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Abortion Services and Military Medical Facilities

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Summary

In 1993, President Clinton modified the military policy on providing abortions at military medical facilities. Under the change directed by the President, military medical facilities were allowed to perform abortions if paid for entirely with non-Department of Defense (DOD) funds (i.e., privately funded). Although arguably consistent with statutory language barring the use of Defense Department funds, the President's policy overturned a former interpretation of existing law barring the availability of these services. On December 1, 1995, H.R. 2126, the FY1996 DOD Appropriations Act, became law (P.L. 104-61). Included in this law was language barring the use of funds to administer any policy that permits the performance of abortions at any DOD facility except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy resulted from an act of rape or incest. Language was also included in the FY1996 DOD Authorization Act (P.L. 104-106, February 10, 1996) prohibiting the use of DOD facilities in the performance of abortions. These served to reverse the President's 1993 policy change. Recent attempts to change or modify these laws have failed.

Over the last 3 decades, the availability of abortion services at military medical facilities has been subjected to numerous changes and interpretations. Within the last 5 years, Congress has considered numerous amendments to effectuate such changes. Although Congress, in 1992, passed one such amendment to make abortions available at overseas installation, it was vetoed.

The changes ordered by the President did not necessarily have the effect of greatly increasing access to abortion services. Abortions are generally not performed at military medical facilities in the continental United States. In addition, few have been performed at these facilities abroad for a number of reasons. First, the U.S. military follows the prevailing laws and rules of foreign countries regarding abortion. Second, the military has had a difficult time finding health care professionals in uniform willing to perform the procedure.

One policy option that had been implemented would have affected the availability of abortions overseas. This option included the hiring of civilians who would perform abortions and other medical duties. Such an option, however, may not have done much to enhance access to abortion services because the military is still limited to following local laws and regulations. In addition, questions can be raised as to whether or not the contracting costs and other costs related to the hiring of a civilian should be considered when determining the amount charged for abortion services.

With the enactment of P.L. 104-61 and P.L. 104-106, these questions became moot, because now, no DOD funds nor facilities may be used to administer any policy that provides for abortions at any DOD facility, except where the life of the mother may be endangered if the fetus were carried to term. Privately funded abortions at military facilities are permitted when the pregnancy was the result of an act of rape or incest.

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Abortion Services and Military Medical Facilities

Purpose

The purpose of this report is to describe and discuss the provisions for providing abortion services to military personnel, their dependents and other military health care beneficiaries at military medical facilities. The report describes the history of these provisions, with particular emphasis on legislative actions. Finally, this report discusses a number of proposals to modify the Clinton Administration provisions, as well as recently enacted legislation.

Issue

Shortly after his inauguration on January 20, 1993, President Clinton issued a memorandum on abortions at military hospitals. This memorandum directed a change in policy so that abortions could be performed at military medical facilities provided that the procedure was privately funded. This memo stated that:

> Section 1093 of title 10 of the United States Code prohibits the use of Department of Defense ("DOD") funds to perform abortions except where the life of a women would be endangered if the fetus were carried to term. By memorandum of December 21, 1987, and June 21, 1988, DOD has gone beyond what I am informed are the requirements of the statute and has banned all abortions at U.S. military facilities, even where the procedure is privately funded. The ban is unwarranted. Accordingly, I hereby direct that you reverse the ban immediately and permit abortion services to be provided, if paid for entirely with non-DOD funds and in accordance with other relevant DOD policies and procedures.[1]

The issue at hand is how the language in Title 10 of the United States Code and the President's memo are to be interpreted. As the President's memorandum makes obvious, this language has been subject to varying interpretations that allowed or denied abortion services. Specifically, Sec. 1093 states:

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[1]President William J. Clinton, Memorandum for the Secretary of Defense, Memorandum on Abortions in Military Hospitals, January 22, 1993; filed with the Office of the Federal Register, 11:50 a.m., January 27, 1993; cited in Public Papers of the Presidents of the United States, William J. Clinton, 1993, Washington, D.C., Government Printing Office, 1994: 11.

> Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.[2]

Although the President's interpretation of the language is arguably consistent with the letter of the law, critics contend that it countermands the spirit of the statute and is overly broad. In other words, it is argued that the intent of this language was to prevent the DOD from providing abortion services. Proponents of the Clinton change argue that Congress allowed for exactly this type of interpretation. Proponents note that this interpretation is particularly important for eligible beneficiaries who are deployed overseas in areas where affordable and sanitary abortion services are not available in the local economy.

Following the election of the 104th Congress, Democrats were replaced by Republicans as committee leaders. Representative Robert K. Dornan, the then-new Republican Chairman of the Military Personnel and Compensation Subcommittee (House National Security Committee), noted that one of his priorities "is barring abortions at overseas military hospitals, even if the patients pay for them."[3] On December 1, 1995, P.L. 104-61 was enacted. According to this law:

> Sec. 8119. None of the funds made available in this Act may be used to administer any policy that permits the performance of abortions at medical treatment or other facilities of the Department of Defense.
>
> Sec. 8119A. The provision of Section 8119 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.

