

The original documents are located in Box 9, folder “Defense Department - Abortion Policy (2)” of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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1. FYI

2. Files

Put desk re
"Defense abortion Policy"
along with related
materials.
1.

Legislative Affairs

27 JUN 1975

Honorable Timothy E. Wirth
House of Representatives
Washington, D. C. 20515

Dear Mr. Wirth:

I have been asked to reply to your June 11th letter to the President concerning Department of Defense abortion policy at military hospitals.

The Department of Defense is presently reevaluating the subject with a view toward an appropriate recommendation to the President in light of current federal and state law. The task is complicated by recent enactment of detailed legislation by several states, attempting to regulate this area more precisely than in the period prior to the Supreme Court decisions you mention. Several of the new state requirements have been found to be inconsistent with constitutional principles enunciated by the Supreme Court; but courts have recognized that certain state requirements may be constitutionally valid. Given the complex relationship between state and federal regulations at military bases, we believe that policy on this subject should not be changed without carefully considering all relevant legal issues.

We appreciate your interest in this sensitive and complicated matter. If we can be of further assistance to you, please do not hesitate to contact us.

Sincerely yours,

(Signed) L Niederlehner

Martin R. Hoffmann

Coordination:

White House Officials

ASD (LA)

Special Asst. to the Secretary
of Defense, Rm. 3E941, Pentagon



THE WHITE HOUSE OFFICE

REFERRAL

To: The Honorable Martin Hoffmann
General Counsel
Department of Defense
~~Washington, D. C. 20301~~

Date: June 20, 1975

ACTION REQUESTED

- ☐ Draft reply for:
☐ President's signature.
☐ Undersigned's signature.
- ☐ Memorandum for use as enclosure to reply.
- ☒ Direct reply.
☒ Furnish information copy.
- ☐ Suitable acknowledgment or other appropriate handling.
- ☐ Furnish copy of reply, if any.
- ☐ For your information.
- ☐ For comment.

NOTE

Prompt action is essential.

If more than 72 hours' delay is encountered, please telephone the undersigned immediately, Code 1450.

Basic correspondence should be returned when draft reply, memorandum, or comment is requested.

REMARKS:

Description:

☒ Letter: ☐ Telegram: ☐ Other:

To: The Honorable Gerald R. Ford
From: The Honorable Timothy E. Wirth
Date: June 11, 1975
Subject: Military Abortion Policy

WH 21268

By direction of the President:

Dudley Chapman
Dudley Chapman
Associate Counsel



Dulley
Chapman

June 17, 1975

Dear Mr. Wirth:

This will acknowledge receipt and thank you for your June 11 letter to the President urging that he rescind the 1971 Presidential Order relating to abortions at military bases and issue a new order to comply with Federal law rather than State laws as provided in the 1971 Order.

You may be assured your letter will be called to the attention of the President at the earliest opportunity. In the meantime, copies will be shared with the appropriate members of the staff.

With kindest regards,

Sincerely,

Vernon C. Loen
Deputy Assistant
to the President

The Honorable Timothy E. Wirth
House of Representatives
Washington, D.C. 20515

bcc: w/incoming to Philip Buchen for appropriate handling
and reply.

bcc: w/incoming to Office of the Military Aide - for your
information.

VCL:EF:VO:jy



15
TIMOTHY E. WIRTH
2D DISTRICT, COLORADO

COMMITTEES:
INTERSTATE AND FOREIGN
COMMERCE
SCIENCE AND TECHNOLOGY

Congress of the United States
House of Representatives
Washington, D.C. 20515

WASHINGTON OFFICE:
516 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-2161

DISTRICT OFFICE:
9485 WEST COLFAX AVENUE
LAKEWOOD, COLORADO 80215
(303) 234-5200

June 11, 1975

MF
The Honorable Gerald R. Ford
The White House
Washington, D.C. 20500

Dear Mr. President:

As you may know, certain military health agencies are currently following a policy on abortion which conflicts with the 1973 Supreme Court ruling on abortion. A Presidential order issued on April 3, 1971, directed that "the policy on abortions at military bases in the U.S. be made to correspond...with state law." Since several state laws place restrictions on abortion that the Supreme Court ruling disallowed, abortion practices vary from one installation to another.

