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THE WHITE HOUSE
WASHINGTON

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THE WHITE HOUSE

WASHINGTON

INFORMATION

February 6, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: PHIL BUCHEN *P.W.B.*
FROM: BOBBIE GREENE KILBERG *BK.*
SUBJECT: Proposed Constitutional Amendments
on Abortion

Max Friedersdorf has asked me to prepare for your information an analysis of the various constitutional amendments that have been introduced in the 94th Congress on abortion.

There are three basic types of constitutional amendments dealing with abortion:

- (1) a right to life amendment which would prohibit state action in the area of abortion;
- (2) a right to life amendment which would prohibit both state and private action in the area of abortion; and
- (3) a states' rights amendment which would give each state the authority to allow, regulate or prohibit abortions.

The Constitutional Amendments Subcommittee of the Senate Judiciary Committee considered a number of anti-abortion amendments in 1975 and voted not to report any out of the Subcommittee. The Civil Rights and Constitutional Rights Subcommittee of the House Judiciary Committee held two days of hearings on anti-abortion amendments on February 4 and 5 of this year, but it is most unlikely that any amendment will be reported out of the Subcommittee.

Below is a description of each of the basic types of anti-abortion constitutional amendments, more than 50 of which have been introduced in the House and the Senate:



(1) Right to life constitutional amendment which would prohibit state action in the area of abortion

Congressman Erlenborn (R., Ill.) has introduced H. J. Res. 99, a state action amendment prohibiting both abortion from conception and euthanasia. No explicit exception is made in the abortion prohibition to protect the life of the mother. The proposed amendment reads as follows:

Section 1. Neither the United States nor any state shall deprive any human being, from conception, of life without due process of law; nor deny to any human being, from conception, within its jurisdiction, the equal protection of the law.

Section 2. Neither the United States nor any state shall deprive any human being of life on account of age, illness, or incapacity.

Section 3. Congress and the several States shall have power to enforce this article by appropriate legislation.

The Fourteenth Amendment definition of state action would apply to this amendment. Among H. J. Res. 99's co-sponsors are Congressman Delaney (D., N. Y.), Congressman Eilberg (D., Pa.), and Congressman Mazzoli (D., Ky.). According to the minority counsel of the House Civil Rights and Constitutional Rights Subcommittee, the state action approach was not seriously focused upon in the Subcommittee's hearings.

(2) Amendment to prohibit all state and private action in the area of abortion

H. J. Res. 311, introduced by Congressman Latta (R., Ohio), is typical of this type of amendment. It states as follows:

Section 1. With respect to the right to life, the word 'person' as used in this Article and in the Fifth and Fourteenth Articles of amendment to the Constitution of the United States applies to all human beings



irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law preventing only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several States shall have power to enforce this article by appropriate legislation.

This amendment forbids euthanasia as well as abortion, and it does contain an exception to protect the life of the mother.

Among the Congressmen who either have co-sponsored H. J. Res. 311 or have introduced similar amendments are Madden (D., Ind.), Quie (R., Minn.), Erlenborn, Delaney, Smith (R., Nebr.), Hyde (R., Ill.), Goldwater, Jr. (R., Calif.), Oberstar (D., Minn.) and Lagomarsino (R., Calif.). In the Senate, Senator Buckley has introduced two constitutional amendments, one of which is identical to the Latta wording and both of which contain the same intent. The Buckley amendments were S.J. Res. 10 and 11 which were re-introduced as S.J. Res. 140 and 141 in October, 1975 after the former resolutions were voted down in Subcommittee by votes of 2-to-5. The co-sponsors of the Buckley amendments are Senators Bartlett, Curtis, Eastland, Garn, Hatfield, Helms, Proxmire and Young.

All of the right to life bills in this category, except one introduced by Congressman Delaney and one introduced by Senator Helms, contain a provision to save the life of the mother. The Helms amendment was voted down in Subcommittee by a vote of 2-to-5. One resolution, H. J. Res. 451, introduced by Congressman Blouin (D., Iowa) and co-sponsored by four other Democrats, requires that while protecting the life of the mother "every reasonable effort" must be made to preserve the life of her unborn offspring.

Another variation in the right to life amendments is a resolution introduced by Congressman Karth (D., Minn.) (H. J. Res. 197)



that contains an exception to allow termination of a pregnancy of no more than ten days' duration which resulted from rape. No distinction is made between statutory and forcible rape.

None of the state action or private action right to life amendments contain an exception for the mental illness of the mother.

(3) States' rights amendment which would give each state the authority to allow, regulate or prohibit abortions

The basic states' rights amendment has been introduced in the House as H. J. Res. 96 by Congressman Whitehurst (R., Va.) and in the Senate as S. J. Res. 91 by Senator Scott of Virginia. The Whitehurst amendment was co-sponsored by you when you were in the House and is presently co-sponsored by Congressmen Rhodes, Steiger (R., Ariz.), Treen (R., La.) and Wampler (R., Va.), among others. Senator Scott's resolution was voted down in the Senate Subcommittee by a vote of 3-to-5.

The basic Whitehurst provision reads as follows:

Section 1. Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion.

This states' rights amendment does not specifically provide an exception to save the life of the mother.

The minority counsel of the House Judiciary Civil Rights and Constitutional Rights Subcommittee is of the opinion that the language of the Whitehurst and Scott amendments could be interpreted by the courts as being consistent with the Supreme Court's 1973 abortion decisions and thus defeat the intent of the amendments. Other lawyers disagree with this opinion, and cite as especially important a clear legislative history.

Another states' rights approach is illustrated by S. J. Res. 143, an amendment re-introduced by Senator Burdick after his amendment was not reported out of Subcommittee by a vote of 4-to-4. An identical amendment was introduced in the House by Congresswoman



Sullivan (D., Mo.). Burdick's amendment is both anti-abortion and anti-euthanasia and reserves to the states and to the Congress within Federal jurisdictions the affirmative power to protect life.

The Congress within Federal jurisdictions and the several States within their respective jurisdictions shall have power to protect life, including the unborn, at every state [sic] of biological development irrespective of age, health, or condition of physical dependency.

The Burdick amendment does not contain an exception to save the life of the mother.

* * * *

Right to life and states' rights amendments which do not provide an exception to save the life of the mother would create a condition of competing fundamental rights if ratified. While the unborn child's right to life would be constitutionally protected, so would the mother's right to life under the Fifth and Fourteenth Amendments. While it could be legally logical to hold that the ratification of the new amendment would supersede the right of the mother to life under the Fifth and Fourteenth Amendments, it is inconceivable to the Solicitor General and to most other attorneys that the Supreme Court would ever in fact rule that the mother's life must be sacrificed for the unborn child's life.

The following are the positions on the issue of anti-abortion constitutional amendments of the House and Senate Republican leadership:

Congressman Rhodes: co-sponsor of Whitehurst states' rights amendment to give each state the authority to allow, regulate or prohibit abortions.

Congressman Conable: has generally stated that he is not completely happy with the Supreme Court decision, and he had asked the Chairman of the Judiciary Subcommittee to hold hearings so that all views could be fully aired. Congressman Conable has not come out in favor of a constitutional amendment.



Congressman Michel: opposes abortion on demand and abortion as a contraceptive device. However, he favors abortion when a pregnancy is a danger to a mother's life, or when a woman has been raped. He does not favor abortion in the case of mental illness. The Congressman also does not favor a constitutional amendment on the issue but feels that it may be possible to present the Supreme Court with arguments that might cause it to reconsider its 1973 decisions. He is presently looking into this possibility.

Senator Scott: presently does not favor a constitutional amendment.

Senator Griffen: has not supported a constitutional amendment.

Senator Tower: would consider the possibility of supporting a states' rights amendment.

The following are the positions on the issue of anti-abortion constitutional amendments of the Republican and Democratic Presidential candidates:

Reagan: favors state action and private action right to life amendment except where necessary to save the mother's life or to end a pregnancy caused by rape.

Carter, Jackson, Shriver: believe abortion is wrong; do not favor Supreme Court ruling; do not favor either right to life or states' rights amendment.

Bayh, Harris, Udall: agree with Supreme Court decision.

Wallace: favors right to life amendment.



THE WHITE HOUSE
WASHINGTON

DATE 2/13/76

TO: *Phil Buchen*

FROM: SARAH MASSENGALE

For filing



THE WHITE HOUSE

WASHINGTON

January 27, 1976

MEMORANDUM FOR THE FILE

FROM: SARAH MASSENGALE *Sarah Massengale*

SUBJECT: Meeting with representatives of three anti-abortion groups, Thursday, January 22, 1976, 10:45-11:15 a.m.

