35

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 701
1050 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036

TELEPHONE
(202) 872-0005

September 3, 1980

Mr. John Charles Houston
Director of Congressional Affairs
The Public Service Research Council
Suite 600
8330 Old Courthouse Road
Vienna, Virginia 22180

Dear John:

In response to your August 28, 1980 letter, I submit the following comments in regards to the pending Senate bill affecting the political rights of government employees and other persons receiving government benefits.

Senate Bill - Offenses Involving Political Rights

The Senate bill substantially amends the criminal law provisions of Chapter 29, Volume 18, of the U.S. Code pertaining to Elections and Political Activities by persons involved with the federal government. Presently, Sections 600 and 601 broadly protect against the politicization of the bureaucracy. Specifically, the direct or indirect, actual or threatened, promise or deprivation of any government benefit on account of any political activity is prohibited under the pain of a criminal penalty. This provision would appear to proscribe virtually any kind of political action directed towards a government employee, or other persons covered under Chapter 29, as welfare recipients.

1. Removal Of General Protections

The Senate bill would remove this blanket protection and specify the exact types of activities which would be inpermissible. This approach would perforate the present statute, and render it less effective in preventing political abuse within government. Only a broadly worded law can effectively limit indirect coercion. The multitude of human responses possible in the employment relationship in bringing political pressures are only limited by one's imagination.

For example, general political discussion by a supervisor concerning a candidate surely conveys that person's political preferences and expectations concerning employee's assistance. Thus, a strong likelihood exists that provisions of the Senate bill could be circumvented, and the primary purpose of protecting government workers from political coercion frustrated.

In place of Sections 600 and 601, and other provisions in the statute, are Sections 1511-13 concerning obstructing an election, registration, or political campaign; Sections 1514-16 concerning interfering with federal benefits or misuse of authority for political purposes, and Sections 1517-18 concerning soliciting and making campaign contributions. Several specific types of interference in regard to registration and voting would be unlawful; giving or taking of anything of value, including a government benefit as a guid pro quo for voting preference. Moreover, manipulation of employment status predicated upon the making of political contributions is partially regulated, and is discussed in Section 3 of this letter.

2. Underdefining the Term "Anything of Value"

The provision in regards to interference with the election process, Sections 1511-13, prohibit a government employee from providing "anything of value" to interfere with a person's perogative in registering to vote or voting. The term "anything of value" is not defined, except to exclude "nonpartisan physical activities or services to facilitate registration or voting." See Section 1518(a). This definition is less inclusive than that in the Federal Election Campaign Act of 1971, as amended.

The Campaign Act specifies types of political influence (i.e. a contribution) to include a "gift, subscription, loan, advance, or deposit of money, or anything of value." 11 CFR Sec. 100.7(a)(1). "Anything of value" includes "in-kind contributions," as goods or services without charge or under fair market value. Types of goods or services include facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists. 11 CFR Sec. 100.7(a)(iii). Explicitly excluded from the definition of "anything of value" is the value of volunteer time, and, to a maximum of $3,000, volunteer related expenses, as with the use of real or personal property.

The definition of "anything of value" in the Senate bill was either poorly drafted or left intentionally vague. It is unclear whether in-kind gifts are covered. Unlike the

Campaign Act definition, there is an unlimited exemption for "nonpartisan physical activities or services to facilitate registration or voting." The term "physical" activities is meaningless (what are non-physical activities?), and use of the term "facilitation" of registration and voting is a "wide-open door" for abuse involving compelled volunteerism. This provision expressly legitimitizes the act of an employee requesting that another employee volunteer his time in partisan political activities.

The impact of eliminating general Sections 600 and 601 prohibitions pertaining to general political activity, coupled with the vague wording of "anyting of value" surely would not lead to the depoliticizing of the government, and reveals a strong pro-labor bias in the legislation.

Labor organizations have a ready-made political base with members. Public sector labor leaders on the job site may be able to coerce members into donating their time, and personal promises for so-called nonpartisan registration or voting activities. During the last presidential election, private sector labor expended millions of dollars for such activities on behalf of President Carter. Moreover, districts with large numbers of union members in which close congressional races were anticipated, were targeted for nonpartisan registration and get-out-the-vote drives. Getting the voters to the polls in an otherwise apathetic election year, meant control of these elections. These devises may now become open for the public sector labor union's use at the site of employment.

This problem is especially acute with the growth of powerful public sector unions at a time when members are dissatisfied with management's proposals for wage increases. Therefore, the potential for abuse surpasses political coercion of the worker, and reaches at the heart of government. Union leaders could gain control of government through the use of the political leverage they have with their members, which may determine who is elected to govern. Present government leaders realize this, and may modify their public policy positions to suit the interests of one group over the public welfare.

3. Intermediate Status For Fundraising

Section 602 of the present law strictly prohibits political fundraising by government employees from other government employees. It is noteworthy that members of Congress may not solicit their staff, and this section was stricken from the

proposed law. Section 603 precludes solicitation on government property; Sections 604 and 605 prevent solicitation of welfare recipients or disclosure of the welfare rolls; Section 605 generally stops any type of intimidation to secure political cntributions; and Section 607 makes the act of contributing to a fellow government worker a crime.

The Senate bill generally maintains the proscription against solicitation, but abrogates the provisions against collection of unsolicited contributions. A government official still may not use his authority to affect employment status (as to promote or not promote an employee) on the basis of the giving of not giving of a political contribution. However, because of the power one employee has over another, a "fine line" is drawn between soliciting voluntary contributions, which is unlawful, and collecting unsolicited contributions, which is lawful in the Senate bill.

The definitional section of the Senate bill, 1518(d), permits fundraising by government employees by excluding such activities from the meaning of "receiving a political contribution." This provision permits employees to act as a conduit for political contributions, provided a two-prong test is met. The contribution must be "received by mail" and "promptly transferred to a campaign depositior." Herein lies a tremendous potential for abuse.

It is extremely unlikely that an unsolicited contribution would be mailed unless it was requested. How would such a person know of this fundraising possibility, unless he was informed. When does dissemination of such information turn into an actual solicitation? I would submit that the inherent inequities of an employment situation, one person having power over job assignments, promotions, salary levels, etc., and in the bestowal of government benefits, lead to the situation that informing a person that he may lawfully mail political contributions is more likely than not tantamount to an actual solicitation. Thus, a new reservoir of campaign contributions would be created - at the expense of unprotected workers. The disclosure of this intermediary function, as required by the Campaign Act, would not obviate the potential for misuse or abuse.

* * *

The Senate bill has not been artfully drafted. The

vagueness resulting would raise serious constitutional questions should anyone be prosecuted under it. The practical effect would be an "opening of the door" to new political practices by government workers and recipients of government benefits. On a day-to-day basis, certain government employees will tell colleagues of a "liberalizing" of the criminal provisions which will affect such persons political activities. Partisan pressures, subtle and otherwise, will be the result. I predict the Department of Justice would have no better of a track record in discovering, and prosecuting offenders under the Senate bill than under the present law.

It may be worthwhile to present written or oral testimony concerning the ramifications of the Senate bill before the Judiciary Committee in both houses of Congress. Proposed recommendations may include:

1) Retention of the general Sections 600 and 601 prohibitions,

2) Tracking the definitional section from the relevant provisions of the Campaign Act when the same words of art are used, and

3) Using more accurately drawn statutary language in general.

If I can be of further assistant, or if you have any questions concerning this opinion letter, please do not hesitate to call me.

Sincerely yours,

Richard Mayberry

H. Richard Mayberry, Jr.

Criticism 19

Criticism: S. 1630 would --

19. Overturn the Barlow case prohibiting warrantless inspections by OSHA in cases in which a plant guard blocks the entry of an inspector conducting an unlawful inspection.

So long as the inspector can prove he is acting in "good faith" (the "clean heart-empty head standard"), the guard can exercise no more resistance against the inspector than a murderer could exercise against a policeman who witnessed the murder.

Response: S. 1630 would not, and is plainly not intended to, overturn the Barlow decision. That case merely required a warrant for the inspection of private business facilities; it did not purport to sanction the use of force to eject a federal inspector who enters upon business premises without a warrant. Section 1302, to which the criticism is addressed, simply adopts a provision -- common to most modern state codes -- stating that physically interfering with government functions is a misdemeanor. In so doing, however, the section improves considerably upon current law in accommodating the concern that seems to underly the criticism: it provides a new defense to a charge of physically obstructing a government inspector if the inspector was acting unlawfully and the interference was reasonably necessary to protect a person or property in the defendant's custody or possession (Section 1302(b)(3)). Contrary to the assertion in the criticism, the inspector's good faith would have absolutely no bearing on the availability of the defense.

RESPONSE TO RESPONSE: A memorandum of law is attached. Summitt has implicitly conceded that this criticism was well taken, and has added a new provision creating a defense in the case of an unlawful inspection. Unfortunately, this defense is so full of loopholes as to be functionally useless. The most serious loophole is a requirement that the person exercising the resistance have custody or possesion of the person or property which is being protected. In the case of the plant guard cited in the example, this is probably not the case. At the very least, Summitt is setting the stage for years of litigation on this point.

Section 1302 (Obstructing a Government Function by Physical Interference): Mr. Shapiro states that section 1302 "should not significantly alter the consequences of the Barlow decision because of either an overriding constitutional right or an OSHA inspector's inability to establish good faith when he has no warrant."

Regarding the first assertion, it is absolutely clear that the constitutionality of the search and the ability of the victim of the unconstitutional search to resist are two separate questions. In People v. Briggs, 19 N.Y.2d 37, 224 N.E.2d 93 (1966), the New York Court of Appeals held that a defendant was not privileged to use force to resist an unlawful arrest by a state trooper where the officer held an arrest warrant, even though the warrant was insufficient in law.

Carrying it a step further, it is obvious that a person is not privileged to kill a police officer conducting an unconstitutional search of his home. Furthermore, the Model Penal Code recognizes the ability of the legislature to prescribe by statute the limits of resistance to unconstitutional or unlawful activity.

In the hypothetical case cited in the memorandum, an OSHA inspector, operating with "clean heart and empty head," seeks to conduct a warrantless search of a factory or office. In my opinion, a company could not forcibly prevent him from conducting that search, if he chose to ignore the company's request that he not do so.

This is because section 1302 not only codifies for the first time in federal law a general criminal statute prohibiting "impair(ment by force or threat of force of) a government function ... involving ... the performance by an inspector of a specific duty imposed by a statute, or by a regulation, rule, or order." In addition, it provides that an adequate defense must establish both that the inspection was unlawful and that the inspector was not acting in good faith.

The Roundtable's counsel on this issue has conceded that my hypothetical is "a close question."

The government could easily overcome the "force or threat of force" threshold if the business went any further than to request that the inspection not be conducted.

As for good faith, the test is met by an inspector operating with a "clean heart and an empty head." Every office and store in America could photocopy the Barlow case, as Mr. Post has suggested; and presumably this would render any inspection "in bad faith." But in view of the fact that inspectors do not tend to clear their activities with the corporate board room or the company's general counsel, this would be something of an impractical precaution. And it would not provide any relief for a company resisting an inspector with a constitutionally overbroad subpoena, which, given the complex state of the law in that area, would almost necessarily be in good faith.