I believe justice demands that military abortion policy be updated and standardized to conform with constitutional requirements stated by the Supreme Court. In order to insure consistency in the medical services afforded women at our various military installations, and in order to comply with the Supreme Court ruling, I hope that you will act as quickly as possible to rescind the 1971 Presidential order and issue a new order to bring all federally-provided medical services into conformity with the law.

I appreciate your attention to this question, and am sure you will act to resolve an inequity needlessly affecting so many lives.

Sincerely yours

Timothy E. Wirth
Timothy E. Wirth

TEW:ov



Mr. Bucher

THE WHITE HOUSE

WASHINGTON

July 16, 1975

Dear Art:

The President has asked me to respond to your letter of June 10, concerning the policy on abortions at American military bases in the United States. I apologize for the delay in doing so.

The American Civil Liberties Union report that you forwarded to the President alleges that a significant number of military bases are continuing to follow local laws on the subject of abortion that are inconsistent with the United States Supreme Court decisions in the cases of Roe v. Wade and Doe v. Bolton. The basis for this policy is said to be President Nixon's Executive Order in 1971 directing military bases to comply with local law on the subject. As you know, the ACLU is critical of this policy, since, in its view, many local laws still on the books are inconsistent with the Roe and Doe decisions.

It is my understanding that the Presidential order in question merely reflected the statutory scheme for military bases and other Federal reservations within the United States under the Assimilative Crimes Act (18 U.S.C. 13). That Act provides as follows:

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

Thus, even if President Ford were to rescind the Nixon order, the underlying statutory requirement would remain intact.

The problem which the ACLU has identified, if true, is more the result of poor legal advice than it is the result of the general



directive that local laws apply. Local statutes which are inconsistent with the Supreme Court rulings are not valid law either on or off a Federal reservation. We have discussed this matter with Martin Hoffman, General Counsel of the Defense Department, and have asked him to investigate the allegations to see what action, if any, should be taken.

I shall stay in touch with you on this matter.

Sincerely,

Richard D. Parsons
Associate Director and Counsel
Domestic Council

The Honorable Arthur S. Flemming
Chairman
United States Commission on
Civil Rights
Washington, D. C. 20245

bcc: Philip Buchen ✓
Jim Cavanaugh
Art Quern



THE WHITE HOUSE
WASHINGTON

*Military
to be
to be*

July 22, 1975

MEMORANDUM FOR:

JIM CONNOR

FROM:

PHILIP BUCHEN

P.W.B.

SUBJECT:

Caspar Weinberger's memo of
June 24, 1975, re Department
of Defense's Policy with respect
to women having abortions in
hospitals on military bases

In response to your memo of July 11, I attach a suggested
form of response for the President to send to Secretary
Weinberger.

Attachment



THE WHITE HOUSE
WASHINGTON

Dear Cap:

Thank you very much for your memorandum of June 24. I agree with you that it is troublesome for the Department of Defense to have indicated a possible change in the existing policy with respect to abortions performed in hospitals on military bases. Unfortunately, neither you nor I had any forewarning of this development prior to our meeting with the Catholic Bishops.

I have had Phil Buchen check into the matter and he finds that there is no intent to depart from the statement made by President Nixon in 1971 requiring local law to be followed in this respect. That statement is consistent with the statutory scheme for military bases requiring acceptance of local criminal law for all military installations within the United States.

Nevertheless, a problem arises from the recent enactment of detailed legislation by several States in an attempt to adjust their laws on abortion practices so as to conform to the applicable Constitutional principles which were enunciated by the Supreme Court. Already some of these enactments have been found to be inconsistent with the Supreme Court decisions, and others may well be held eventually to be inconsistent. The Department of Defense thus has a problem of how to be selective in adhering only to those laws which are Constitutional.

Department of Defense bases had apparently been following local laws without any regard for whether they were constitutional. As the Department reappraises the validity of some local laws, there



will probably be some changes in practice based on new legal advice, but not because of a change in policy. I understand that this is being studied by the Department of Defense preparatory to making appropriate recommendations to me.