On February 10, 1996, P.L. 104-106 was enacted. This law further limited that availability of abortion services:

> Sec. 738(b). RESTRICTION ON THE USE OF FACILITIES – No medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.[4]

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[2]10 U.S.C. Sec. 1093, added P.L. 98-525, Sec. 1401(e)(5), October 19, 1984, 98 Stat. 2617. It should be noted that the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), a medical program for military dependents, certain retirees and their dependents who are unable to receive care at a military medical facility, will provide coverage for abortions only when the mother's life is in danger. "The attending physician must certify in writing that the abortion was performed because a life-endangering condition existed, and must provide medical documentation to the CHAMPUS claims processor in order for CHAMPUS to share the cost of the procedure." See U.S. Department of Defense, OCHAMPUS, CHAMPUS Handbook, October 1994: 42.

[3]Maze, Rick, Representative Dornan: Pay gap one of top concerns, Army Times, January 16, 1995: 3.

[4]U.S. Congress, Conference Committee, National Defense Authorization Act for Fiscal Year 1996, H.Rept. 104-450, S. 1124, 104th Cong., 2d Sess., January 22, 1996: 206-207.

Background

There appears to be no evidence of a formal service policy on abortions prior to 1970. Sources familiar with the issue at that time note that the availability of abortion services at military medical facilities varied by service, location, physician, and "command milieu." Each of the services approached the issue differently. The Air Force tended to be somewhat more liberal, while the Army and the Navy tended to be somewhat more conservative. Each facility also tended to follow the laws and regulations of the state within which it was located. Individual physicians ultimately had a say regarding whether or not they personally would provide such services. Finally, the commanders of various medical facilities may have had some effect on how and under what circumstances abortion services may have been provided. Commanders often lead by example without explicitly stating their own opinions, policies, or giving direct orders. Subordinates are acutely aware of their commander's approach to issues and often will integrate this approach into their own practice. In other words, a policy may exist without one ever being officially stated. Although formal policy may not exist, physicians also follow professional guidelines, as they interpret them, by practicing "good medicine." Thus, the decision to provide an abortion may have been based on a host of medical indications particular to any given case. Generally, it appears that military physicians performed few abortions at military medical facilities in this era.

In certain situations, such as in Vietnam (1961-1975), military medical facilities generally did not provide abortion services. Instead, medical evacuations to other countries that had available procedures (Japan, for example) provided access to abortion services.

In 1970, the office responsible for health affairs at DOD reportedly issued "orders that military hospitals perform abortions when it is medically necessary or when the mental health of the mother is threatened."[5] The rules, however, did not require military personnel to perform abortions. These rules were less restrictive than the abortion laws in a number of states. One year later, then-President Richard M. Nixon directed that military policy concerning abortions at military bases in the United States "be made to correspond with the laws of the States where the bases are located."[6]

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[5]Wolffe, Jim, Abortion ban may be lifted soon stateside, Air Force Times, April 12, 1993: 23.

[6]Statement About Policy on Abortions at Military Base Hospitals in the United States, April 3, 1971, Public Papers of the Presidents of the United States, Richard Nixon, 1971, Washington, D.C., Government Printing Office, 1972: 500. Since CHAMPUS relied, then as now, on local health care providers, these individuals were already subject to State laws and regulations pertaining to abortion.

Following the 1973 Supreme Court case of Roe v. Wade,[7] the Department of Defense funded abortions for any women eligible for DOD health care, subject to certain limitations. First, two physicians were required to find that the abortion was "medically indicated" or required for "reasons of mental health." Second, the funding for these services could not be in conflict with the law of the state in which the abortion is carried out.[8] Since states had differing rules regarding abortion, it was possible for women to be treated differently depending on the location of the facility. Nevertheless, there remains anecdotal evidence of variations in accessibility similar to those that existed before Roe v. Wade.

In 1975, concerns were raised over inconsistencies between state statutes and the Roe decision. Military medical personnel were instructed to follow the Constitutional guidance provided in Roe in certain instances, even though the state statutes had not been successfully challenged in court.[9]

From August 31, 1976 to August 31, 1977, approximately 26,000 abortions where performed in military hospitals or in the CHAMPUS program.[10]

In 1978, an amendment to the Department of Defense appropriations bill offered by Representative Robert Dornan prohibited the use of Defense Department funds for abortions with certain exceptions. This amendment, as enacted, stated that:

> None of the funds appropriated by this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians. Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.[11]

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[7]Roe v. Wade, 410 U.S. 113 (1973). The Court held that the Constitution protects a woman's decision whether or not to terminate pregnancy and that a State may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision.

[8]Ayres, B. Drummond, Jr., New York Times, August 10, 1978: 79 (microfilm).

[9]U.S. Department of Defense, Assistant Secretary of Defense (Health and Environment), James R. Cowen, Memorandum for the Assistant Secretaries of the Military Departments (M&RA), Abortion Policy, 17 September 1975.

[10]U.S. Department of Defense, Directorate for Defense Information, Press Division, 9 August, 1978.