Mr. Post appears to feel the Senator overstates his case when he says that section 1302 "overrules" Barlow. In making that statement, the Senator considered three questions:

(1) Would Barlow have gone to prison if section 1302 had been in effect at the time of his inspection, and if he had persisted in resisting the inspector?

(2) Would section 1302 allow substantial numbers of inspectors to conduct warrantless searches without facing any lawful threat of resistance at the plant gate?

(3) Should Barlow mean something more than an after-the-fact remedy against an unconstitutional search which a company is powerless to prevent?

Anyone answering these three questions in the affirmative would be forced to conclude that Barlow has in fact been effectively overruled.

Criticism 20

Criticism: S. 1630 would --

20. Massively expand the jurisdiction of federal officers on Western lands.

Response: S. 1630 would not "massively expand" the jurisdiction of federal officers on Western lands. The United States Government owns about one-third the land in the United States, but has no criminal jurisdiction over about 90 percent of this area, which is subject to exclusive state jurisdiction. The States, however, frequently do not have sufficient resources to police these federal lands. Federal officers have the same arrest authority for State offenses on these lands as private citizens have, but this arrest authority varies substantially from State to State.

In order to permit state and local authorities to more effectively utilize federal resources to assist them in appropriate instances, S. 1630 in Section 3031 provides that federal law enforcement officers authorized to make federal arrests may make arrests for State or local law violations if they are authorized to do so by the State or local government. Upon making such an arrest on behalf of a State or local government, the federal officer must promptly take the arrested person before the nearest State or local judge.

RESPONSE TO RESPONSE: Summitt concedes the portion of the point which he understands.

There is no program massively expanding federal jurisdiction in which the states are required to accept the monies or services. Rather, federal jurisdiction has grown in every instance by expanding the federal government's ability to get involved in an area state regulation, and giving the States an opportunity to accept or reject that encroachment.

In addition, various substantive offenses, such as section 1703 and 1823, also contain serious extensions.

45

Criticism 21

Criticism: S. 1630 would --

21. Require a businessman to sequester his own records on behalf of a government agency, at a point long before any agency action had been brought against him, if he determined that the record would be useful to the agency if such a proceeding were ever brought.

Response: It is unclear whether this criticism is directed to Section 1325 (Tampering with Physical Evidence) or to Section 1345 (Failing to Keep a Government Record), or to both. In any event, the criticism is without merit.

Section 1325 would carry forward the provisions of current law (18 U.S.C. 1503 and 1505) that prohibit the destruction or alteration of records with a specific intent to impair their availability in an official proceeding before they can be made the subject of a search warrant or a subpoena. Unlike present law, this section would extend to instances in which an official proceeding was not actually pending at the time when the records were destroyed, but there must be proof beyond a reasonable doubt that the defendant knew, at the time that he destroyed the records, that the proceeding was likely to be instituted, as well as proof that the records were destroyed for the purpose of making them unavailable in the proceeding. Thus an embezzler who, upon learning a shortage has been discovered, alters some records or erases a computer tape with the intent to thwart any ensuing investigation, will be subject to the section. At the suggestion of the business community, a special subsection was added to provide that disposing of a record pursuant to a destruction program (in the ordinary course of business) gives rise to a presumption that the destruction was not with any improper intent (Section 1325(b)).

Section 1345 is part of a package of provisions designed to reach fraud and corruption that involves waste of taxpayer's monies. It would prohibit an individual from fraudulently failing to maintain a record required by law to be kept by a State agency or an organization as a condition of receiving a federal contract, loan, or other form of benefit. The provision

will protect taxpayers by facilitating prosecution of persons who fraudulently convert federal program funds and then "cover their tracks" by deliberately, and with fraudulent intent, failing to keep adequate records as required by the program. In such a case, even though the offender succeeds in preventing prosecution for the underlying felony, he will still be subject to misdemeanor punishment for fraudulent conduct aimed at concealing his theft. The key to this offense is, of course, the defendant's state of mind; he must have an intent to defraud.

RESPONSE
TO RESPONSE: Attached are copies of 18 USC 1503 and 1505. The reader can compare this to Section 1325 and decide for himself whether the S. 1630 provision has any precedent in current law.

It is significant to note that, whatever conviction under section 1325 might require, it does not require--

that official proceeding to which material might be of interest to as imminent;

that the preceeding to which the material might be of interest ever occur;

that the record bears on the guilt or innocence of any party or is even material to the proceeding;

that the material represents anything more than something which might be embarrassing to the corporation or might reveal trade secrets;

that the agency had a right to the material;

that the material could have been constitutionally required to be produced;

that the document was within the regulatory or adjudicatory authority of the agency.

A memorandum of law is also attached.

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770; Sept. 19, 1962, Pub.L. 87-664, § 6(a), 76 Stat. 551.

(E) Section 1325 (Tampering with Physical Evidence): Mr. Shapiro has covered some, but not all of the problems with this section. Current law with regard to agency authority over company records is embodied in 18 U.S.C. 1505:

> ...
>
> Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand.... (s)hall be fined not more than $5,000 or imprisoned not more than five years, or both.

No case has been called to our attention which would hold a person liable for evasion of an investigative demand which has not been made (let alone a proceeding which has not been initiated), and the clear language of the statute would seem to contradict such an interpretation. The result of the extension would be that, even before an agency has brought charges against a company, a businessman coming across a document which might be of interest to that agency if charges were brought would be forced to sequester that record on behalf of that agency.

Criticism 22

Criticism: S. 1630 would --

22. Overturn the result in Friedman v. United States, 374 F.2d 363 (1967), thereby allowing prosecutions of businessmen for misleading oral statements to an agency with no regulatory or adjudicatory power over the area in which the misstatement is made.

Response: In the Friedman case, the Court of Appeals for the Eighth Circuit held that an oral false statement to the FBI was not covered by the general false statement statute in existing law (18 U.S.C. 1001) because the court construed the statute to cover only false statements made to agencies with regulatory or adjudicative jurisdiction. The Friedman interpretation of the current statute has been rejected by every other federal court of appeals to consider the question. (See, e.g., United States v. Adler, 380 F.2d 917 (1967)) and implicitly by the Supreme Court (see Bryson v. United States, 396 U.S. 64, 70-71 (1969)). S. 1630 follows the approach of the latter cases (Section 1343).

The majority approach represented by the Adler case certainly appears to be the more reasonable one, particularly if -- as is required by Section 1343 but not by current law -- the person making the false statement must know that it is made to a law enforcement officer or a noncriminal investigator and must either volunteer the statement or make it after being warned that making such a statement is an offense. It should be noted that this provision would not penalize the making of a merely misleading or unintentionally false statement; it would reach only a statement that the maker knows to be false.

RESPONSE TO RESPONSE: I cite one case in support of my statement of current law. Summitt cites one relevant case and one irrelevant case. This seems like a Mexican standoff.

Criticism 23

Criticism: S. 1630 would --

23. Write the word "sex" into the criminal penalties for all of the federal civil rights laws, without specifying ~~that~~ "sex" does not mean "sexual preference" or creating a clear defense for a person operating a sexually segregated hotel or athletic facility or making an employment decision on the basis of sex which may or may not be in violation of Title VII of the Civil Rights Act.

Response: Section 1504 carries forward the provisions of 18 U.S.C. 245 that make it an offense to use force or threat of force to injure or intimidate a person attempting to exercise specified civil rights, if the injury or intimidation is prompted because of the person's race, color, religion, or national origin -- and to this existing list of characteristics it adds sex. It adds it in a separate paragraph, however, in a manner that makes it clear that the inclusion of sex discrimination will not confer new rights; it will simply penalize the use of physical force to interfere with the exercise of existing rights. Accordingly, there is no reason for a special defense of the nature suggested in the criticism -- there is no offense absent discrimination in contravention of currently protected rights.

It is clear under existing law that the word "sex" does not mean "sexual preference." See DeSantis v. Pacific Telephone and Telegraph Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979) (the prohibition in title VII of the Civil Rights Act "applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.")

RESPONSE TO RESPONSE: Last year, Senator McClure's staff finally got the Department of Justice to admit that S.1722 language would have criminalized YWCAs, men's or women's public schools and colleges, women's hotels, women's athletic facilities, segregated dangerous work sites with only men, etc., because, using a bouncer, locked door, or any other contrivance to keep men or women out would be "by force or threat of force(bouncer, locked door, etc.)...intentionally...interfer(ing) with (such) person... because of such...person's...sex...in order to intimidate (such) person from...applying for, participating in, or enjoying...employment, ...a public school or public college,... an inn, hotel, motel,...or (any) other place of exhibition or entertainment that serves the public."

After DOJ failed to point out any language that would prevent this interpretation, it promised to remedy the situation.

This year's language is even worse:

(1) For some reason, "force or threat of force" has been removed from the definition of sex discrimination.

(2) It is not clear whether the ambiguous language contained in S.1630 ("in violaion of such other person's right not to be subject to discrimination on that account") would be interpreted by a court as an expansive new declaration of sexual rights or as a condition under which criminal penalties could be imposed. If the former, that problem in and of itself would make this the worst bill of the decade.

On the question of gay rights, the Supreme Court has not ruled. Neither has the radical D.C. Circuit Court of Appeals. It is clear that a litigative effort to establish that "sex" means "sexual preference" will be made at the earliest possible moment. We find it particularily unnerving that Summitt is steadfastly unwilling to statutorily exclude "sexual preference" from the definition of "sex," given that he is so adamant in declaring that this is the current law.

Criticism 24

Criticism: S. 1630 would --

24. Specifically create statutory remedies whereby a court could order corporations convicted of certain regulatory offenses to notify their customers to sue them.

Response: S. 1630 contains a provision (Section 2005) that will permit a judge, during the sentencing process, to require a defendant (whether an individual, corporation, labor union, or other entity) convicted of criminal fraud to give notice of the conviction to the victims of the offense (who, in cases involving large-scale frauds, may not all be known to anyone other than the defendant) in order to facilitate any private actions that may be warranted for recovery of losses. Without such a provision, many victims of major fraud schemes may not become aware of the fraud (e.g., that the mining stock they purchased is counterfeit) until it is too late to seek restitution, or may not be able to ascertain the perpetrator's whereabouts (e.g., a "fly-by-night" roofing operation). A limitation is placed upon a defendant's obligation if notice would require undue expense. Moreover, it is quite clear that a court today could accomplish the same result as a condition of probation.

RESPONSE TO RESPONSE: This expressly contradicts the committee report of the last two years. The 1979 report stated:

> There are no provisions of the current federal law requiring an offender to give notice of his conviction to his victims. There is, however, an analogous concept contained in present statutes that require motor vehicle and tire manufactures to notify the Secretary of Transportation of defects in their products and permit the Secretary to disclose those defects to the public(15 USC 1402(d)). The extension of the concept to the area of criminal law was proposed by the national commission.

Criticism 25

Criticism: S. 1630 would --

25. Allow all of a company's assets to the forfeited to the federal government because it engaged in a payment to a foreign official which was not considered unlawful or inappropriate in the country in which it was made.

