The original documents are located in Box 9, folder "Defense Department - Abortion Policy (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Send to Jerald ter Horst

WACs Get Abortions Despite Ban
by Patrick Sloyan
(Excerpted from Newsday)

The Defense Department has been authorizing abortions - nearly 5,400 last year - for women in military service and the wives and daughters of servicemen. This violates Defense Department regulation and in some instances the laws of foreign nations where U.S. troops are stationed. Pentagon officials privately blame Defense Secretary Schlesinger for "looking the other way" and refusing to clarify Pentagon policy on abortion.

Bernard Katz, a spokesman for the Army surgeon general, said DOD policy based on executive order issued by former President Nixon in 1972, permits abortion only where physical or mental health is threatened.

To get around the Pentagon regulations, military physicians have found a loophole. "You can just say mental health is involved in demand abortions," one Army doctor said. -- (5/11/75)

1/30/75

Art Quern said he talked with Lazarus yesterday -- mentioned the two memos he had sent you on DOD abortion policies. Asked that I send copies to Lazarus.

Called Lazarus and he said he had promised to call me and ask if I could check on the status and he would assist if Mr. Buchen wasn't able to get to them.

The memos are with Chapman. So advised Lazarus -- Nancy had given him copies.

3A6

For Duldley, who
is working off the
original memo, I believe.

R.

THE WHITE HOUSE

WASHINGTON

May 14, 1975

MEMORANDUM TO: PHIL BUCHEN

FROM: ART QUERN

SUBJECT: DOD Abortion Policies

As a follow-up to my memorandum of May 8 regarding DOD abortion policies, we have discovered in further research something that may make the issue much easier to resolve.

As you will recall, the ACLU charges that DOD is still adhering to a 1971 Nixon Executive Order directing that any abortions on military bases be in accordance with relevant State law. The ACLU says this Order is in direct conflict with the 1973 Supreme Court ruling that State laws cannot limit abortions.

What we have found, however, is that President Nixon issued a statement not an Executive Order concerning Defense abortion practices (copy attached). Obviously that fact changes the nature of the problem.

For instance, perhaps the issue could be resolved by Defense making whatever policy changes are necessary on the subject, with no need to involve the President.

We will need your guidance on this, though, and I will look forward to whatever thoughts you have.

Thanks.

Attachment

127 Statement About Policy on Abortions at Military Base Hospitals in the United States. *April 3, 1971*

HISTORICALLY, laws regulating abortion in the United States have been the province of States, not the Federal Government. That remains the situation today, as one State after another takes up this question, debates it, and decides it. That is where the decisions should be made.

Partly for that reason, 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.

The effect of this directive is to reverse service regulations issued last summer, which had liberalized the rules on abortions at military hospitals. The new ruling supersedes this—and has been put into effect by the Secretary of Defense.

But while this matter is being debated in State capitals and weighed by various courts, the country has a right to know my personal views.

From personal and religious beliefs I consider abortion an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I cannot square with my personal belief in the sanctity of human life—including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.

Ours is a nation with a Judeo-Christian heritage. It is also a nation with serious social problems—problems of malnutrition, of broken homes, of poverty, and of delinquency. But none of these problems justifies such a solution.

A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands.

NOTE: The statement was released at San Clemente, Calif.

128 Message on the Opening of the 1971 Baseball Season. *April 5, 1971*

BY TRADITION the President of the United States or his representative signals the beginning of the major league baseball season by throwing out the first ball.

Although I regret that I cannot be at Kennedy Stadium in Washington for this opening game, I am very proud that my representative is Master Sergeant Daniel L. Pitzer of the United States Army. No President has ever been better represented than I am today.

For four long years, Sergeant Pitzer was a prisoner of the Viet Cong in South Vietnam. As he performs this American ritual of throwing out the first ball, he does so as a reminder that there are still

Send to Dudley Chapman

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by Patrick Sloyan
(Excerpted from Newsday)

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THE WHITE HOUSE

WASHINGTON

May 9, 1975

MEMORANDUM FOR: DUDLEY CHAPMAN

FROM: PHILIP BUCHEN P.W.B.

Attached is a memo of May 8 to me from Art Quern with an accompanying memo.

Kindly review and prepare suggested response for me to send.

Attachment

THE WHITE HOUSE

WASHINGTON

May 8, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: ART QUERN

SUBJECT: Department of Defense Abortion Policies

This is to solicit your guidance in a question regarding Federal policy toward legal restrictions on abortions.

Background

Pam Needham and I recently met with representatives of the American Civil Liberties Union to listen to their comments regarding Federal agency abortion policies. We learned at the meeting that their major concern was a 1971 Executive Order signed by President Nixon which directed that any abortions on military bases should be performed in accordance with relevant State laws.

Issue

The ACLU is concerned that the 1971 Executive Order conflicts with the more recent 1973 Supreme Court abortion ruling that State laws cannot limit abortions (at least in the first trimester). ACLU contends that some States still enforce restrictive abortion laws. Many of these laws are in the process of being tested in the courts.

The ACLU contends that by virtue of this Executive Order requiring military bases to adhere to State law in regard to abortions Federal policy does not conform to the ruling of the Supreme Court. In addition, they claim that abortion is the only medical service provided on Federal military establishments which is so subject to State statutes. They further argue that this policy is inhibiting other Federal programs (non-military) from adhering to the Supreme Court decision. Their solution is for the President to rescind the Executive Order and to allow unrestricted abortions on military installations and Indian health service facilities. The ACLU's paper is attached.

Comment

We told them we would look into the questions they were raising. They subsequently went to the press and indicated that they were not encouraged by the response they had received at our meeting. We would appreciate your suggestion as to how we should proceed.

Attachment

cc: Jim Cannon
Pam Needham
Bill Gulley

MEMORANDUM

RE: EXISTING POLICIES WITHIN THE FEDERAL GOVERNMENT WHICH ARE IN CONFLICT WITH THE 1973 SUPREME COURT DECISIONS ON ABORTION.

DATE: May 5, 1975

In the course of its efforts to secure nation-wide compliance with the 1973 Supreme Court decisions on abortion, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), the Reproductive Freedom Project of the American Civil Liberties Union has found that the abortion policies of federal government health care providers deviate significantly from the principles expressed in Roe and Doe and the cases decided since then.[1]

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[1]Litigation subsequent to Roe and Doe has clarified the following issues, among others, which were not explicitly resolved in those decisions: 1) whether public hospitals could refuse to permit abortions, 2) whether welfare payments could be denied for abortions, and 3) whether consent, spousal or parental, could be required for a woman to obtain an abortion. Courts have consistently provided negative answers to these questions, and in the course of doing so, have referred back to Roe and Doe and the clear enunciation there of a woman's fundamental right to have an abortion within the first six months of pregnancy.

Cases in which public hospitals have not been allowed to refuse to permit abortions are Nyberg v. City of Virginia, Minnesota, 495 F.2d 1342 (1974), Doe v. Hale Hospital, 500 F.2d 144 (1974), Doe v. Poelker, 497 F.2d 1063 (8th Cir. 1974), Doe v. Mundy, 378 F.Supp. 731 (E.D. Wisc. 1974), aff'd _____ F.2d _____ (7th Cir. Jan. 30, 1975), Orr v. Koefoot, 377 F.Supp. 673 (D. Neb. 1974), Santiago v. Colon, Civil No. 74-862 (D.P.R. Aug. 6, 1974), and Roe v. Arizona Board of Regents, 2CA-Civ. 1834 (Ariz. Ct. of Appeals, April 21, 1975). In two of these cases (Nyberg v. City of Virginia, Minn. and Doe v. Hale Hospital), the Supreme Court has refused to review appeals from the hospitals thereby leaving the lower courts' orders intact. And in two more of these cases (Doe v. Poelker and Doe v. Mundy), the courts

(footnote continued on next page)

Among those federal agencies whose policies conflict with the Supreme Court's and lower federal courts' decisions are the Department of Defense, the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), the Indian Health Service, the Bureau of Medical Services, and the Peace Corps.

In addition, many federal employee health insurance programs do not cover abortion as a legitimate medical expense. Since all federal employee health insurance policies do provide coverage

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(footnote continued from preceding page)

have said not only that public hospitals cannot refuse to provide abortions, but also that they have the positive duty to provide services for them.