[11]P.L. 95-457, Section 863, October 13, 1978, 92 Stat. 1254. In anticipation of this change, the Office of the Assistant Secretary of Defense (Public Affairs) published a News Release (September 29, 1978) functionally implementing this language effective September 30, 1978. This change also affected funding for CHAMPUS claims.

In 1979, similar language was enacted in the FY1980 DOD appropriations act. The 1979 language did not contain any restrictions with regard to the "severe and long-lasting physical health damage to the mother that would result if the pregnancy were carried to term when so determined by two physicians." In other words, a determination that carrying the pregnancy to term would affect the physical health of a woman was not a basis for providing abortions under this language.[12]

This language did not prevent all abortions at military hospitals. Military hospitals overseas reportedly performed approximately 1,300 abortion in FY1979. These abortions were privately paid for. Defense officials allowed these procedures under the rationale that at certain overseas (or isolated U.S.) stations, safe and reliable civilian facilities were not always available.[13]

In 1980, the language included in the FY1981 DOD appropriations act was again modified as follows:

> None of the funds appropriated by this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victim of rape or incest, when such rape has within seventy-two hours been reported to a law enforcement agency or public health service; nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy: *Provided, however,* That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate.[14]

Under this language, the reporting requirement for incest was removed. Also, victims of rape were required to report the incident within 72 hours.[15] In addition, language was added encouraging the states to exercise their authority with regard to funding abortions.

The language was shortened considerably in 1981. Many of the exceptions to the prohibition of funding were removed. This language stated that:

> None of the funds provided by this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.[16]

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[12]P.L. 96-154, Section 762, December 21, 1979, 93 Stat. 1162.

[13]Smith, Paul, 1300 FY79 O'seas Abortions Revealed, Army Times, December 8, 1980: 2.

[14]P.L. 96-527, Section 760, December 15, 1980, 94 Stat. 3091.

[15]Previous language required that such a report should be made "promptly." DOD interpreted this to mean within 48 hours. It was also expected that victims of incest would report the incident(s) to appropriate authorities, however, the lack of a time restriction meant that a report could be delayed indefinitely. (See DOD Issues New Rules On Abortion, Army Times, March 9, 1981: 15.)

[16]P.L. 97-114, Section 757, December 29, 1981, 95 Stat. 1588.

Identical language was included in the following 2 years' appropriations acts.[17] Finally, in 1984, Congress codified this language in Title 10, United States Code (see quoted text at the top of page 2).[18]

In 1988, DOD modified its rules to require a physician's statement for abortion claims made via CHAMPUS. This change was instituted to assure that all claims for abortions performed in the private sector and covered by CHAMPUS were for life threatening situations. "CHAMPUS officials said life-threatening conditions include leukemia, breast cancer and other malignancies, kidney failure, congestive heart failure, severe heart disease, uncontrolled diabetes and several other conditions."[19]

On June 21, 1988, Dr. William Mayer, then-Assistant Secretary of Defense (Health Affairs), issued a memorandum barring abortions in military medical facilities overseas. Although Dr. Mayer recognized that privately paid abortions did not violate the letter of the law, he issued the memorandum to avoid the appearance of "insensitivity to the spirit" of the law.[20]

In 1990, an attempt to overturn this restriction failed. An amendment (to the DOD authorization act) to allow abortions at military medical facilities overseas was withdrawn when the Senate fell two votes short of the number needed to invoke cloture (58-41).[21] The House of Representatives rejected a similar amendment.

On May 22, 1991, the House of Representatives reversed itself and passed (220-208) an amendment to the DOD authorization act that would have reinstated the pre-paid overseas policy. Proponents argued that the language would be merely a return to the policy as it existed prior to Dr. Mayer's memo of 1988. Opponents countered that, as drafted, the amendment offered by Representative AuCoin would go beyond the then-prevailing policy by allowing abortions for any reason and at any time during the pregnancy.[22] The measure was rejected once again when the Senate fell two votes short of the 60 votes needed to invoke cloture (58-40).[23]

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[17]P.L. 97-377, Section 755, December 21, 1982, 96 Stat. 1860; P.L. 98-212, Section 751, December 8, 1983, 97 Stat. 1447.

[18]10 United States Code 1093, P.L. 98-525, sec 1401(e)(5), October 19, 1984, 98 Stat. 2617. Note this change occurred via an authorization act and not as a part of the appropriations process (Omnibus Defense Authorization Act, 1985).

[19]Kimble, Vesta, Doctor's Statement Needed for Abortion Claims, Navy Times, March 14, 1988: 24.

[20]Abortion Is Restricted At Military Hospitals, New York Times, July 19, 1988: A11. "The abortion issue in military hospitals has a symbolic and political importance that dwarfs the actual numbers of people involved. Military hospitals overseas performed only six abortions in the last year they were permitted [1987]." Willis, Grant, Clinton ends ban on military abortions, Air Force Times, February 1, 1993: 4.

[21]Congressional Record, August 3, 1990: S11813-S11824.

[22]Congressional Record, May 22, 1991: H3394 et seq.

