THE WHITE HOUSE

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MEMORANDUM FOR THE PRESIDENT

FROM: BILL GALSTON

SUBJ: ABORTION-RELATED ISSUES

Action-forcing Events

During the next few months, you will face a long list of decisions concerning abortion and abortion-related issues. Many of these decisions relate to federal funding, an issue that arises in at least half a dozen appropriations bills (see Tab A). Chairman Natcher has requested guidance from the White House concerning these bills by early next week. Other key decisions involve the Freedom of Choice Act, the content of the health care basic benefits package, and the Supreme Court nomination.

Many of the appropriations issues are likely to be narrowed, or eliminated altogether, when health care reform is enacted. Nonetheless, they must be addressed as freestanding issues this year in the context of the annual appropriations process.

In recent weeks, pressures to clarify our substantive positions and strategic intentions concerning abortion-related questions have been steadily intensifying. In response, the Domestic Policy Council has brought together an informal working group representing numerous departments within the White House as well as HHS and OMB. The members of this group include Ricki Seidman (Communications), Melanne Verveer (Office of the First Lady), Charlotte Hayes (Office of the Vice President), Doris Matsui (Public Liaison), Christine Varney (Cabinet Affairs), Susan Brophy (Legislative Affairs), Joan Baggett (Political Affairs), Carol Rasco (Domestic Policy Council), Steve Neuwirth (Counsel's Office), Jerry Klepner (HHS), Harriet Rabb (HHS), and Nancy-Ann Min (OMB). This memorandum--the first of a series--contains background information on key issues as well as recommendations and options for your consideration.

Political Context

Within your administration, there is a broad consensus that while we should deal with choice issues in a principled and consistent manner, we must make every reasonable effort to lower their public profile for the remainder of this year. There are two principal justifications for this view.

First, it is essential, so far as possible, to keep focused on the economic plan until it has made it through the Congress. The last thing we need is an ongoing heated controversy that divides our energies and diverts the public's attention while reinforcing their view that we're not spending enough time on the economy.

Second, it is essential to regain our balance on cultural matters. During your campaign, you reassured the American people that you identified with mainstream/heartland values, but the first four months of the administration have sown some doubts on that score. There may be worse to come. We face the possibility of a summer in which the political dialogue is largely framed by issues such as gays in the military, political correctness on campus, quotas, and reproductive services contained within a health care proposal. For this reason, while the administration should remain true to its principles, we should not go out of our way to emphasize issues that reinforce the impression that we are somehow outside the cultural mainstream.

In this connection, it is worth noting that the people now distinguish fairly sharply between choice, which they support within broad limits, and public funding, which they are much less likely to support. Even when our position on public funding is carefully framed, we are sure to encounter substantial difficulties in forging sustainable majorities in the Congress and in the court of public opinion.

An Easy Case: Federal Employee Health Benefit (FEHB) Plans

Under current law, FEHB plans (affecting federal employees and dependents) may not cover abortions unless the life of the mother is in danger. The DPC working group recommends that this restriction be eliminated. The result would be that FEHB plans would be <u>allowed</u> but not <u>required</u> to cover a wider range of abortion services. In most circumstances, federal employees would be able to choose among several plans with varying levels of coverage.

Decision on FEHB Recommendation

_____	_____	_____
Accept	Reject	Discuss

A Harder Case: The Hyde Amendment

A. Substantive Issues

Your campaign made a determined effort to subsume federal funding issues under the rubric of national health care reform. You recognized, however, that they would persist as free-standing issues until the enactment of that reform. You now face the question of how to deal with the Hyde amendment.

During the campaign you opposed laws that prohibit federal funding for abortion. At the same time, you favored substantial leeway for the states to chart their own course. That is why your proposed budget simultaneously deletes the Hyde amendment and declares that "the Administration will work with the Congress to facilitate an approach that is compatible with both Federal and State law."