Response: Section 4001 permits the Attorney General to institute a civil action to obtain the forfeiture of property used in connection with certain criminal offenses under the Code. One such offense is commercial bribery (Section 1751), an offense that, among other provisions, includes by cross-reference payments to foreign officials in violation of the existing Foreign Corrupt Practices Act. Contrary to the assertion in the criticism, however, no conviction for commercial bribery could result in forfeiture of "all of a company's assets." Section 401(a)(18) plainly limits forfeiture to property "given or received in violation of" the bribery statute. In other words, only the value of the bribe itself would be subject to forfeiture.

RESPONSE TO RESPONSE: Summit perceives only one of two possible vehicles under which a company could be proceeded against under the comercial bribery statute. A company charged with more than one violation of section 1751 could also be regarded as a "racket," with all of the attendent consequences of that definition.

abortion

THE WHITE HOUSE

WASHINGTON

3 July 1981

MEMORANDUM TO: MARTIN ANDERSON

FROM: BARBARA HONEGGER

SUBJECT: HEALTH RISKS FROM PREGNANCY AND CHILDBIRTH, AND THE PROPOSED HUMAN LIFE BILL, S. 158

Pregnancy and childbirth today pose risks to the health of American women. 305 deaths from pregnancy and childbirth were reported in 1978. 39% of the 3.3 million American women who had a child in 1978 experienced medical complications directly related to pregnancy, labor and delivery, or the post-partum period immediately following delivery. If the additional significant risks of Cesarean sections are added, the percentage rises to 54%.

According to the National Center for Health Statistics, the percentage of pregnancies with reported medical complications in U.S. hospitals has risen significantly since the early 1970's. Despite continued advances in medical technology and care, the percentage of pregnancies complicated with health-threatening problems rose from 25% in 1975 to 39% in 1978. If the additional risks from Cesareans are added, the percentage in 1975 was 32%, and 54% in 1978.

Since 1970, the number of American women who have undergone Cesarean deliveries has risen so dramatically (from 329,000 in 1975 to 510,000 in 1978) that the National Institutes of Health called a special conference in 1980 to address the problem and propose immediate ways to control the numbers of these procedures.

The health risks to an American woman from legal abortion today are far less than the health risks from committing a pregnancy to childbirth.

Attached is a table summarizing maternity-related health risks. The data for this table were supplied by the National Center for Health Statistics.

HEALTH RISKS TO AMERICAN WOMEN FROM PREGNANCY AND CHILDBIRTH

(SHORT-STAY, NON-FEDERAL HOSPITALS)[1]

		1975	1976	1977	1978
I	Total pregnancies committed to Birth[2]	3,177,994	3,200,899	3,359,685	3,365,580
II	Total Live Births[2]	3,144,198	3,167,788	3,326,632	3,333,279
III	Total Pregnancies committed to term with medical complications[3]	783,000	1,027,000	1,161,000	1,285,000
IV	Percentage of total pregnancies carried to term with medical complications[3]	25% 32%	32% 44%	35% 49%	39% 54%
V	Complications of Pregnancy other than spontaneous abortion	424,000	421,000	454,000	448,000
VI	Complications of Delivery (Birth) including spontaneous abortion[4] and Cesarean section (major surgery)	1,581,000	1,671,000	1,882,000	2,034,000
VII	Complications of the Puererium (Post-partum period)	82,000	78,000	79,000	68,000
VIII	Mature spontaneous abortions[2,4]	33,796	33,111	33,053	32,301
IX	Cesarean Section Deliveries (major surgery)[5]	328,000	378,000	455,000	510,000

1 Figures are from the National Center for Health Statistics. 95% of births in the U.S. today take place during short-stays in non-federal hospitals.

2 Exact total figures. All other figures (those ending in zeroes) are based upon nationwide sample surveys of short-stay federal hospital medical records by the National Center for Health Statistics.

3 Total pregnancies committed to term (birth) = Total live births (II) + total mature spontaneous abortions--abortions of fetuses of at least 20 weeks of age, the age at which most states re-require the event to be reported (VIII). Spontaneous abortions are included in the total of pregnancies committed to term because, unlike induced abortions, which the Human Life Bill, S158, and related constitutional amendments would hope to outlaw, they risk the life and health of the woman due to no fault of her own. Additionally, a woman who has carried a fetus to 20 weeks and has not attempted to end her pregnancy is likely to be committed to carrying that pregnancy to term.

4 The total number of spontaneous or natural abortions of 20-week-or-over-aged fetuses remains stable at about 33,000 per year.

5 The risk figures actually underestimate the danger to a woman from Cesarean section delivery, for once a Cesarean is performed on a woman, her chances of requiring this higher-than-normal-risk surgical procedure for future deliveries is vastly increased. The large number of American women who have already undergone Cesareans will likely require them for the remainder of their reproductive lives, with the attendant risks higher than those for conventional childbirth.

11 SEP 1981

national RIGHT TO LIFE committee, inc.

Suite 341, National Press Bldg. — 529 14th Street, N.W. —
Washington, D. C. 20045 — (202) 638-4396

September 11, 1981

From: J. C. Willke, M. D.
President

To: Mr. Edwin Meese III

Re: Current Legislation

I am writing as a follow up to a meeting with Mr. Edwin Gray, Mr. William Gribbon, and Mr. Edwin Thomas yesterday.

This concerns the administration's position on the Hyde Amendment and the Ashbrook Amendment.

Currently, the Hyde Amendment to the Labor-HHS appropriations bill restricting the use of federal funds for Medicaid abortions is part of a continuing resolution. We expect the current language, which we support, to be attached in the House to either the FY '82 Department of Health and Human Services Appropriations bill or to an omnibus continuing resolution.

The Ashbrook Amendment, by a vote of 253 to 167, was added to the Treasury-Postal Appropriations Bill by the House. It would eliminate the use of federal funds for induced abortions through federal employees' health insurance. Currently, 25,000 such abortions are being paid for annually with tax money (which constitutes 60% of such funding).

It is my request, in the name of the 50 state Right to Life organizations and their 2000 chapters which I represent, that the administration, in line with its current policy, make known to the members of the Senate Appropriations Committee that it stands in strong support of both the "pure" Hyde and the Ashbrook amendments.

The Treasury-Postal Appropriations Bill will be marked up in that committee as early as Tuesday, September 15. Therefore, we ask your prompt attention to this matter.

Finally, let me express my personal appreciation to you, Mr. Thomas, Mr. Gray, and Mr. Gribbon, for the opportunity to communicate on this. Having been a part of the "team"

during the pre-election time, and having been at least a bit distanced from the administration by recent events, I welcome the opportunity to again enjoy a renewed rapport. This certainly provides us with a chance to resume cooperation as well as to begin to mend fences.

Sincerely,

J. C. Willke, M. D.

JCW:em

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

14 SEP 1981

September 12, 1981

TO: Ed Thomas

FROM: Bill Gribbin

RE: Wilkie conversation -- Tuesday's Presidential meeting with Republican leadership

Senator Hatfield, Chairman of Appropriations, had his legislative director, Tom Getman, call here yesterday. The upshot of a long conversation was that Hatfield plans to ask either the President or Mr. Meese for Administration "guidance" on the Hyde and Ashbroook amendments at Tuesday's GOP leadership meeting.

Getman knows that the Administration has backed the Hyde Amendmen in House consideration of the Labor-HHS Appropriations bill, and that our position on Ashbrook was that it "is in accord with Administration policy." He nonetheless reports that Senator Hatfield would like to have "clean" appropriations bills. (You know what happened when that was tried in May: Helms led the Senate in defeating Hatfield by an embarrassing roll call vote.) So Hatfield will be looking for some encouragement that the Administration will back him -- or at least, not oppose him -- if he tries, in Committee or on the floor, to remove the Hyde Amendment from Labor-HHS and the Ashbrook Amendment from Treasury Appropriations.

In the context of your discussions with Wilkie and others, I am sure you know the great sensitivity of this matter.

cc: Ed Gray

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 14, 1981

TO: MARTIN ANDERSON

VIA: ED GRAY
RON FRANKUM RF

FROM: GARY BAUER GB

RE: Abortion Restrictions on Appropriations Bill

As per the request from your office, the following is an update on the abortion problem we face on the Hill. Several events have taken place since our conversation on May 13 concerning the problem of abortion restrictions on appropriation bills.

1. It is now generally believed that the amendment offered by Senator Hatfield last week in his Subcommittee effectively removed all restrictions on the use of HHS funds for abortion. (Previously, it was assumed that his amendment did nothing more than allow the present law, with its "Hyde restrictions", to continue.)

2. Since Sen. Hatfield indicated he acted with Administration support, and since this has not been denied, the anti-abortion groups are aiming their ire at us. In addition to feeling misled, they believe our strategy will eliminate opportunities for the Senate to go on the record on the abortion issue. (Twenty-four of the 33 Senators up in 1982 are pro-abortion and the anti-abortion forces believe that many of them will be defeated if the record clearly shows their position on the issue.)

3. They have arranged for Senators Helms and Eagleton to offer an amendment from the floor that places the restrictions back on the bill. They also informed Morton Blackwell in Elizabeth Dole's Department that if the Helms-Eagleton amendment fails because the Administration is able to convince some anti-abortion Republicans to vote against it, they will hold a press conference and directly attack the Administration.

4. We appear at this point to be on a collision course with normally friendly groups. Given the President's anti-abortion views, I fear this type of conflict, if it becomes public, will result in the President being forced to go even further "out front" on this issue than any of us may feel comfortable with.

5. The problem is made more difficult by the fact that this controversy is not a one time event. Last night the House of Representatives voted 242-155 to prohibit any funds to be paid under the Federal employees health benefit program for abortions. The margin of the vote was surprising and indicates there is a strong anti-abortion block in the House. This appropriations bill will now come to the Senate. Using the Hatfield strategy, we would move in the Senate Committee to eliminate that language in order to keep appropriation bills clean. If we do that, it will be brought up on the floor again. In short we are backing into a confrontational posture with groups extremely friendly to us in the election.

6. I am fearful that Mr. Meese has not been briefed on the full ramifications of our strategy and recommend that he be brought up to date as quickly as possible. It is not too late for us to take the initiative and add the anti-abortion language on the floor as an administration position.

F: ABORTION

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

TO: Ed Thomas

FROM: Bill Gribbin

RE: Supplemental Appropriations -- Hatfield, etc.

I think we can crack a deal between Hatfield and Helms, which would prevent a bloodbath, issue by issue, on every controversial social policy during Senate consideration of the Supplemental.

Hatfield seems amenable, and Helms is cautiously supportive. But Helms insists, emphatically, that our arrangements would have to be ratified in a Meese-Hatfield-Helms meeting.

I strongly recommend that. It could save us incredible grief on the Senate floor.

As tentatively proposed, the arrangement would be as follows:

1. The Senate considers the Supplemental without reference to abortion funding restrictions.
2. Hatfield appoints conferees, as does Proxmire, who constitute a majority for accepting the House language of the Hyde amendment: life of the mother plus states rights.
3. Hatfield promises to support the House language and bring it back to the Senate as the only possible outcome.
4. The Administration secures an advance commitment from Senator Stennis, if he is to be a Democratic conferee, to support, as he always has, the House language.
5. Helms quietly puts out word that he is willing to see this matter taken care of in conference.

I am sure that Hatfield will eagerly agree to such a meeting. He fully understands the peril of going to the floor with a bill that would touch off a firestorm among Republicans and gleeful Administration-baiting among opportunistic Democrats.