[23]Nelson, Soraya, Overseas abortion amendment fails, Army Times 12, 1991: 16.

The battle over this language intensified. Proponents stated that military women or dependents overseas were forced into dangerous or life threatening situations in countries where safe, legal, or affordable abortions could not be provided. Opponents argued that no woman was denied military transportation to receive access to an abortion in another country.

Again in 1992, Representative AuCoin introduced language to overturn the restrictions on abortions at overseas military facilities. This amendment was passed (216-193).[24] On Sept. 18, 1992, the Senate rejected (36-55) an effort to strike language overturning the restrictions on overseas abortions. Despite these votes, it was expected that President Bush would veto any defense legislation reinstating the former policy. This expected veto was cited as the reason for the language being dropped by the conferees.[25] By unanimous consent, the Senate agreed to substitute the language pertaining to overseas abortions into S. 3144 after striking all after the enacting clause.[26] S. 3144 was simultaneously passed by unanimous consent. The House subsequently passed the measure (220-186) on October 3, 1992.[27]

Arguably, the Senate and House agreed to remove this language from the DOD authorization act in anticipation of a presidential veto. By removing the language and passing it as a free standing bill, the authorization act was not jeopardized. Since this was not presented in the authorization act, it remains unknown whether President Bush would have exercised his veto authority over the entire bill. Nevertheless, President Bush did pocket-veto S. 3144 on Oct. 31, 1992 (after the congressional adjournment). No attempt was made to override this veto.[28]

As a result of President Clinton's 1993 memorandum (see page 1), then-Secretary of Defense Les Aspin directed the Secretaries of the Military Departments to re-instate the pre-1988 policy concerning the availability of abortions overseas. On May 9, 1994, the Assistant Secretary of Defense (Health Affairs), Dr. Stephen C. Joseph, released a memorandum[29] seeking to unify and make consistent DOD policy.

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[24]Congressional Record, June 4, 1992: H4150-H4156.

[25]Dewar, Helen, Bush's Veto Power Stalled the Abortion-Rights Push in Congress, Washington Post, November 30, 1991: A6.

[26]Both House and Senate versions of the FY93 Defense Authorization Act contained provisions that would "entitle military personnel and their dependents to reproductive health care services in a medical facility of the uniformed services outside the United States on a reimbursement basis.... The conferees agree to exclude this provision. The Senate has passed a bill (S. 3144) which contains this provision. The House intends to pass this bill and send it to the President as soon as possible." U.S., Congress, House, Conference Committee, National Defense Authorization Act for Fiscal Year 1993, H.Rept. 102-966, H.R. 5006, 102d Cong., 2d Sess., October 1, 1992: 716.

[27]See H.Res. 589, Congressional Record, October 2, 1992: H10803-H10804, and Congressional Record, October 3, 1992: H10966-H10975.

[28]Congressional Quarterly, December 19, 1992: 3926.

[29]U.S. Department of Defense, Assistant Secretary of Defense (Health Affairs), Memorandum, Implementation of Policy Regarding Pre-Paid Abortions in Military Treatment

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This policy had five parts that 1) provided access to abortion services for service women and eligible dependents overseas, 2) required the valid consent of a parent or other designated person in the case of a minor who was "not mature enough and well enough informed to give valid consent," 3) relieved those medical practitioners directly involved from performing abortions if they objected, 4) respected host nation laws regarding abortion, and, 5) direct the Military Health Services System to provide other means of access if providing pre-paid abortion services at a facility was not feasible. Such alternate means could include supplementing staff with contract personnel, referrals, travel, etc. The cost of an abortion had been reported to be about $500.[30]

In practice, the policy instituted by President Clinton's 1993 action may not have had the effects the President had expected. Although abortion access had been liberalized in terms of overall policy, liberalization had not necessarily occurred in terms of actual access.

> In the 6 years preceding the 1988 ban, military hospitals overseas had performed an average of 30 abortions annually. Last spring, though, when the military medical officials surveyed 44 Army, Navy and Air Force obstetricians and gynecologists stationed in Europe, they found that all but one doctor adamantly refused to perform the procedure.
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> That one holdout, too, quickly switched positions.... No military medical personnel willing to perform abortions have stepped forward in the Pentagon's sprawling Pacific theater of operations, either.[31]

A number of reasons have been advanced to explain this general unwillingness by health care personnel in uniform to perform these procedures. First, fewer medical schools require or provide training in these techniques than was the case in the years immediately following the Roe v. Wade decision.[32] Second, it is widely thought that, the military in general, and military physicians in particular, tend to be more conservative on social issues than many population cohorts. Even if training were

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[29](...continued)
Facilities, May 9, 1994: 2p.

[30]Nelson, Soraya S., Pentagon pens rules on abortion, Army Times, May 23, 1994: 10.

[31]Morrison, David C., An Order That Didn't Take, National Journal, April 16, 1994: 900.