The difficulty is that these two bodies of law are frequently incompatible. For example, Medicaid requires states to provide all "medically necessary" services to eligible beneficiaries. Simply removing the Hyde amendment from federal legislation would almost certainly compel many states to fund abortions that they now exclude through either statutory or (as in the case of Arkansas) constitutional provisions. There is no way of fully harmonizing federal and state law as now written. The question, rather, is how they can be adjusted to reach mutual consistency.

Your DPC working group recommends that all states be required to fund Medicaid abortions in cases of rape, incest, and when the mother's life is endangered. Beyond these cases, each state should be left free to make its own determination.

The rationale is as follows: Even the Hyde amendment permitted abortions to relieve threats to mothers' lives, while rape and incest represent conditions for publicly funded abortion that enjoy substantial public support. A move to restore the original Hyde amendment would probably succeed in Congress if the alternative is simple deletion; substitute language that includes rape and incest would offer a better chance of defeating Hyde. Our proposal would establish that language as a federal baseline while not tying the hands of the states (now numbering 15) that want to go farther.

Decision on Hyde Language

_____	_____	_____
Accept	Reject	Discuss

B. Strategic Issues

There are two options for reaching this language as a legislative result. The first is to take the lead--to announce our legislative objective promptly and forthrightly, starting with Chairman Natcher, and to deploy our resources on the Hill to reach that objective during the next two months. The second is simply to restate our commitment to deleting Hyde and to working with the Congress to craft more satisfactory language. Under the second option, we would in effect be asking the Congress to make the opening bid, and we would be prepared to intervene later with our language as an alternative to reinstating Hyde.

The advantage of the first option is that it allows you to demonstrate leadership by acting clearly and decisively in a hotly contested arena. The disadvantage is that it could offend nearly everyone, at least initially. In particular, it would dismay many of your pro-choice supporters by putting you in the position of sponsoring abortion coverage that is arguably narrower than the criterion of "medical necessity" built into the Medicaid statute.

An advantage of the second option is that it preserves your freedom of action to forge consensus over time. Another advantage is when you offer your substantive recommendation during the course of the Hyde debate, it might well be seen, not as selling out our pro-choice supporters, but rather as rescuing them from a straightforward reinstatement of the Hyde amendment. A disadvantage of this option is that it could be seen, and represented, as evasive and lacking in principled leadership.

The DPC working group recommends option two, with two conditions. First, we cannot say that we are working with the Congress unless we are actually doing so. To implement option two, we would have to enter substantive discussions on this matter with key congressional leaders--promptly.

Second, you would need a public articulation of your position that takes account of the undeniable difficulties and that you could sustain until the actual legislative resolution. We recommend the following as a response to questions:

"As I made clear in my budget proposal, I don't think the Hyde amendment should be reinstated. I've also stated that my administration is committed to working with the Congress to find an approach that respects both federal and state law. I'm well aware of the fact that these bodies of law aren't fully consistent, but I'm confident that we can work out a solution that both protects the principle of choice and respects the deep and legitimate differences that exist among the states as well as among individual citizens. Discussions to achieve this result are now underway."

Decision on Hyde Strategy

Option 1	Option 2	Discuss

Other Appropriations Issues

The remaining appropriation bills differ from Medicaid in that they do not raise federal-state issues. (Some, such as DC appropriations, now restrict the use of local as well as federal funds.) Otherwise, the substantive and strategic issues are very similar.

Our recommendation concerning these bills is that we declare our willingness to work with the Congress and that we adopt as our practical objective (1) the relaxation of restrictions on federal funding to include rape and incest as well as the life of the mother, and (2) where appropriate, local choice in determining the use of local funds.

Two forthcoming bills raise special issues. We have just been informed that the Department of Defense is prepared to include a repeal of the Hyde amendment in its Authorization Bill. We will work with them to ensure, so far as possible, that the language respects the particular circumstances and sensibilities of the military.