Those cases in which courts have ruled that welfare payments cannot be denied for abortions, whether "elective" or "therapeutic," are Klein v. Nassau Medical Center, 347 F.Supp. 496 (E.D. NY 1972), Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973), Roe v. Norton, 380 F.Supp. 726 (D. Conn. 1974), Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974), aff'd on other grounds, 505 F.2d 186 (3rd Cir. 1974), vacated on other grounds and hearing en banc ordered on Jan. 31, 1975, Roe v. Ferguson, No. 74-315 (S.D. Ohio, Sept. 16, 1974) at 43 LW 2143, Wulff v. Singleton, No. 74-1484 (8th Cir. Dec. 31, 1974, reversing 380 F.Supp. 1137 (E.D. Mo. 1974), Doe v. Myatt, No. A3-74-48 (D. N.D. Jan. 27, 1975), and Doe v. Westby, 383 F.Supp. 1143 (D. S.D. 1974). These rulings have all reasoned that when a medical benefits system pays the expenses of women who choose to terminate their pregnancies by childbirth, it must also pay the expenses of women whochoose to terminate their pregnancies by abortion. In short, the state must be neutral in the childbirth v. abortion choice.

Cases in which consent requirements have been declared unconstitutional are the following: Coe v. Gerstein, 376 F. Supp. 695 (7 D. Fla. 1973), Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973), Wolfe and Crossen v. Schroering and Hancock, Civ. No. C-74-186-L (W.D. Ky. Nov. 19, 1974), Baird v. Bellotti, Civ. No. 74-4992-F (D. Mass. April 28, 1975), Foe v. Vanderhoof, No. 74-F-418 (D. Colo. Feb. 5, 1975), Jones v. Smith, 278 So. 2d 339 (Fla. Ct. App. 1973), and Doe v. Doe, 314 N.E. 2d 128 (Mass. S.J.C. 1974). On this issue, the courts have reasoned that since a state itself cannot prohibit a woman from having an abortion, it cannot delegate this veto power to her husband or parents.

for childbirth, those which do not provide coverage for abortion clearly limit a woman's options insofar as she is denied one of her only two alternatives--i.e., childbirth and abortion--to her condition of pregnancy. Although no court decisions have required payments for abortions, per se, they have always reasoned that when a public agency provides payment for maternity care, payment for abortion must be provided also.

THE 1971 PRESIDENTIAL ORDER

While the Department of Defense, CHAMPUS, the Indian Health Service, and the Bureau of Medical Services sometimes provide abortion services, they do so only on the basis of the pre-Roe and -Doe Presidential Order of 1971, which specifically directed military base hospitals to perform abortions in accordance with state law. Its purpose was to overturn the more liberal policy issued by the Department of Defense on July 31, 1970, which permitted abortions at military base hospitals, regardless of state law.

Although President Nixon's justification for handing down this order might have been based on a desire to minimize conflict between state and federal law and to keep military bases from projecting the reputation of "abortion mills," a more likely rationale for the Order was his personal aversion to abortion, fortified by public opposition to the military's policy reflected in mail to the White House. Certainly the former two concerns were vitiated by the 1973 rulings which made abortions legal in all states.

In his statement upon delivering the Order on April 3, 1971, the former President said:

> . . . 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 rule at the military base hospitals are to correspond to that law.
>
> The effect of this directive is to reverse service regulations issued last summer, which had liberalized the rules on abortions at military hospitals. The new ruling supersedes this--and has been put into effect by the Secretary of Defense.

And further in the same statement:

> A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands.
>
> Weekly Compilation of Presidential Documents, No. 15, week ending April 12, 1971, p. 598.

In 1971, state laws varied considerably. Some seventeen states had already "liberalized" their abortion laws, while other states were beginning to rethink theirs. After the Supreme Court decisions, there could still be variations from state to state with respect to some aspects of abortion law (e.g., states could make regulations to safeguard maternal health in the second trimester, and they could proscribe abortion altogether in the third trimester unless a woman's life or health were in danger), but the states could not constitutionally interfere with a woman's decision to have an abortion during the first

six months of pregnancy.

In short, the Supreme Court ruled in 1973 that the abortion decision 1) was protected by the constitutional right of privacy and the exercise of that right, 2) was a matter only for the pregnant woman and her physician, 3) could not be prohibited by the state during the first six months of pregnancy (or prior to viability), and 4) if prohibited thereafter, must nevertheless be protected when the woman's life or health was at stake. At the same time, the Supreme Court said that all state laws must conform with the trimester scheme it devised.

Thus, if the 1971 Presidential Order is read now in light of the 1973 decisions, there need be no real conflict. If states had struck down their old laws and made their new ones to conform with the guidelines of Roe and Doe, there would be no problem with restrictive state laws, and hence with the Presidential Order. However, either out of sheer defiance or simple neglect of these decisions, states have both kept their old restrictive laws and passed additional ones which are in direct violation of Roe and Doe.

In actuality, the Presidential Order is interpreted very strictly according to pre-1973 standards so that any dispute between a restrictive state law and the Supreme Court decisions is resolved by federal health care providers on the side of state law. In addition, the military branches have their own regulations which are even more restrictive than many state laws.

Although the state laws which infringe upon a woman's right to have an abortion are being systematically challenged and invalidated in the courts, it is clear that some states will never tire of defying the Supreme Court by continuing to pass restrictive abortion legislation. This is especially true of legislators who accord less importance to the Constitution than to pressure from isolated groups seeking to impose their beliefs upon the entire society.[2] It is not difficult to see how the conflict between restrictive state laws coupled with the 1971 Presidential Order, and the Supreme Court decisions, continue to confuse and intimidate health care providers within the federal government.

This confusion is understandable in light of the Executive Branch's failure to revise its 1971 policy after the 1973 Supreme Court decisions were handed down. Although the '71 Presidential Order is legally obsolete, that fact is simply not known to government health care providers who think they must abide by either unconstitutional state laws or the policies of their own agencies, rather than the law of the land.

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[2]See "Constitutional Aspects of the Right to Limit Childbearing," a Report of the United States Commission on Civil Rights, April, 1975. Its recommendations to the Congress are 1) to reject constitutional amendments proposed to undermine existent constitutional guarantees in matters related to childbearing; 2) to reject any other legislation proposed to restrict such constitutional guarantees, and to repeal that which has already been enacted; and 3) specifically to repeal a discriminatory, anti-abortion provision in the Legal Services Corporation Act.

Currently, when asked about their abortion policies, administrators of the agencies enumerated above cite the 1971 Presidential Order only. Their failure to mention the Supreme Court decisions indicates that 1) they simply do not acknowledge those decisions, or 2) they do acknowledge the decisions, but feel that the Supreme Court decisions cannot supersede a Presidential Order, and that only another Presidential Order can. The latter seems more prevalent.

This unnecessary confusion can be eliminated easily with the issuance of a new Presidential Order, rescinding the old one and ordering all government policies regarding abortion to be made in accordance with Roe and Doe.

Summarized below are the results of my inquiry into the current policies of government related health care providers on abortion services.

DEPARTMENT OF DEFENSE

In response to a letter of inquiry (Jan. 23, 1975) to the Department of Defense, Vernon McKenzie, Principal Deputy Assistant Secretary of Defense, Department of Health and Environment, said:

1. In October 1966, the Secretary of Defense issued a memorandum to the Secretaries of the Military Departments which directed that family planning services and supplies, including counseling and guidance, be provided in accordance with sound medical practice and subject to the availability and facilities and the capabilities of the medical staff of a military facility.

2. In April 1971, the President directed that military facilities located in states whose abortion laws are more restrictive than this Department's general policy must adhere to those states' laws; and

3. No such modification of the above family planning policy is in effect concerning sexual sterilization.

Under the broad family planning policy which McKenzie cites, there is evidence that Medical Corps members feared performing a variety of medical duties in violation of a state civil or criminal statute. In the spring of 1970, DOD Deputy Assistant Secretary Louis M. Rousselot issued a memorandum to the Surgeons General in response to this problem. The memorandum declared, "State statutes have no force or effect on Federal officers when engaged in Federal functions pursuant to federal law." Rousselot then requested wide dissemination of the memorandum in order "to allay the fears and anxieties of any Medical Corps officers who may be concerned about this matter."

On July 16, 1970, Rousselot issued a memo specifically on abortions, saying they were to be performed "when medically necessary or for reasons of mental health," and subject to the availability of space, facilities, and capabilities of the medical staff. On July 31, 1970, Rousselot further clarified this policy: he said clearly, "authorized family planning procedures should be provided in military facilities in the United States without regard to local state laws." (Emphasis mine.) This policy no doubt precipitated the April, 1971 Presidential Order, which made abortion an anomaly on military bases in that it was governed by state law when all other "federal functions" were governed by federal law.