[32]According to the Alan Guttmacher Institute, from 1976 to 1991, the proportion of residency programs that did not offer abortion training rose from 7.5 to 31%. In 1976, 26% of the residency programs required abortion training. By 1991, only 12% required such training. The Accreditation Council for Graduate Medical Education has directed obstetrical residents should be taught how to perform abortions, unless they have a moral or religious objection. This change in policy is scheduled to become effective on January 1, 1996. Abortion mandated for OB training, Washington Times, February 15, 1995: A12. On March 19, 1996, the Senate passed the Coats amendment (no. 3513): "to amend the Public Health Service Act to prohibit governmental discrimination in the training and licensing of health professionals on the basis of the refusal to undergo or provide training in the performance of induced abortions," by a vote of 63 yeas and 37 nays. Congressional Record, March 19, 1996, S2262-S2266, S2268-S2276, S2280.

made available it is unlikely that many would volunteer. Third, the social order on military posts tends to be very close-knit and hierarchical. A subordinate may choose not to "ruffle the feathers" of a superior over such a contentious issue. Thus, the social norms established by superiors in the military environment are likely to translate into action or inaction by subordinates. This conventional wisdom gains credibility given the enormous amount of leverage superiors in the military have over the careers of subordinates. (Although this is true in the civilian context, it apparently exists to a lesser degree, especially in professional fields such as medicine in which civilians are generally unwilling to formally judge or second guess professional colleagues.) Fourth, the medical team must consist of volunteers. Any member of a medical team needed to perform an abortion can essentially "veto" it. Fifth, since military physicians are paid a salary, and not on the basis of procedures performed, there is no economic incentive to provide abortions. Finally, rules exist requiring the services to respect the prevailing laws in each country. Thus, the restrictions of a particular country may limit the access to pre-paid abortions at military facilities (see Appendix).[33]

Given these factors and considerations, it was reported that 27 abortions were performed at military hospitals worldwide in 1993[34] and 10 in 1994. All of the 1994 abortions were reported to be "life of the mother" cases; i.e., none were "pre-paid." According to data provided by DOD, two abortions were performed at military treatment facilities worldwide in FY1999. For FY2000, one therapeutic abortion was reported.

Responding to the lack of medical personnel willing to perform abortions, the Army's 7th Medical Command (Europe) sought in 1993 to hire a civilian physician whose duties would include providing abortion services.[35] This move would be consistent with the President's memo stating that "[i]n circumstances in which it is not feasible to provide pre-paid abortion services in a particular military facility, the [Military Health Services System] shall develop other means to assure access." Such an affirmative step would provide access where none was available before. However, such a step could be viewed as encouraging abortion and threatened to provoke protests both within the uniformed services and in the international community.[36] To date, reports of protests have not been found.

Another consideration along similar lines is to expand the use of foreign physicians, as suggested by the Defense Advisory Committee for Women in the Services (DACOWITS). This may be effective in certain situations, but not all, since

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[33]"Most countries where American military personnel are stationed restrict or outlaw them [abortions] altogether." Nelson, Soraya S., Limits remain on abortions at overseas hospitals, Navy Times, Feb. 22, 1993: 11.

[34]Nelson, Soraya S., Military abortions overseas: Still rare, Army Times, Sept. 5, 1994: 18.

[35]Scholar, Steve, Army seeking civilian doctor willing to do abortions at military hospitals, Stars and Stripes (European), April 28, 1993: 1.

[36]"A Pentagon decision to send doctors overseas to perform abortions in military hospitals could spark protest from pro-life groups in Germany, pro-life GIs say." Pro-Life Protests, American Legion, July 1994: 10.

DOD is still required to observe local laws. Countries such as Spain, South Korea, and Panama outlaw or sharply restrict abortions.[37]

Following German unification, in 1993, a German court issued an injunction against a law that would have unified abortion policies in the east and west. The *Bundestag* – lower house of the German parliament – struggled to write new laws. During this void, the performance of abortions or restrictions on abortion services at military facilities in Germany, although not illegal, may have been inflammatory to certain German sensitivities.[38] On August 21, 1995, German President Roman Herzog signed into law a measure passed by the *Bundestag* (on June 29) and approved by the *Bundesrat* – upper house – (on July 14). Under this law, abortions are illegal (except in cases of rape or "medical necessity"), but a woman who seeks an abortion during the first 12 weeks will not be subject to criminal prosecution provided she attends a compulsory counseling session reviewing her options.[39]

Contracting with foreign physicians poses its own problems. Countries that lack professional medical personnel trained to U.S. standards (the very reason argued for providing these services in the first place) are less likely to have physicians with a skill level which would be commendable for contracting.

In certain cases, contracting may be an option, but it raises other considerations. If the patient was to pay the cost of the abortion, does such a cost include a pro-rated amount based on contracting, training, travel, and other costs required to provide these services? Inclusion of these in such a cost calculation could well make the price of these services prohibitive. Conversely, using Defense Department funds to make available "pre-paid" abortions (i.e., through contracting, travel, etc.) could be viewed as in conflict with 10 USC 1093.

