a provision, 18 U.S.C. § 2401, imposing criminal penalties for "Transportation of minors to avoid certain laws relating to abortion." The proposed statute provides that

whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, if the requirements of a law requiring parental involvement in a minor's abortion decision, in the State in which the individual resides, are not met before the individual obtains the abortion, shall be fined under this title, imprisoned not more than 1 year or both.

Proposed 18 U.S.C. § 2401(a).¹ In addition to these criminal penalties, the law also provides a civil cause of action for a parent or guardian who "suffers legal harm" from a violation of subsection (a). See proposed 18 U.S.C. § 2401(c). The law provides an exception "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Proposed 18 U.S.C. § 2401(b).

2. The State Laws With Which the Statute Seeks to Compel Compliance

Constitutional assessment of this law requires an examination of its practical effects. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 886-887 (1992) (assessment even of the facial validity of a statute turns on evidence in the record). This in turn requires a description of the legal background against which it has been proposed and particularly of the state statutes with which it seeks to compel compliance.

Over twenty years ago the Supreme Court held that pregnant minors as well as pregnant adults have a constitutional right to choose whether to terminate a pregnancy. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976). The Court has of course acknowledged that "the State has somewhat broader authority to regulate the activities of children than of adults," *id.* at 74-75, but it has also explained that the decision to terminate a pregnancy may not be regulated as freely as other decisions a minor may wish to make for herself:

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. . . . A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education,

¹ As drafted, the statute makes no exceptions for circumstances where the perpetrator believes in good faith that the pregnant adolescent has notified her parents or otherwise complied with the laws of her state of residence.

employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Bellotti v. Baird (Bellotti II), 443 U.S. 622, 642 (1979) (plurality opinion) (citations omitted).

Consequently, since 1976 legal restrictions on the availability of abortions have been impermissible if they "impose undue burdens upon a minor capable of giving an informed consent." *Bellotti v. Baird (Bellotti I)*, 428 U.S. 132, 147 (1976). In application of this standard, the Court has held that the interests of parents in their minor daughter's pregnancy does not outweigh the daughter's constitutional right to choose whether to terminate her pregnancy. "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Danforth*, 428 U.S. at 75. It has also held that the states may legislate concerning parental involvement in the abortion decision only as a means "to protect the minor's welfare." *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990).

The decision of the Supreme Court in *Casey*, 505 U.S. at 878, reaffirmed these principles. There the Court held that "[r]egulations which do no more than create a structural mechanism by which . . . the parent or guardian of a minor[] may express profound respect for the life of the unborn are permitted," but only "if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877 (controlling plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

Under the undue burden test, laws that may "in fact amount to [an] 'absolute, and possibly arbitrary, veto'" over the decision of the pregnant young woman are invalid, *Bellotti II*, 443 U.S. at 644, including laws that absolutely mandate either parental consent or parental notification before a pregnant minor can obtain an abortion. See *Danforth*, 428 U.S. 52 (striking down consent law that would by its terms give parents the power to veto a pregnant minor's abortion decision); *Bellotti II*, 443 U.S. 622 (striking down statute effectively requiring a pregnant woman "consul[t] or notif[y]" her "available" parent or parents because it would effectively give them a veto over her decision); *Hodgson*, 497 U.S. 417 (striking down two-parent notification law). As Justice Powell wrote for the Court in 1983, state abortion laws must make "provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her right to choose an abortion." *Akron v. Akron Center For Reproductive Health (Akron I)*, 462 U.S. 416, 441 n. 31 (1983).

Parental consent and notification laws — including all the laws with which the proposed statute seeks to compel compliance — thus must provide what has come to be called a "judicial bypass" proceeding. At this proceeding the pregnant adolescent must be allowed to show either

that she is "mature enough and well enough informed" to make her own abortion decision without notifying or seeking the consent of her parents, or that "the desired abortion would be in her best interests." *Bellotti II*, 443 U.S. at 643-644. The bypass is a safety valve that prevents notification and consent laws from being an undue burden. And even a notification or consent law with a judicial bypass provision will be invalid if it presents a "substantial obstacle" to obtaining an abortion. See *Bellotti II*, 443 U.S. at 647 (striking a judicial bypass provision that imposed an undue burden on minors' right to seek an abortion); *Casey*, 505 U.S. at 899 (parental consent laws must have an "adequate" bypass procedure).