Now that the Presidential Order and the Supreme Court decisions are in conflict, I am told (by telephone) by Major Thomas Ely, Consultants and Ambulatory Division, Office of the Army Surgeon General, that the three Surgeons General have petitioned the Secretary of Defense to change Department policy to comply with Roe and Doe. However, McKenzie's letter did not mention any current effort to revise military policy, and I have not received any response to my 3/11/75 letter to him, asking about such revision.

Although the various branches of the military have formulated their own policies with respect to abortion, they all defer to state law when it is more restrictive. As the policies of the separate military branches will demonstrate below, there are current regulations to permit only "medically indicated" abortions, to require parental and spousal consent, consultation with a second physician, and the imposition of an arbitrary time frame within which abortions "should" be performed.

Army

Although there is no definition of what constitutes a "medical indication" for abortion in the written Army policy, I was told per telephone by the Director of Health Care Operations that the Army does abortions "for health reasons," a phrase which suggests the "therapeutic"/"elective" distinction. If the Army performs only "therapeutic" abortions, its policy violates Roe and Doe and subsequent litigation on that ground, as does its practice of requiring a consulting physician and parental consent for minors.

The Army's policy, as stated in Army Regulations 40-3, paragraph 2-25 (September 17, 1973) appears as follows:

> c. Abortions may be performed in Army MTF's (Military Treatment 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. Written consent of the patient and concurrence of one qualified physician consultant are required prior to the procedure. Consent prior to abortion of unemancipated minors will be obtained in accordance with paragraph 2-24 . . . .

When there exists a conflict with this policy and state law:

> f. Abortion procedures in Army MTF's in those states where the state criteria on abortions are more restrictive than the policy outlines in c above shall be in accordance with the more restrictive criteria.

It is impossible that any state law in conformance with Roe and Doe could be more restrictive than the policy outlined in "c."

Air Force

It is noteworthy that "therapeutic" abortion is defined in the Air Force regulations as "the removal of the intra-uterine human embryo or fetus from its mother before viability" when in fact, this is an accurate definition for all abortions, both "therapeutic" and so-called "elective." (There is no provision in the Air Force regulations for "elective" abortions.)

The policy of the Air Force is as follows:

> When medically indicated including mental health reasons, pregnancies may be terminated in Air Force hospitals subject to the availability of space, facilities and the capability of the medical staff, ideally before 12 weeks of gestation. Although Air Force medical practice is not subject to regulation under state law, it is a matter of policy in those states where criteria on termination of pregnancies are more restrictive than the above, the Air Force will conform to those statutes and practices which are determined applicable by proper state authorities until changed or amended by state legislative action. In those states that lack current legislation or whose legislation is ambiguous, determination or interpretation of the state law is the responsibility of the local Judge Advocate.
>
> Air Force Regulations 160-12, paragraph 23 re: "Therapeutic Abortion" (Sept. 9, 1974).

Air Force policy requires both spousal and parental (in the case of unmarried minors) consent. While no concurring physician's opinion is required, the patient's medical record must contain statements of 1) need for a "therapeutic" abortion, and 2) consent from the patient, spouse, and parents, as applicable. Thus, the certification of "therapeutic" need, the consent requirements, and the "suggestion" that abortions be performed before twelve weeks of gestation all infringe upon a woman's fundamental right to decide with her physician to have an abortion, as defined by Roe and Doe.

In keeping with the practice of general military health care, when space, facilities, or staff is not available, patients may be referred to other Air Force hospitals or else given a "non-availability" statement for treatment in other kinds of facilities.

It should be noted that in the Air Force sterilization procedures may be performed "in accordance with sound medical practice subject only to the availability of space and facilities and the capabilities of the medical staff. Neither State laws nor local medical practices will be a factor in making these determinations." (Emphasis mine.)

Navy

On April 30, 1975, per telephone conversation, I was told by Lieutenant Bob Taylor in the Management Information Division that pre-Roe and Doe Navy regulations (SECNAVINST 6300.2A, Form A 71) are "out of date, illegal, and no longer used." Lt. Taylor says that there are no written instructions now, and until general Department of Defense policy is revised to comply with Roe and Doe, the Navy will use Roe and Doe as its policy, even when state laws conflict.

However, when asked about specific requirements of the new Department of Defense regulations (which he had in hand, but could not release because they have not been finalized), Lt. Taylor said that only in the first trimester will abortions be performed in accordance with Roe and Doe. In the second trimester, he said, abortions will be performed in accordance with local law (the Supreme Court decisions allow second trimester regulations by the states only to safeguard maternal health). In addition, there are spousal and parental consent requirements "in the absence of local law to the contrary."

Clearly, then, the Department of Defense's proposed revised policy will not be in conformance with the guidelines established by Roe and Doe unless further revisions are made.

CHAMPUS

The Civilian Health and Medical Program of the Uniformed Services is a cost-sharing civilian health care program for approximately eight million dependants and retirees of the seven Uniformed Services: Army, Navy, Air Force, Marine Corps, Coast Guard, and the Commissioned Corps of the Public Health Services and of the National Oceanic and Atmospheric Administration.

While there is no explicit language excluding abortion coverage in the CHAMPUS pamphlet, I was told (per telephone conversation) by the Director for CHAMPUS Policy, Office of Assistant Secretary of Defense for Health and Environment, that policy with respect to abortion is to follow state law, and further, that CHAMPUS probably does not provide coverage for abortion services where there is any conflict between state and federal law.

Because the CHAMPUS program covers military dependents and retirees, it seems highly probable that the 1971 Presidential Order is the reason--direct or indirect--for CHAMPUS's policy, even if the Order itself is not cited as the basis for it.

INDIAN HEALTH SERVICE

The Indian Health Service's 3/28/72 statement of policy with respect to abortion remains unchanged since Roe and Doe:

> Although the doctrine of Federal supremacy provides that state and local laws shall not be binding on Federal officers and employees acting within the scope of their office, it is Presidential policy that abortion procedures in Federal medical facilities be made to correspond with the laws of the state where those facilities are located.
>
> Emphasis mine. Indian Health Manual, TN No. 72-2 (3/28/72), 3-9.2, Abortions, p. 4.

Sterilizations, however, are a private matter between patient and physician:

> The performance in IHS facilities of male or female sterilization procedures . . . is a matter to be decided between the patient and the physician, irrespective of state laws.
>
> Ibid., Sterilizations, p. 5.

Because the Indian Health Service is part of the Health Services Administration, under the aegis of the Department of Health, Education, and Welfare, a letter of inquiry regarding the above was addressed to Dr. Louis Hellman, Deputy Assistant Secretary for Population Affairs, DHEW. Dr. Hellman's response (March 19, 1975) included the following points:

1. The Indian Health Service was advised by our (HEW's) General Counsel to follow the Presidential Order and will continue to do so until a new Presidential Order is issued;

2. In spite of the Supreme Court Decisions of 1973, each state law must be tested and found unconstitutional; and

3. There is no way at the present time that HEW can set up a standard national policy which would abridge state law.

BUREAU OF MEDICAL SERVICES

The Bureau of Medical Services is also part of the Health Services Administration, Department of Health, Education, and Welfare. Pertinent health care providers in its jurisdiction are Public Health Service hospitals. I was told in a letter (April 7, 1975) by the Director of the Bureau of Medical Services that "the policy of the Bureau of Medical Services conforms with the policy established by the Administrator of the Health Services and Mental Health Administration on February, 1972." The policy for the Bureau of Medical Services is exactly the same as that for the Indian Health Service (see above).[3]

PEACE CORPS

While the Peace Corps pays for all other health needs of its Volunteers, the Peace Corps says in its 12/5/73 Manual (Section 242, p. 7) that "the medical expenses incurred by a Volunteer in having an abortion will not be paid by the Peace

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[3]The Health Services and Mental Health Administration are now two separate agencies. The Health Services Administration includes the 1) Indian Health Service, 2) Bureau of Medical Services which provides direct care to eligible persons through Public Health Service hospitals and clinics, 3) Bureau of Community Health Services which provides direct health care through grant programs, and 4) Bureau of Quality Assurance which does not provide any direct health care.