According to a DoD Information Paper, in August 1994, "a policy on hiring non-military physicians to perform abortions was issued with specific reference to treatment facilities in Germany. DoD respects host nation laws regarding abortion."[40]

Furthermore, it was unlikely that abortion services would become more available if the military reduced the number of physicians as part of DOD downsizing of the force structure. One drawdown proposal suggests that DOD could reduce the number of physicians in uniform by as much as 50%.[41] Under the Administration's

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[37]Women in the services, Fast Track, Army Times, July 4, 1994: 20.

[38]"Women's groups, opposition politicians from the west, and easterners across the political spectrum expressed outrage at the court's decision. Many observers felt the decision exposed the deep east-west social divide." Donfried, Karen E., German-American Relations in the New Europe, CRS Issue Brief IB91018, Jan. 27, 1994: 6.

[39]The Week in Germany, January 30, 1998.

[40]Memorandum for Assistant Secretary of Defense (Health Affairs), Information Paper on abortion policy for Dr. Hambre's confirmation hearing, July 1997.

[41]"In June [1994], a Pentagon study found that only about half of the current number of military doctors are needed for any foreseeable military operation." Jowers, Karen, 50% cut

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long-term defense spending plans, 5,600 civilian medical personnel will be cut from the Army over the next 6 years. The Navy and Air Force, together, are expected to be reduced by less than 2,000. These reductions "amount to the equivalent of shutting three of the Army's eight medical centers, experts say."[42] The reduction of civilian professionals in the U.S. military may require DOD to rotate uniformed physicians back to the U.S. from overseas reducing the number of physicians overseas further. Such a reduction would likely serve to reduce the availability of abortion services overseas.

Recent Legislative Action

The House version of the FY1996 Defense Authorization Act contained a section that would terminate the policy of allowing the performance of abortions on a pre-paid basis, at military facilities. Under this language:

> This section would amend Section 1093 of Title 10, United States Code, to include restricting the Department of Defense from using medical treatment facilities or other DOD facilities, as well as DOD funds, to perform abortions unless necessary to save the life of the mother.[43]

The Senate report contained no similar provisions.

As a result of numerous political differences between the House and the Senate language, as well as Administration opposition on a number of issues raising the specter of a veto, the Authorization Act stalled in conference. Legislators sought to have language included in the FY1996 DOD Appropriations Act that would prohibit abortions at overseas military facilities. The Appropriations Conference Committee originally included the following language:

> Sec. 8119. None of the funds made available in this Act may be used to administer any policy that permits the performance of abortions at medical treatment or other facilities of the Department of Defense, except when it is made known to the federal official having authority to obligate or expend such funds that the life of the mother would be endangered if the fetus were carried to term: Provided, That the provisions of this section shall enter into force if specifically authorized in the National Defense Authorization Act for Fiscal Year 1996.

Thus, the nature of this language only allowed it to take effect, when and if the Authorization language was enacted into law. As noted, at the time, the Authorization bill was stalled in conference and faced a possible veto. The failure of

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[41](...continued)
is planned in military doctors, Air Force Times, Jan. 23, 1995: 28.

[42]Nelson, Soraya S., Medicare users may lose hospital access, Navy Times, September 5, 1994: 26.

[43]U.S. Congress, House, Committee on National Security, National Defense Authorization Act for Fiscal Year 1996, H.Rept. 104-131, H.R. 1530, 104th Cong., 1st Sess., June 1, 1995: 237.

the Authorization bill to be passed would negate any language concerning abortions in the Appropriations bill.

On September 29, 1995, pro-life legislators in the House and a large number of Democrats (opposed to the bill on policy and other spending considerations) joined ranks and rejected the Conference version of the FY1996 DOD Appropriations Act (151-267), thereby returning the bill to the House-Senate conference.[44] On November 16, 1995, the conferees agreed to a compromise that included the following language:

> Sec. 8119. None of the funds made available in this Act may be used to administer any policy that permits the performance of abortions at medical treatment or other facilities of the Department of Defense.
>
> Sec. 8119A. The provision of Section 8119 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.

On December 1, 1995, the Appropriations Act, with the above two sections, became law.[45]

On December 15, 1995, the House passed the FY1996 Authorization Act (containing the language cited on page 11). The bill was approved by the Senate on December 19, 1995. On December 28, 1995, the President vetoed the Authorization Act, and in a letter to Congress, he stated:

> H.R. 1530 [FY1996 Defense Authorization Act] also contains ... provisions that would unfairly affect certain service members.... I remain very concerned about provisions that would restrict service women and female dependents of military personnel from obtaining privately funded abortions in military facilities overseas, except in the cases of rape, incest, or danger to the life of the mother. In many countries, these U.S. facilities provide the only accessible, safe source for these medical services. Accordingly, I urge Congress to repeal a similar provision that became law in the "Department of Defense Appropriations Act, 1996."[46]

On January 3, 1996, the House of Representatives failed to override the veto with a vote of 240-156. Two days later, the House amended S. 1124 by striking "all after the enacting clause of S. 1124 and insert[ing] in lieu thereof the text of H.R. 1530 [the vetoed language] as reported by the committee of conference on December 13, 1995, contained in [H.Rept. 104-406]."[47] Under unanimous consent, the language was taken from the Speaker's table, as amended, and sent to conference. On January 22, conference report H.Rept. 104-450 was filed. On January 24, 1996, the House agreed to the conference report (287-129). Two day later, the Senate agreed to the conference report (56-34). Provisions barring the use of DOD facilities to perform

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[44]Maze, Rick, and William Matthew, Defense Spending Bill Slapped Back by Unlikely Union in Congress, Army Times, October 9, 1995: 25.