E.M. -- do you have any instructions on this for me? E.W.T.

more vulnerable. In many marriages, the husband's pension is the major asset. If it is taken out of the marital kitty, there isn't much property left to divide.

In the view of most state courts, dividing the pension amounts to simple economic justice. But the Supreme Court's decisions cast marital law back to the days when a husband's money was all his and a housewife's work wasn't worth a dime.

A deciding clause in the Railroad Retirement Act says that a third party cannot normally be assigned any right to the worker's pension. Most state courts say that that clause applies only to outside creditors who are suing for a judgment. But the Supreme Court held that it also cuts out any property rights claimed by a spouse. (All private pensions insured by the Employee Retirement Income Security Act are covered by that same, spouse-denying clause.)

In the military case, the court said that the wife is entitled to part of the pension only if Congress specifically grants it.

Special Cases: Howard Lipsey, chairman of the family-law section of the Association of Trial Lawyers, thinks that these two decisions will not spread to private pensions. "These are special cases," he argues. The military-pension decision, for example, was linked to Congress' right to regulate armies. But Doris Freed, who heads the research committee of the American can Bar Association's family-lay section, disagrees, calling the decisions "a clear and present danger" to the equitable property division established by state law.

Bills introduced in Congress would guarantee wives the pension rights called into question by the Supreme Court. (Congress permits civil-service and foreign-service pensions to be divided in divorce.) But Rep. Pat Schroeder says the bills face tough going, "partly because some opponents have been through bitter divorces and can't look at the issue objectively."

If Congress and the courts deny a wife her stake in what was expected to be the couple's pension, the message is clear: a housewife is not worthy of her hire. Given the high divorce rate, her only security may lie in quitting full-time housework and finding another occupation.

MILITARY WIVES SET TO DO BATTLE OVER TORPEDOED PENSIONS

(By Jane Bryant Quinn)

NEW YORK.—The U.S. Supreme Court scorned military wives last June in a decision that wiped out all their pension rights after divorce. This week, those wives will carry their grievances to a Senate Armed Services subcommittee, in what is shaping up as the hottest marital battle in town.

The military wives are carrying the ball, but their success or failure could affect the pension rights of every housewife.

Badly but, the issue is this: Is a housewife a full, economic partner in her marriage? Or is she a charity case whose support in old age depends solely on keeping her husband's goodwill?

If she's a full economic partner, she should be entitled—as a matter of right—to share in the property accumulated during the marriage. At divorce, her share should be hers to keep.

Most state court now accept the economic partnership view of marriage and include pension assets as part of the property.

Housewives are not generally treated as 50–50 partners. Except for California and a few other states, most courts award wives something less than half. For example, if a marriage lasted 20 years and her property rights are determined to be, say, 40 percent, she gets 40 percent of the value of the pension accumulated during the years of the marriage (or its equivalent in other property).

The Supreme Court, however, rejected pension division in the only two cases to come before it so far (one on military pensions, one on railroad retirement). It said these particular pensions belong solely to the worker, as a personal entitlement.

The husband, in short, is working for his own retirement security and the housewife is working for the husband. If the marriage fails, her retirement is her own problem, not his.

That Supreme Court decision created two categories of housewives: one with some measure of old-age protection in divorce and one without. At present, military and railroad-retirement wives are the ones without.

Military wives are trying to persuade Congress to pass a pension-protection law that would undo the Supreme Court decision. Three main proposals are under consideration.

If any of them is passed, it will be an important measure of congressional intent on the property rights of women. It will stand as a precedent in future cases.

If they fail, the Supreme Court might read it to mean that Congress does not want wives to have property rights to their husbands' pensions. That could result in taking hard-won rights away from other women, too.

Women who have careers and pensions of their own may not much worry about the status of their husbands' pensions. But for older housewives, pension rights can make the difference between getting by and getting welfare. Military wives find it particularly hard to earn their own pensions because they must move around too much to stick with any one job.

The simplest pension-rights bill comes from Sen. Dennis DeConcini (D-Ariz.), who wants to return the issue to state jurisdiction. His view is that a military wife, like other wives, should be entitled to whatever property, including pensions, is awarded her under state divorce law.

A bill from Rep. Kent Hance (D-Tex.) carries that principle one step further by dealing with the problem of collecting state-ordered pension distributions as well as alimony and child support awarded against retirement pay. "We need a law providing for a workable payment system for the court orders many of us already have," Vivian Filemyr, national president of Action for Former Military Wives, told my associate, Virginia Wilson.

If a military man moves and quits paying his ex-wife and children, the Defense Department refuses to tell the ex-wife where he is. The Hance bill would guarantee her court-ordered payments by sending her checks directly.

A more sweeping bill from Rep. Patricia Schroedor (D-Colo.) would guarantee military wives married 10 years or more a pro rata share in their husbands' pensions, along with other rights. Such a law would actually put military wives in a more favorable position than other wives.

So far, the military-pension debate has been capturing the attention of only the men and women directly affected. Male-dominated military organizations uniformly oppose the proposals now in Congress. The Defense Department has yet to be heard from, but the outcome of this narrow battle could affect marital rights everywhere.●

By Mr. HATCH:

S.J. Res. 110. Joint resolution to amend the Constitution to establish legislative authority in Congress and the States with respect to abortion; to the Committee on the Judiciary.

HUMAN LIFE FEDERALISM AMENDMENT

● Mr. HATCH. Mr. President, I am proposing an amendment to the Constitution today—the human life federalism amendment—that would overturn the infamous decision of the U.S. Supreme Court in *Roe* v. *Wade* 410 U.S. 113 (1973). This amendment would restore to the representative branches of Government the authority to legislate with respect to the practice of abortion.

ROE AGAINST WADE

In Roe against Wade, the Court found that the due process clause of the 14th amendment contained a guarantee of a "right to privacy" that was broad enough to encompass a woman's decision "whether or not to terminate pregnancy." Id. at 153. Because the right to personal privacy was a "fundamental right," it could be limited only by some "compelling State interest." Id. at 153. While such an interest could not be based upon the inclusion of unborn human life in the term "person" in the 14th amendment—with respect to which there may be no deprivation of life without due process of law—the Court nevertheless found some measure of State interest in protecting maternal health and in preserving the "potential life" of the fetus. Id. at 148.

In seeking to give expression to these interests, as well as protecting the newly discovered right to terminate one's pregnancy, the Court summarized its holding in the following manner:

(a) For the stage prior to approximately the end of the first trimester of pregnancy, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. 410 U.S. at 164–165.

The scope of the abortion right set forth by the Court in Roe against Wade on January 22, 1973, was broader than that existing at the time in every one of the 50 States in the Union.

Prior to Roe against Wade, 31 States had statutes on their books that totally protected life from conception. Of the 19 that permitted abortion under certain circumstances, all 19 permitted abortions where necessary to save the life of the mother, 6 permitted abortions in cases of rape, 5 in cases of incest, and 4 in cases where there was likelihood that a child would be born with a substantial deformity. In only four States was abortion on demand permitted and, in each of these, there were temporal limits to such a right. The most liberal provision existed in the State of Massachusetts which permitted abortions without restrictions until the sixth month of pregnancy.

Whatever one's perceptions about

abortion, it is difficult to argue with the proposition that Roe against Wade has created a regime of abortion on demand, a national policy of abortion without restrictions of any significant kind. It is this status quo that would be overturned by the proposed human life federalism amendment.

During the first trimester of the pregnancy, the plenary right to abortion is express. During that period, there is absolutely no governmental authority to intervene in the woman's decision to abort. During the second trimester, a Government interest in abortion does arise—the interest in protecting and preserving maternal health. This interest may be expressed through governmental requirements that such abortions be performed within hospitals, clinics, or other facilities licensed to perform abortions.

There remains an absence of governmental authority, however, to do anything more than insure the safeness of the procedures of abortion. There are no protections whatsoever for the unborn fetus during this stage of the pregnancy.

During the final trimester of abortion—or approximately at that point at which the fetus reaches "viability"—a potential interest arises in protecting the fetus. The Government, finally, was in a position to protect the life of the fetus.

The Court, however, limited even this authority with an exception—and it was an exception that consumed the rule. During even the third trimester of the pregnancy, the right to abortion existed where necessary to protect the life or health of the mother. The critical element here was the health of the mother.

According to the Court in the companion case of *Doe* v. *Bolton* 410 U.S. 179 (1973), whether or not the health of the mother necessitated an abortion was a medical judgment to be made "in the light of all factors—physical, emotional, psychological, and the woman's age—relevant to her well-being." Id. at 192.

In other words, to quote Prof. John Noonan of the University of California Law School, the absolute right to abortion was curbed during the final trimester only by "the necessity of a physician's finding that she needed an abortion." Noonan, "A Private Choice" (New York: MacMillan, 1979), 12. It would be a rare physician who would be incapable of defending an abortion decision on the grounds that, in his best medical judgment, the "well-being" of the mother demanded it.

The abortion right then is a virtually unrestricted right under Roe and Doe. Any significant restrictions on this right are illusory. To quote Professor Noonan again:

> For the nine months of life within the womb the child was at the gravida's (pregnant woman's) disposal—with two restrictions: She must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion. *Id.* at 12.

No substantial barriers of any kind exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy.

JURISPRUDENCE OF ROE

Apart from the national policy of abortion that it spawned, the Roe decision has been criticized broadly as an exercise in jurisprudence by observers of varying political persuasions and varying perspectives on abortion. In dissent in the Roe and Doe cases, Justice White observed:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing State abortion statutes. 410 U.S. at 221.

Justice Rehnquist added in an accompanying dissent:

> The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. . . . To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. 410 U.S. at 174.

Prof. Archibald Cox, the former Solicitor General of the United States, remarked of the Roe decision:

> The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations. . . . Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution. Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976), 113–114.

Prof. John Hart Ely of the Harvard Law School, while taking care to divorce himself from critics of the substantive policy expressed in Roe, concluded:

> It is, nevertheless, a very bad decision . . . It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be. Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade* 82, Yale Law Journal 920, 947 (1973).

Alexander Bickel, professor at the Yale Law School, described the decision as akin to a "model statute" and expressed bewilderment at how such a responsibility had come to be vested in the Court:

> One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject . . . *Roe* is derived not from Herbert Spencer's Social Statics, but from fashionable notions of progress . . . this will not do. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 28.

Prof. Charles Rice of the Notre Dame Law School described the decision as "the most outrageous decision ever handed down by the Court in its entire history"; Prof. Richard Epstein of the University of Chicago Law School referred to Roe as "comprehensive legislation," without "principled grounds"; Prof. Robert Byrn of the Fordham Law School attacked the decision as resting upon "multiple and profound misapprehension of law and history"; Dean Harry Wellington of the Yale Law School viewed Roe as "Pickwickian" and "without mandate"; and Prof. Joseph Witherspoon of the University of Texas Law School described the decision as "unquestionably the most erroneous decision in the history of constitutional adjudication by the Supreme Court." Professor Noonan concluded his analysis of the abortion cases by stating:

> The liberty established has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal beliefs of seven justices on the men and women of fifty States. The continuation of the liberty is a continuing affront to constitutional government in this country. Noonan at 189.