Corps." In recent conversations with Peace Corps personnel, we have learned that there is a more lenient, unwritten policy towards paying the expenses incurred for a "therapeutic" abortion, the definition for which appears to be subjective and arbitrary at worst, and purely medical at best.

Nevertheless, adopting what it calls a policy of complete neutrality with regard to abortion, the Manual stresses that "The Peace Corps does not authorize abortions in any sense." (Underlining in original.) The Manual does say that medical advice, counseling, and return transportation to the United States will be provided for all single pregnant Volunteers, but not the cost of the abortion itself.

Thus, while the Peace Corps does not refer to the Presidential Order of 1971, it nevertheless evades compliance with the 1973 Supreme Court decisions. And again, an agency of the federal government has agreed to provide care for only one alternative to pregnancy (childbirth), while denying care for the other (abortion). Such discretion on the part of public policy makers has been struck down as unconstitutional by the numerous courts which have dealt with the same issue as it applies to welfare recipients.

FEDERAL EMPLOYEE HEALTH INSURANCE PROGRAMS

The Federal Employees Health Benefits Law requires its several plans to include "obstetrical benefits." (See Section

8904, "Types of Benefits," Appendix A, Chapter 89, Title 5, United States Code--Health Insurance.) Again, the principle established in the Medicaid cases regarding payments for elective abortions is pertinent: when an agency of the government pays for general obstetrical and gynecological services, it must pay for both options used to deal with pregnancy--that is, childbirth and abortion.

In reviewing the manuals provided for the forty-six government-sponsored health insurance programs, I find that all forty six provide maternity coverage while only twenty eight health plans say clearly that they pay for elective abortions. And of these twenty eight plans, some of the conditions for coverage are still dubious: two indicate payment for abortions in accordance with state law, one for abortions which are simply described as "legal," and another for abortions in the first twelve weeks of pregnancy.

Six of the plans clearly indicate payment for "therapeutic" abortions. Two more of the plans indicate they will not pay for "elective" abortions (one of these says it will not pay for "legal" abortions!), and thereby indicate they will pay for "therapeutic" abortions.

Ten of the plans simply do not mention payment for abortion, whether "elective" or "therapeutic." But because several of these are comprehensive plans, it is safe to assume that at least some of them provide coverage for abortion on the same basis as that for childbirth.

Because the courts have repeatedly struck down the "therapeutic"/"elective" distinction in requiring welfare payments for all abortions when maternity benefits are already provided, it is time that insurors, especially those of federal employees, revise their policies to eliminate it as well.

CONCLUSION

The 1973 Supreme Court decisions on abortion were not self-enforcing; official inertia as well as religiously motivated opposition to abortion has impeded women's access to abortion services. Consequently, nation-wide compliance with the principles of Roe and Doe has been achieved only by a very active second round of litigation which has succeeded in translating a rule of law into a functioning process by which some million women per year obtain abortions. Moreover, this litigation has established principles which apply directly to the abortion policies of the agencies discussed in this memorandum.

First, the public hospital cases have all held that public agencies cannot discriminate against performing abortions when they provide other obstetrical and gynecological services. Clearly, then, military facilities, Public Health Service hospitals, or any other public medical facility cannot arbitrarily exclude elective abortions either, despite arguments of overcrowded facilities or staff opposition. While no staff member should ever be forced to participate in an abortion (or

sterilization) against his or her religious or moral principles, the medical facility itself is not relieved from the responsibility of finding medical personnel who will perform such procedures. If there are problems of space and scheduling, they should be resolved in the same manner as similar problems involving other medical services for which alternative arrangements are made.

Second, federal agencies and health insurance plans cannot constitutionally exclude payment for women who choose to terminate their pregnancies by abortion while paying the expenses of women who choose to terminate their pregnancies by childbirth. Though this principle was established in welfare cases, it applies to all public agencies which provide maternity benefits without paying for abortion services. All the abortion litigation since 1973 warns that any attempt to justify the performance of "therapeutic" abortions at the exclusion of "elective" ones is constitutionally indefensible.

The third principle concerns consent requirements, whether spousal or parental. When the Supreme Court said that the abortion decision was one protected by the constitutional right of privacy, and belonged only to the woman and her doctor, it implicitly excluded parents and spouses from any legal role in the decision-making process. Subsequent litigation has reinforced this principle repeatedly.

The degree of conflict and confusion regarding abortion policy among federal health care providers is due, in large

part, to the 1971 Presidential Order. Because the courts have clarified additional issues unresolved in Roe and Doe--public hospitals, public monies, and third-party consent--there is no reason why the federal government cannot, and should not, instruct its agencies in unambiguous terms that the 1971 Presidential Order has been superseded by the 1973 Supreme Court decisions.

In order to revise the policy of the executive branch of the government so that it conforms to the law, we recommend

1. that the 1971 Presidential Order be rescinded;

2. that a new Presidential Order be published, indicating that the Supreme Court decisions will now be the basis for abortion policy within all branches of the federal government; and

3. that this new order be widely distributed through official channels to eliminate any further confusion over what is, and is not, present law and policy with respect to abortion.

Prepared by: Priscilla Williams
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Counsel: Judith Mears, Director
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THE WHITE HOUSE

WASHINGTON

May 14, 1975

MEMORANDUM TO: PHIL BUCHEN

FROM: ART QUERN

SUBJECT: DOD Abortion Policies

As a follow-up to my memorandum of May 8 regarding DOD abortion policies, we have discovered in further research something that may make the issue much easier to resolve.

As you will recall, the ACLU charges that DOD is still adhering to a 1971 Nixon Executive Order directing that any abortions on military bases be in accordance with relevant State law. The ACLU says this Order is in direct conflict with the 1973 Supreme Court ruling that State laws cannot limit abortions.

What we have found, however, is that President Nixon issued a statement not an Executive Order concerning Defense abortion practices (copy attached). Obviously that fact changes the nature of the problem.

For instance, perhaps the issue could be resolved by Defense making whatever policy changes are necessary on the subject, with no need to involve the President.

We will need your guidance on this, though, and I will look forward to whatever thoughts you have.

Thanks.

Rob Quern

Attachment

127 Statement About Policy on Abortions at Military Base Hospitals in the United States. *April 3, 1971*

HISTORICALLY, laws regulating abortion in the United States have been the province of States, not the Federal Government. That remains the situation today, as one State after another takes up this question, debates it, and decides it. That is where the decisions should be made.

Partly for that reason, 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.

The effect of this directive is to reverse service regulations issued last summer, which had liberalized the rules on abortions at military hospitals. The new ruling supersedes this—and has been put into effect by the Secretary of Defense.

But while this matter is being debated in State capitals and weighed by various courts, the country has a right to know my personal views.

From personal and religious beliefs I consider abortion an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I cannot square with my personal belief in the sanctity of human life—including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.

Ours is a nation with a Judeo-Christian heritage. It is also a nation with serious social problems—problems of malnutrition, of broken homes, of poverty, and of delinquency. But none of these problems justifies such a solution.

A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands.

NOTE: The statement was released at San Clemente, Calif.

128 Message on the Opening of the 1971 Baseball Season. *April 5, 1971*

BY TRADITION the President of the United States or his representative signals the beginning of the major league baseball season by throwing out the first ball.

Although I regret that I cannot be at Kennedy Stadium in Washington for this opening game, I am very proud that my representative is Master Sergeant Daniel L. Pitzer of the United States Army. No President has ever been better represented than I am today.

For four long years, Sergeant Pitzer was a prisoner of the Viet Cong in South Vietnam. As he performs this American ritual of throwing out the first ball, he does so as a reminder that there are still

Sent to Dick Cheney

WACs Get Abortions Despite Ban
by Patrick Sloyan
(Excerpted from Newsday)

The Defense Department has been authorizing abortions - nearly 5,400 last year - for women in military service and the wives and daughters of servicemen. This violates Defense Department regulation and in some instances the laws of foreign nations where U.S. troops are stationed. Pentagon officials privately blame Defense Secretary Schlesinger for "looking the other way" and refusing to clarify Pentagon policy on abortion.

Bernard Katz, a spokesman for the Army surgeon general, said DOD policy based on executive order issued by former President Nixon in 1972, permits abortion only where physical or mental health is threatened.

To get around the Pentagon regulations, military physicians have found a loophole. "You can just say mental health is involved in demand abortions," one Army doctor said. -- (5/11/75)

THE WHITE HOUSE

WASHINGTON

June 9, 1975

MEMORANDUM FOR: ART QUERN

FROM: PHILIP BUCHEN P.W.B.