Participants

Ms. Nellie Grey, March for Life Committee
Ms. Randy Engle, U.S. Coalition for Life
Reverend Harold Brown, Christian Action Council
(Dr. Mildred Jefferson, National Right to Life, was unable to attend)
Philip Buchen
Marjorie Lynch, HEW
Judy Wolf, DOJ
Bobbie Kilberg, Counsel's Office
H. P. Goldfield, Counsel's Office
Judy Hope, Domestic Council
Sarah Massengale, Domestic Council

This meeting was requested by Ms. Grey to be held on the day of the Pro-Life march protesting the 1973 Supreme Court decisions on abortion.

Ms. Massengale indicated that the purpose of the meeting since it had been requested by Ms. Grey was to listen to what the three organization representatives had to say.

Ms. Grey said that a purpose of the meeting was to establish communication and contact with the persons within the Federal Government who could be responsive to the concerns of the various "anti-abortion" or "pro-life" groups. She expressed strong concern about "tax dollars being used to pay for abortions." Ms. Grey indicated that even though the government could not prohibit abortion it was not necessary to encourage and to fund abortions.

In addition to challenging "liberal" state laws in the courts, Ms. Grey wanted to open a dialogue with people at HEW and at Justice who could re-examine the legality of Federal actions (e.g. HEW reimbursement for abortions for Medicaid patients). Ms. Lynch and Ms. Wolf each indicated that they would be willing to talk again with Ms. Grey and her colleagues.



Reverend Brown said that his major concern was the enactment of a "pro-life" amendment to the Constitution but that he realized the proper realm for action on that was the Congress, not the Executive Branch.

Ms. Engle expressed her opposition to: HEW abortion policy, HEW and AID family planning, population control and birth control, policies and programs, fetal research, and sex education in the schools.

The representatives of the Administration listened to the concerns expressed. All present agreed that further communication would be directed to HEW (Ms. Lynch) and Justice (Ms. Wolf).



*Defense
Abortion*

THE WHITE HOUSE
WASHINGTON

March 16, 1976

Dear Ms. Meyer:

Thank you for your letter of February 10 commenting on the President's position on abortion. I read your constitutional analysis with interest and appreciate your taking the time to write me.

Sincerely,

Philip W. Buchen
Philip W. Buchen
Counsel to the President

Hermine Herta Meyer, Esquire
4701 Willard Avenue
Chevy Chase, Maryland 20015



THE WHITE HOUSE

WASHINGTON

August 11, 1976

MEMORANDUM FOR: JIM CANNON
SARAH MASSENGALE

FROM: BOBBIE GREENE KILBERG *Bobbie*

SUBJECT: Parental Consent to Abortions:
Bellotti v. Baird, 44 L.W. 5221
(July 1, 1976)

Attached is a copy of the memorandum which I sent to you on August 6 on the Supreme Court abortion decision in Planned Parenthood v. Danforth. In the Planned Parenthood case, the Court declared unconstitutional a provision in a Missouri statute which required the written consent of a parent or person in loco parentis for an abortion for an unmarried woman under 18 years of age. The Court held that a State may not impose a blanket requirement of a parental veto:

" . . . the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."

However, the Court also emphasized that its holding did "not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." And it went on to note that the fault with the statutory provision was "that it imposes a special consent provision . . . and does so without a sufficient justification for the restriction." (Emphasis added.)

In the case of Bellotti v. Baird, decided the same day as Planned Parenthood, the Supreme Court held that a three-judge Federal district court should not have ruled on the constitutionality of a 1974 Massachusetts abortion statute but rather should have certified to the Massachusetts Supreme Judicial Court appropriate questions



concerning the meaning of the statute and the abortion procedure it imposed. The district court had held the statute unconstitutional because it created a parental veto over the performance of abortion on minor children in that it applied even to those minors capable of giving informed consent. The statute required parental consent to an abortion for an unmarried minor less than 18 but provided that, if the parents refused to consent, consent could be obtained by court order "for good cause shown, after such hearing as he judge deems necessary." (Statutory provision at Tab A.)

The Supreme Court vacated the judgment of the district court and instructed that court to abstain pending construction of the statute by the Massachusetts courts and to certify appropriate questions to the State court. In so ruling, the Supreme Court held that abstention was appropriate where an unconstrued State statute was susceptible of a construction by the State judiciary that "might avoid in whole or in part the necessity for Federal constitutional adjudication, or at least materially change the nature of the problem." It also stated that the Massachusetts statute was susceptible to appellants' interpretation that, while it prefers parental consultation and consent, it permits a minor capable of giving informed consent to obtain a court order allowing abortion without parental consultation and further permits even a minor incapable of giving informed consent to obtain an abortion order without parental consultation where it is shown that abortion would be in her best interest. The implication was that such an interpretation would avoid or substantially modify the Federal constitutional challenge to the statute.

The Supreme Court noted that at the same time it had struck down the Missouri statute that created a parental veto, it had held that a requirement of written consent on the part of a pregnant adult was not unconstitutional unless it unduly burdened the right to seek an abortion. Referring back to the Bellotti case before it, the Court noted that it was concerned with a statute directed towards minors, "as to whom there are unquestionably greater risks of inability to give an informed consent. Without holding that a requirement of a court hearing would not unduly burden the right of a mature adult, . . . we think it clear that in the instant case adoption of appellants' interpretation would 'at least



materially change the nature of the problem' that appellants claim is presented."

The Court finally noted that in light of its disapproval of a parental veto in the Planned Parenthood case, it assumed that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, would "not impose this most serious barrier" and that as the issue thus would become one of "relative burden" rather than "total denial of access."

cc: Phil Buchen



THE WHITE HOUSE

WASHINGTON

August 6, 1976

MEMORANDUM FOR:

JIM CANNON
SARAH MASSENGALE

FROM:

BOBBIE GREENE KILBERG

SUBJECT:

Supreme Court Abortion Decision
in Planned Parenthood v. Danforth
(July 1, 1976)

Bobbie

Attached is a memo to me from H. P. Goldfield of our staff summarizing the Danforth case. The decision specifically declared unconstitutional Section 3 of a Missouri statute which required spousal or parental consent (for unmarried women under age 18) for abortions in the first trimester of pregnancy. However, because of the wording of the statute and the 1973 Supreme Court decision in Roe v. Wade, it is likely that a requirement for spousal or parental consent in the second or third trimesters of pregnancy would be equally unconstitutional.

Attachment



THE WHITE HOUSE

WASHINGTON

August 5, 1976

MEMORANDUM FOR:

BOBBIE GREENE KILBERG

FROM:

H. P. GOLDFIELD

SUBJECT:

Planned Parenthood v. Danforth
44 U.S. L. W. 5197 (July 1, 1976)

Facts

Two Missouri physicians challenged the constitutionality of the Missouri abortion statute which required:

1.) voluntary and informed consent: before submitting to an abortion during the first 12 weeks of pregnancy, a woman must consent in writing to the procedure and certify that her consent is informed and freely given;

2.) spousal consent: the written consent of the spouse of a woman seeking an abortion is required unless a licensed physician certifies that the abortion is necessary to preserve the woman's life;

3.) parental consent for minors seeking abortions: the written consent of a parent or person in loco parentis is required for the abortion of an unmarried woman under age 18.

Holding and Opinion

The Supreme Court upheld the constitutionality of the informed consent provision, but struck down the provisions requiring parental and spousal consent.

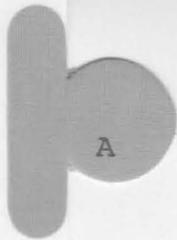
1.) voluntary and informed consent: In determining that the state may constitutionally require a woman to consent in writing to an abortion, the Court reasoned that the decision to abort is often stressful and, therefore, the state has an interest in insuring that the woman is fully aware of the consequences of her decision.

2.) spousal consent: The Court ruled that the spousal consent provision did not comport with the standard of Roe v. Wade since the state cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy."



3.) parental consent: For substantially the same reasons as in the case of spousal consent provision, the Court ruled that the state may not impose a parental consent requirement as a condition to a minor's abortion during the first 12 weeks of pregnancy. The Court reasoned that there is no significant state interest in conditioning an abortion on the consent of a parent.





STATUTE

The Act, Stat. 1974, c. 706, § 1, amended Mass. Gen. Laws Ann., c. 112 (Professions and Occupations), by adding §§ 12H through 12R. Section 12P provides:

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."



ples rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. . . . Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Broadrick v. Oklahoma*, 413 U.S., at 610-611 (citation omitted). Today's holding threatens to make just such "roving commissions" of the federal courts.

MICHAEL L. BOICOURT, Assistant Attorney General, State of Missouri (JOHN C. DANFORTH, Attorney General, with him on the brief) for petitioner; FRANK SUSMAN, St. Louis, Missouri (SUSMAN, SCHERMER, WILLER & RIMMEL, with him on the brief) for respondents.