OVERTURNING SUPREME COURT

Justice White in his Roe dissent aptly characterized the majority decision when he observed:

> The upshot is that the people and the legislatures of the fifty States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against the spectrum of possible impacts on the mother on the other hand.

It is this result that the proposed human life Federalism amendment is intended to overcome. The proposed amendment would restore to the States—as well as invest in Congress—the authority to legislate with respect to abortion. While I would personally favor an amendment that would impose a duty upon the States to prohibit virtually all abortions, I must stress that this is not the objective of the present amendment. It is not necessary that there be this duty in order to overcome the Roe and Doe decisions. It is necessary only that the representative branches of the Government no longer be totally limited in their ability to act in restricting or regulating or prohibiting abortion because of some presumed constitutional right to abortion.

There is no such constitutional right to abortion, in my view. It has never existed and there is nothing in the proposed measure that would concede that such a right has ever existed. I recognize, however, that, under our structure of Government, it is the duty of the Court to "say what the law is," *Marbury* v. *Madison* 1 Cranch 137 (1803). For better or worse, the Court has spoken on the issue of abortion in Roe and Doe; it has articulated a constitutional right to abortion emanating from the 14th amendment. There is no alternative now that a constitutional amendment to overcome this result—except to wait for the slim possibility that the Court may some day admit its error and overturn on its own the abortion cases.

There is certainly ample precedent for such a response to a Supreme Court decision. The 11th amendment to the Constitution, prohibiting the Federal judicial power to be exercised in suits by citizens of a State against another State, came in direct response to an action of the Supreme Court in accepting jurisdiction over such a case. *Chisholm* v. *Georgia*, 2 U.S. 419 (1793).

The 14th amendment, in circumstances not dissimilar from the present case, was proposed to the Constitution following the infamous decision of the Supreme Court in the *Dred Scott* case finding that black individuals were nonpersons under the Constitution. 60 U.S. 393 (1857).

The 16th amendment, permitting the imposition of a Federal income tax, was later enacted in response to a Supreme Court decision finding an unappor-

tioned—by State—tax to be in violation of article I of the Constitution. *Pollock* v. *Farmer's Loan and Trust Co.*, 157 U.S. 429 (1895); 158 U.S. 601 (1895).

Finally, the 26th amendment, according 18-year-olds the right to vote in Federal and State elections, was proposed following the Court's decision that the Congress lacked authority to impose such an obligation statutorily upon the States. *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

In addition, serious efforts at constitutional amendment were made in response to Court decisions on the subjects of child labor laws, *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), later overruled in *United States* v. *Darby*, 312 U.S. 100 (1941); and State legislative apportionment requirements, *Baker* v. *Carr*, 369 U.S. 186 (1962).

PROGENY OF ROE

It is not simply the abortion right that was created in Roe and Doe that is the object of my proposed amendment. However indefensible these decisions as matters of policy and jurisprudence, they have been distorted further by a series of subsequent decisions clarifying the scope of this right. Each of them have come in response to post-Roe efforts by the States to accord some measure of protection to unborn human life, or to establish some procedure to insure that the abortion decision was a deliberate, carefully considered one. In virtually every instance, the Supreme Court has struck down these exercises.

In *Planned Parenthood* v. *Danforth* 428 U.S. 52 (1976), the Supreme Court held that spousal consent statutes, which required the consent to an abortion by the father of a fetus, were unconstitutional. See also *Coe* v. *Gerstein* 376 F. Supp. 695 (S.D. Fla. 1974), affirmed 428 U.S. 901 (1976). The Court in Danforth also held that so-called informed consent statutes, which required a physician to obtain the written consent of a woman after apprising her of the dangers of abortion and possible alternatives, were constitutional only if the requirements were closely related to maternal health and not unnecessarily burdensome upon the abortion right. See also *Freiman* v. *Ashcroft* 584 F. 2d 247, affirmed 99 S. Ct. 1416 (1979).

In *Belotti* v. *Baird* 443 U.S. 622 (1979), the Court held that, while parental consent statutes requiring minors to obtain the consent of their parents prior to having an abortion were not unconstitutional per se, the State must also provide alternative procedures for obtaining an abortion in the event that parental consent is not forthcoming or if the minor does not want to request such consent.

See also *Planned Parenthood* v. *Danforth* 428 U.S. 52 (1976). In *H.L.* v. *Matheson* Docket No. 79-5903 (1981), however, the Court upheld a Utah State statute prohibiting physicians, under narrowly defined circumstances, from performing an abortion on unemancipated minors without parental notification. The statute was drawn extremely narrowly to require such notification "if possible" and to apply if the minor is living with and dependent upon her parents and has made no showing or claim of unusual maturity.

In *Colautti* v. *Franklin*, 439 U.S. 379 (1979), the Court ruled that fetal protection statutes were generally unconstitutional by reason of being vague and overy broad. Such statutes, in one manner or another, impose an obligation upon a performing doctor to make reasonable efforts to save the life of an aborted fetus. In Colautti, the Court found that such statutes were permissible only with respect to viable fetuses—who by definition were least in need of such protection—and that they must contain precise standards for determining such viability. See also *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

Thus, even at the latest stages of pregnancy, the Court refused to find a significant interest in the life of the fetus that could be balanced against the apparently unrestricted right of the woman to terminate her pregnancy at will. It is the progeny of Roe and Doe, as much as Roe and Doe themselves, toward which my proposed amendment is directed. It is these cases which make clear the lengths to which some on the Court are prepared to go in defense of the abortion right.

FEDERALISM AMENDMENT

The proposed amendment would read in its entirety:

> The right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions; *Provided*, That a law of a State more re-restrictive than a law of Congress shall govern.

It is language that I hope will be scrutinized by my colleagues, by the public, and by participants in the hearing process that will begin next month in the Subcommittee on the Constitution.

In removing the abortion controversy from the Federal judicial branch, the proposed amendment would place the debate within those institutions of Government far better equipped to deal with the issue. By its very nature, the judiciary is the wrong forum to resolve the enormously difficult problem of abortion. Because they cannot control the specific types of cases that come before them, and because they are limited in their ability to fashion compromise solutions to difficult issue, the courts are entirely the wrong place within which to argue about abortion.

The "all or nothing" legalization of abortion-on-demand of Roe and Doe has done nothing but exacerbate the tensions already created by the abortion controversy. Unlike most legislative solutions in which some element of deference is paid to major political or social or occupational groupings, the abortion decisions involved a small group of seven individuals who totally ignored the passionately held views of a large number of the American people. They did this not in response to the unequivocal demands of the operative document of our Nation, but in the course of a decision whose jurisprudence and whose textual and historical foundation in the Constitution is at least as suspect as the policies that it fostered.

Let me be clear about what I am saying. I personally believe that abortion is an "all or nothing" issue. I am irreconciliably opposed to abortion. I believe that abortion involves the taking of a human life. It is morally, ethically, and—I believe—constitutionally wrong. Should my amendment become part of the Constitution, I would be among those seeking the most restrictive State and Federal laws with respect to abortion. When a greater consensus exists in this country on the repugnance of abortion—which consensus I believe will be promoted by this amendment—I will be among those seeking a direct constitutional prohibition on abortion.

That consensus, unfortunately, does not exist yet today. The abortion issue, if it is to be elevated into an issue of constitutional proportions, should be elevated only through the normal consensus-building procedure of the article V amendment process rather than through the process of judicial reinterpretation.

For the present, I believe that it is important to reenfranchise all the people in fashioning a solution to the abortion controversy. That can only be done by placing this issue back within the representative branches of Government where it should have remained all along. I would expect that the result would be difficult legislative compromises, bitter sessions of negotiation and give-and-take, and solutions not entirely satisfactory to any single group or individual, including myself.

Although I would expect to continue personal efforts to secure a total abolition of abortion in this country, I know that I would be able to tolerate a regime that permitted some abortions much better if it were the result of the clear will of the citizenry speaking through their representatives than where it has been the result of a small elite imposing their own personal views through the pretext of constitutional interpretation.

LEGISLATIVE OPTIONS

Because the proposed amendment would only provide authority to the State legislatures and Congress to act on the issue of abortion—without dictating particular legislative outcomes or policies—I would hope that all of my colleagues who can distinguish between abortion and run-of-the-mill medical operations would consider supporting it. Nothing is mandated by this amendment. It does not get involved with any issues relating to "when human life begins." It does not read in "rape" or "incest" or "medical necessity" exceptions into the Constitution. It does not require any particular treatment of contraceptives—which would not be covered by the amendment—or abortifacients or IUD's. No questions of tort law or criminal law or insurance law are inadvertently raised.

All that the proposed amendment would do is to "deconstitutionalize" the issue of abortion. There would no longer be a constitutional right or guarantee of abortion. Congress and the States, it is true, could act under the proposed amendment to totally prohibit abortion. They could prohibit abortions in all but narrowly limited or defined circum-

stances. I would personally support this. But, if they chose, they could undertake far less extensive reforms. They could, for example—

First. Choose only to limit the circumstances of late pregnancies alone;

Second. Choose only to impose obligations upon physicians to save the lives of fetuses capable of surviving an abortion;

Third. Place limitations upon the experimental and medical research use of fetuses;

Fourth. Require that women contemplating abortion be fully apprised of the risks of abortion and alternatives to abortion;

Fifth. Require some form of parental consent to abortions performed upon minors;

Sixth. Require some form of spousal consent to abortions performed upon a woman;

Seventh. Establish some minimum waiting period before an abortion could occur or require some form of professional consultation prior to an abortion;

Eighth. Establish rights of refusal to perform abortions in physicians or nurses, or in entire hospitals;

Ninth. Limit the commerce in abortifacient devices;

Tenth. Limit public advertising by abortion clinics and by abortion services.

The Congress and the States, if they chose, could further decide to do nothing about abortion. That, too, would be within their discretion under the proposed amendment.

MISCELLANEOUS ASPECTS

Let me briefly summarize some of the technical aspects of the proposed amendment that I have tried to consider carefully. I will, of course, look forward to hearing testimony on these and other aspects of the amendment during the upcoming Subcommittee on the Constitution hearings:

The "right to abortion" referred to in the first sentence is a right that apparently was derived in Roe from the due process clause of the 14th amendment. There is some suggestion even in Roe, though, that the right may be derived from the ninth amendment. Roe at 153. There is some confusion on this point. The purpose of the proposed amendment is to abrogate this "right" whatever its alleged constitutional basis.

There is some disagreement as far as whether or not each of the individual sentences of the amendment standing alone would effectively overturn Roe. I believe that they probably would, but have chosen to clarify this issue by proposing that each be placed into the Constitution. Together, it should be explicit that there is no constitutionally based right to abortion emanating from any provision of the Constitution that might potentially restrict the ability of Congress or the States to legislate with respect to the subject.

The right to legislate with respect to abortion would, of course, be restricted by other provisions of the Constitution not relating to a right to abortion. It would be a clear violation of the equal protection clause of the 14th amendment, for example, for a State to distinguish between women on the basis of race in permitting or restricting abortions.

The concept of "concurrent" power to legislate with respect to abortions is not dissimilar to the concept of "concurrent" power given Congress and the States to enforce the 18th amendment relating to the manufacture, sale, or transportation of intoxicating beverages. There would be separate and independent—not joint—power in Congress and the States to exercise their territorial limits. *National Prohibition Cases* 253 U.S. 350 (1920).