Funding for abortion in foreign aid programs also raises a distinctive issue. As you know, the People's Republic of China has come under persistent criticism for alleged use of involuntary sterilization and forced abortion as part of a population control strategy. Your budget proposal deletes language that forbids U.S. funding for overseas programs that provide abortions as an element of voluntary family planning. But the remaining language is unequivocal in its rejection of coercive measures. Public testimony by AID officials and others should be crystal-clear on this point. And if, as some have suggested, the U.N Population Fund is sufficiently disturbed by Chinese practices to consider withdrawing from that country altogether, we should be supportive of their decision to do so.

Freedom of Choice Act

As you know, the Freedom of Choice Act represents a major effort to codify the holding of Roe as interpreted prior to the Webster and Casey decisions. The Senate version of the bill has already been marked up by the full Labor and Human Resources Committee. It allows states to require parental involvement with minors' decisions and to decline to pay for the performance of abortions. It also includes a so-called "conscience clause" preventing states from imposing an obligation to perform abortions on individual doctors and institutions (such as Catholic hospitals) with principled objections to this practice. The House version of the bill, which was marked up and passed out this Wednesday, incorporates the conscience and parental involvement clauses but not the provision allowing states to decline to pay for the performance of abortions.

While these points are opposed by some advocacy groups, they are consistent with Roe and are supported by mainstream advocacy groups such as NARAL. (For additional details, see Tab B.)

During the campaign, you pledged to sign a Freedom of Choice Act along the lines of the bills reported out of the Senate and House committees. While there is a significant difference between the two versions, at this point the principal issue before us is one of timing and legislative strategy, not substance. Advocacy

groups who are longstanding supporters take the position that they refrained from bringing the bill to the floor last fall in deference to the campaign's request for delay. Now, they say, we owe it to them to intervene with the House and Senate leadership to move the bill quickly; the leadership is looking for a signal from the White House and is unlikely to move forward without one.

The counterargument runs as follows:

(1) We are already being criticized for an overly crowded agenda, and we don't need another big, controversial item that further diverts attention from the economic plan.

(2) You have already acted aggressively to further the pro-choice agenda, and you face a large number of abortion-related appropriations votes in the next few months. If you encourage a postponable abortion debate to surface during this period, it will rivet public attention on this issue and reinforce your emerging cultural disconnect with ethnic and other swing voters.

(3) We should focus our attention this summer on the unavoidable battle over the inclusion of reproductive services in the basic health benefits package.

(4) The principal reason why FOCA didn't come to the floor last year was that its backers didn't have the votes, and it's still not clear that they do. Speaker Foley has said that he will not bring the bill to the floor unless he is confident that it can pass without killer amendments. The number of close votes in the Judiciary Committee this Wednesday suggests that this is not yet the case and that more work needs to be done.

On balance, we believe that the arguments for delay are stronger than the arguments for moving forward at this time, and we so recommend. You should be aware, however, that many of your pro-choice supporters are likely to regard a decision not to proceed at this time as a deep disappointment--if not an outright betrayal. Should you choose to delay the bill significantly, they may go public with very vocal objections.