Thus, although subsection (a) of the proposed law purports to dictate compliance with statutes that "requir[e] parental involvement in a minor's abortion decision," in fact the state laws to which it refers do not require such involvement. See § 2401(a). And indeed, this is acknowledged in another subsection of the proposed statute which defines "law requiring parental involvement in a minor's abortion decision" to mean a law "requiring before an abortion is performed on a minor, either the notification to, or consent of, a parent or guardian of that minor, or proceedings in a state court." Proposed 18 U.S.C. § 2401(d).

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3. The Circumstances in Which A Pregnant Minor Will Seek An Out-of-State Abortion

This leads to an obvious question: Since a pregnant minor cannot be forced to notify or obtain the consent of her parents before obtaining an abortion, but may under all notification and consent laws in the country obtain judicial consent to her abortion — and since these judicial bypass procedures are themselves invalid if they present a "substantial obstacle" to a pregnant minor's exercise of her right to choose — why would any pregnant minor seek to cross state lines in order to avoid these laws?

The answer is that, in practice, the judicial bypass does not always work as required by the Supreme Court's rulings. Indeed, the Court itself recently recognized this problem. To begin with, not all judges will apply the law conscientiously. To give but one example, the Supreme Court in *Hodgson v. Minnesota* described unchallenged judicial findings that "a number of counties [in Minnesota] are served by judges who are unwilling to hear bypass petitions." *Hodgson*, 497 U.S. at 440. There is also evidence that the rate at which some state judges grant these petitions is disproportionately low, something that appears to reflect their own personal views about abortion, rather than the legal standards they are supposed to apply: For example, in 1992 the director of a woman's clinic in Indianapolis reported that in six years she had never known of any minor successfully obtaining a judicial bypass in that city. See Lewin, Parental Consent to Abortion: How Enforcement Can Vary, *The New York Times*, May 28, 1992 at A1. In Ohio, one 17 1/2 year old had a petition denied by a judge who concluded that she had "not had enough hard knocks in her life." *Id.*

In addition, although bypass procedures are required by the Constitution in order to prevent imposition of a substantial obstacle in the path of a pregnant minor who wishes to have an abortion, in at least some states "[t]he court [bypass] experience produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to forego the bypass option and either notify their

parents or carry to term." *Hodgson*, 497 U.S. at 441-442 (quoting the unchallenged finding of the district court). Indeed, rather than undergo the judicial bypass process, some girls have apparently been driven to obtain unlawful abortions, something from which at least one 17 year old, Becky Bell, has died. *Lewin, supra*.

One Minnesota judge who adjudicated bypass petitions "testified that minors found the bypass procedure "a very nerve-wracking experience,"" *Hodgson*, 497 U.S. at 441 n. 29. "[A]nother testified that the minor's "level of apprehension is twice what I normally see in court." A Massachusetts judge who heard similar petitions in that State expressed the opinion that "going to court was "absolutely" traumatic for minors . . . "at a very, very difficult time in their lives.""*Id.* (citations omitted). In *Hodgson*, a Minnesota doctor who performs abortions "testified that when her minor patients returned from the court process, 'some of them are wringing wet with perspiration. They're markedly relieved, many of them. They — they dread the court procedure often more than the actual abortion procedure. And it — it's frequently necessary to give them a sedative of some kind beforehand.'" *Id.*

For purposes of assessing its constitutionality, then, it must be remembered that this statute operates on some of the most vulnerable, scared and desperate young women and girls in our society. These may well not be the majority of pregnant minors to whom the law would apply. Undoubtedly many pregnant women cross state lines to obtain abortions because the nearest abortion provider is not in their home state. Among minors crossing state lines for this reason, many may have consulted their parents and involved them in their decision. Others would likely not object to the application of the Child Custody Protection Act. But, as the Supreme Court's decision in *Casey* makes clear, the constitutional assessment of the statute begins not with this latter group of pregnant minors, but with those who do not wish to notify their parents or to undergo their home state's judicial bypass regime. See *Casey*, 505 U.S. at 895 (facial validity of husband-notification law is determined by assessing the law's effect on those "married women who do not wish to notify their husbands of their intentions" to get abortions). Unable to tell their parents of their pregnancies these are young women and girls would rather seek the assistance of another adult, perhaps a close relative, in travelling out of state to obtain an abortion, than comply with the bypass provisions of the state in which they reside.