The question of whether a Federal law enacted under the proposed amendment would conflict with a State law is largely one of statutory construction that cannot be approached mechanically. Similarly, what is more or less "restrictive" in the way of placing limits upon abortion is a matter that cannot be summarized through formulas.

The basic premise of the amendment, however, is this. The Congress would be empowered to establish minimum national standards with respect to abortion, if it chose. Under the supremacy clause of the Constitution, a Federal enactment would take precedence over a State enactment in the case of irreconcilable conflict. See for example, *State* v. *Gauthier* 118 A. 380 (1922); *State* v. *Ligaarden* 230 N.W. 729 (1930); *State* v. *Lucia* 157 A. 61 (1931).

The latter clause of the second sentence, however, would alter this general rule of preemption to the extent that a State enactment was more restrictive of abortion than a congressional enactment.

In some respects, the differences between the more traditional constitutional amendments relating to abortion and the immediate amendment are not as great as appears at first glance. Even a proposed amendment that directly prohibited abortion would not be self-enforcing. It would require Federal and State enabling legislation. Given that the judiciary would—properly—be reluctant to force a coequal legislative branch of government to pass legislation, there would likely be a major element of discretion deposed in the legislative branches of Government under even a direct human life amendment.

Finally, I would note that, because it is a Constitution that we are amending, not a legal code, I have placed a priority on making clear the principle that is being pursued, not on insuring that each and every opportunity for possible circumvention is forestalled. I am not sure that this is possible. In this respect, I quote again from Professor Noonan:

> The Constitution is not addressed to persons of bad will, but to persons—judges, legislators, officeholders, citizens—who want to abide by its provisions. Therefore, it is neither necessary nor desirable to draft with an eye to silly, sophistical, or evasive interpretations. No language can be made foolproof. There is no language that cannot be distorted by evil men or inverted by clever men. It is not hard to show the vulnerability of any form of words to ingenious and insympathetic interpretation. As the Constitution is not addressed to the wicked or the foolish, so it is not addressed to the sophistical. The Constitution, and any amendment to it, speak to the understanding of those who with good will seek to comprehend the purposes of its framers. *Noonan* at 182.

CONCLUSION

Let me conclude by saying to those who would argue that this amendment represents a concession to, or a compromise with, a morally indefensible policy. I do not believe that this is true. Not only would the proposed amendment overturn Roe against Wade, but it would, arguably, go further by clarifying that Congress, as well as the States, possesses authority with respect to abortion. It would restore the status quo prior to the Roe decision—and then some.

While I would personally prefer that we go further, there can be absolutely no doubt in anyone's mind that there is not currently the kind of consensus for this action—either in the country or in Congress—that would permit this to be done. Nor is such a consensus imminent. The longer that abortion on demand continues, the more acceptable that it becomes, the more that it becomes institutionalized. I do not believe that we can permit this to happen.

Once, however, we can establish in the Constitution the principle that abortion is not an ordinary, routine medical operation, I believe that we can begin to reeducate all the American people to the cruel realities of abortion. Acceptance of this principle in the organic law of our land will better enable us to carry on education and information efforts.

The longer that the status quo—unrestricted abortion—continues to be the law of the land, the greater the number of citizens who will grow up in this country oblivious to any other reality, the greater the number of citizens who will forget that there was a time at which abortion was condemned unanimously by the States. Not during the Middle Ages, not during the era of the Founding Fathers, not during the industrial revolution, but during the entirety of our Nation's history through the 1950's and the 1960's and up until January 22, 1973.

The law is, in fact, a teacher. We must give it that opportunity before it is too late, before the lesson goes permanently unlearned.

I urge the support of my colleagues for the proposed amendment—not only those who share the full extent of my concern about abortion, but those as well who are uneasy at any aspect of the structure that has been erected by the Supreme Court, those who are hesitant at the process by which the abortion revolution has been wrought, and those who recognize the social divisions that have been caused this country by a Court that ignored the strengths of the democratic, representative processes of government in resolving differences among citizens.

I ask unanimous consent that the full text of the joint resolution appear at this point in the RECORD:

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

S.J. RES. 110

Resolved by the Senate and House of Representatives of the United States in Congress assembled, (two-thirds of each

House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern.".

ADDITIONAL COSPONSORS

S. 517

At the request of Mr. BENTSEN, the Senator from New York (Mr. D'AMATO) and the Senator from Iowa (Mr. GRASSLEY) were added as cosponsors of S. 517, a bill to amend the Clean Air Act to provide for further assessment of the validity of the theory concerning depletion of ozone in the stratosphere by halocarbon compounds before proceeding with any further regulation of such compounds, to provide for periodic review of the status of the theory of ozone depletion, and for other purposes.

S. 895

At the request of Mr. MATHIAS, the Senator from Michigan (Mr. LEVIN) was added as a cosponsor of S. 895, a bill to amend the Voting Rights Act of 1965 to extend certain provisions for an additional 10 years, to extend certain other provisions for an additional 7 years, and for other purposes.

S. 953

At the request of Mr. HEFLIN, the Senator from Louisiana (Mr. JOHNSTON) and the Senator from Washington (Mr. JACKSON) were added as cosponsors of S. 953, a bill to create a program to combat violent crime in the United States, and for other purposes.

S. 954

At the request of Mr. HEFLIN, the Senator from Louisiana (Mr. JOHNSTON) was added as a cosponsor of S. 954, a bill to amend title 18 and the Omnibus Crime Control and Safe Streets Act of 1974 and for other purposes.

S. 1142

At the request of Mr. HEFLIN, the Senator from Montana (Mr. MELCHER) was added as a cosponsor of S. 1142, a bill to amend the National Traffic and Motor Vehicle Safety Act of 1966 to authorize the Secretary of Transportation to require tire dealers or distributors to provide first purchasers with a form to assist manufacturers in compiling tire defects if the Secretary determines such notice is necessary in the interest of motor vehicle safety.

S. 1158

At the request of Mr. HEFLIN, the Senator from Alabama (Mr. DENTON) was added as a cosponsor of S. 1158, a bill for the relief of Christina Boltz Sidders.

S. 1235

At the request of Mr. D'AMATO, the Senator from Arizona (Mr. DECONCINI) was added as a cosponsor of S. 1235, a bill to exempt certain matters relating to the Central Intelligence Agency from the disclosure requirements of title 5, United States Code.

S. 1323

At the request of Mr. TSONGAS, the Senator from Maine (Mr. MITCHELL), the Senator from Connecticut (Mr. DODD), the Senator from Michigan (Mr. LEVIN), and the Senator from Montana (Mr. BAUCUS) were added as cosponsors of S. 1323, a bill to amend the Internal Revenue Code of 1954 with respect to the residential energy and investment tax energy credits, and for other purposes.

S. 1378

At the request of Mr. JEPSEN, the Senator from Utah (Mr. HATCH) was added as a cosponsor of S. 1378, a bill to strengthen the American family and to promote the virtues of family life through education, tax assistance, and related measures.

S. 1532

At the request of Mr. HEFLIN, the Senator from Arkansas (Mr. BUMPERS), and the Senator from Ohio (Mr. METZENBAUM) were added as cosponsors of S. 1532, a bill to amend the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure with respect to examination of prospective jurors.

S. 1589

At the request of Mr. HEFLIN, the Senator from North Dakota (Mr. ANDREWS) was added as a cosponsor of S. 1589, a bill to improve the security of the electric power generation and transmission system in the United States.

SENATE JOINT RESOLUTION 97

At the request of Mr. MITCHELL, the Senator from South Dakota (Mr. PRESSLER), and the Senator from Oregon (Mr. PACKWOOD) were added as cosponsors of Senate Joint Resolution 97, a joint resolution to designate the second full week in October as "National Legal Secretaries' Court Observance Week."

SENATE JOINT RESOLUTION 105

At the request of Mr. LAXALT, the Senator from Wisconsin (Mr. KASTEN), the Senator from Maryland (Mr. MATHIAS), the Senator from Alabama (Mr. DENTON), the Senator from California (Mr. CRANSTON), the Senator from Louisiana (Mr. JOHNSTON), the Senator from Texas (Mr. BENTSEN), and the Senator from Kansas (Mr. DOLE) were added as cosponsors of Senate Joint Resolution 105, a joint resolution to designate October 1981 as "National PTA Membership Month."

SENATE CONCURRENT RESOLUTION 32

At the request of Mr. MATHIAS, the Senator from Texas (Mr. BENTSEN) was added as a cosponsor of Senate Concurrent Resolution 32, a concurrent resolution authorizing a bust or statute of Dr. Martin Luther King, Jr., to be placed in the Capitol.

SENATE RESOLUTION 77

At the request of Mr. HEFLIN, the Senator from Alabama (Mr. DENTON) was added as a cosponsor of Senate Resolution 77, a resolution relating to the granting of exit visas for Irina and Boris Ghinis and their children, Julia and Allis Ghinis, for departure from the Soviet Union.

SENATE RESOLUTION 199

At the request of Mr. NUNN, the Senator from South Carolina (Mr. HOLLINGS), the Senator from Oregon (Mr. HATFIELD), the Senator from California (Mr. HAYAKAWA), the Senator from Texas (Mr. TOWER), the Senator from Florida (Mr. CHILES), the Senator from Oklahoma (Mr. BOREN), the Senator from Minnesota (Mr. DURENBERGER), the Senator from Pennsylvania (Mr. SPECTER), the Senator from Kentucky (Mr. HUDDLESTON), the Senator from Arizona (Mr. GOLDWATER), the Senator from North Carolina (Mr. HELMS), the Senator from Tennessee (Mr. SASSER), the Senator from Connecticut (Mr. WEICKER), the Senator from Washington (Mr. JACKSON), the Senator from New York (Mr. D'AMATO), the Senator from Michigan (Mr. LEVIN), the Senator from Mississippi (Mr. COCHRAN), the Senator from Nebraska (Mr. ZORINSKY), the Senator from Rhode Island (Mr. PELL), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Hawaii (Mr. INOUYE), the Senator from South Dakota (Mr. ABDNOR), the Senator from Wisconsin (Mr. KASTEN), the Senator from Alaska (Mr. MURKOWSKI), and the Senator from Illinois (Mr. PERCY) were added as cosponsors of Senate Resolution 199, a resolution to authorize "National Productivity Improvement Week."

SENATE RESOLUTION 211

At the request of Mr. BENTSEN, the Senator from West Virginia (Mr. ROBERT C. BYRD) was added as a cosponsor of Senate Resolution 211, a resolution calling on the Governors of the Federal Reserve System to encourage banks to make loans available for productive uses while eliminating loans for speculative and unproductive uses.

SENATE RESOLUTION 213—RESOLUTION AUTHORIZING SUPPLEMENTAL EXPENDITURES BY THE COMMITTEE ON THE JUDICIARY

Mr. THURMOND (for himself and Mr. BIDEN) submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 213

Resolved, That section 2 of the Senate Resolution 53, Ninety-seventh Congress, agreed to March 31 (legislative day, February 16), 1981, is amended by striking out the amounts "$4,272,722" and "$172,490" and inserting in lieu thereof "$4,425,590" and "$179,990", respectively.