SUBJECT: DOD Abortion Policies

The ACLU memorandum that you forwarded alleges that a significant number of military bases are continuing to follow local laws on the subject of abortion that are inconsistent with the Supreme Court decisions on this issue in 1973. The basis for this policy is said to be President Nixon's statement in 1971 calling for military bases to comply with local law on this subject. The ACLU memorandum is critical of this policy of following local law and of the restrictive approach which some bases are taking on the abortion question.

President Nixon's statement that local law should be followed is consistent with the statutory scheme for military bases under the Assimilative Crimes Act, 62 stat. 686,18 U.S.C. Sec. 13, which adopts local criminal law for all U.S. military installations within the United States. If the ACLU allegations are true that some of the local bases are following local laws which are inconsistent with the Supreme Court rulings, the problem lies in the legal advice on which they are acting, and not on the general directive that local laws apply. Local statues which are inconsistent with the Supreme Court rulings are not valid local law either within or without a Federal reservation.

Dudley Chapman of my staff has discussed this problem with Martin Hoffman, the General Counsel of the Department of Defense, who agrees with these conclusions and is investigating to see what action can be taken. When we hear from him, we will pass his report on to you.

or incidental. 80th Congress House Report No. 304.

References in Text. Section 1 of Title 5, referred to in text, is now covered by section 101 of Title 5, Government Organization and Employees.

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.

Library References

United States ⇐94. C.J.S. United States § 137 et seq.

Notes of Decisions

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1. Constitutionality

Section 1001 of this title providing for punishment of anyone who knowingly and willfully makes any false or fraudulent statement in matter within jurisdiction of any department or agency of United States was not unconstitutional as to defendant on ground that he was not able to determine what word "department" meant as used in such section 1001. Haddad v. U. S., C.A.Cal.1965, 349 F.2d 511, certiorari denied 86 S.Ct. 193, 382 U. S. 896, 15 L.Ed.2d 153.

2. Construction

Reviser's notes commenting on this section and section 451 of Title 28 are authoritative in interpreting United States Code. Acron Investments, Inc. v. Federal Sav. & Loan Ins. Corp., C.A.Cal.1966, 363 F.2d 236, certiorari denied 87 S.Ct. 506, 385 U.S. 970, 17 L.Ed.2d 434.

3. Federal Bureau of Investigation

Federal Bureau of Investigation is "agency" within definition of this section. U. S. v. Stark, D.C.Md.1955, 131 F.Supp. 190.

4. Grand jury

Federal grand jury was not an "agency" within section 1001 of this title. U. S. v. Allen, D.C.Cal.1961, 193 F.Supp. 954.

5. Defenses

If a department or agency has colorable authority to do what it is doing, constitutionality of statute or order requiring keeping of records furnishing of information or giving of answers is immaterial, and such infirmity may not be relied upon as a defense for a specific violation thereof Humble Oil & Refining Co. v. U. S., C.A.N.M.1952, 198 F.2d 753, certiorari denied 73 S.Ct. 328, 344 U. S. 909, 97 L.Ed. 701.

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

June 25, 1948, c. 645, 62 Stat. 685; July 12, 1952, c. 695, 66 Stat. 589.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., § 451 (Mar. 4, 1909, c. 321, § 272, 35 Stat. 1142 [derived from R.S. § 5339; Sept. 4, 1890, c. 874, 26 Stat. 424]; June 11, 1940, c. 323, 54 Stat. 304).

The words "The term 'special maritime and territorial jurisdiction of the United States' as used in this title includes:" were substituted for the words "The crimes and offenses defined in sections 451-468 of this title shall be punished as herein prescribed."

This section first appeared in the 1909 Criminal Code. It made it possible to combine in one chapter all the penal provisions covering acts within the admiralty and maritime jurisdiction without the necessity of repeating in each section the places covered.

The present section has made possible the allocation of the diverse provisions of chapter 11 of Title 18, U.S.C., 1940 ed., to particular chapters restricted to particular offenses, as contemplated by the alphabetical chapter arrangement.

In several revised sections of said chapter 11 the words "within the special maritime and territorial jurisdiction of the United States" have been added. Thus the jurisdictional limitation will be preserved in all sections of said chapter 11 describing an offense.

Enumeration of names of Great Lakes was omitted as unnecessary.

Other minor changes were necessary now that the section defines a term rather than the place of commission of crime or offense; however, the extent of the special jurisdiction as originally enacted has been carefully followed. 80th Congress House Report No. 304.

1952 Amendment. Act July 12, 1952, added subsec. (5).

Legislative History. For legislative history and purpose of Act July 12, 1952, see 1952 U.S.Code Cong. and Adm.News, p. 2101.

Cross References

Laws of states adopted for areas within federal jurisdiction, see section 13 of this title.

Library References

Criminal Law ⇐97(2). C.J.S. Criminal Law § 137.

THE WHITE HOUSE
WASHINGTON

Date 4/9

TO: Phil Buchen

FROM: DUDLEY CHAPMAN

ACTION:

✓ Approval/Signature

_____ Comments/Recommendations

_____ Prepare Response

_____ Please Handle

_____ For Your Information

_____ File

REMARKS:

country issued as money without authorization by proper officer of the United States was not intended to limit the quoted term to that of a country with which the United States is at peace, but is broad enough also to embrace the government of a country with which the United States is at war. U. S. v. Gertz, C.A.Hawaii 1957, 249 F.2d 662.

§ 12. Postal Service defined

The term "Postal Service", as used in this title, includes the "Post Office Department" and every employee thereof, whether or not he has taken the oath of office.

June 25, 1948, c. 645, 62 Stat. 686.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., §§ 301, 360 (Mar. 4, 1909, c. 321, §§ 230, 231, 35 Stat. 1134. [Derived from R.S. § 3832]).

This section consolidates sections 301 and 360 of Title 18, U.S.C. 1940 ed., with necessary changes in phraseology. 80th Congress House Report No. 304.

Cross References

Postal Service generally, see section 1 et seq. of Title 39, The Postal Service.

Library References

Post Office ⇐2. C.J.S. Post Office § 2 et seq.

§ 13. Laws of states adopted for areas within federal jurisdiction

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.

June 25, 1948, c. 645, 62 Stat. 686.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 468 (Mar. 4, 1909, c. 321, § 289, 35 Stat. 1145 [derived from R.S. § 5391; July 7, 1898, c. 576, § 2, 30 Stat. 717]; June 15, 1933, c. 85, 48 Stat. 152; June 20, 1935, c. 284, 49 Stat. 394; June 6, 1940, c. 241, 54 Stat. 234).

Act March 4, 1909, § 289 used the words "now in force" when referring to the laws of any State, organized Territory or district, to be considered in force.

As amended on June 15, 1933, the words "by the laws thereof in force on June 1, 1933, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal," were used.

The amendment of June 20, 1935, extended the date to "April 1, 1935," and the amendment of June 6, 1940, extended the date to "February 1, 1940".

The revised section omits the specification of any date as unnecessary in a revision, which speaks from the date of its enactment. Such omission will not only make effective within Federal reserva-

tions, the local State l
the date of the enactmen
but will authorize the l
apply the same measuri
offenses as is applied
State under future char
law and will make unn
pro forma amendments
keep abreast of change
In other words, the revis

Criminal Law ⇐16.

THE WHITE HOUSE

WASHINGTON

May 9, 1975

MEMORANDUM FOR: DUDLEY CHAPMAN

FROM: PHILIP BUCHEN P.W.B.

Attached is a memo of May 8 to me from Art Quern with an accompanying memo.

Kindly review and prepare suggested response for me to send.

Attachment

THE WHITE HOUSE

WASHINGTON

May 8, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: ART QUERN

SUBJECT: Department of Defense Abortion Policies

This is to solicit your guidance in a question regarding Federal policy toward legal restrictions on abortions.

Background

Pam Needham and I recently met with representatives of the American Civil Liberties Union to listen to their comments regarding Federal agency abortion policies. We learned at the meeting that their major concern was a 1971 Executive Order signed by President Nixon which directed that any abortions on military bases should be performed in accordance with relevant State laws.

Issue

The ACLU is concerned that the 1971 Executive Order conflicts with the more recent 1973 Supreme Court abortion ruling that State laws cannot limit abortions (at least in the first trimester). ACLU contends that some States still enforce restrictive abortion laws. Many of these laws are in the process of being tested in the courts.