Nos. 75-73 AND 75-109

Francis X. Bellotti, Attorney General of Massachusetts, et al.,
Appellants,
75-73 v.
William Baird et al.
Jane Hunerwadel, etc.,
Appellant,
75-109 v.
William Baird et al.

On Appeals from the United States District Court for the District of Massachusetts.

[July 1, 1976]

Syllabus

A 1974 Massachusetts statute governs the type of consent, including parental consent, required before an abortion may be performed on an unmarried woman under the age of 18. Appellees, an abortion counseling organization, its president and its medical director, and several unmarried women who were pregnant at the time, brought a class action against appellant Attorney General and District Attorneys, claiming that the statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. A temporary restraining order was entered prior to the effective date of the statute. Thereafter, a three-judge District Court held the statute unconstitutional as creating a "parental veto" over the performance of abortions on minor children in that it applied even to those minors capable of giving informed consent, and permanently enjoined its operation, denying by implication appellants' motion that the court abstain from deciding the issue pending authoritative construction of the statute by the Massachusetts Supreme Judicial Court. In 1975, after the District Court's decision Massachusetts enacted a statute dealing with consent by minors to medical procedures other than abortion and sterilization, and in this Court appellees raised an additional claim of impermissible distinction between the consent procedures applicable to minors in the area of abortion under the 1974 statute and the consent required by the 1975 statute in regard to other medical procedures. *Held*: The District Court should have abstained from deciding the constitutional issue and should have certified to the Massachusetts Supreme Judicial Court appropriate questions concerning the meaning of the 1974 statute and the procedure it imposes.

(a) Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary that "might avoid in whole or in part the necessity for federal consti-

tutional adjudication, or at least materially change the nature of the problem." *Harrison v. NAACP*, 360 U.S. 167, 177.

(b) Here the 1974 statute is susceptible of appellants' interpretation that while it prefers parental consultation and consent it permits a minor capable of giving informed consent to obtain a court order allowing abortion without parental consultation and further permits even a minor incapable of giving informed consent to obtain an abortion order without parental consultation where it is shown that abortion would be in her best interests, and such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute.

(c) In regard to the claim of impermissible discrimination due to the 1975 statute, it would be appropriate for the District Court also to certify a question concerning this statute, and the extent to which its procedures differ from the procedures required under the 1974 statute.

393 F. Supp. 847, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, a three-judge District Court for the District of Massachusetts enjoined the operation of certain provisions of a 1974 Massachusetts statute that govern the type of consent required before an abortion may be performed on an unmarried woman under the age of 18. In so acting, the court denied by implication a motion by appellants that the court abstain from deciding the issue pending authoritative construction of the statute by the Supreme Judicial Court of Massachusetts. We hold that the court should have abstained, and we vacate the judgment and remand the case for certification of relevant issues of state law to the Supreme Judicial Court, and for abstention pending the decision of that tribunal.

I

On August 2, 1974, The General Court of Massachusetts (the Legislature), over the Governor's veto, enacted legislation entitled "An Act to protect unborn children and maternal health within present constitutional limits." The Act, Stat. 1974, c. 706, § 1, amended Mass. Gen. Laws Ann., c. 112 (Professions and Occupations), by adding §§ 12H through 12R.¹ Section 12P provides:

"Section 12P.

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both

¹ Prior to the passage of the 1974 Act there were already in existence a § 12H and a § 12I of c. 112. These were added by Stat. 1973, c. 173, § 1, and c. 521, § 1, respectively. The former called for the printing of the physician's name on a prescription blank, and the latter concerned one's right not to participate in an abortion or sterilization procedure, and to be free from damage claims or discipline for exercising that right.

These pre-existing §§ 12H and 12I have not been repealed. Consequently, due to this legislative oversight, Massachusetts has two statutes denominated § 12H of c. 112 and two denominated § 12I of that chapter. This opinion, however, concerns only the 1974 legislation.

of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

All nonemergency abortions are made subject to the provisions of § 12P by § 12N.² Violations of § 12N are punishable under § 12Q by a fine of not less than \$100 nor more than \$2,000.³ Section 12R provides that the Attorney General or any person whose consent is required may petition the superior court for an order enjoining the performance of any abortion.⁴

II

On October 30, 1974, one day prior to the effective date of the Act,⁵ plaintiffs, who are appellees here, filed

²Section 12N.

"Except in an emergency requiring immediate action, no abortion may be performed under sections twelve I [before 24 weeks] or twelve J [24 weeks or more] unless

"(1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and

"(2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.

"Except in an emergency requiring immediate action, no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services."

³Section 12Q provides in pertinent part:

"Any person who willfully violates the provisions of sections twelve N or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars."

⁴Section 12R.

"The attorney general or any person whose consent is required either pursuant to section twelve P or under common law, may petition the superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of sections twelve I through twelve Q."

⁵Unless a statute is declared an emergency or may not be made the subject of a referendum petition, a law passed by the General Court does not take effect "earlier than ninety days after it has

this action in the United States District Court for the District of Massachusetts, asserting jurisdiction under 28 U. S. C. §§ 1343 (3), 1331, and 2201, and 42 U. S. C. § 1983, and claiming that § 12P violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They sought injunctive and declaratory relief, and requested the empaneling of a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284.

On October 31, the single District Judge issued an order temporarily restraining the enforcement of the parental consent requirement of § 12P, and accepting the request for a three-judge court.⁶ Record Doc. 2.

The plaintiffs, and the classes they purported to represent, are:

1. William Baird, a citizen of New York.

2. Parents Aid Society, Inc., a Massachusetts not-for-profit corporation. Baird is president of the corporation and is director and chief counselor of the center it operates in Boston for the purpose of providing, *inter alia*, abortion and counseling services. Baird and Parents Aid claim to represent all abortion centers and their administrators in Massachusetts who, on a regular and recurring basis, deal with pregnant minors. App. 13, 43.

3. Mary Moes I, II, III, and IV, four minors under the age of 18, pregnant at the time of the filing of the suit, and residing in Massachusetts. Each alleged that she wished to terminate her pregnancy and did not wish to inform either of her parents.⁷ *Id.*, at 16-18, 19-22. The Moes claimed to represent all pregnant minors capable of, and willing to give, informed consent to an abortion, but who decline to seek the consent of both parents, as required by § 12P. *Id.*, at 13, 43.

4. Gerald Zupnick, M. D., a physician licensed to practice in Massachusetts. He is the medical director of the center operated by Parents Aid. He claims to represent all physicians in Massachusetts who, without pa-

become a law." Mass. Gen. Laws Ann. Const. Amend., Art. 48, Ref., Pt. 1.

⁶Because of the temporary restraining order and the injunction subsequently issued by the three-judge court, Juris. Statement A-33, A-34; App. 45-46, the parental consent provisions of § 12P have not yet been effective.

⁷The complaint as originally filed, named only Mary Moe I and Mary Moe II as the pregnant minor plaintiffs, with affidavits concerning their status attached. App. 16-18. Thereafter, in November 1974, affidavits were executed by Mary Moe III and Mary Moe IV. App. 19-22. The motion to certify the plaintiffs' classes, filed December 9, 1974, refers to the four Mary Moes. Similarly, the District Court referred to the fact that four Mary Moes were named in the action. 393 F. Supp. 847, 849 (Mass. 1975). The record does not disclose how or when Mary Moes III and IV were added as parties plaintiff. In any event, Mary Moes II, III, and IV were dismissed from the suit for failure to adduce evidence supporting their standing, *id.*, at 849 n. 1, and they have not appealed that ruling. The way in which Mary Moes III and IV entered the case, therefore, is of no concern to us here.

We note that the fact the pregnancy of Mary Moe I has been terminated (through an abortion performed under the protection of the temporary restraining order entered by the District Court, *id.*, at 850 n. 4) in no way moots the case. *Roe v. Wade*, 410 U. S. 113, 124-125 (1973).

rental consent, see minor patients seeking abortions. *Ibid.*

The defendants in the action, who are the appellants in No. 75-73 (and who are hereinafter referred to as the appellants), are the Attorney General of Massachusetts, and the district attorneys of all the counties in the Commonwealth.

Appellant in No. 75-109 (hereinafter referred to as the intervenor-appellant) is Jane Hunerwadel, a resident and citizen of Massachusetts, and parent of an unmarried minor female of childbearing age. Hunerwadel was permitted by the District Court to intervene as a defendant on behalf of herself and all others similarly situated.* Record Doc. 8.