Analysis

1. The Statute Fails to Use Reasonable Means To Achieve Its Ends In Violation of the Due Process Clause

To begin with, even if it were permissible for the government to prevent the pregnant minors affected by this statute from crossing state lines in order to obtain out of state abortions without complying with the laws of their home state, the means used in this statute to achieve those ends violate Due Process which requires government to use only "reasonable" means to achieve even its legitimate ends. See *Hodgson v. Minnesota*, 497 U.S. at 450.

This law does not prohibit pregnant minors themselves from crossing state lines nor does it purport to criminalize their conduct in obtaining abortions in other states without complying with the laws of their state of residence. Rather it punishes any adult who provides them

assistance by transporting them across state lines. And it covers *all* adults, including relatives to whom a desperate, frightened pregnant adolescent might turn.

The law thus would deny pregnant minors fearful of telling their parents of their pregnancy — perhaps because of a history of abuse or even because their own father or another relative may be responsible for the pregnancy — the assistance of *any* compassionate or sympathetic adult, including any adult family member, at a time when they need it the most. These pregnant minors would still be permitted to attempt to obtain an out of state abortion, but the proposed law would require them to do so on their own.

The Court's cases make clear that such a brutal and harmful mechanism for achieving even a legitimate governmental purpose would violate the Constitution. Government may not attempt to deter a minor from engaging in a particular activity — here, obtaining an out of state abortion without complying with her home state's parental consultation or bypass law — by making it more hazardous. See *Carey v. Population Services International*, 431 U.S. 678, 694-695 (1977) (plurality opinion) (state may not restrict minors' access to contraceptives as a means of "deter[ing]" "minors' sexual activity" by "increasing the hazards attendant on it"); *id.* at 714-716 (Stevens, J., concurring in the judgment) (same principle); *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1973) (prohibiting distribution of contraceptives to the unmarried is an "unreasonable" way of achieving the goal of "discouraging premarital sexual intercourse").

Instructive in this regard is *Hodgson v. Minnesota*, in which the Court recently held that a two-parent notification provision — justifiable, like the proposed statute, only to the extent that it serves the best interests of the pregnant minor — did not "reasonably further any legitimate state interest." 497 U.S. 417, 450 (1990). The Court concluded that

Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. . . . In [some] circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive.

497 U.S. at 450-451 (citations omitted). See also *id.* at 454 (the only permissible justification for "any rule requiring parental involvement in the abortion decision" is "the best interests of the child.>").

The Court of course has recognized that it would be desirable for parents to be involved in the important decisions their children may make, including the decision whether to carry a pregnancy to term. However, the Court has also recognized that "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a

minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 642. Because the Child Protection Custody Act attempts to achieve its ends only by depriving the scared, pregnant minor of the assistance of any sympathetic adult, it violates the Constitution. As in *Hodgson*, the Due Process Clause requires government to "adopt less burdensome means to protect the minor's welfare." *Hodgson*, 497 U.S. at 455.

2. *The Proposed Law Unduly Burdens The Right of a Pregnant Minor to Obtain an Abortion*

Next, under the analytical approach recently articulated by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883, 887 (1992), the proposed statute unconstitutionally imposes an "undue burden" upon the constitutional rights of those pregnant adolescents to whom it applies. See *Casey*, 505 U.S. 883, 887 (1992) (controlling plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (making clear that the right of a pregnant minor "to make the ultimate decision" cannot be unduly burdened).