If you do get any further inquiries on this subject, I suggest that you respond in accordance with this advice.

Sincerely,

The Honorable Caspar Weinberger
Secretary of Health, Education,
and Welfare
Washington, D. C. 20201



THE WHITE HOUSE

WASHINGTON


July 15, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR:

PHILIP BUCHEN

FROM:

JAMES E. CONNOR 

SUBJECT:

Caspar Weinberger's memo of June 24, 1975
re Department of Defense's Policy with
respect to women having abortions in hospitals
on military bases

The President has reviewed your memorandum of July 1 on the above subject and requested that you prepare a response to Cap from him. It was further noted:

"But, there is some sound merit to Cap's
comment on credibility - Why did DOD do it without
some forewarning? "

Please follow-up with appropriate action.

cc: Don Rumsfeld



THE WHITE HOUSE
WASHINGTON

tl
DOD
Gerald

July 1, 1975

MEMORANDUM FOR:

JIM CONNOR

FROM:

PHILIP BUCHEN

P.W.B.

SUBJECT:

Re Caspar Weinberger's memo of
June 24, 1975 re Department
of Defense's Policy with
respect to women having
abortions in hospitals on
military bases

This office has received letters from the following members of Congress urging that the President change the policy as represented by a Presidential Order in 1971 concerning abortions at military bases in the U.S.:

Congresswoman Millicent Fenwick
Congressman Timothy E. Wirth
Congressman Donald M. Fraser
Senator Charles H. Percy

We have referred these letters to the Defense Department for reply and attached is a copy of a reply sent Congresswoman Fenwick.

On the basis of this reply, it appears that the Defense Department is not contemplating a change in policy, although certainly no policy can be maintained which pays heed to unconstitutional State laws.

If the purpose of the Weinberger memo to the President is to raise this problem to the Presidential level, I vigorously object to doing so. If the President merely wants to be informed on this subject, I suggest that we ask the Department of Defense to prepare a report on the subject rather than to have the President guided by Cap's proposed memo.

Attachments



23 JUN 1975

Honorable Millicent Fenwick
House of Representatives
Washington, D. C. 20515

Dear Mrs. Fenwick:

I have been asked to reply to your June 4th letter to the President concerning Department of Defense abortion policy at military hospitals.

The Department of Defense is presently reevaluating the subject with a view toward an appropriate recommendation to the President in light of current federal and state law. The task is complicated by recent enactment of detailed legislation by several states, attempting to regulate this area more precisely than in the period prior to the Supreme Court decisions you mention. Several of the new state requirements have been found to be inconsistent with constitutional principles enunciated by the Supreme Court; but courts have recognized that certain state requirements may be constitutionally valid. Given the complex relationship between state and federal regulations at military bases, we believe that policy on this subject should not be changed without carefully considering all relevant legal issues.

As for abortion requests by refugees, the State Department has authorized the U. S. Public Health Service to make contractual arrangements with qualified off-base facilities when Department of Defense facilities cannot provide the service for policy or other reasons. It is our understanding that HEW coordinators at each refugee site are presently making the necessary arrangements, including transportation out of state if local laws prohibit the abortion.



We have taken the liberty of sending your letter to Mrs. Julie Vadala Taft of the Interagency Task Force, who is familiar with the details of this policy; we are advised that her office will be in touch with you shortly.


We appreciate your interest in this sensitive and complicated matter. If we can be of further assistance to you, please do not hesitate to contact us.

Sincerely yours,

Signed Martin R. Hoffmann
Martin R. Hoffmann

Coordination:

White House Officials

OSD Control #WH20802 
General Counsel - GC 1468
Subject - Abortions - #529
JSells/Chron/jo
Rewritten: JNelson/jp/19 Jun 75
Chron

Special Asst. to the Secretary
of Defense, Rm. 3E941, Pentagon

ASD (LA)

Legislative Affairs



THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.: /

Date: June 28, 1975

Time:

FOR ACTION: Phil Buchen ✓
James Cannon
Bob Hartmann
Jack Marsh

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Wednesday, July 2

Time: 12 Noon

SUBJECT:

Caspar Weinberger's memo of June 24, 1975
re Department of Defense's Policy with respect
to women having abortions in hospitals on military
bases.