On November 13, appellants filed a "Motion to dismiss and/or for summary judgment," arguing, *inter alia*, that the District Court "should abstain from deciding any issue in this case." Record Doc. 4, p. 2. In their memorandum to the court in support of that motion, appellants, in addition to other arguments, urged that § 12P, particularly in view of its judicial review provision, "was susceptible of a construction by state courts that would avoid or modify any alleged federal constitutional question." Record Doc. 5, p. 12. They cited *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1940), and *Lake Carriers' Assn. v. MacMullen*, 406 U. S. 498, 510-511 (1972), for the proposition that where an unconstructed state statute is susceptible to a constitutional construction, a federal court should abstain from deciding a constitutional challenge to the statute until a definitive state construction has been obtained.

The District Court held hearings on the motion for a preliminary injunction; these were later merged into the trial on the merits. It received testimony from various experts and from parties to the case, including Mary Moe I. On April 28, 1975, the three-judge District Court, by a divided vote, handed down a decision holding § 12P unconstitutional and void. 393 F. Supp. 847 (Mass.). An order was entered declaring § P "and such other portions of the chapter [112] insofar as they make specific reference thereto" void, and enjoining the defendants from enforcing them. App. 45-46; Appellants' Juris. Statement A-33, A-34.

The majority held, *inter alia*, that appellees Mary Moe I, Doctor Zupnick, and Parents Aid had standing to challenge the operation of the statute, individually and as representatives of their proposed classes, 393 F. Supp., at 850-852,⁹ and that the intervenor-appellant had standing

* Also permitted to intervene as defendants were Kathleen Roth, *et al.*, parents situated similarly to Hunerwadel, and Jane Doe, an anonymous parent of a pregnant unmarried minor. The District Court dismissed all the intervenors except Hunerwadel for failure to adduce facts necessary to show standing. 393 F. Supp., at 850. Technically, these dismissed intervenors, who have not appealed, might well be classified as appellees under our Rule 10 (4). Their status, however, does not affect the disposition of these cases.

⁹ In regard to appellee Baird, the majority stated: "In the light of the unassailable standing of other plaintiffs . . . we do not pass on the question of Baird's standing." 393 F. Supp., at 851.

to represent the interests of parents of unmarried minor women of childbearing age, *id.*, at 849-850. It found that "a substantial number of females under the age of 18 are capable of forming a valid consent," and viewed the overall question as "whether the state can be permitted to restrain the free exercise of that consent, to the extent that it has endeavored to do so." *Id.*, at 855.

In regard to the meaning of § 12P, the majority made the following comments:

"1. The statute does not purport to require simply that parents be notified and given an opportunity to communicate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenor in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for our considering it.

"2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.

"4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests." 393 F. Supp., at 855.

"The dissent is seemingly of the opinion that a reviewing Superior Court Judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation." *Id.*, at 855 n. 10.

"The parents not only must be consulted, they are given a veto." *Id.*, at 856.

The majority observed that "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 1967, 387 U. S. 1, 13," 393 F. Supp., at 856, and, accordingly, held that the State cannot control a minor's abortion in the first trimester any more than it can control that of an adult. Re-emphasizing that "the statute is cast not in terms of protecting the minor . . . but in recognizing independent rights of parents," the majority concluded that "[t]he question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?" *Ibid.*

The majority found that in the instant situation, unlike others, the parents' interests often are adverse to those of the minor and, specifically rejecting the contrary result in *Planned Parenthood of Central Mo. v. Danforth*, 392 F. Supp. 1362 (ED Mo. 1975), see *app.*, p. —, concluded:

"But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis

their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected." 393 F. Supp., at 857.

The dissent argued that the parents of Mary Moe I, by not being informed of the action or joined as parties, "have been deprived of their legal rights without due process of law," *ibid.*, that the majority erred in refusing to appoint a guardian *ad litem* for Moe, and that it erred in finding that she had the capacity to give a valid and informed consent to an abortion. The dissent further argued that parents possess constitutionally cognizable rights in guiding the upbringing of their children, and that the statute is a proper exercise of state power in protection of those parental rights. *Id.*, at 857-865.

Most important, however, the dissent's view of the statute differed markedly from the interpretation adopted by the majority. The dissent stated:

"I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counseling before having the abortion. The requirement of consent of both parents¹⁰ ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion." *Id.*, at 864.

The indicated footnote reads:

"The majority speculate concerning possible interpretations of the 'for good cause shown' language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute." *Ibid.*

Both appellants and intervenor-appellant appealed. We noted probable jurisdiction of each appeal and set the cases for oral argument with *Planned Parenthood of Missouri v. Danforth*, *ante*, and its companion cross-appeal. 423 U. S. 982 (1975).

III

Appellants and intervenor-appellant attack the District Court's majority decision on a number of grounds.

They argue, *inter alia*, and each in their or her own way, that § 12P properly preserves the primacy of the family unit by reinforcing the role of parents in fundamental decisions affecting family members; that the District Court erred in failing to join Moe's parents; that it abused its discretion by failing to appoint a guardian *ad litem*; and that it erred in finding the statute facially invalid when it was capable of a construction that would withstand constitutional analysis.

The interpretation placed on the statute by appellants in this Court is of some importance and merits attention, for they are the officials charged with enforcement of the statute.¹⁰

Appellants assert, first, that under the statute parental consent may not be refused on the basis of concerns exclusively of the parent. Indeed, "the 'competing' parental right consists exclusively of the right to assess independently, for their minor child, what will best serve that child's best interest [I]n operation, the parents' actual deliberation must range no further than would that of a pregnant adult making her own abortion decision." Brief for Appellants 23. And the superior court's review will ensure that parental objection based upon other considerations will not operate to bar the minor's abortion. *Id.*, at 22-23. See also Brief for Intervenor-Appellant 26.

Second, appellants argue that the last paragraph of § 12P¹¹ preserves the "mature minor" rule in Massachusetts, under which a child determined by a court to be capable of giving informed consent will be allowed to do so. Appellants argue that under this rule, a pregnant minor could file a complaint in superior court seeking authorization for an abortion, and, "[i]mportantly, such a complaint could be filed *regardless* of whether the parents had been consulted or had withheld their consent." Brief for Appellants 37-38 (emphasis in the original);

¹⁰ It is not entirely clear that appellants suggested the same interpretation in the District Court as they suggest here. See 393 F. Supp., at 855. Nevertheless, the fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue. Cf. *Wisconsin v. Constantineau*, 400 U. S. 433, 437 (1971).

The practice of abstention is equitable in nature, see *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496, 500-501 (1941), and it would not be improper to consider the effect of delay caused by the State's failure to suggest or seek a constitutional interpretation. Cf. *Baggett v. Bullitt*, 377 U. S. 360, 379 (1964). In the instant case, however, there has been no injury to appellees' rights due to the delay (if any) in the appellants' coming forward with the interpretation they now espouse. As a result of the various orders of the District Court, the challenged portion of the statute has never gone into effect. Nor can we adopt the view that once a request for abstention is made, it is beyond the power of the District Court to consider possible interpretations that have not been put forth by the parties. Indeed, it would appear that abstention may be raised by the court *sua sponte*. See *Railroad Comm'n v. Pullman Co.*, *supra*. Cf. *England v. Medical Examiners*, 375 U. S. 411, 413 (1964).

¹¹ "Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

Tr. of Oral Arg. 17: Appellants and the intervenor-appellant assert that the procedure employed would be structured so as to be speedy and nonburdensome, and would ensure anonymity. Brief for Appellants 38 n. 30; Brief for Intervenor-Appellant 26; Tr. of Oral Arg. 24-26.

Finally, appellants argue that under § 12P, a judge of the superior court may permit an abortion without parental consent for a minor incapable of rendering informed consent, provided that there is "good cause shown." Brief for Appellants 38. "Good cause" includes a showing that the abortion is in the minor's best interests. *Id.*, at 39.

The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto."¹²

Appellees, however, on their part, take an entirely different view of the statute. They argue that the statute creates a right to a parental veto,¹³ that it creates an irrebuttable presumption that a minor is incapable of informed consent,¹⁴ and that the statute does not permit abortion without parental consent in the case of a mature minor or, in the case of a minor incapable of giving consent, where the parents are irrationally opposed to abortion.¹⁵

Appellees specifically object to abstention. Their objection is based upon their opinion that "the statute gives to parents of minors an unbridled veto," Brief for Appellees 49, and that once that veto is exercised, the minor has the burden of proving to the superior court judge that "good cause" exists. *Ibid.* They view the "good cause" hearing as forcing the judge to choose "be-

tween the privacy rights of the young woman and the rights of the parents as established by the statute." *Ibid.* Assuming that "good cause" has a broader meaning, appellees argue that the hearing itself makes the statute unconstitutional, because of the burden it imposes and the delay it entails. *Ibid.*

IV

In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison v. NAACP*, 360 U. S. 167, 177 (1959). See also *Colorado River Conservation District v. United States*, — U. S. — (slip op. 12-13) (1976); *Carey v. Sugar*, — U. S. — (slip op. 6) (1976); *Kusper v. Pontikes*, 414 U. S. 51, 54-55 (1973); *Lake Carriers' Assn. v. MacMullan*, 406 U. S., at 510-511 (1972); *Zwickler v. Koota*, 389 U. S. 241, 249 (1967); *Railroad Comm'n v. Pullman Co.*, *supra*.