As the Supreme Court explained in *Casey*, an undue burden exists, and therefore a provision of law is invalid, if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 887. Because the proposed statute has both this purpose and this effect, it is unconstitutional.

a. First, the statute's effect will be to place a substantial obstacle in the path of the young women it targets who seek to exercise their constitutionally-protected right to choose. As described above, under *Casey*, the facial validity of the statute must be assessed by its impact upon those subject to the law "who do not wish" to comply with its requirements. *Casey*, 505 U.S. at 895. If "in a large fraction of" these cases the law would "operate as a substantial obstacle to a woman's choice to undergo an abortion," it is "an undue burden, and therefore invalid." *Id.* See also *Fargo Women's Health Center v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay and injunction) (reaffirming that this is the proper approach for determining the facial validity of a statute under *Casey*'s undue burden standard).

Here, then, the constitutionality of the Act must be measured by its impact upon the class of pregnant women and girls under eighteen who would rather seek the assistance of an adult in travelling out of state than notify their parents or undergo their home state's judicial bypass regime. These young women are willing to go to great lengths — seeking an abortion out of state — in order to avoid the practical effects of the laws of their home states.

The fact that they have chosen to go to such lengths to avoid the legal requirements imposed by their states of residence indicates that the proposed statute, which would force them to choose between, on the one hand, notifying their parents or going through their state's judicial bypass procedure, or, on the other, giving up their right to choose, will "in a large fraction of the cases . . . operate as a substantial obstacle to [their] choice to undergo an abortion," *id.*, effectively resulting in their carrying their pregnancies to term despite their desire to obtain an abortion.

Casey makes clear that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877. Where, however, a regulation, even one with a benign purpose, will "dete[r]" a "significant number of women . . . from procuring an abortion as surely as if the [government] had outlawed abortion," it imposes an undue burden and it cannot stand. See *Casey*, 505 U.S. at 894 (invalidating as an undue burden Pennsylvania's spousal notification law). See also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) (statute is invalid if it would "intimidate women into continuing pregnancies").

Of course it could be argued that what leads to the creation of the "substantial obstacle" in this case is the flawed operation of certain states' judicial bypass regimes. If the bypass provisions were functioning properly, the pregnant minor could avoid the prohibitive effects of the proposed federal law by seeking a not-unduly-burdensome bypass in her state of residence.

Undoubtedly flaws in the implementation of some states' judicial bypass regimes are one of the but-for causes of the interference that the proposed statute will work with respect to the right to choose. However, so long as the proposed statute would in effect impose a substantial obstacle upon the pregnant minors it affects who seek out of state abortions without complying with the laws of their states of residence, it violates the constitution under *Casey*. That it might not be the only cause of this, or that some group of pregnant minors might also be able to obviate this effect by bringing an action challenging as an undue burden the operation of the notification and consent laws in their state of residence, is irrelevant. See *Casey*, 505 U.S. at 897 (striking down law that by its terms did nothing more than require women to notify their spouses of their intent to have an abortion because "[w]hether the prospect of the notification itself deters . . . women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to [a] veto . . .").

b. Next, the statutory text demonstrates that the *purpose* of the law is to create a substantial obstacle that will prevent these minor women from obtaining abortions. The law contains an exception that reveals that its drafters intend that the law should act as an absolute prohibition on abortions. Under the statute, the restriction on transportation across state lines for purposes of obtaining an abortion does not apply "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Proposed 18 U.S.C. § 2401(b).

Tellingly, this is *not* an exception for the performance in an emergency of a life-saving abortion. Such an exception would make sense if the law were truly intended merely to enforce compliance with laws in the pregnant minor's home state relating to parental consent or notification. This compliance process would take some time, and thus would not be appropriate in the case of a medical emergency.

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Rather, this exception is designed to permit the pregnant woman to obtain an abortion that she would otherwise be unable to obtain altogether, whether she must do so on an emergency basis or not. Although in some sense this exception is broader than what might be expected in a law truly designed to compel notification or bypass, it reveals that the statute is intended not to foster effective compliance with state laws that themselves pose no substantial obstacle to the exercise of the right to choose, but to effectively require those young women afraid to comply with state laws to carry their pregnancies to term. Even if the law would not be effective in achieving this goal, because this is its purpose, it violates the Fourteenth Amendment to the Constitution.

c. Lastly, even aside from these infirmities, the proposed statute would still violate the Constitution under *Casey* because it lacks the required exception for the health of the pregnant woman. The Court in *Casey* made clear that "the essential holding of *Roe*," which it reaffirmed, "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