Decision on FOCA Strategy

_____ Delay

_____ Go Forward

_____ Discuss

Attachment A

ABORTION-RELATED GENERAL PROVISIONS

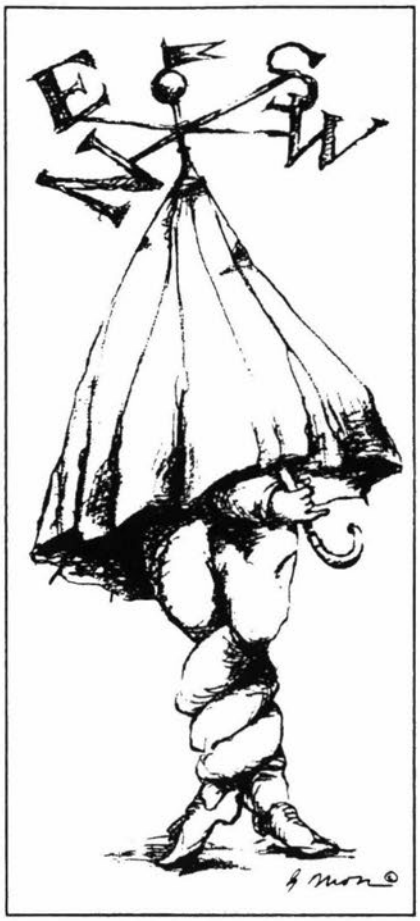
Appropriation Bill	Current Status	Affected Population
Labor-HHS General Provisions Sec. 103	Federal funding allowed only when the life of the mother is endangered if the fetus is carried to term.	Medicaid, Indian Health Service, and PHS grantee clients
D.C. Appropriation Bill	Funding allowed only when the life of the mother in endangered if the fetus is carried to term. (Includes local tax funds).	D.C. residents who would otherwise receive non-Medicaid funding for abortions
State-Commerce-Justice General Provisions Sec. 103, 104, 105	Federal funding allowed only when the life of the mother is endangered if the fetus is carried to term. Also provides that "no funds shall be used to require any person to perform or facilitate an abortion; " but permits funds for escorting to abortion services outside the Bureau of Prisons.	INS detainees, sentenced and pre-sentenced prisoners, transitionally housed asylees, special witnesses and families protected by DOJ, and inmates
Treasury-Post Office appropriation bill, Sec. 513, 514 of Title 5	FEHB plans may not cover abortions unless the mother is endangered if the fetus is carried to term.	Federal employees and dependents
DOD-United States Code, Sec. 1093 of Title 10,	Federal funding allowed only when the life of the mother is endangered if the fetus is carried to term.	Military personnel and dependents
Foreign Aid--H.R. 5368 Foreign Operations, PL 102-391, Sec 524 and 534 (Kemp-Kasten Amendment)	No funds shall be used for : 1) abortions, 2) to lobby for abortion, or 3) involuntary sterilization as a method of family planning or as incentive to undergo sterilization.	Peace Corps workers and countries receiving U.S. foreign assistance

WASHINGTON UPDATE

Policy and Politics in Brief

THOSE WINDS OF CHANGE ARE TRICKY

BY ELIZA NEWLIN CARNEY



Just as abortion-rights groups should be relishing the fact that there is at last a President who supports their agenda, they're threatened with the loss of one of their most prized goals: a law ensuring women's right to abortion.

The so-called Freedom of Choice Act, which essentially would codify the Supreme Court's 1973 *Roe v. Wade* ruling that legalized abortion, may never reach the floor this year, House Speaker Thomas S. Foley, D-Wash., said at an April 22 press conference. Foley cited lack of support for a rule that would limit amendments likely to weaken the bill.

ABORTION

The uncertain fate of the bill—which is scheduled to be taken up by the House Judiciary Committee later this month—points up deep divisions in Congress over how far the government should go in restricting abortion rights. It also signals a bitter struggle ahead over pending questions such as whether Congress should allow federal spending on abortions and whether abortion services should be included in a national health care plan.

"This is a very difficult issue still," said Rep. Don Edwards, D-Calif., chairman of the Judiciary Subcommittee on Civil and Constitutional Rights and the Freedom of Choice Act's primary sponsor in the House. "The general public is in favor of choice for women, but to some extent they are ambivalent about certain limitations that the states want to put on it."

In theory, the 103rd Congress is a golden opportunity for abortion-rights advocates who've been frustrated for 12 years by an anti-abortion White House. On his second day in office, President Clinton signed five executive orders rolling back a slew of federal abortion restrictions, including the "gag rule" banning abortion counseling in government-financed clinics.

Clinton's also promised to work with Congress to repeal a law that bars medicaid-financed abortions for poor women; appoint a *Roe v. Wade* supporter to the Supreme Court; and include abortion financing in his national health care program. Congress and the Administration have also proposed measures to improve clinic access and safety, spurred in part by the March murder of David Gunn, a physician who performed abortions at a Pensacola (Fla.) clinic.