[45]P.L. 104-61, 109 Stat. 636, December 1, 1995.

[46]Veto message from the President of the United States (H. Doc. No. 104-155), cited in the Congressional Record, January 3, 1996: H12.

[47]Congressional Record, January 5, 1996: H302.

abortions, except in cases of rape, incest or where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy, were included in this language (see quoted text at the bottom of page 2). On February 10, 1996, President Clinton signed the FY1996 Defense Authorization Act into law.[48]

Although the prohibition against using funding in the Appropriations Act would have lapsed at the end of the fiscal year, the change made via the Authorization Act modifies Title 10 United States Code. As such, this change will not lapse at the end of the fiscal year. Thus, this language will stay in effect unless and until Congress (with the President's signature) specifically acts to amend, modify, strengthen or repeal these provisions.

On May 14, 1996, an amendment was offered to the House version of the FY1997 National Defense Authorization Act to overturn the prohibition on military facilities performing abortions and allow such abortions to be performed at these medical facilities so long as federal funds are not used (i.e., patient-paid abortions). The amendment was defeat by a vote of 192 ayes and 225 noes.[49] Slightly more than one month later, the Senate passed an identical amendment to its version of the FY1997 National Defense Authorization Act by a voice vote.[50] Ultimately, the Senate conferees receded and the Senate amendment was dropped.

Efforts to amend these provisions have continued. On June 19, 1997, Representative Jane Harman offered and amendment to the fiscal year 1998 DOD Authorization Act that would purportedly

> [restore the] policy affording access to certain health care procedures for female members of the armed forces and dependents at Department of Defense facilities.

The amendment was rejected (196-224).[51]

In 1998, the House National Security Committee rejected another attempt to allow for privately funded abortions at these facilities.[52] On June 25, 1998, the Senate rejected a similar provision (44-49).[53]

During consideration of the FY2000 National Defense Authorization Act, the House Personnel Subcommittee accepted an amendment by Representative Sanchez to reverse the restrictions on privately funded abortions being performed at overseas military medical facilities. Another amendment, by Representative Kuykendall, would have allowed Defense Department funding of abortions in cases of rape or incest. Upon consideration by the House Armed Services Committee, the Sanchez amendment was dropped and the Kuykendall amendment was further amended by

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[48]P.L. 104-106, 110 Stat. 186, February 10, 1996.

[49]Congressional Record, May 14,1996, H5013-H5022.

[50]Congressional Record, June 19, 1996, S6460-S6469.

[51]Congressional Record, June 19, 1997, H4056-H4069.

[52]CQ Weekly, Other Policy Issues, May 9, 1998: 1240.

[53]Congressional Record, June 25, 1998, S7060-S7076.

Representative Buyer. As amended the Kuykendall amendment would allow Defense Department funding of abortions in cases of *forcible* rape or incest *provided that the rape or incest had been reported to a law enforcement agency*. [Italics represent the Buyer changes.] Later efforts to reinstate the Sanchez language allowing for abortions at overseas military facilities when personal funds are used were rejected by both the House and the Senate. Ultimately, the Kuykendall amendment, as amended, was also deleted during conference consideration of the FY2000 National Defense Authorization Act, thereby leaving the law unchanged.[54]

(Although not specifically related to the above discussion of the military abortion issue, other language has been proposed that would have had an affect on the consideration of the abortion issue. H.R. 2436[55] included, in part, language modifying Title 10, United States Code. According to this language, any conduct violating certain provisions of the Uniform Code of Military Justice, by a person subject to the Uniform Code of Military Justice, that causes death or bodily injury to an unborn child who is in utero at the time the conduct takes place, would be guilty of a criminal offense. For example, if during an assault on a pregnant women, the unborn child were injured, such an injury would constitute a separate offense. Exceptions were included in cases of abortions, medical treatment of the woman, or conduct of the woman with regard to her unborn child. On September 30, 1999, the House passed this language (254-172). The next day, it was received and read in the Senate. On February 23, 2000, the Senate Committee on Judiciary held hearings on a Senate companion bill, S. 1673. No further action was taken by the Senate, and the legislation failed to become law. More recent efforts to pass this legislation have not been successful.)

Proponents note that such language would recognize the victimization of the child while in utero and afford appropriate criminal sanctions to perpetrators of violent acts. Critics view the inclusion of such language as a means of defining a fetus as a victim and thereby acknowledging or creating a separate human existence. These critics are concerned that such language would arguably recognize the fetus as separate person in the eyes of the law thereby complicating the abortion debate.[56]

In consideration of the FY2001 National Defense Authorization Act (H.R. 4205), the House Armed Services Committee "voted to retain its ban on abortions at military hospitals unless the mother's life is at risk. The 31-20 vote came May 10 on an amendment that would have allowed abortions at overseas hospitals if patients rather than the government paid for them. The 29-26 vote came on a failed try to allow military hospitals to perform abortions in cases of rape or incest."[57] Eight days later, a floor amendment was offered that would strike subsections a and b of 10 USC

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[54]Maze, Rick, "Abortion Provision Dropped from Defense Bill," The Times, August 16, 1999: 11.