As currently written, the proposed statute contains no exception for the pregnant adolescent's health at all. As the Court explained in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the constitution requires statutes that would restrict abortion to contain an exception for the preservation of the woman's "psychological as well as physical well-being." 410 U.S. at 192. Under *Doe*, such provisions will only be constitutionally adequate if they permit a doctor to assess the woman's health "in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." *Id.*

3. The Statute Raises Substantial Federalism Concerns

Finally, this statute raises substantial federalism concerns. The proposed law is unlike all other federal laws of which I am aware that prohibit the transportation of individuals across state lines. These laws ordinarily seek to make federal crimes out of crossing state lines for unlawful purposes. See, e.g., 28 U.S.C. § 2421 (prohibiting transportation in interstate commerce of "any individual . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense"); 28 U.S.C. § 2423 (prohibiting transportation in interstate commerce of "any individual under the age of 18 years . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense"). By contrast, the statute here prohibits the transportation of minors across state lines for a purpose that is lawful. Nor is it limited to adults who coerce individuals to crossing state lines for purposes of having an abortion. The pregnant adolescent will likely have consented to going out of state and, indeed, in the ordinary case may well have asked the adult for assistance in doing just that.

This law is also unusual — indeed, perhaps, unique — in that it seeks in effect to render the laws of the "destination" states inapplicable to some individuals based solely on their state of residence. Viewed from the other side, it seeks to subject the pregnant adolescent to the laws of her state of residence wherever she may travel within the United States.

The federalism concerns that restrict Congress's power to regulate the interstate movement of people and its power to impose any regime of "disparate treatment of residents and nonresidents" of a state, *Jones v. Helms*, 452 U.S. 412, 422 (1981), are reflected in the constitutional "right to travel." "Although the textual source of this right has been the subject of debate, its fundamental nature has consistently been recognized by th[e Supreme] Court." *Id.* at 418. As the Court explained in *Shapiro v. Thompson*,

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

Shapiro v. Thompson, 394 U.S. 618, 629-630 (1969).

The right to travel protects against not only those laws that actually burden, restrict or deter movement across state lines, but those that "penalize" it as well. See *Dunn v. Blumstein*, 405 U.S. 330, 339-340 (1972). In this it imposes a restriction upon the enactment of laws that discriminate between residents and non-residents of each State, much in the same way as the Privileges and Immunities Clause of Article IV, which applies at least to state enactments.

That Clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." U.S. Const. Art. IV, § 2.² Nothing in its text restricts its applicability only to state legislative enactments. And indeed, Justice O'Connor has argued that the right to interstate travel, which does restrict Congress, is itself rooted in the Privileges and Immunities Clause of Article IV. See *Zobel v. Williams*, 457 U.S. 55, 78-81 (1982) (O'Connor, J., concurring in judgment). Nonetheless, because Justice Harlan concluded that it did not "limi[t] federal power," *Shapiro*, 394 U.S. at 666 (Harlan, J., dissenting), and because that argument finds some support in the Privileges and Immunities Clause's position in Article IV of the Constitution, I will describe the restrictions imposed upon states by the Clause primarily to shed light upon the probable scope of the at-least-closely-analogous protections provided by the right to travel.

² The Supreme Court has found that "the terms 'citizen' and 'resident' are 'essentially interchangeable' . . . for purpose of analysis of most cases under the Privileges and Immunities Clause." *Hicklin v. Orbeck*, 437 U.S. 524, n. 8 (1978) (citation omitted).

The Privileges and Immunities Clause, fundamental to the structure of our federal system, "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of state B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). With very limited exceptions, e.g., *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978) (Montana may charge non-residents more than residents for a hunting license), the Privileges and Immunities Clause prohibits laws that distinguish between residents and non-residents with respect to goods and opportunities (at least those that are not attributable to state programs or revenues). See L. Tribe, *American Constitutional Law*, § 6-35 at 540. What is legal for the residents of a state must be available within that state to residents of the other states as well.