The ACLU contends that by virtue of this Executive Order requiring military bases to adhere to State law in regard to abortions Federal policy does not conform to the ruling of the Supreme Court. In addition, they claim that abortion is the only medical service provided on Federal military establishments which is so subject to State statutes. They further argue that this policy is inhibiting other Federal programs (non-military) from adhering to the Supreme Court decision. Their solution is for the President to rescind the Executive Order and to allow unrestricted abortions on military installations and Indian health service facilities. The ACLU's paper is attached.

Comment

We told them we would look into the questions they were raising. They subsequently went to the press and indicated that they were not encouraged by the response they had received at our meeting. We would appreciate your suggestion as to how we should proceed.

Attachment

cc: Jim Cannon
Pam Needham
Bill Gulley

MEMORANDUM

RE: EXISTING POLICIES WITHIN THE FEDERAL GOVERNMENT WHICH ARE IN CONFLICT WITH THE 1973 SUPREME COURT DECISIONS ON ABORTION.

DATE: May 5, 1975

In the course of its efforts to secure nation-wide compliance with the 1973 Supreme Court decisions on abortion, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), the Reproductive Freedom Project of the American Civil Liberties Union has found that the abortion policies of federal government health care providers deviate significantly from the principles expressed in Roe and Doe and the cases decided since then.[1]

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[1]Litigation subsequent to Roe and Doe has clarified the following issues, among others, which were not explicitly resolved in those decisions: 1) whether public hospitals could refuse to permit abortions, 2) whether welfare payments could be denied for abortions, and 3) whether consent, spousal or parental, could be required for a woman to obtain an abortion. Courts have consistently provided negative answers to these questions, and in the course of doing so, have referred back to Roe and Doe and the clear enunciation there of a woman's fundamental right to have an abortion within the first six months of pregnancy.

Cases in which public hospitals have not been allowed to refuse to permit abortions are Nyberg v. City of Virginia, Minnesota, 495 F.2d 1342 (1974), Doe v. Hale Hospital, 500 F.2d 144 (1974), Doe v. Poelker, 497 F.2d 1063 (8th Cir. 1974), Doe v. Mundy, 378 F.Supp. 731 (E.D. Wisc. 1974), aff'd _____ F.2d _____ (7th Cir. Jan. 30, 1975), Orr v. Koefoot, 377 F.Supp. 673 (D. Neb. 1974), Santiago v. Colon, Civil No. 74-862 (D.P.R. Aug. 6, 1974), and Roe v. Arizona Board of Regents, 2CA-Civ. 1834 (Ariz. Ct. of Appeals, April 21, 1975). In two of these cases (Nyberg v. City of Virginia, Minn. and Doe v. Hale Hospital), the Supreme Court has refused to review appeals from the hospitals thereby leaving the lower courts' orders intact. And in two more of these cases (Doe v. Poelker and Doe v. Mundy), the courts

(footnote continued on next page)

Among those federal agencies whose policies conflict with the Supreme Court's and lower federal courts' decisions are the Department of Defense, the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), the Indian Health Service, the Bureau of Medical Services, and the Peace Corps.

In addition, many federal employee health insurance programs do not cover abortion as a legitimate medical expense. Since all federal employee health insurance policies do provide coverage

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(footnote continued from preceding page)

have said not only that public hospitals cannot refuse to provide abortions, but also that they have the positive duty to provide services for them.

Those cases in which courts have ruled that welfare payments cannot be denied for abortions, whether "elective" or "therapeutic," are Klein v. Nassau Medical Center, 347 F.Supp. 496 (E.D. NY 1972), Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973), Roe v. Norton, 380 F.Supp. 726 (D. Conn. 1974), Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974), aff'd on other grounds, 505 F.2d 186 (3rd Cir. 1974), vacated on other grounds and hearing en banc ordered on Jan. 31, 1975, Roe v. Ferguson, No. 74-315 (S.D. Ohio, Sept. 16, 1974) at 43 LW 2143, Wulff v. Singleton, No. 74-1484 (8th Cir. Dec. 31, 1974, reversing 380 F.Supp. 1137 (E.D. Mo. 1974), Doe v. Myatt, No. A3-74-48 (D. N.D. Jan. 27, 1975), and Doe v. Westby, 383 F.Supp. 1143 (D. S.D. 1974). These rulings have all reasoned that when a medical benefits system pays the expenses of women who choose to terminate their pregnancies by childbirth, it must also pay the expenses of women whochoose to terminate their pregnancies by abortion. In short, the state must be neutral in the childbirth v. abortion choice.

Cases in which consent requirements have been declared unconstitutional are the following: Coe v. Gerstein, 376 F. Supp. 695 (7 D. Fla. 1973), Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973), Wolfe and Crossen v. Schroering and Hancock, Civ. No. C-74-186-L (W.D. Ky. Nov. 19, 1974), Baird v. Bellotti, Civ. No. 74-4992-F (D. Mass. April 28, 1975), Foe v. Vanderhoof, No. 74-F-418 (D. Colo. Feb. 5, 1975), Jones v. Smith, 278 So. 2d 339 (Fla. Ct. App. 1973), and Doe v. Doe, 314 N.E. 2d 128 (Mass. S.J.C. 1974). On this issue, the courts have reasoned that since a state itself cannot prohibit a woman from having an abortion, it cannot delegate this veto power to her husband or parents.

for childbirth, those which do not provide coverage for abortion clearly limit a woman's options insofar as she is denied one of her only two alternatives--i.e., childbirth and abortion--to her condition of pregnancy. Although no court decisions have required payments for abortions, per se, they have always reasoned that when a public agency provides payment for maternity care, payment for abortion must be provided also.

THE 1971 PRESIDENTIAL ORDER

While the Department of Defense, CHAMPUS, the Indian Health Service, and the Bureau of Medical Services sometimes provide abortion services, they do so only on the basis of the pre-Roe and -Doe Presidential Order of 1971, which specifically directed military base hospitals to perform abortions in accordance with state law. Its purpose was to overturn the more liberal policy issued by the Department of Defense on July 31, 1970, which permitted abortions at military base hospitals, regardless of state law.

Although President Nixon's justification for handing down this order might have been based on a desire to minimize conflict between state and federal law and to keep military bases from projecting the reputation of "abortion mills," a more likely rationale for the Order was his personal aversion to abortion, fortified by public opposition to the military's policy reflected in mail to the White House. Certainly the former two concerns were vitiated by the 1973 rulings which made abortions legal in all states.

In his statement upon delivering the Order on April 3, 1971, the former President said:

> . . . 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 rule at the military base hospitals are to correspond to that law.
>
> The effect of this directive is to reverse service regulations issued last summer, which had liberalized the rules on abortions at military hospitals. The new ruling supersedes this--and has been put into effect by the Secretary of Defense.

And further in the same statement:

> A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands.
>
> Weekly Compilation of Presidential Documents, No. 15, week ending April 12, 1971, p. 598.

In 1971, state laws varied considerably. Some seventeen states had already "liberalized" their abortion laws, while other states were beginning to rethink theirs. After the Supreme Court decisions, there could still be variations from state to state with respect to some aspects of abortion law (e.g., states could make regulations to safeguard maternal health in the second trimester, and they could proscribe abortion altogether in the third trimester unless a woman's life or health were in danger), but the states could not constitutionally interfere with a woman's decision to have an abortion during the first

six months of pregnancy.

In short, the Supreme Court ruled in 1973 that the abortion decision 1) was protected by the constitutional right of privacy and the exercise of that right, 2) was a matter only for the pregnant woman and her physician, 3) could not be prohibited by the state during the first six months of pregnancy (or prior to viability), and 4) if prohibited thereafter, must nevertheless be protected when the woman's life or health was at stake. At the same time, the Supreme Court said that all state laws must conform with the trimester scheme it devised.

Thus, if the 1971 Presidential Order is read now in light of the 1973 decisions, there need be no real conflict. If states had struck down their old laws and made their new ones to conform with the guidelines of Roe and Doe, there would be no problem with restrictive state laws, and hence with the Presidential Order. However, either out of sheer defiance or simple neglect of these decisions, states have both kept their old restrictive laws and passed additional ones which are in direct violation of Roe and Doe.

In actuality, the Presidential Order is interpreted very strictly according to pre-1973 standards so that any dispute between a restrictive state law and the Supreme Court decisions is resolved by federal health care providers on the side of state law. In addition, the military branches have their own regulations which are even more restrictive than many state laws.