But instead of gaining momentum, abortion-rights advocates find themselves suddenly on the defensive, losing money, membership and support on Capitol Hill. In part, their struggle reflects the pitfalls of being on the winning side. "With the victor goes the spoils," Kathryn Colbert, vice president of the Center for Reproductive Law and Policy in New York City, said wryly.

In part, groups like the National Abortion Rights Action League (NARAL) and the Planned Parenthood Federation of America Inc. are hurt by public sentiment that the abortion battle is over. "The greatest threat to choice is complacency," said Kate Michelman, president of NARAL, where donations from direct-mail fund raising are down a third from this time last year.

The abortion debate has also shifted ground from simple questions of legality to such thorny areas as whether taxpayers should foot the bill for abortions or whether parents must be notified before their underage daughters can obtain an abortion. Polls show that many voters who support abortion rights in general also favor some restrictions. A July CBS News-*New York Times* poll found that 56 per cent of respondents supported state laws limiting abortion's availability, and 52 per cent opposed using tax dollars to finance poor women's abortions.

On the Freedom of Choice Act, abortion-rights groups have been undermined by internal bickering. NARAL and Planned Parenthood lead a coalition that strongly backs both the House and Senate versions of the bill; the National Organization for Women (NOW), allied with several other women's and public-interest groups, opposes Senate provisions that would allow states to pass laws that require parental involvement and bar the use of state funds for abortions.

"Our position has always been that we wanted a bill that would not encourage the states to treat young women and poor women differently," said Ginny Montes, national secretary of NOW, which is joined by the American Civil Liberties Union and the Fund for the Feminist Majority in opposing the Senate bill.

But the legislation's supporters say it won't pass if language that allow states to restrict abortions is ruled out entirely. Edwards said he plans to introduce a measure clarifying that states may continue to require parental involvement, when the House Judiciary Committee marks up the bill. "All of our polls and whip checks indicate that the *Roe* provision on parental involvement must be in the bill, or we lose literally scores of votes," Edwards said.

And while abortion-rights advocates are fighting among themselves, the anti-abortion lobby is more organized than ever, presenting a unified front and flooding both chambers with mail. A well-organized postcard campaign by the Committee for a Human Life Amendment, a Washington lobby group backed by

Catholic dioceses nationwide, contributed to a serious Capitol Hill mail backlog, House post office director Michael Shinay said. The campaign generated about 1.5 million postcards on the Freedom of Choice Act, he estimated.

"All the pro-life forces are united on at least three priorities: defeating the Freedom of Choice Act, preserving the Hyde Amendment [a proviso named for its sponsor, Rep. Henry J. Hyde, R-Ill., that bans medicaid financing for poor women's abortions] and preventing Clinton from imposing abortion coverage through the national health plan," said Douglas Johnson, legislative director of the National Right to Life Committee. "We're guardedly optimistic that the President may fail on all three of those fronts."

Freedom of Choice Act backers counter that Clinton's support, along with that of a new generation of women in Congress, bodes well for the measure. Many of the freshman women made abortion rights a central campaign theme, Rep. Nita M. Lowey, D-N.Y., said.

"The increase in women Members automatically brings a new perspective and urgency to the issue," said Lowey, who heads the Pro-Choice Task Force of the Congressional Women's Caucus.

But some Members of Congress admitted that sharp disagreements over strategy persist. Some bill backers want a closed rule that would allow no amendments once the bill reaches the floor. (The purpose would be to prevent anti-abortion lawmakers from weakening the bill beyond recognition.) Others say that limited amendments should be allowed. With no agreement, the legislation may die quietly.

Abortion-rights advocates admit that the bill faces an uphill fight and are pushing for quick action by House and Senate leaders. Some fear that debate over the legislation and over the Hyde amendment will be heated, possibly weakening the Administration's resolve to include controversial abortion provisions in its health care package.

"In my view, we have a challenge ahead of us," said the Center for Reproductive Law and Policy's Colbert. "We need to convince legislators that these restrictions are very pernicious and that they ought not to be enacted at the state level. The problem is that, that's not a 30-second soundbite." ■