This rule has been specifically held to apply to the legal terms under which one may obtain an abortion. In *Doe v. Bolton*, the Supreme Court invalidated a law that would have made abortions available in Georgia only to state residents. It held:

Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward v. Maryland*, 12 Wall. 418, 430 (1871); *Blake v. McClung*, 172 U.S. 239, 248-256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer v. Witsell*, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

Doe v. Bolton, 410 U.S. 179, 200 (1973).

There can be little doubt that ordinarily a law that operates as the proposed one does would violate the constitutional right to travel. Congress could not forbid individuals to shop out of state on Sunday if they are residents of a state with blue laws that mandate Sunday store closures. It could not forbid individuals who are away from their home states to buy handguns without complying with the restrictive laws of their states of residence. Indeed, it could not forbid adult women from obtaining abortions out of state without complying with waiting periods imposed by their states of residence. These laws would be beyond congressional power under the federalism principles reflected in the right to travel. To saddle individuals with the laws of their home state wherever they travel in the land would not be permissible. Although the limited number of decisions in this area leave it an open issue, whether a law like the proposed one is permissible that has this structure but that affects only a class of minors presents at least a substantial constitutional question.

II

105TH CONGRESS
2D SESSION

S. 1645

To amend title 18, United States Code, to prohibit taking minors across State lines to avoid laws requiring the involvement of parents in abortion decisions.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1998

Mr. ABRAHAM (for himself, Mr. LOTT, Mr. DEWINE, Mr. INHOFE, Mr. NICKLES, Mr. COVERDELL, Mr. HELMS, Mr. COATS, Mr. SESSIONS, Mr. ENZI, Mr. CRAIG, Mr. KYL, Mr. HATCH, Mr. FAIRBOLT, Mr. BROWNBACK, Mr. SANTORUM, Mr. MCCONNELL, Mr. HUTCHINSON, Mr. BOND, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to prohibit taking minors across State lines to avoid laws requiring the involvement of parents in abortion decisions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Child Custody Protec-
5 tion Act".

1 **SEC. 2. TRANSPORTATION OF MINORS TO AVOID CERTAIN**
2 **LAWS RELATING TO ABORTION.**

3 (a) IN GENERAL.—Title 18, United States Code, is
4 amended by inserting after chapter 117 the following:

5 **CHAPTER 117A—TRANSPORTATION OF MI-**
6 **NORS TO AVOID CERTAIN LAWS RE-**
7 **LATING TO ABORTION**

“Sec.

“2401. Transportation of minors to avoid certain laws relating to abortion.

8 **“§ 2401. Transportation of minors to avoid certain**
9 **laws relating to abortion**

10 “(a) OFFENSE.—Except as provided in subsection
11 (b), whoever knowingly transports an individual who has
12 not attained the age of 18 years across a State line, with
13 the intent such individual obtain an abortion, if in fact
14 the requirements of a law, requiring parental involvement
15 in a minor’s abortion decision, in the State where the indi-
16 vidual resides, are not met before the individual obtains
17 the abortion, shall be fined under this title or imprisoned
18 not more than one year, or both.

19 “(b) EXCEPTION.—The prohibition of subsection (a)
20 does not apply if the abortion was necessary to save the
21 life of the minor because her life was endangered by a
22 physical disorder, physical injury, or physical illness, in-
23 cluding a life endangering physical condition caused by or
24 arising from the pregnancy itself.

1 “(c) CIVIL ACTION.—Any parent or guardian who
2 suffers legal harm from a violation of subsection (a) may
3 obtain appropriate relief in a civil action.

4 “(d) DEFINITIONS.—For the purposes of this sec-
5 tion—

6 “(1) a law requiring parental involvement in a
7 minor’s abortion decision is a law—

8 “(A) requiring, before an abortion is per-
9 formed on a minor, either—

10 “(i) the notification to, or consent of,
11 a parent or guardian of that minor; or

12 “(ii) proceedings in a State court; and

13 “(B) that does not provide as an alter-
14 native to the requirements described in sub-
15 paragraph (A) notification to or consent of any
16 person or entity who is not described in that
17 subparagraph;