Although the state laws which infringe upon a woman's right to have an abortion are being systematically challenged and invalidated in the courts, it is clear that some states will never tire of defying the Supreme Court by continuing to pass restrictive abortion legislation. This is especially true of legislators who accord less importance to the Constitution than to pressure from isolated groups seeking to impose their beliefs upon the entire society.[2] It is not difficult to see how the conflict between restrictive state laws coupled with the 1971 Presidential Order, and the Supreme Court decisions, continue to confuse and intimidate health care providers within the federal government.

This confusion is understandable in light of the Executive Branch's failure to revise its 1971 policy after the 1973 Supreme Court decisions were handed down. Although the '71 Presidential Order is legally obsolete, that fact is simply not known to government health care providers who think they must abide by either unconstitutional state laws or the policies of their own agencies, rather than the law of the land.

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[2]See "Constitutional Aspects of the Right to Limit Childbearing," a Report of the United States Commission on Civil Rights, April, 1975. Its recommendations to the Congress are 1) to reject constitutional amendments proposed to undermine existent constitutional guarantees in matters related to childbearing; 2) to reject any other legislation proposed to restrict such constitutional guarantees, and to repeal that which has already been enacted; and 3) specifically to repeal a discriminatory, anti-abortion provision in the Legal Services Corporation Act.

Currently, when asked about their abortion policies, administrators of the agencies enumerated above cite the 1971 Presidential Order only. Their failure to mention the Supreme Court decisions indicates that 1) they simply do not acknowledge those decisions, or 2) they do acknowledge the decisions, but feel that the Supreme Court decisions cannot supersede a Presidential Order, and that only another Presidential Order can. The latter seems more prevalent.

This unnecessary confusion can be eliminated easily with the issuance of a new Presidential Order, rescinding the old one and ordering all government policies regarding abortion to be made in accordance with Roe and Doe.

Summarized below are the results of my inquiry into the current policies of government related health care providers on abortion services.

DEPARTMENT OF DEFENSE

In response to a letter of inquiry (Jan. 23, 1975) to the Department of Defense, Vernon McKenzie, Principal Deputy Assistant Secretary of Defense, Department of Health and Environment, said:

1. In October 1966, the Secretary of Defense issued a memorandum to the Secretaries of the Military Departments which directed that family planning services and supplies, including counseling and guidance, be provided in accordance with sound medical practice and subject to the availability and facilities and the capabilities of the medical staff of a military facility.

2. In April 1971, the President directed that military facilities located in states whose abortion laws are more restrictive than this Department's general policy must adhere to those states' laws; and

3. No such modification of the above family planning policy is in effect concerning sexual sterilization.

Under the broad family planning policy which McKenzie cites, there is evidence that Medical Corps members feared performing a variety of medical duties in violation of a state civil or criminal statute. In the spring of 1970, DOD Deputy Assistant Secretary Louis M. Rousselot issued a memorandum to the Surgeons General in response to this problem. The memorandum declared, "State statutes have no force or effect on Federal officers when engaged in Federal functions pursuant to federal law." Rousselot then requested wide dissemination of the memorandum in order "to allay the fears and anxieties of any Medical Corps officers who may be concerned about this matter."

On July 16, 1970, Rousselot issued a memo specifically on abortions, saying they were to be performed "when medically necessary or for reasons of mental health," and subject to the availability of space, facilities, and capabilities of the medical staff. On July 31, 1970, Rousselot further clarified this policy: he said clearly, "authorized family planning procedures should be provided in military facilities in the United States without regard to local state laws." (Emphasis mine.) This policy no doubt precipitated the April, 1971 Presidential Order, which made abortion an anomaly on military bases in that it was governed by state law when all other "federal functions" were governed by federal law.

Now that the Presidential Order and the Supreme Court decisions are in conflict, I am told (by telephone) by Major Thomas Ely, Consultants and Ambulatory Division, Office of the Army Surgeon General, that the three Surgeons General have petitioned the Secretary of Defense to change Department policy to comply with Roe and Doe. However, McKenzie's letter did not mention any current effort to revise military policy, and I have not received any response to my 3/11/75 letter to him, asking about such revision.

Although the various branches of the military have formulated their own policies with respect to abortion, they all defer to state law when it is more restrictive. As the policies of the separate military branches will demonstrate below, there are current regulations to permit only "medically indicated" abortions, to require parental and spousal consent, consultation with a second physician, and the imposition of an arbitrary time frame within which abortions "should" be performed.

Army

Although there is no definition of what constitutes a "medical indication" for abortion in the written Army policy, I was told per telephone by the Director of Health Care Operations that the Army does abortions "for health reasons," a phrase which suggests the "therapeutic"/"elective" distinction. If the Army performs only "therapeutic" abortions, its policy violates Roe and Doe and subsequent litigation on that ground, as does its practice of requiring a consulting physician and parental consent for minors.

The Army's policy, as stated in Army Regulations 40-3, paragraph 2-25 (September 17, 1973) appears as follows:

> c. Abortions may be performed in Army MTF's (Military Treatment 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. Written consent of the patient and concurrence of one qualified physician consultant are required prior to the procedure. Consent prior to abortion of unemancipated minors will be obtained in accordance with paragraph 2-24 . . . .

When there exists a conflict with this policy and state law:

> f. Abortion procedures in Army MTF's in those states where the state criteria on abortions are more restrictive than the policy outlines in c above shall be in accordance with the more restrictive criteria.

It is impossible that any state law in conformance with Roe and Doe could be more restrictive than the policy outlined in "c."

Air Force

It is noteworthy that "therapeutic" abortion is defined in the Air Force regulations as "the removal of the intra-uterine human embryo or fetus from its mother before viability" when in fact, this is an accurate definition for all abortions, both "therapeutic" and so-called "elective." (There is no provision in the Air Force regulations for "elective" abortions.)

The policy of the Air Force is as follows:

> When medically indicated including mental health reasons, pregnancies may be terminated in Air Force hospitals subject to the availability of space, facilities and the capability of the medical staff, ideally before 12 weeks of gestation. Although Air Force medical practice is not subject to regulation under state law, it is a matter of policy in those states where criteria on termination of pregnancies are more restrictive than the above, the Air Force will conform to those statutes and practices which are determined applicable by proper state authorities until changed or amended by state legislative action. In those states that lack current legislation or whose legislation is ambiguous, determination or interpretation of the state law is the responsibility of the local Judge Advocate.
>
> Air Force Regulations 160-12, paragraph 23 re: "Therapeutic Abortion" (Sept. 9, 1974).

Air Force policy requires both spousal and parental (in the case of unmarried minors) consent. While no concurring physician's opinion is required, the patient's medical record must contain statements of 1) need for a "therapeutic" abortion, and 2) consent from the patient, spouse, and parents, as applicable. Thus, the certification of "therapeutic" need, the consent requirements, and the "suggestion" that abortions be performed before twelve weeks of gestation all infringe upon a woman's fundamental right to decide with her physician to have an abortion, as defined by Roe and Doe.

In keeping with the practice of general military health care, when space, facilities, or staff is not available, patients may be referred to other Air Force hospitals or else given a "non-availability" statement for treatment in other kinds of facilities.

It should be noted that in the Air Force sterilization procedures may be performed "in accordance with sound medical practice subject only to the availability of space and facilities and the capabilities of the medical staff. Neither State laws nor local medical practices will be a factor in making these determinations." (Emphasis mine.)

Navy

On April 30, 1975, per telephone conversation, I was told by Lieutenant Bob Taylor in the Management Information Division that pre-Roe and Doe Navy regulations (SECNAVINST 6300.2A, Form A 71) are "out of date, illegal, and no longer used." Lt. Taylor says that there are no written instructions now, and until general Department of Defense policy is revised to comply with Roe and Doe, the Navy will use Roe and Doe as its policy, even when state laws conflict.

However, when asked about specific requirements of the new Department of Defense regulations (which he had in hand, but could not release because they have not been finalized), Lt. Taylor said that only in the first trimester will abortions be performed in accordance with Roe and Doe. In the second trimester, he said, abortions will be performed in accordance with local law (the Supreme Court decisions allow second trimester regulations by the states only to safeguard maternal health). In addition, there are spousal and parental consent requirements "in the absence of local law to the contrary."

Clearly, then, the Department of Defense's proposed revised policy will not be in conformance with the guidelines established by Roe and Doe unless further revisions are made.