We do not accept appellees' assertion that the Supreme Judicial Court of Massachusetts inevitably will interpret the statute so as to create a "parental veto," require the superior court to act other than in the best interests of the minor, or impose undue burdens upon a minor capable of giving an informed consent.

In *Planned Parenthood of Missouri v. Danforth*, *ante*, we today struck down a statute that created a parental veto. (Slip op., at —.) At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion. In this case, we are concerned with a statute directed towards minors, as to whom there are unquestionably greater risks of inability to give an informed consent. Without holding that a requirement of a court hearing would not unduly burden the rights of a mature adult, cf. *Doe v. Rampton*, 366 F. Supp. 189 (Utah 1973), we think it clear that in the instant case adoption of appellants' interpretation would "at least materially change the nature of the problem" that appellants claim is presented. *Harrison v. NAACP*, 360 U. S., at 177.

Whether the Supreme Judicial Court will so interpret the statute, or whether it will interpret the statute to require consideration of factors not mentioned above, impose burdens more serious than those suggested, or create some unanticipated interference with the doctor-patient relationship, we cannot now determine.¹⁶ Nor need we

¹² See generally *Planned Parenthood of Missouri v. Danforth*, *ante*, at —; *Poe v. Gerstein*, 517 F. 2d 787 (CA5 1975), Juris. Statement pending, No. 75-713; *Jackson v. Guste*, — F. Supp. — (Civ. No. 74-2425) (ED La. Jan. 26, 1976); *Doe v. Zimmerman*, 405 F. Supp. 534 (MD Pa. 1975); *Doe v. Exon*, — F. Supp. — (Civ. No. CV 75-L-146) (Neb. Oct. 8, 1975); *Planned Parenthood Assn. v. Fitzpatrick*, 401 F. Supp. 554 (ED Pa. 1975); *Foe v. Vanderhoof*, 389 F. Supp. 947 (Colo. 1975); *Gary-Northwest Indiana Women's Services v. Bowen*, — F. Supp. — (Civ. No. H-74-289) (ND Ind. Jan. 3, 1975); *Wolfe v. Schroering*, 388 F. Supp. 631 (WD Ky. 1974); *State v. Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975).

¹³ "[The statute can] force a pregnant sixteen-year-old to become a seventeen-year-old mother because her own mother wants a grandchild." Brief for Appellees 33.

¹⁴ "[T]he parental consent statute constitutes a legislative decree that no person under age 18 is competent to consent to an abortion. This contravenes the line of decisions which have struck down certain irrebuttable presumptions as violative of due process." *Id.*, at 42.

¹⁵ "The statute has no exception for mature minors, or other minors with immature, emotionally upset parents." *Id.*, at 46.

¹⁶ As stated in n. 6, *supra*, the challenged portion of the statute has never gone into effect. The heated debate among the parties over the meaning of the statute is a strong indication of the ambiguities it contains. We assume that the Supreme Judicial Court will do everything in its power to interpret the Act in conformity with

determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome. It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented.

Appellees also raise, however, a claim of impermissible distinction between the consent procedures applicable to minors in the area of abortion, and the consent required in regard to other medical procedures. This issue has come to the fore through the advent of a Massachusetts statute, enacted subsequent to the decision of the District Court, dealing with consent by minors to medical procedures other than abortion and sterilization.¹⁷ As we hold today in *Planned Parenthood*, however, not all distinction between abortion and other procedures is forbidden. *Ante*, at —. The constitutionality of such dis-

its title: "An Act to protect . . . within present constitutional limits." See *Boehning v. Indiana State Employee Assn.*, 423 U. S. 6 (1975).

¹⁷ Prior to the enactment of that statute, the consent procedure in regard to abortion, at least as interpreted by appellants, was arguably merely a codification of the common law. See Brief for Appellants 24-39. The new legislation, Stat. 1975, c. 564, approved Aug. 28, 1975, reads:

"Chapter 112 of the General Laws is hereby amended by striking out section 12F, as amended by section 1 of chapter 335 of the acts of 1971, and inserting in place thereof the following section:

"Section 12F.

"No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

"Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

"Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (i) relied in good faith upon the representations of such minor that

tion will depend upon its degree and the justification for it. The constitutional issue cannot now be defined, however, for the degree of distinction between the consent procedure for abortions and the consent procedures for other medical procedures cannot be established until the nature of the consent required for abortions is established. In these circumstances, the federal court should stay its hand to the same extent as in a challenge directly to the burdens created by the statute.

Finally, we note that the Supreme Judicial Court of Massachusetts has adopted a Rule of Court under which an issue of interpretation of Massachusetts law may be certified directly to that Court for prompt resolution. Mass. Rules of Court, Sup. Jud. Ct. Rule 3:21 (1976). This Court often has remarked that the equitable practice of abstention is limited by considerations of "the delay and expense to which application of the abstention doctrine inevitably gives rise." *Lake Carriers' Assn. v. MacMullan*, 406 U. S., at 509, quoting *England v. Medical Examiners*, 375 U. C. 411, 418 (1964). See *Kusper v. Pontikes*, 414 U. S., at 54. As we have also noted, however, the availability of an adequate certification procedure¹⁸ "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U. S. 386, 391 (1974). This Court has utilized certification procedures in the past, as have courts of appeals. *Ibid.* and cases cited therein at 390 nn. 5 and 6.

The importance of speed in resolution of the instant case is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in *Planned Parenthood*, we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose this most serious barrier. Insofar as the issue thus ceases to become one of total denial of access and becomes one rather of relative burden, the cost of abstention is reduced and

he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

¹⁸ There is no indication that the Massachusetts certification procedure is inadequate. Indeed, the dissent in the District Court cited a prior case in which the procedure was employed with no apparent difficulty. 393 F. Supp., at 864 n. 15, citing *Hendrickson v. Sears*, 495 F. 2d 513 (CA1 1974).

the desirability of that equitable remedy accordingly increased.

V

We therefore hold that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes. In regard to the claim of impermissible discrimination due to the 1975 statute, a claim not raised in the District Court but subject to inquiry through an amended complaint, or perhaps by other means, we believe that it would not be inappropriate for the District Court, when any procedural requirement has been complied with, also to certify a ques-

tion concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P.

The judgment of the District Court is vacated, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

S. STEPHEN ROSENFELD, Assistant Attorney General, State of Massachusetts, and BRIAN A. RILEY, Boston, Massachusetts (FRANCIS X. BELLOTTI, Attorney General, MICHAEL EBY, GARRICK F. COLE, Assistant Attorneys General, THOMAS P. McMAHON, MARY LAURA RUSSELL, THOMAS P. RUSSELL, ROBERT J. REYNOLDS and MARY T. WELBY, with them on the brief) for appellants; ROY LUCAS, Washington, D.C. (LUCAS & STOLTZ and JOAN C. SCHMIDT, with him on the brief) for appellees.

NOTICE: These opinions are subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released * * * at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

abortion

THE WHITE HOUSE

WASHINGTON

September 4, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: BOBBIE GREENE KILBERG BK

SUBJECT: Solicitor General's Amicus Brief in Beal v. Doe

In his amicus brief, Solicitor General Bork argues that the Pennsylvania Medicaid plan satisfied the rational basis test for equal protection under the Fourteenth Amendment. The respondents have argued that the bar on payments for non-therapeutic abortions invidiously discriminates between "those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion" and thus that the limitation can be justified, if at all, only if it promotes a "compelling state interest". Bork has responded to this assertion as follows:

"Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures."

Attachment

cc: Philip Buchen ✓
 Sarah Massengale



THE WHITE HOUSE

WASHINGTON

September 4, 1976

MEMORANDUM FOR:

JIM CAVANAUGH

FROM:

BOBBIE GREENE KILBERG

SUBJECT:

Cases on Federal Funding
and Abortion

BK

Sarah Massengale called last evening with the request that I provide you this morning with information on the amicus curiae brief filed in March, 1976 by Solicitor General Bork in the case of Beal v. Doe. The brief was filed in support of the petitioners request that the U.S. Supreme Court grant certiorari to review a 1975 decision by the Third Circuit Court of Appeals that held that the State of Pennsylvania was required under the Medicaid program of Title XIX of the Social Security Act to pay for non-therapeutic abortions. Under Pennsylvania's Medicaid plan, payments for abortions had been limited to those abortions which were medically indicated, i.e. abortions certified by physicians as necessary for the health of the woman or necessary to prevent the birth of an infant with an incapacitating deformity or mental deficiency. Medicaid payments for abortions that were not required for medical reasons had been barred. This limitation had meant, in effect, that women covered by Medicaid in Pennsylvania who had voluntary, non-therapeutic abortions had to use their own money to pay for the abortions.