ACTION REQUESTED:

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

REMARKS:

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





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

June 24, 1975

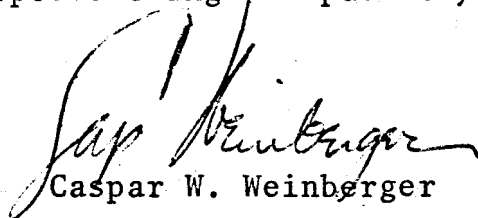
MEMORANDUM FOR THE PRESIDENT

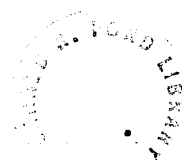
Newspaper reports state that the Department of Defense is considering changing their policy with respect to women having abortions in hospitals on military bases. As you will recall, the present policy is that abortions on military bases should be done in conformity with the laws of the States where the bases are located.

When the Catholic Bishops met with you last week, they specifically inquired as to whether there was going to be a change in policy and reiterated their endorsement of the existing policy and their opposition to any change. I advised them that I knew of no plan for any change and that I thought the present policy was a good one.

I do not see any advantage to be gained by changing the policy nor to public indications that the policy is about to be changed, and for that reason I would recommend that we try to discourage any further consideration of changing an existing policy which thus far has not caused any particular problems nor, so far as I am aware, any particular demand for change.

I also think that the Catholic Bishops would quite justifiably feel they had been misled if, a few days after their conference when none of us had any idea that any policy change was planned, a proposed change is publicly discussed by "Pentagon spokesmen."


Caspar W. Weinberger



June 9, 1975

6/12/75
sent
to
Dudley

Dear Millicent:

This will acknowledge receipt and thank you for your June 4 letter to the President urging that he rescind the 1971 Presidential Order relating to abortions at military bases and issue a new order to comply with Federal law rather than State laws as provided in the 1971 Order.

You may be assured your letter will be called to the attention of the President at the earliest opportunity. In the meantime, copies will be shared with the appropriate members of the staff.

With kindest regards,

Sincerely,

Vernon C. Loan
Deputy Assistant
to the President

The Honorable Millicent Fenwick
House of Representatives
Washington, D.C. 20515

bcc: ✓w/incoming to Phillip Buchen for appropriate handling and reply.

w/incoming to Office of the Military Aide - for your information.

VCL:EF:VO:mlg



MILLICENT FENWICK
5TH DISTRICT, NEW JERSEY

COMMITTEES:
BANKING, CURRENCY AND
HOUSING
SMALL BUSINESS

Congress of the United States
House of Representatives
Washington, D.C. 20515

4 June 1975

WASHINGTON OFFICE:
1610 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-7300

DISTRICT OFFICES:
41 NORTH BRIDGE STREET
SOMERVILLE, NEW JERSEY 08876
TELEPHONE: (201) 722-8200

POST OFFICE BUILDING
1 MORRIS STREET
MORRISTOWN, NEW JERSEY 07960
TELEPHONE: (201) 538-7267

mf
Honorable Gerald R. Ford
President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to urge you to rescind the 1971 Presidential Order issued by former President Nixon directing that "the policy on abortions at military bases in the U.S. be made to correspond...with state law." This order is still adhered to by both military health agencies and certain other non-military health services even though many stricter state laws are in direct conflict with the more liberal 1973 Supreme Court ruling on abortion.

There are constitutional grounds upon which this abortion policy should be updated to conform to Federal law. Now prompt action is especially necessary in view of the current confinement of 130,000 Vietnamese refugees on U.S. military bases. These women have fled from Vietnam unprepared for contraceptive protection. Here in the United States, the contraceptive services at the military bases are limited and civilian medical care is out of their reach because they are unable to leave the bases. These refugees are being weighted with an additional burden which appears to be the result of unequal Federal medical services.