CHAMPUS

The Civilian Health and Medical Program of the Uniformed Services is a cost-sharing civilian health care program for approximately eight million dependants and retirees of the seven Uniformed Services: Army, Navy, Air Force, Marine Corps, Coast Guard, and the Commissioned Corps of the Public Health Services and of the National Oceanic and Atmospheric Administration.

While there is no explicit language excluding abortion coverage in the CHAMPUS pamphlet, I was told (per telephone conversation) by the Director for CHAMPUS Policy, Office of Assistant Secretary of Defense for Health and Environment, that policy with respect to abortion is to follow state law, and further, that CHAMPUS probably does not provide coverage for abortion services where there is any conflict between state and federal law.

Because the CHAMPUS program covers military dependents and retirees, it seems highly probable that the 1971 Presidential Order is the reason--direct or indirect--for CHAMPUS's policy even if the Order itself is not cited as the basis for it.

INDIAN HEALTH SERVICE

The Indian Health Service's 3/28/72 statement of policy with respect to abortion remains unchanged since Roe and Doe:

> Although the doctrine of Federal supremacy provides that state and local laws shall not be binding on Federal officers and employees acting within the scope of their office, it is Presidential policy that abortion procedures in Federal medical facilities be made to correspond with the laws of the state where those facilities are located.
>
> Emphasis mine. Indian Health Manual, TN No. 72-2 (3/28/72), 3-9.2, Abortions, p. 4.

Sterilizations, however, are a private matter between patient and physician:

> The performance in IHS facilities of male or female sterilization procedures . . . is a matter to be decided between the patient and the physician, irrespective of state laws.
>
> Ibid., Sterilizations, p. 5.

Because the Indian Health Service is part of the Health Services Administration, under the aegis of the Department of Health, Education, and Welfare, a letter of inquiry regarding the above was addressed to Dr. Louis Hellman, Deputy Assistant Secretary for Population Affairs, DHEW. Dr. Hellman's response (March 19, 1975) included the following points:

1. The Indian Health Service was advised by our (HEW's) General Counsel to follow the Presidential Order and will continue to do so until a new Presidential Order is issued;

2. In spite of the Supreme Court Decisions of 1973, each state law must be tested and found unconstitutional; and

3. There is no way at the present time that HEW can set up a standard national policy which would abridge state law.

BUREAU OF MEDICAL SERVICES

The Bureau of Medical Services is also part of the Health Services Administration, Department of Health, Education, and Welfare. Pertinent health care providers in its jurisdiction are Public Health Service hospitals. I was told in a letter (April 7, 1975) by the Director of the Bureau of Medical Services that "the policy of the Bureau of Medical Services conforms with the policy established by the Administrator of the Health Services and Mental Health Administration on February, 1972." The policy for the Bureau of Medical Services is exactly the same as that for the Indian Health Service (see above).[3]

PEACE CORPS

While the Peace Corps pays for all other health needs of its Volunteers, the Peace Corps says in its 12/5/73 Manual (Section 242, p. 7) that "the medical expenses incurred by a Volunteer in having an abortion will not be paid by the Peace

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[3]The Health Services and Mental Health Administration are now two separate agencies. The Health Services Administration includes the 1) Indian Health Service, 2) Bureau of Medical Services which provides direct care to eligible persons through Public Health Service hospitals and clinics, 3) Bureau of Community Health Services which provides direct health care through grant programs, and 4) Bureau of Quality Assurance which does not provide any direct health care.

Corps." In recent conversations with Peace Corps personnel, we have learned that there is a more lenient, unwritten policy towards paying the expenses incurred for a "therapeutic" abortion, the definition for which appears to be subjective and arbitrary at worst, and purely medical at best.

Nevertheless, adopting what it calls a policy of complete neutrality with regard to abortion, the Manual stresses that "The Peace Corps does not authorize abortions in any sense." (Underlining in original.) The Manual does say that medical advice, counseling, and return transportation to the United States will be provided for all single pregnant Volunteers, but not the cost of the abortion itself.

Thus, while the Peace Corps does not refer to the Presidential Order of 1971, it nevertheless evades compliance with the 1973 Supreme Court decisions. And again, an agency of the federal government has agreed to provide care for only one alternative to pregnancy (childbirth), while denying care for the other (abortion). Such discretion on the part of public policy makers has been struck down as unconstitutional by the numerous courts which have dealt with the same issue as it applies to welfare recipients.

FEDERAL EMPLOYEE HEALTH INSURANCE PROGRAMS

The Federal Employees Health Benefits Law requires its several plans to include "obstetrical benefits." (See Section

8904, "Types of Benefits," Appendix A, Chapter 89, Title 5, United States Code--Health Insurance.) Again, the principle established in the Medicaid cases regarding payments for elective abortions is pertinent: when an agency of the government pays for general obstetrical and gynecological services, it must pay for both options used to deal with pregnancy--that is, childbirth and abortion.

In reviewing the manuals provided for the forty-six government-sponsored health insurance programs, I find that all forty six provide maternity coverage while only twenty eight health plans say clearly that they pay for elective abortions. And of these twenty eight plans, some of the conditions for coverage are still dubious: two indicate payment for abortions in accordance with state law, one for abortions which are simply described as "legal," and another for abortions in the first twelve weeks of pregnancy.

Six of the plans clearly indicate payment for "therapeutic" abortions. Two more of the plans indicate they will not pay for "elective" abortions (one of these says it will not pay for "legal" abortions!), and thereby indicate they will pay for "therapeutic" abortions.

Ten of the plans simply do not mention payment for abortion, whether "elective" or "therapeutic." But because several of these are comprehensive plans, it is safe to assume that at least some of them provide coverage for abortion on the same basis as that for childbirth.

Because the courts have repeatedly struck down the "therapeutic"/"elective" distinction in requiring welfare payments for all abortions when maternity benefits are already provided, it is time that insurors, especially those of federal employees, revise their policies to eliminate it as well.

CONCLUSION

The 1973 Supreme Court decisions on abortion were not self-enforcing; official inertia as well as religiously motivated opposition to abortion has impeded women's access to abortion services. Consequently, nation-wide compliance with the principles of Roe and Doe has been achieved only by a very active second round of litigation which has succeeded in translating a rule of law into a functioning process by which some million women per year obtain abortions. Moreover, this litigation has established principles which apply directly to the abortion policies of the agencies discussed in this memorandum.

First, the public hospital cases have all held that public agencies cannot discriminate against performing abortions when they provide other obstetrical and gynecological services. Clearly, then, military facilities, Public Health Service hospitals, or any other public medical facility cannot arbitrarily exclude elective abortions either, despite arguments of overcrowded facilities or staff opposition. While no staff member should ever be forced to participate in an abortion (or

sterilization) against his or her religious or moral principles, the medical facility itself is not relieved from the responsibility of finding medical personnel who will perform such procedures. If there are problems of space and scheduling, they should be resolved in the same manner as similar problems involving other medical services for which alternative arrangements are made.

Second, federal agencies and health insurance plans cannot constitutionally exclude payment for women who choose to terminate their pregnancies by abortion while paying the expenses of women who choose to terminate their pregnancies by childbirth. Though this principle was established in welfare cases, it applies to all public agencies which provide maternity benefits without paying for abortion services. All the abortion litigation since 1973 warns that any attempt to justify the performance of "therapeutic" abortions at the exclusion of "elective" ones is constitutionally indefensible.

The third principle concerns consent requirements, whether spousal or parental. When the Supreme Court said that the abortion decision was one protected by the constitutional right of privacy, and belonged only to the woman and her doctor, it implicitly excluded parents and spouses from any legal role in the decision-making process. Subsequent litigation has reinforced this principle repeatedly.

The degree of conflict and confusion regarding abortion policy among federal health care providers is due, in large

part, to the 1971 Presidential Order. Because the courts have clarified additional issues unresolved in Roe and Doe--public hospitals, public monies, and third-party consent--there is no reason why the federal government cannot, and should not, instruct its agencies in unambiguous terms that the 1971 Presidential Order has been superseded by the 1973 Supreme Court decisions.

In order to revise the policy of the executive branch of the government so that it conforms to the law, we recommend

1. that the 1971 Presidential Order be rescinded;

2. that a new Presidential Order be published, indicating that the Supreme Court decisions will now be the basis for abortion policy within all branches of the federal government; and

3. that this new order be widely distributed through official channels to eliminate any further confusion over what is, and is not, present law and policy with respect to abortion.

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