In contrast to the Third Circuit decision, the Second and Sixth Circuits had ruled that Title XIX permitted state Medicaid plans to deny coverage of abortions that were not medically necessary. In the 1975 Second Circuit decision in Roe v. Norton, the Justice Department filed an amicus brief in which it argued that the Medicaid statute required only that necessary medical services be covered. Justice



argued that since non-therapeutic abortions were not "necessary medical services", states should have the option to determine for themselves whether to include those abortions in their Medicaid programs.

In his amicus brief, the Solicitor General stated that the United States Government believed the Supreme Court should review the Beal v. Doe case because of the conflicting decisions of the lower courts and the substantial importance of the questions presented in the case to the federal government's oversight responsibilities under Title XIX. The Solicitor General further stated that the Government was of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated.

The plaintiffs in the Beal v. Doe case had raised the issue of both Title XIX and the equal protection clause of the Fourteenth Amendment. The U.S. District Court for the Western District of Pennsylvania ruled that the Pennsylvania limitation of coverage to abortions that are medically necessary did not contravene Title XIX but that the state restriction as applied during the first trimester of pregnancy did deny equal protection since it created "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." The defendants appealed to the Third Circuit Court of Appeals which held that Title XIX prohibits a participating state from requiring a physician's certification of medical necessity as a condition for funding during both the first and second trimesters of pregnancy. In light of this disposition, the court found it unnecessary to address the constitutional question. Though the Second and Sixth Circuits had ruled upon the statutory question, the Solicitor General's amicus brief addressed itself to both the statutory and constitutional questions since they were both raised by the respondents in opposing the granting of certiorari.



The Solicitor General's Office has informed me that the U.S. Supreme Court has accepted certiorari in Beal v. Doe but has not yet heard oral arguments on the merits. It is also my understanding that the Solicitor General's Office has decided not to file a separate brief on the merits but I am attempting to double-check this.

The only other federal funding cases which I am aware of involve hospitals and raise the general question of whether a hospital that provides obstetric services is required as a result of the 1973 Supreme Court abortion decisions to also permit abortions to be performed on their premises. Generally, the lower courts have found that public hospitals do have a duty to permit abortions to be performed on their premises but that private hospitals do not. On December 1, 1975, the Supreme Court refused to hear a challenge to a 1973 statute that permitted federally aided private hospitals to decline, on either religious or moral grounds, to permit abortions or sterilizations. The specific case involved a hospital in Montana run by a Roman Catholic Order.

Most of the litigation in regard to private hospitals has turned on the question of government funding and "state action." The prevailing, though not unanimous, view of the lower courts has been that the 1973 Supreme Court abortion decisions prohibit only state-imposed bars to abortion and do not cover bars imposed by private groups. Most courts have held that even when the private hospitals have sizable government funding, this funding is not sufficient "state action" to bring the hospitals within the law.

You may be interested to know that when Supreme Court Justice Stevens was on the Seventh Circuit Court of Appeals he wrote the majority opinion in the 1973 case of Doe v. Bellin Memorial Hospital. In that case the Seventh Circuit held as follows:

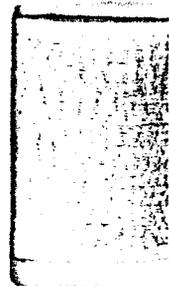
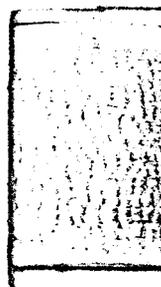
- (1) that a private hospital, by accepting funds under the Hill-Burton Act, did not surrender its right to determine whether it would accept abortion patients; and



(2) that notwithstanding the acceptance by private hospital officials of financial support from both Federal and state governments and the detailed regulation of the hospital by the state, implementation of private hospital rules relating to abortions did not constitute action "under color" of state law within the meaning of civil rights statutes, in the absence of a showing that the state sought to influence hospitals' policy respecting abortions either by direct regulation or by discriminatory application of its powers or benefits.

cc: Philip Buchen ✓
Sarah Massengale





September 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON *J Cannon*
SUBJECT: Study of Federal Funding for Abortions

This is a preliminary report on federal funding for abortions.

Background: On September 10th, in a meeting with the Catholic Bishops, the question of the use of federal funds for abortions was discussed. You indicated that you were directing the Domestic Council and the Counsel's Office to study this issue.

Purpose of the Study: The purpose of this study is to determine what current laws do permit the use of federal funds for abortions and to submit an evaluation of whether these funds are used for abortions in ways that exceed the minimum required by law.

Description: This study of the use of federal funds for abortion is focusing on three basic elements:

- The number of federal programs which make available funds for abortion and the number of abortions provided by these programs;
- What is the statutory authority, or other legal basis, for the availability of funds for abortion under the various federal programs; and
- An evaluation of whether the availability of funds under the various federal programs goes beyond the statutory or other legal minimum requirements.

All of the federal departments and agencies that have such programs have been directed to provide pertinent information. Our initial review of available data indicates that the figures are so scattered, diffused and incomplete that we will never get precise answers to your questions. However, in order to get a thorough, objective and accurate report, we will have to address the following difficulties:



- The diverse number of federal departments, agencies and programs which have some authority for funding abortions;
- The variety of legal interpretations in different jurisdictions and under diverse authorities; and
- Precise statistics on the number of abortions are difficult to verify because:
 - a) The different requirements for record keeping under the various federal programs which fund abortions; and
 - b) Abortions may be provided and recorded under different medical diagnosis.

Legal History: The Supreme Court first ruled on the issue of abortion on January 22, 1973 in two concurrent decisions. The Court held 7-2 in both cases that on the basis of a constitutional right to privacy States could not interfere with the decision of a woman and her doctor to terminate a pregnancy during its first three months. Further, while States could exercise some control over abortion in the second three months, on the basis of a legitimate state interest, they could constitutionally ban abortion only in the last trimester.

A majority held that the historic rationale for laws controlling abortion -- to protect the health and safety of a woman -- no longer applied during the early stages of pregnancy.

But key questions remained unanswered, including the difficult legal question of when life actually begins.

Pending Supreme Court Ruling: The Supreme Court has accepted certiorari to a 1975 decision by the Third Circuit Court of Appeals which held that the State of Pennsylvania was required under Medicaid to pay for non-therapeutic abortions. A memorandum on the case is attached at Tab A. This decision could support the concept that abortions should be available regardless of ability to pay, an issue that is raised in this year's Labor-HEW appropriations abortion amendment.

The Court, which will convene in October, has not yet heard oral arguments on the merits. The Solicitor General did file an amicus curiae brief in March, 1976, supporting Pennsylvania's request for review and its position that the state is not required to pay under Medicaid for non-therapeutic abortion (i.e. abortion on demand). The Solicitor General stated that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated.



Specifically in regard to the Fourteenth Amendment, the Solicitor General argued as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

1977 Labor-HEW Appropriations: As you know, the Labor-HEW Appropriations bill includes an amendment restricting federal funding of abortions. The effect of this provision is that no funds in the appropriation can be used for abortions "Except where the life of the mother would be endangered if the fetus were carried to term".

The conference report is not as restrictive as the language of the amendment and in some respects is contradictory; for example, it indicates that abortion would be permitted in cases of rape or incest.

The Conference Report states:

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

At issue here is whether the federal government will pay for non-therapeutic abortions for the poor.



Preliminary Findings:

A. Current Policies: Our initial analysis indicates that four agencies have legislative authority for medical services which they have interpreted to include authority to permit them to fund or provide abortions: HEW, DOD, VA, and Civil Service Commission.

It is worth noting that the Congress has not acted consistently to prohibit abortion as a means of family planning. For example, AID, which has family planning authority, is prohibited by Act of Congress from funding abortion. Similarly, in HEW the Congress has prohibited abortion under Title X of the Public Health Service Act (Family Planning) but has not addressed this issue in family planning under Title XIX (Medicaid) or Title XX (Social Services).

It is also worth noting that the Executive Branch over the years has not been consistent. As an administrative matter, HEW has decided that abortion can be a reimbursable service under the family planning section of Title XX. CSA, however, which has legislative authority for family planning has acted administratively to prohibit the use of CSA funds for any surgical procedures intended to cause abortion.

In December 1975, HEW, in order to comply with its General Counsel's interpretation of the Supreme Court decision, ordered all PHS facilities to provide abortions as a normal medical procedure in all states. Previously this procedure was not available where prohibited by State law, even if the State law was unconstitutional.