NOTICE OF HEARINGS

SUBCOMMITTEE ON ENERGY REGULATION

Mr. HUMPHREY. Mr. President, I would like to announce for the information of the Senate and the public that the oversight hearings previously scheduled before the Subcommittee on Energy Regulation for Monday, November 2 and Tuesday, November 3 to consider the implementation of title I of the Natural Gas Policy Act of 1978 have been canceled.

96 CONGRESS
1st SESSION

S. J. RES.

(NOTE.—Fill in all blank lines except those provided for the date, number, and reference of resolution.)

IN THE SENATE OF THE UNITED STATES

Mr. HATCH

introduced the following joint resolution; which was read twice and referred to the Committee on

JOINT RESOLUTION

(Insert title of joint resolution here)

To amend the Constitution to establish legislative authority in Congress and the States with respect to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE ---

"A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern.".

— F Rel to life

TITLE X

Department of HHS

Authorized for $130 million for FY 1981-81 for family planning services.

This total infrastructure was built by people of the following convictions:

a) Pro-abortion
b) Anti-rights of parents to know or have input into a minor's access to abortion or contraceptive information, referral, etc.

Only top-level officials can be changed -- no way to change infrastructure.

Solution:

1. Progressively de-fund and at least partly dissolve this program.

2. Rebuilt it through Senator Denton's bill, the Adolescent Family Life Program, authorized for $30 million for FY 81-82. It imbodies:

    a) Pro-life
    b) Parent involvement
    c) Discourages promiscuity and encourages sexual restraint among teenagers.

Comment:

It is probable that a high percent of the present functionaries who make up the infrastructure of of Title X do not support the administration.

It is anticipated that a new family planning structure erected upon the "Denton" concept would enthusiastically support the administration.

national RIGHT TO LIFE committee, inc.

Suite 341 National Press Bldg — 529 14th Street, N.W. — Washington, D. C. 20045 — (202) 638-4396

MEMORANDUM

To: Board of Directors and State Offices
State Legislative Coordinators and Citizen Lobbyists

From: Douglas Johnson / Legislative Director

Re: Title X Funding

Date: September 1, 1981

General background: Title X of the Public Health Service Act is the federal government's largest family planning program, receiving $250.3 million in Fiscal Year 1981. Of this, $162 million went for family planning services (clinics, etc.), and $88.3 million to the National Institutes of Health for family planning biomedical research.

Title X abuses were outlined in the Fact Sheet recently prepared by Jack Klenk of the Republican Steering Committee, which I sent to Board members and State Offices in July. I encourage you to review that document.

Recent developments: Earlier this year the Reagan Administration proposed folding Title X into a block grant. This would have increased state control over the administration and funding levels of family planning programs. But Planned Parenthood and similar groups have many powerful defenders in Congress, among them Rep. Henry Waxman (D-Ca.), chairman of the Health and Environment Subcommittee, who adamantly insisted that Title X must be reauthorized as a federally administered categorical program. After a protracted stalemate in a Senate-House conference committee in late July, Title X was reauthorized (re-enacted) as a categorical program for three more years, as part of the Reagan Administration's omnibus budget reconciliation bill.

Although the House conferees were successful in their major goal of reauthorizing Title X, they made several concessions to the chairman of the Senate conferees, Sen. Orrin Hatch (R-Utah), a leading foe of Title X. They agreed to lift the age restriction which had delayed the nomination of Dr. C. Everett Koop to be Surgeon General, thus clearing the way for Senate confirmation proceedings later this month. They also wrote into the budget bill a new program to address the adolescent pregnancy problem. The new program, which has a pro-life thrust, is called the Adolescent Family Life (AFL) program. The program was originally introduced by Sen. Jeremiah Denton (R-Al.) as a separate bill (S. 1090), but under the conference committee trade-off it became law as part of the budget bill, without going through the usual legislative process. S. 1090 was usually referred to in the press as "the chastity bill."

Authorizations and appropriations: The budget bill authorized FY 82 funding levels for most federal programs. Authorized funding levels generally serve as ceilings.

The actual FY 82 funding levels will be set in upcoming appropriations bills. Appropriations for both Title X and AFL will be included in the Labor-Health & Human Services-Education Appropriations Bill. Like other appropriations bills, the Labor-HHS bill is supposed to be enacted by the end of the fiscal year (Sept. 30). But since the bill has not yet come out of subcommittee in either house, Congress almost certainly will have to pass a "continuing resolution" to continue current funding levels for at least a few weeks while the bill goes through the legislative process.

Although the bill may not be enacted until sometime in October, important decisions regarding funding for Title X and AFL will be made in subcommittee and committee soon after Congress returns from recess September 9.

The budget bill included an authorization of $130 million for Title X for FY 82. The AFL program was authorized for $30 million. The Reagan Administration has not yet released its recommendations for actual appropriations for these two programs. But rumor has it that the Administration may ask for full funding of Title X ($130 million), but only $11 million for AFL.

What we can do: Our goals are two: (1) to obtain full funding of AFL ($30 million), and (2) to cut the Title X appropriation as much as possible.

A number of conservative and pro-family groups have already launched a grassroots letterwriting campaign, urging that Congress appropriate only $85 million to Title X. Even a reduction to $100 million would have a significant impact on the Planned Parenthood "network."

I have been in contact directly or indirectly with several key Senate offices in support of this effort. But I believe that the NRLC Legislative Office should maintain a somewhat low profile on this matter. The effort to slash Title X funding will be viewed by some (including some members of Congress who support NRLC's position on other issues) as an attack on family planning per se. Particularly in this sensitive area, each NRLC state affiliate must proceed as it determines will be most appropriate and effective with its own congressional delegation. Some of you may choose to add this issue to the already lengthy list of subjects for grassroots letterwriting to Congress during September (along with the items outlined in the August 19 LEGISLATIVE ALERT). Others may simply wish to quietly contact congressmen regarding some of the points noted below.

Arguments for drastically reducing funding for Title X include the following:

(1) The new Adolescent Family Life (AFL) program has a pro-life orientation. It will be administered by Marjory Mecklenburg, director of the Office of Adolescent Pregnancy Programs and a former chairman of the board of NRLC. Among other goals, the program is intended to help pregnant adolescents deal with their situations in responsible, humane ways. Family involvement and the adoption option will be encouraged. The law contains tight restrictions on abortion referrals. But the program cannot have a fair trial without full funding ($30 million). Since AFL is directed towards adolescents, a group currently heavily served by Title X-funded facilities, it is appropriate even on simple fiscal grounds to avoid duplication of services by reducing Title X by at least $20 million (and, in effect, transferring this

amount to fully fund AFL).

(2) Although Title X has always contained a provision prohibiting funds from going to programs "where abortion is a method of family planning," Title X is a primary source of funding for Planned Parenthood corporations and other abortion-promoting organizations. Planned Parenthood alone channels countless thousands of girls and women into abortion clinics every year. Jeannie Rosoff, a vice president of the Planned Parenthood Federation of America (PPFA) has written, "There is no basis for believing that the prohibition of Title X funds for abortion as a method of family planning was intended to prohibit the use of such funds for abortion counseling and referral or even promotion and encouragement of abortion." PPFA President Faye Wattleton confirmed this stance before a Senate subcommittee last March.

(3) Planned Parenthood and similiar agencies are taking increasingly active political roles in opposing the pro-life movement. For example, Planned Parenthood is expanding its lobbying efforts in Washington and in state capitols, buying anti-HLA ads in major publications, etc. While most PP branches probably are careful not to directly use public funds for such purposes, the massive flow of tax money into PP coffers sustains the entire PP infrastructure and permits PP to devote the funds which it receives from private sources (such as direct mail) to overtly political purposes.

(4) In a study released on June 19, the General Accounting Office (GAO) reported that Title X funded facilities are encouraging unnecessary repeat visits by clients, wasting from $6 to $13 million a year. Many such facilities also routinely provide certain medical tests and "educational" programs to clients who do not need them, wasting a "substantial" additional amount, said the GAO.

Congress will begin work on the Labor--HHS Appropriations Bill immediately after reconvening September 9. Lobbying efforts should be focused upon members of the Senate Appropriations Committee, listed below, and particularly upon those committee members who also sit on the Labor--HHS Subcommittee (indicated by underscoring). Members of the House Appropriations Committee should also be contacted, particularly those who sit on the Labor--HEW Subcommittee (also underscored). Members of either house who would be sympathetic on this issue should be contacted even if they do not sit on these committees. Please transmit to the Legislative Office any feedback (positive or negative) which you receive from your congressmen.

SENATE APPROPRIATIONS COMMITTEE

Republicans: Hatfield (chairman), Stevens, Weicker, McClure, Laxalt, Garn, Schmitt, Cochran, Andrews, Abdnor, Kasten, D'Amato, Mattingly, Rudman, Specter.

Democrats: Proxmire, Stennis, Byrd (W. Va.), Inouye, Hollings, Eagleton, Chiles, Johnston, Huddleston, Burdick, Leahy, Sasser, DeConcini, Bumpers.

HOUSE APPROPRIATIONS COMMITTEE

Democrats: Whitten, chairman, Boland, Natcher, Smith (Iowa), Addabbo, Long (Md.), Yates, Obey, Roybal, Stokes, Bevill, Chappell, Alexander, Murtha, Traxler, Early, Wilson, Boggs, Benjamin, Dicks, McHugh, Ginn, Lehman, Hightower, Sabo, Dixon, Fazio, Hefner, AuCoin, Akaka, Watkins, Gray. Dwyer.

Republicans: Conte, McDade, Edwards (Ala.), Myers, Robinson, Miller (Ohio), Coughlin, Young (Fl.), Kemp, Regula, Burgener, O'Brien, Smith (Neb.), Rudd, Pursell, Edwards (Ok.), Livingston, Green (NY), Loeffler, Lewis, Campbell, Porter.

1. Hyde Amendment (Sen. Hatfield)

2. Ashbrook Amendment (Sen. Hatfield)

3. Title X (Denton bill)

4. Confirmation, Dr. Koop

5. Confirmation, Judge O'Connor

6. Human Life Amendment - Hearings Oct. 5

7. Human Life Bill

Nuclear Policy on Hold Until After French Vote

The government of new French President François Mitterand has increased speculation about the future of the world's most flourishing nuclear power program by ordering a freeze on new nuclear power projects. The order does not affect plants already under construction. Broad government policy on nuclear matters is not expected to be defined until after a promised debate next fall in the new parliament that will be chosen in the impending French elections.

The freeze is consistent with a promise in the campaign platform of Mitterand's Socialist Party to complete reactors now being built but not to make major decisions about the inherited, highly ambitious nuclear power program (*Science*, 22 August 1980, p. 884) until after a national debate on energy.

Suspension of nuclear testing at France's Mururoa test site in the South Pacific was announced by the defense ministry at the end of May; the suspension was lifted a few days later. Policy decisions on strategic arms and nonproliferation issues also will await reconstitution of the government after the elections.

On the matter of nuclear power, Mitterand played a cautious hand during the campaign, adhering generally to the party platform. Within the Socialist Party, attitudes on nuclear energy range from outright opposition to solid support of the big nuclear power program, including breeder reactors. (The party platform calls for completion of the Super-Phenix breeder, but beyond that is noncommittal.)