18 “(2) the term ‘minor’ means an individual who
19 is not older than the maximum age requiring paren-
20 tal notification or consent, or proceedings in a State
21 court, under the law requiring parental involvement
22 in a minor’s abortion decision; and

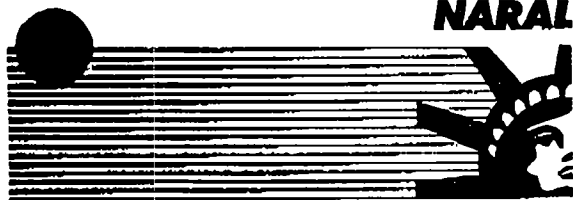
23 “(3) the term ‘State’ includes the District of
24 Columbia and any commonwealth, possession, or
25 other territory of the United States.”.

4

1 (b) CLERICAL AMENDMENT.—The table of chapters
2 for part I of title 18, United States Code, is amended by
3 inserting after the item relating to chapter 117 the follow-
4 ing new item:

“117A. Transportation of minors to avoid certain laws relating to
abortion 2401.”

○

NARAL Promoting Reproductive Choices

May 8, 1998

Ned Crabb
Letters Editor
The Wall Street Journal
200 Liberty Street
New York, NY 10281

Dear Mr. Crabb:

Professor Mary Ann Glendon's diatribe against President Clinton and his stand against the "Mexico City" abortion gag rule displays an extraordinary lack of understanding of the issues and groups involved and of the current state of women's reproductive health around the world (On Abortion, It's Clinton vs. The U.N., May 5, 1998).

It is important for your readers to understand that the only reason the payment of U.N. dues is tied to the issue of abortion is because abortion opponents in Congress have inextricably linked the two. Anti-choice lawmakers are in effect holding hostage important foreign policy priorities of the Administration in an attempt to force the President to accept restrictive anti-family planning language. Glendon's piece also obscures the fact that, since the passage of the 1973 Helms Amendment, it has been illegal to use U.S. funds for abortion services overseas.

The language to which President Clinton objects would deny U.S. family planning assistance to any organization operating overseas that uses its *own non-U.S. funds* to provide abortion services or even advocate on abortion issues in its own country. According to Secretary of State Madeline Albright, the "lobby" ban is "basically a gag rule that would punish organizations for engaging in the democratic process in foreign countries and for engaging in legal activities that would be protected by the First Amendment if carried out in the United States."

Professor Glendon also appears to lack any understanding of the impact restrictive abortion policies have on women around the world. According to information presented at the recent World Bank Conference on Safe Motherhood, approximately seventy to eighty thousand women die each year from unsafe abortions and every minute of every day a woman dies of complications related to pregnancy and childbirth. *That's almost 600,000 deaths per year.* Abortion is a safe procedure when carried out legally under standard medical conditions, but under the threat of criminal prosecution or in substandard facilities, it becomes frighteningly unsafe. Restricting access to safe abortion and jeopardizing funding for family planning services only exacerbates this problem and further endangers women facing crisis pregnancies.

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Wall Street Journal
May 8, 1998
Page 2

Ms. Glendon's statement that President Clinton "has never wavered" from some "principle" of unrestricted access to abortion is also counterfactual and preposterous. President Clinton, like NARAL, supports *Roe v. Wade*, which allows states to restrict abortion after viability, so long as women's health and lives are protected. As Governor of Arkansas, Clinton even signed legislation banning post-viability abortions, with exceptions for life, health, rape and incest.

Finally, Ms. Glendon slurs family planning organizations by suggesting that much of their political advocacy work is aimed at population control through pressuring poor women into abortion and sterilization. Nothing could be further from the truth. Family planning organizations and pro-choice groups merely advocate that women need the full range of reproductive options available to them in order to responsibly manage their reproductive lives. That means access to safe abortion services, but also to the family planning services that help to reduce the need for abortion.

I would suggest that the Professor do more research on what happens to women when their reproductive options are limited or denied. She can start with the country of Nepal where abortion is prohibited under any circumstances, including rape, incest and the endangerment of the woman's life. It would be interesting to see how she "spins" the deaths of the women in that country who seek unsafe abortions despite the big hand of government and the threat of imprisonment. They do so because they have no choice and only limited options.