In March 1971, as a result of an Executive Order by President Nixon, the Secretary of Defense directed that military medical facilities should observe applicable state laws regulating abortion procedures in military medical facilities. In September, 1975, in order to comply with the Supreme Court decision of 1973, upon the ruling of its General Counsel, DOD ordered all military facilities to provide therapeutic abortions as a normal medical service for its beneficiaries and their dependents. Outside of military medical facilities, abortions are provided under the CHAMPUS program where this practice is consistent with State law.



The VA provides therapeutic abortions for a veteran when the procedure approved by a properly constituted VA medical board. Under the VA CHAMPUS program, survivors and dependents of veterans who are or were totally disabled from a service-connected disability can receive either therapeutic or non-therapeutic abortions. This is the same benefit provided certain dependents and survivors of active duty and retired members of the Armed Forces under the CHAMPUS program and in fact is administered by CHAMPUS as a result of a DOD/VA agreement.

Under the Federal Employees Health Benefits Program the Civil Service Commission provides abortion benefits for all covered Federal employees and their families through the payment of group health insurance premiums.

B. Current Practices: It is estimated that HEW is currently financing between 250,000 and 300,000 abortions annually at a cost of \$45-55 million. No information exists for departmental programs separating therapeutic from non-therapeutic abortions.

- The Social and Rehabilitation Service provides most of the funding for abortion services under Social Security Act Title XIX (Medicaid) and Title XX (Social Services). Expenditures for such abortion procedures must be estimated since Social Services and Medicaid data are not available on diagnostic or clinical classification or surgical or medical procedures.
- The Indian Health Service (IHS) provides comprehensive health services to American Indians and Alaskan natives. During fiscal year 1973, the IHS provided approximately \$750,000 for an estimated 3,100 abortion procedures.
- The Bureau of Medical Services estimates that in Public Health Service hospitals approximately \$34,000 was expended for abortion services in such hospitals during fiscal year 1974.

In calendar year 1975 DOD provided 6,849 abortions in its own facilities and 13,087 through CHAMPUS at an estimated cost of \$9 million.

During FY 76 only one veteran received a therapeutic abortion in a VA hospital. Figures for dependents and survivors of veterans are not kept separately from the CHAMPUS program and are included with the DOD statistics.



The Federal Employees Health Benefits Program administered by the Civil Service Commission is the single largest insured group in the nation. There are no separately kept statistics on the utilization of federal employee health benefits for abortions.

Comments: The study is underway and we are proceeding to sort out the legal issues and the details of current practices under existing Federal programs.

The question of sorting out the statistics on what is the current use of Federal funds for abortions will of necessity involve a good deal of estimating. We will seek to provide the most sound and responsible estimates that can be arrived at.

Initial analysis indicates that in some cases it may be difficult to determine the legal minimum requirements.

It is worth noting that the immediate legal context is subject to change by:

- a) Supreme Court decision in regard to the Pennsylvania case over the required use of medicaid funds for abortions,
- b) Final resolution of the "Hyde" amendment in the Labor-HEW Appropriations bill and subsequent legal challenges to that provision.

In effect, the key question of federal funding for abortions will in most instances crystalize into whether the poor are denied a medical service which is available to the rest of the population.

Summary: We can, at this stage, report that:

1. The data base in regard to funding abortions is incomplete and confusing.
2. The legal basis for much of this funding is not always clear and is in a process of change.
3. Both Congressional and Executive Branch actions have lacked consistency.
4. The key issue is whether the federal government will pay for non-therapeutic abortions for the poor.



THE WHITE HOUSE

WASHINGTON

September 4, 1976

MEMORANDUM FOR THE FILES

FROM: BOBBIE GREENE KILBERG

BK

SUBJECT: Beal v. Doe and Other Cases Involving
Government Funding and Abortion

This is to provide information on the amicus curiae brief file in March, 1976 by Solicitor General Bork in the case of Beal v. Doe. The brief was filed in support of the petitioners request that the U.S. Supreme Court grant certiorari to review a 1975 decision by the Third Circuit Court of Appeals that held that the State of Pennsylvania was required under the Medicaid program of Title XIX of the Social Security Act to pay for non-therapeutic abortions. Under Pennsylvania's Medicaid plan, payments for abortions had been limited to those abortions which were medically indicated, i.e., abortions certified by physicians as necessary for the health of the woman or necessary to prevent the birth of an infant with an incapacitating deformity or mental deficiency. Medicaid payments for abortions that were not required for medical reasons had been barred. This limitation had meant, in effect, that women covered by Medicaid in Pennsylvania who had voluntary, non-therapeutic abortions had to use their own money to pay for the abortions.

In contrast to the Third Circuit decision, the Second and Sixth Circuits had ruled that Title XIX permitted State Medicaid plans to deny coverage of abortions that were not medically necessary. In the 1975 Second Circuit decision in Roe v. Norton, the Justice Department filed an amicus brief in which it argued that the Medicaid statute required only that necessary medical services be covered. Justice argued that since non-therapeutic abortions were not "necessary medical services", states should have the option to determine for themselves whether to include those abortions in their Medicaid programs.



In his amicus brief, the Solicitor General stated that the United States Government believed the Supreme Court should review the Beal v. Doe case because of the conflicting decisions of the lower courts and the substantial importance of the questions presented in the case to the federal government's oversight responsibilities under Title XIX. The Solicitor General further stated that the Government was of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment to the U.S. Constitution required a federally-funded state Medicaid program to pay for abortions that were not medically indicated. Specifically in regard to the Fourteenth Amendment, the Solicitor General argued as follows:

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

The plaintiffs in the Beal v. Doe case had raised the issue of both Title XIX and the equal protection clause of the Fourteenth Amendment. The U.S. District Court for the Western District of Pennsylvania ruled that the Pennsylvania limitation of coverage to abortions that are medically necessary did not contravene Title XIX but that the state restriction as applied during the first trimester of pregnancy did deny equal protection since it created "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." The defendants appealed to the Third Circuit Court of Appeals which held that Title XIX prohibits a participating state from requiring a physician's certification of medical necessity as a condition for funding during both the first and second trimesters of pregnancy. In light of this disposition, the court found it unnecessary to address the constitutional question. Though the Second and Sixth Circuits had ruled upon the statutory question, the Solicitor General's amicus brief addressed itself to both the statutory and constitutional questions since they were both raised by the respondents in opposing the granting of certiorari.



The Supreme Court has accepted certiorari in Beal v. Doe but has not yet heard oral arguments on the merits.

Government funding also is involved in a group of cases involving the general question of whether hospitals that provide obstetric services are required as a result of the 1973 Supreme Court abortion decisions to permit abortions to be performed on their premises. Generally, the lower courts have found that public hospitals do have a duty to permit abortions to be performed on their premises but that private hospitals do not. Most of the litigation in regard to private hospitals has turned on the question of government funding and "state action". The prevailing, though not unanimous, view of the lower courts has been that even when private hospitals have sizable government funding, this funding is not sufficient "state action" to require those hospitals to accept abortion patients, absent a showing that the state sought to influence a hospital's policy respecting abortions either by direct regulation or by discriminatory application of its powers or benefits. In addition, on December 1, 1975, the Supreme Court refused to hear a challenge to a 1973 Federal statute that permitted federally aided private hospitals to decline, on either religious or moral grounds, to permit abortions or sterilizations.



THE WHITE HOUSE

WASHINGTON

September 28, 1976

MEMORANDUM FOR: JIM CONNOR
THROUGH: PHIL BUCHEN ^{P.}
FROM: BOBBIE GREENE KILBERG BK
SUBJECT: Cannon memo 9/21/76 re Study of
Federal Funding of Abortions

We participated in the drafting of the attached memorandum from Jim Cannon to the President, and we concur in its contents.

Since this memorandum has not yet been sent into the President, we would like to add an additional paragraph to page 3 of the attachment at Tab A. That paragraph will indicate that the Supreme Court has now accepted certiorari in a case involving public hospitals and the provision of abortion services. A re-typed page which includes the additional paragraph is attached (page 3 of Tab A).

Attachment



The Supreme Court has accepted certiorari in Beal v. Doe but has not yet heard oral arguments on the merits.

Government funding also is involved in a group of cases involving the general question of whether hospitals that provide obstetric services are required as a result of the 1973 Supreme Court abortion decisions to permit abortions to be performed on their premises. Generally, the lower courts have found that public hospitals do have a duty to permit abortions to be performed on their premises but that private hospitals do not. Most of the litigation in regard to private hospitals has turned on the question of government funding and "state action". The prevailing, though not unanimous, view of the lower courts has been that even when private hospitals have sizable government funding, this funding is not sufficient "state action" to require those hospitals to accept abortion patients, absent a showing that the state sought to influence a hospital's policy respecting abortions either by direct regulation or by discriminatory application of its powers or benefits. In addition, on December 1, 1975, the Supreme Court refused to hear a challenge to a 1973 Federal statute that permitted federally aided private hospitals to decline, on either religious or moral grounds, to permit abortions or sterilizations.