In order to alleviate this injustice, I am hoping that you will issue a new order that will put federally-provided medical services in harmony with Federal law.

Thank you for your concern.

Yours respectfully,

Millicent Fenwick
MILLICENT FENWICK

Member of Congress



MF:vh

THE WHITE HOUSE
WASHINGTON

Date September 4, 1975

TO: Phil Buchen

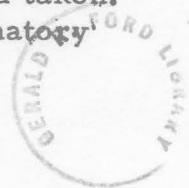
FROM: **DUDLEY CHAPMAN**

ACTION:

- ☒ Approval/Signature
- Comments/Recommendations
- Prepare Response
- Please Handle
- For Your Information
- File

REMARKS:

You are right that Niederlehner's memo differed from the approach we had taken. The attached memo is self-explanatory and provides a formal record.



THE WHITE HOUSE

WASHINGTON

September 4, 1975

MEMORANDUM FOR

Leonard Niederlehner
Acting General Counsel
Department of Defense

SUBJECT: DOD Abortion Policy

Martin Hoffmann forwarded to me on August 13, 1975, a copy of Mr. Jerome Nelson's memorandum on this subject. That memorandum concludes that a change in DOD policy is needed to the extent that military installations have been following state laws that are inconsistent with the Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973) and subsequent lower court decisions.

The only applicable Presidential directive is President Nixon's Executive Order of 1971 which requires that the Defense Department comply with local laws governing abortion. This, of course, means only valid state laws and so does not require compliance with state laws that are inconsistent with the ruling of the Supreme Court. It is, therefore, unnecessary to make any change in the Presidential directive in order to bring DOD policies into compliance with applicable court decisions.

Dudley Chapman, of my staff, has discussed this informally with Mr. Nelson who indicated that this is the way DOD intends to proceed, and that there is no need for a Presidential statement as he had suggested in his memorandum.

I agree that no change in the existing Presidential directive is required, and that DOD should issue whatever directives of its

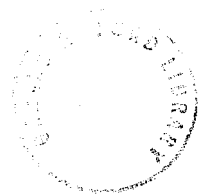


own may be needed to bring practices on military installations into compliance with the rulings of the Supreme Court.

Philip W. Buchen

Philip W. Buchen

Counsel to the President



588

THE WHITE HOUSE

WASHINGTON

August 22, 1975

learned
Niederlehner
G. J. G. C.

MEMORANDUM FOR: DUDLEY CHAPMAN

FROM: PHILIP BUCHEN *P.W.B.*

SUBJECT: DoD Abortion Policy

Attached is a recent memo to me from Marty Hoffmann and his copy of a memo from Mr. Niederlehner.

You will recall that you last worked on this subject to prepare a letter from the President to Cap Weinberger. There also have been previous letters on this subject to Representative Fenwick and other members of Congress. It seems to me that Mr. Niederlehner's memo presents the situation in a light different from that reflected in the letter prepared for the President to send Cap Weinberger.

Kindly let me have your comments and suggestions.

Attachments

LIBRARY



SECRETARY OF THE ARMY
WASHINGTON

August 13, 1975

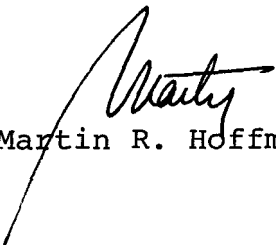
NOTE TO HONORABLE PHILIP BUCHEN

RE: DoD Abortion Policy

This represents a bit of unfinished business that I thought was taken care of before I left the General Counsel's office. It represents our best thinking on the issue at this time and, as I think you will see, it is probably the only way to go.

I will be happy to provide such transitional services as may accrue to the President's benefit until we get the problem resolved.

With best wishes.