Since the presidential election, the nuclear power issue that has drawn the most attention has been a controversial plan to build four 1300-megawatt power reactors near the coastal village of Plogoff in Brittany. The project has attracted bitter local opposition and been given symbolic status by the vigorous national antinuclear movement.

Mitterand's appointee to the newly created post of Minister of the Sea appeared to be playing to this constituency when he announced that the Plogoff project had been "canceled."

François Mitterand

An under secretary of the energy ministry, however, followed smartly with a clarifying statement that Plogoff was simply included in the freeze.

Both the Communist Party on the Left and conservatives on the Right strongly support nuclear power so Plogoff is a symbol for them too. With crucial elections looming, the government seems to have sought to pull the plug on the Plogoff issue.

—John Walsh

Human Life Bill Arouses More Opposition

Nearly 1300 scientists and researchers from Harvard, MIT, Brandeis, and Tufts have joined the growing chorus of those opposed to the controversial "Human Life" bill (S. 158) now being considered in the Senate (*Science*, 8 May, p. 648). The bill attempts to bar abortion by declaring that protected human life begins at the moment of conception, an idea the bill claims is supported by "present day scientific evidence."

This premise is "a misuse and a misunderstanding of science," according to the petition signed by 1283 scientists, including 147 faculty members and six Nobel laureates. Taking a cue from a resolution passed recently by the National Academy of Sciences, the petition states that "science cannot define the moment at which 'actual human life' begins." The signers also deplored Congress's attempt to undermine what they said are reproductive rights of women guaranteed by the Supreme Court.

The petition was written by a newly formed group calling itself Harvard Scientists for Reproductive Health. The six Nobelists who signed were David Baltimore and Salvador Luria of MIT, and Walter Gilbert, William Lipscomb, George Wald, and Konrad Bloch of Harvard. Also signing were the chairmen of the Harvard, Tufts, and Brandeis biology departments.

Similar opposition has been expressed by the American Medical Association (AMA), whose board of trustees recently voted to lobby actively against the bill. An AMA spokesman says the bill raises a possibility that a fetus has legal rights that would compete with a need to protect a mother's health.

The Reagan Administration has thus far avoided comment on the bill, and there are signs that it wants to avoid becoming embroiled in the controversy. In recent testimony before the Senate judiciary subcommittee, the Department of Health and Human Services deliberately downplayed statistics showing a sharp decline in mortality from abortion since its legalization in 1973.

These and other data showing that abortion poses less health risk than childbirth were scheduled for presentation on 20 May by Ward Cates, chief of the abortion surveillance branch of the Centers for Disease Control in Atlanta. Cates was told at the last minute that his boss, Carl Tyler, head of CDC's family planning division, would present the testimony in abbreviated fashion instead. Cates was told that CDC was acting on direct orders from the office of HHS Secretary Richard Schweiker, an avowed foe of abortion.

The statistics that made the department uneasy showed, among other things, that the abortion rate has not increased since its legalization—that legal abortions have merely substituted for previously illegal ones. Cates's testimony also claimed that legalized abortion policies have provided teenagers with alternatives to entering high-risk marriages, and that outpatient abortion services provide a model for convenient, low-cost services related to family planning and sex.

Science was unable to get an ex-

0036-8075/81/0619-1372500.50/0

planation from HHS for its decision on the testimony and thus could not determine if it was caused by Schweiker's opposition to the message or merely by a desire to avoid making CDC, a fact-gathering agency, a target for politicians. Cates says he hopes to publish his testimony in a scientific journal.—***R. Jeffrey Smith***

World Bank Puts Off Energy Lending Plans

The executive directors of the World Bank have bowed to pressure from the Reagan Administration by postponing an expansion of the Bank's lending for energy development in the Third World. The decision, taken at a meeting on 4 June, will give the Administration more time to determine whether to support such a move.

The Bank already intends to lend about $13 billion for energy projects over the next 5 years, but it believes that at least an additional $12 billion will be needed to help developing countries reduce their dependence on imported oil. Bank officials have been drafting plans to establish a separate affiliate to fund energy projects, but the Reagan Administration said in February that it could not support such a step at that time (*Science*, 3 April, p. 21). As part of an internal review of U.S. policies for the World Bank and other multilateral lending institutions, the Administration is now trying to decide whether it should support any expansion of the Bank's current energy lending plans.

The review, which is being headed by the Treasury Department, will not be completed for several weeks. According to Administration sources, there is at present a divergence of opinions, with officials from the State Department arguing in favor of an expanded Bank lending program while officials from the Treasury Department and the Office of Management and Budget are opposed.

Meanwhile, the Bank's president-elect, A. W. Clausen, has already gone on record in support not only of expanding the World Bank's energy programs but of setting up a separate energy affiliate as well. In an interview with the Washington *Post*, Clausen

A. W. Clausen

said he is "gung-ho for energy." He said that he will "very carefully analyze the arguments raised against an energy affiliate, and if there is some other way to do it, O.K. But the main idea is to get the energy." Clausen, who was formerly chief executive officer of the Bank of America, takes over at the World Bank on 1 July.

—***Colin Norman***

FDA Plans Action on Sodium in Foods

Arthur Hayes, commissioner of the Food and Drug Administration, says that one of his first priorities is to find a way to lower the sodium content of processed foods. Hayes, who formerly directed the hypertension clinic at Hershey Medical Center (*Science*, 17 April, p. 310), says he will soon begin meeting with industry representatives to seek voluntary reductions.

Hayes made the comments at a recent meeting of the Food and Drug Law Institute to commemorate the 75th anniversary of the enactment of the Food and Drugs Act. Earlier, Richard Schweiker, Secretary of Health and Human Services, also said he is interested "in bringing more information about sodium to the attention of the public, especially the 60 million Americans who have or are at risk for hypertension."

Schweiker also conveyed his approval of pending legislation to extend a moratorium on the ban on saccharin, as well as legislation to extend the patent life of new drugs, an issue high on the pharmaceutical industry's agenda. Schweiker said he had asked Hayes to find ways of accelerating the drug review process and tearing down "unnecessary government imposed barriers" to new innovations.

Hayes said he planned to review all existing FDA regulations, to upgrade FDA's deteriorating animal testing laboratories, and to continue the effort of his precedessors to consolidate FDA's offices at a single site in the Washington suburbs.

—***R. Jeffrey Smith***

It Is Illegal to Say That One Is Sane

Last December, Alexei Nikitin, a Ukrainian mining engineer, approached Western newspaper correspondents with a tale of unsafe working conditions in Soviet mines. Soviet authorities promptly arrested him and sent him to a psychiatric hospital, where he had previously been interned with a diagnosis of "psychopathological—simple form," a rubric often used to describe simple dissent.

Anatoly Koryagin, a psychiatrist who has examined a number of imprisoned Soviet dissidents, interviewed Nikitin and judged him "totally healthy." For making this assessment, which he later conveyed to Western journalists, Koryagin, 42, was sentenced last week to a maximum term of 7 years in prison and 5 years of internal exile.

He is the last person connected with the Working Commission to Investigate the Use of Psychiatry for Political Purposes to be arrested or forced to leave the country. Each of the commission's five members has been sentenced to a long prison term, rendering it largely ineffectual. Koryagin's arrest was the subject of appeals by the National Academy of Sciences committee on human rights, the American Psychological Association, and Amnesty International. His trial lasted 3 days and the official charge was anti-Soviet agitation.

—***R. Jeffrey Smith***

FLA BORTION

20 APR 1981

United States Government
MEMORANDUM

Office of Personnel Management

Subject: Abortion Coverage in Health Insurance Policies

Date: April 17, 1981
In Reply Refer To:

From: Donald J. Devine
Director

Your Reference:

To: Edwin W. Meese III
Counsellor to the President
The White House

You asked at our meeting the other day whether health insurance policies cover abortions.

We did a quick survey of the eight major health insurance companies. Four of them said that abortion coverage or noncoverage is a negotiable item for their group insurance policies. All eight, however, say that most of their group policies do cover abortions.

Mutual of Omaha, the largest, did however say that some of their larger policies do exclude abortions.

One can conclude, then, that the norm is to cover abortions, but that it is not unique to exclude abortions from coverage.

I hope this information will assist you in your thinking on this subject.

18 APR 1981
11 a.m.

CON 101-67-2
OPM Form 631
January 1979

Life Begins at Zero

THERE ARE DAYS—Friday was one—when nature does in fact seem to be imitating art, art being, in this case, the old "Saturday Night Live." We have in mind what must be the most preposterous news of the century: "A Senate subcommittee yesterday decided, by a 3-to-2 party-line vote, that human life begins at conception . . ." Well, we thought, thank God the five of them finally made up their minds. What greater authorities could one ask for on this matter, after all, than the members of the subcommittee on the separation of powers of the U.S. Senate? And what more appropriate way to decide such an issue than by an up or down vote of five politicians? As the fellow said, only in America.

It did occur to us that there is a certain contradiction in the position of those who have been advocating such a finding by the U.S. Congress. For in those few hours of the day when they are not seeking to guarantee that the human fetus will enjoy all the legal rights of a human being, they are seeking to guarantee that human beings will enjoy as few rights as possible. This lobby is not exactly what you would call a great civil, human or legal rights crowd. They may be terrific on getting you born. But once you're born it seems as though the first thing they want to do is unplug your television and lift your passport.

The legislative vehicle of this theological finding is something that has been nicknamed the human life bill. It is the handiwork of Sen. John East of North Carolina who was sent here by the Lord (we decided this by a 4-to-3 vote) to make Sen. Jesse Helms look liberal. His bill is intended to circumvent the Supreme Court's 1973 finding that a variety of anti-abortion laws then existing were not constitutional. It is terrible legislation, and even some of those who favor a constitutional amendment banning abortion think so. What is good about it is that it serves as an illustration of how absolutely out of line—how far beyond their competence, expertise and authority—America's secular politicians are getting in their efforts to make law on this question.

That brings us to what may have been the second silliest, most inappropriate and off-the-mark argument of the week: that concerning the abortion-credentials—we can think of no other way to put it—of Sandra Day O'Connor to serve on the Supreme Court. Consistency does not seem to be an excessive burden on those fighting her on these grounds. First it is argued that what is wanted in a Supreme Court justice is, above all, a penchant for merely interpreting and applying the law, as distinct from making it; in the next breath it is earnestly argued that Mrs. O'Connor should be made to commit herself to a policy position on abortion; this last, of course, has everything to do with making law and much less to do with application or interpretation or the rest of that modest mandate that goes by the name of strict constructionism.

We cannot say that the anti-anti-abortion forces, commenting on this, have been a lot more helpful. The whole argument is askew, about the wrong thing—too much on political *result*, not enough on how and why that result was reached. It avails little insight into the woman's qualifications, thinking or prospective temper as a jurist. Her so-called "pro-abortion" choices in the past may well have represented a very conservative (i.e., strict constructionist) reading of the law at issue and of the permissible reach of politicians. Tell us whether that's liberal or conservative, pro- or anti-abortion, good or bad for human life.

We think Mr. Reagan has probably got himself a conservative jurist. Maybe it's time for some redefinitions here. Will someone please explain how this currently noisy, politically weird and truly far-out group of people pressing for ever more involvement by an all-powerful state in American citizens' private lives and private choices got to be called "conservative" in the first place?