On the question of public hospitals and the provision of abortion services, the Supreme Court has accepted certiorari in the case of Doe v. Poelker, 515 F.2d 541 (1975). In that case, the Eighth Circuit Court of Appeals held that St. Louis, Missouri's policy prohibiting all non-therapeutic abortions in its publicly owned hospitals was unconstitutional "as a unwarranted infringement on pregnant women's right to privacy and as a denial of equal protection to indigent pregnant women." The Court of Appeals ruled that the two city-owned hospital facilities had to be made available for abortion services as they were for other medical services.



THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: September 28, 1976

Time:

FOR ACTION:

cc (for information):

Phil Buchen*

Jim Lynn

FROM THE STAFF SECRETARY

DUE: Date: Thursday, September 30

Time: 10 A. M

SUBJECT:

Jim Cannon memo 9/21/76 re Study of Federal
Funding for Abortions

ACTION REQUESTED:

 For Necessary Action For Your Recommendations Prepare Agenda and Brief Draft Reply For Your Comments Draft Remarks

REMARKS:

*Phil Buchen - do you have any additional comments to make.



PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

*Full copy to: Bobbie Kelber
Jim Canavan*

OFFICE OF THE
GENERAL COUNSEL

October 1, 1976

MEMORANDUM FOR: The Honorable Philip W. Buchen
Counsel to the President

FROM: William H. Taft, IV *William H. Taft, IV*
General Counsel

SUBJECT: Litigation Attacking the Anti-abortion
Provision in the Labor-HEW Appropriations
Act (Hyde Amendment)

We have been informed of the filing today of five separate law suits challenging the constitutionality of the so called "Hyde Amendment" to the HEW Appropriations Act. The Amendment, which went into effect today, prohibits the use of any of the appropriated funds "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

All of the suits center upon the effect of the Amendment in denying federal funds for abortions performed upon women welfare recipients entitled to Medicaid.

The nature and status of the suits are as follows:

Eastern District of New York (Brooklyn). Two suits have been filed. In one of them, brought by one or more planned parenthood groups, Judge Dooling has issued a Temporary Restraining Order "preventing the Secretary from "enforcing" the Hyde Amendment or withholding reimbursement by reason of the Amendment." The TRO will be effective for twenty days. In the meantime, we are to file a brief on October 12 in opposition to plaintiff's motion for a preliminary injunction. There has been no action in the second suit, which was filed by a city hospital association.

District of Columbia. Two separate suits have also been filed in the District of Columbia -- one on behalf of welfare beneficiaries, practicing physicians, and certain health clinics, and the other by the National Abortion Rights Action League. Judge Waddy has issued



a TRO in the first suit, and a hearing on the plaintiff's motion for a preliminary injunction is set for October 12 before Judge Sirica. No hearing has been sought or set in the other case.

District of New Jersey (Newark). Although an application for a TRO accompanied the suit filed in New Jersey, Judge Barlow has declined to issue such an order; and it is unlikely that any action will be taken in this case before next week. We understand that the suit has been brought by a family planning group associated with Rutgers University.

We are coordinating the defense of these law suits with the Department of Justice and will keep you advised of their status and any other suits which may be filed on this subject.

cc: Secretary Mathews





DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

OFFICE OF THE
GENERAL COUNSEL

October 1, 1976

MEMORANDUM FOR: The Honorable Philip W. Buchen
Counsel to the President

FROM: William H. Taft, IV *William H. Taft, IV*
General Counsel

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We are coordinating the defense of these law suits with the Department of Justice and will keep you advised of their status and any other suits which may be filed on this subject.

cc: Secretary Mathews



THE WHITE HOUSE
WASHINGTON

September 14, 1976

Bobbie called approval to Sarah on 9/14. This may be filed.

MEMORANDUM FOR: PHIL BUCHEN
FROM: BOBBIE GREENE KILBERG
SUBJECT: Draft Presidential Letters on Abortion

Bobbie

I received the attached memo from you for comment.

The question of a new Presidential letter on abortion to be used by Correspondence was raised when Anne Higgins presented a new version to Dave Gergen that seemed to have a right to life rather than a states' rights emphasis. Sarah and I reviewed and changed Anne's version and the attached letters are the result (Tab A).

Sarah and I were particularly concerned with two points:

- (1) that the letters state that the President is bound by his oath of office to uphold the law and thus the 1973 Supreme Court abortion decisions; and
- (2) that the letters not specifically mention the Republican Platform.

Both these concerns have been taken care of in the attached letters and, as you can see, they are very similar to the letters that are presently being sent out by Correspondence (Tab B).

Please have Shirley call me with your approval or disapproval of the new letters.

Thanks.



A



THE WHITE HOUSE

WASHINGTON

September 10, 1976

MEMORANDUM FOR: PHIL BUCHEN ✓
ROBERT T. HARTMANN
JACK MARSH
MAX FRIEDERSDORF
JIM LYNN
DAVE GERGEN

FROM: JIM CANNON *Jim*

SUBJECT: Draft Presidential Letters on Abortion

Attached for your comments and recommendations are two draft letters on the President's position on abortion to be used by the correspondence section in replying to letters on abortion. One is for the President's signature, the other for Roland Elliott's.

Could you please reply to Sarah Massengale, Room 220, Ext. 6776 by Tuesday, September 14, close of business.

Thank you.



3



THE WHITE HOUSE

WASHINGTON

DRAFT

Dear

President Ford has asked me to thank you for your thoughtful message concerning the abortion issue. He appreciates the concern which prompted you to share your views on this matter.

As you know, the President is bound by his oath of office to uphold the law as it was interpreted by the Supreme Court in the 1973 decisions on abortion. As a matter of personal philosophy, however, he has expressed his opposition to abortion-on-demand, and has been on record supporting a Constitutional Amendment that would return the power to legislate on this matter to each state. He feels strongly that abortion should only be available in very limited cases.

At the recent Eucharistic Congress in Philadelphia, the President expressed his concern over the growing irreverence for life. I am enclosing a copy of his remarks on that occasion. The President is determined to do his best to serve the interests of all the American people. Toward this end he sincerely appreciates hearing from concerned citizens like you.

Sincerely,

Roland Elliott



THE WHITE HOUSE

WASHINGTON

DRAFT

Dear :

Thank you very much for your letter on the proposed Human Life Amendments to the United States Constitution. As President, I am bound by my oath of office to uphold the law as it was interpreted by the Supreme Court in the 1973 decisions on abortion. As a matter of personal philosophy, however, I am opposed to abortion on demand and am on record supporting a Constitutional amendment that would return the power to legislate on this matter to each state. My belief is that abortion should be available only in very limited cases.

At the recent Eucharistic Congress in Philadelphia I expressed my concern over the growing irreverence for life. I am enclosing a copy of my remarks for you.

I appreciate your taking the time to express your views on this important subject.

Sincerely,

Gerald R. Ford



RE: Abortion

THE WHITE HOUSE
WASHINGTON
February 27, 1976

Dear /s/

Thank you very much for your letter expressing your concern about the serious matter of abortion. As President, I am bound by my oath of office to uphold the law as it was interpreted by the Supreme Court in the 1973 decisions on abortion. As a matter of personal philosophy, however, my belief is that abortion should be available only in very limited cases.

I also feel that abortion is a matter better decided at the State level and in 1973, as ~~Minority~~ Leader of the House of Representatives, I cosponsored an amendment to restore to the citizens of each State the power to regulate abortion.

Your letter tells me that you truly care about this problem. I share your concern. I hope you will retain your high ideals and, by your personal example, inspire others to care as you do.

Sincerely,

/s/
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revised - 3/25/76 - beo
proofed - rks/beo

GRF:RLE:DS:/s/
P-839 (2nd Rev.)
85

(Rec. 3/25/76)



RE: Human Life Amendments to Constitution
(Con Abortion)

THE WHITE HOUSE

WASHINGTON

, 1976

GENERAL
WE 3

Dear /s/

Thank you very much for your letter on the proposed Human Life Amendments to the United States Constitution. As President I am bound by my oath of office to uphold the law as it was interpreted by the Supreme Court in the 1973 decisions on abortion. As a matter of personal philosophy, however, my belief is that abortion should be available only in very limited cases.

I also feel that abortion is a matter better decided at the State level and in 1973, as Minority Leader of the House of Representatives, I cosponsored an amendment to restore to the citizens of each State the power to regulate abortion.

I appreciate your taking the time to express your views on this important subject.

Sincerely,

///s///
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recut and revised 3/25/76 -lrc
proofed lrc/rks

GRF:RLE:DS:/s/
P-40 (3rd Rev.)
60

(Rec. 3/25/76)