There is room for legitimate differences of opinion when it comes to the issue of abortion. But all parties suffer when inaccuracies and unsubstantiated assertions are presented as fact as they are in Ms. Glendon's piece.

Sincerely,



Kate Michelman
President



Record Type: Record

To: Elena Kagan/OPD/EOP, Jennifer L. Klein/OPD/EOF, Katharine Button/WHO/EOP
cc: Cynthia Dailard/OPD/EOP
Subject: fyi --Child Custody Protection Act

This bill basically sanctions those who transport minors across state lines for the purposes of having an abortion if the minor does not meet the parental notification requirements of the state in which they reside. There is a life of the minor exception. The Republicans have this bill on a very fast track with hearings scheduled for this week. DOJ has not fully reviewed the legislation yet, but Bill Marshall's view is that there no strong constitutional grounds on which to oppose it. My understanding is that legislative affairs is considering sending a decision memo to the President shortly.

Abortion -
child custody act

William P. Marshall
05/19/98 06:36:17 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Child Custody Protection Act Issues

The following is a quick list of the issues raised by this legislation. The 'A' list contains the ones that may have political traction. The 'B' list includes the more technical problems.

A. The 'A' List

1. The bill imposes criminal sanctions against family members.

2. The bill imposes criminal liability on persons who may not realize they are violating the law (as when the minor falsely informs the transporter that she has parental consent.) This is because the bill predicates liability on the intent to help the minor obtain an abortion rather than on the intent to help the minor avoid the application of a state's parental notification requirements.

Note -- When Senator Abraham introduced the bill, he described the offense as involving the intent to avoid parental involvement requirements. He did not describe the offense as it is written in his bill -- the intent to help the minor obtain an abortion.

3. The bill raises troublesome federal law enforcement concerns. Pursuing alleged violations would require the FBI to investigate a minor's family and close personal friends, raising serious privacy concerns. Enforcing this law would also raise federal enforcement resource issues. Should the federal government be expending its resources in conducting the types of investigations that this law would require, and, if not, would passage of the bill merely be a hollow gesture?

4. The bill represents a dramatic incursion into our traditional understanding of federalism. Federalism presumes that a citizen is free to take advantage of favorable laws in other states. This bill curtails that right.

B. The 'B' List

1. The bill may impose the undue burden of having the minor comply with two separate parental notification statutes -- her home state and the state of the provider.

2. The bill does not take into account that some states' parental involvement laws have no mechanism for extra-territorial application. For example, some states impose the duty to notify a parent on the in-state provider. Since, by definition there is no in-state provider in the case of an extra-territorial abortion, there is no person with legal authority to satisfy the state law's requirements. In such circumstances, the federal law would be a complete bar to the minor's ability to have an out-of-state abortion and, in those circumstances, might be constitutionally suspect.

3. The bill requires the minor to comply with the parental involvement laws of the state in

which she "resides." This could be a different than the state of her domicile (permanent residence) and if so, could lead to a result in which a transporter who takes the minor to have the abortion in the minor's home state could be held criminally liable. This may be particularly problematic in the case of a minor whose divorced parents reside in two different states.

4. There are serious statutory ambiguities. For example, state parental involvement statutes require taking the health and life of the mother into account, and, for that reason the fact the bill does not contain a health exception is permissible. But, because the bill does provide an exception for the mother's life, it could be read as pre-empting any other exceptions contained in state law (including health). Another ambiguity stems from the statute's definition of a law requiring parental involvement as one that requires the notification to, or consent of "a parent or guardian of that minor." Some states, however, allow other persons to provide consent, again raising the issue of whether the federal law pre-empt's state law.

Message Sent To:

Sylvia M. Mathews/WHO/EOP
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Abortion - child custody act

Cynthia Dillard

09/22/98 05:08:22

Fri

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: cloture vote on CCPA

The Senate failed to achieve cloture on the Child Custody Protection Act by a vote of 54-45.

Message Sent To:

Jennifer L. Klein/OPD/EOP
Neera Tanden/WHO/EOP
Nicole R. Rabner/WHO/EOP
Elena Kagan/OPD/EOP
Laura Emmett/WHO/EOP