Martin R. Hoffmann

Attachment



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

4 AUG 1975

*OK - Abbott
4 Aug '75*

MEMORANDUM FOR Mr. Hoffmann

VIA: Mr. Niederlehner

SUBJECT: DoD Abortion Policy

I. Background:

Through a series of 1970 memoranda and letters emanating from the Office of the Assistant Secretary of Defense (Health & Environment), the Department announced its original abortion policy as follows:

"Pregnancies may be terminated in military medical facilities when medically indicated, or for reasons involving mental health and subject to the availability of space and facilities and the capabilities of the medical staff. The performance of these procedures will be based upon the foregoing considerations, which will be applied without regard to local state laws. In each case a decision to terminate a pregnancy will require the agreement of at least two physicians. In addition, no person shall be required to perform, or assist in the performance of, pregnancy terminations in military hospitals, if such performance or participation would be contrary to his religious, moral or ethical beliefs."

This policy concerned only therapeutic abortions and never authorized elective abortions.

In March of 1971 Secretary Laird issued a memorandum to the Service Secretaries directing that military facilities should comply with those State laws which were "more restrictive" than the 1970 policy. This Laird memorandum was apparently the product of an instruction issued by President Nixon to Mr. Laird on March 24, 1971, where the President stated "*** I feel strongly that this Administration should not support a policy contrary to local State laws."



In April of 1971, the President himself publicly announced the new policy stating, inter alia "**** I have directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the States where those bases are located. If the laws in a particular State restrict abortions, the rules at the military base hospitals are to correspond to that law."¹/ The President explained that he was reversing the earlier liberalized rules partly because decisions as to abortion should remain within the province of the various States. As explained in the May 12, 1971, letter from Mr. Buzhardt to the ACLU, the old policy--therapeutic but not elective abortions--continued to apply in those States having more liberal laws.

Thus as to the first trimester, present DoD abortion policy can be summarized as follows:

- (1) At the very least, the proposed abortion must be therapeutic and not elective;
- (2) If the proposed abortion is therapeutic, it can only be performed under circumstances authorized by State law.

In 1973, the Supreme Court held that but for medical consultation requirements, State governments cannot interfere with the individual's decision to have an abortion in the first trimester. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). Subsequent Federal and State court decisions show that virtually all forms of State restriction in the first trimester are invalid. Among the matters invalidated were requirements as to the type of facility, spousal or parental consent, various licensing requirements, and provisions as to advice required of the doctor. Only one court has remotely suggested the validity of any restriction in the first trimester--the possibility of a carefully drawn plan pertaining to spousal consent.

¹/ See Weekly Compilation of Presidential Documents, Week Ending April 10, 1971.

II. Legality of Present Policy

A. Statutory Right

Both active duty members and military dependents have a statutory right to medical care, including maternity care. (10 U.S.C. 1074-- active duty; and 10 U.S.C. 1076, 1077 and 1079--dependents.) This statutory right does not expressly include the right to an elective abortion. However, when construed in light of recent court decisions, the courts are likely to conclude that these statutes include such a right.

B. Court Decisions

The Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973) held that a woman has the right to an elective abortion during the first trimester of pregnancy, subject only to consultation with her physician, State regulation of the physician's qualifications, and State prohibition of abortions not performed by a qualified physician. The lower Federal court opinions decided since then have generally ruled that it is a denial of equal protection under the Fourteenth Amendment to provide medical care or funds for other types of pregnancy care or for procedures medically indistinguishable, such as dilation and curettage and therapeutic abortions, but not for elective abortions. The cases construing the statutory term "necessary medical services" to include elective abortions appear to require our statutes to be construed similarly.

Present policy is inconsistent with the Supreme Court decisions in two ways. First, the policy authorizes only therapeutic abortions and not elective abortions. This clashes directly with the holding of Roe v. Wade that a woman has a Constitutional right to decide upon abortion in the first trimester with medical consultation. In my view, this case leaves no room for a policy which allows therapeutic abortions while ruling out voluntary abortions. Second, the DoD policy of compliance with State laws is also illegal insofar as those States unconstitutionally restrict the right of the woman to have the abortion during the first trimester-- as is the case with residency requirements, special licensing requirements, parental consent, etc.

In conclusion, a military member on active duty and a military dependent both have a legal right to an elective abortion during the first trimester, based on the statutes described above and the Supreme Court decisions and subsequent lower court decisions.

LIBRARY

III. Conclusions and Recommendations:

The possibility of litigation of this issue cannot be ignored. Several cases arising under Medicaid have recognized a cause of action for a denial of equal protection where State authorities disburse Federal funds for therapeutic but not elective abortions. Moreover, the Federal courts regularly entertain litigation at the behest of women who complain of a denial of their Constitutional right to abortion; these courts are consistently holding in favor of the woman where the refusal to perform the abortion is grounded upon State requirements improperly restricting her rights. Moreover, I am told that the local ACLU office is prepared to move against DoD if our policy is not changed. Finally, we have received a number of Congressional inquiries which directly or indirectly raise the question of the validity of our policy in the light of the Supreme Court decisions.

Litigation potential is worsened by the current policy concerning abortions for Indochinese refugees located at various military installations. Presently, arrangements are being made by HEW coordinators to secure abortions for refugees in off-base facilities if the installation facility cannot perform that service for policy or other reasons. These arrangements include transportation out of state where local laws prohibit an abortion. The fact that similar treatment is not afforded American dependents at the same base is an anomaly which poses obvious litigation difficulties.

The subject is, of course, a highly controversial one upon which many persons hold strong views. For example, the Washington Star of June 22, 1975, reports that a group of Catholic Bishops concerned over possible easing of the DoD policy "came away from a White House meeting with President Ford and top Government officials with what they considered to be an assurance that no attempt was being made to change military hospital policy." The article goes on to explain that the Bishops had apparently misconstrued an ambiguous remark by Secretary Weinberger.

There is no course of action that will satisfy everyone. Substantial groups will voice concern no matter what decision is made. Nor can we ignore the possibility that some zealous State official might harass or prosecute military doctors. The likelihood of this is probably quite

low. There would be no basis for such an effort if the hospital were located on land of exclusive Federal jurisdiction; for facilities located on lands of concurrent jurisdiction one must resort to the underlying cession agreement. Moreover, I am told that as a practical matter, State authorities are not now vengeful in this area--at least in the first trimester. Finally, I suggest that any policy reflect the notion that doctors and medical personnel cannot be ordered to perform procedures conflicting with their own ethical or moral views.

Notwithstanding the obvious policy, political and practical problems, the law seems to me clear. Accordingly, I recommend that we attempt to change present DoD policy.

Since the Department is now operating under Presidentially imposed policy it would be at least awkward (and arguably illegal) for the military to effect changes without approval from the Commander-in-Chief. The simplest procedure would lie in a recommendation to the President that the policy be changed. Should the President agree, he could then issue an appropriate statement similar in format to that authored by President Nixon in 1971.

For your assistance, we have drafted such a proposed statement. The proposed policy requires compliance with those State laws which do not conflict with the Supreme Court decisions. This proposal, although posing the practical difficulty of requiring field legal interpretations as to various requirements, is the best approach from the policy viewpoint.



Jerome Nelson
Assistant General Counsel
(Manpower, Health & Public Affairs)

Enclosure



PROPOSED PRESIDENTIAL STATEMENT

In 1973 the Supreme Court held that a woman has a Constitutional right to decide upon abortion in the first trimester where the decision is made in consultation with a physician. In subsequent litigation a number of State restrictions upon that right have been invalidated by the courts. As a result of a 1971 Presidential order requiring military hospitals to follow State law, Department of Defense policy concerning abortion in American military hospitals is not now consistent with the Constitutional principles enunciated by the Supreme Court.

Each of us may have our own deep convictions about this matter. But whatever one's own view, the Supreme Court decision nonetheless represents the law of the land and must be respected. Those of us sworn to the duty of faithfully executing the laws can do no less.

Accordingly, I have directed that the policy concerning abortions at those facilities correspond to State law only insofar as those State laws are consistent with the Supreme Court decision. In no event, however, should the military force its physicians or other medical personnel to perform procedures which they individually believe to be morally or ethically wrong.

4:30 p.m.

Tuesday, September 30, 1975

Dudley says he has seen the article in the newspaper on DOD abortions and doesn't see that anything needs to be done now.

*Have Dudley please get full
text of DOD policy revisions*

*10/1 4:35 relayed message
to Dawn.*