[55]H.R. 2436, Representative Linsey Graham, July 1, 1999.

[56]For additional information on the legal aspects of the abortion issue, see Lewis, Karen L., Jon O. Shimabukuro and Thomas P. Carr, Abortion: Legislative Response, CRS Issue Brief IB95095, updated regularly.

[57]The Times, FastTrack, May 29, 2000: 6.

1093, effectively removing any restriction to providing abortions under this title. The amendment was defeated (221-195).[58]

On June 20, 2000, the Senate tabled (50-49) an amendment to the FY2001 National Defense Authorization Act, S. 2549, that would strike Section b of 10 USC 1093. The amendment would have lifted the ban on the use of military facilities in performing abortions. Although proponents noted that the amendment "would lift restrictions on privately funded abortions at military facilities overseas," as written, the amendment would affect such facilities in the United States as well.[59]

On September 25, 2001, Representative Loretta Sanchez offered an amendment to the National Defense Authorization Act for Fiscal Year 2002. This amendment would have limited the restriction on the use of DOD facilities for performing abortions at those facilities "in the United States." In other words, this language would remove the restriction of providing privately funded abortion services at DOD facilities overseas. The amendment was rejected (199-217).[60]

In conclusion, under current law, 10 United States Code,

§ 1093. Performance of Abortions: Restrictions

(a) Restriction on Use of Funds.–Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

(b) Restriction on Use of Facilities.–No medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.

Although no bills have, as yet, been introduced in the 107th Congress pertaining to this issue, recent history suggests that such legislation should be anticipated.

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[58]Congressional Record, May 18, 2000: H3347-H3350, H3371.

[59]Congressional Record, June 20, 2000: S5406-S5421, S5425.

[60]Congressional Record, September 25, 2001: H6022-25, H6032-33.

Appendix

According to Department of Defense and individual command officials (as reported to the *Army Times*, Sept. 5, 1994: 18; source: Defense Department and individual command officials), the availability of abortion services (prior to the restrictions enacted on December 1, 1995) at military facilities overseas could vary depending on location.

GERMANY

- **National policy:** See discussion on page 10 above.

- **Local U.S. military policy:** Under Germany law, abortions are illegal except in cases of rape or medical necessity. Abortions carried out during the first twelve weeks of pregnancy are not considered a prosecutable offense provided the woman has certification attesting to receiving state approved counseling to review her options. The military does not allow abortions at its facilities.

- **Since the U.S. ban was lifted:** Estimates of how many American service women or family members received abortions from German providers in 1993 are as high as 1,500, although German officials say there is no way to confirm this number.

ITALY

- **National policy:** Abortions are permitted. They must be performed by a licensed gynecologist.

- **Local U.S. military policy:** Abortion services comparable to those in the United States are available from Italian providers in the Naples and Sigonella areas. Service women and family members who desire abortions are referred to pre-identified licensed local providers. Abortions are not performed at military hospitals.

- **Since the U.S. ban was lifted:** One elective abortion was reportedly provided in Sigonella at an Italian facility.

JAPAN

- **National policy:** Abortion is legal and fairly unrestricted, but more expensive than in the United States.

- **Local U.S. military policy:** Given that abortions are readily available in the Japanese community, women seeking abortion from Navy hospitals here are referred to family-service counselors for referrals to Japanese doctors.

- **Since the U.S. ban was lifted:** Few, if any, abortions were performed at military hospitals, Navy officials said. The number of abortions by civilian doctors is unknown.

KOREA

- **National policy:** Abortion is illegal except to save the life of the mother.

- **Local U.S. military policy:** The U.S. military's rules for Korea could not be learned from military officials, but because of the local law, abortions would not be available at U.S. hospitals.

- **Since the U.S. ban was lifted:** Service members or family members continue to have to travel outside of Korea to obtain an abortion.

Problematic Comparisons to Foreign Military Policies

Abortion policies of foreign militaries vary. These variations depend on the country's general policy regarding abortion. For instance, abortion policies are affected by religion (Vatican, Israel, and Islamic nations, for example), population control policies (China) and other cultural factors (nationalized health care policies, such as are found in Great Britain), and issues pertaining to the structure of the military – the presence of women in uniform (many Islamic countries do not have women in uniform, making the issue moot). Some countries do not have a military (Costa Rica for instance does not have a military per se but rather a para-military style security force). In addition, internal legal restrictions or rulings – Court rulings on abortion (see Germany) affect the country's policy. Finally, very few countries maintain a level of overseas deployments that make direct comparisons relevant. For these reasons, comparisons to foreign nations in terms of their abortion policy in general, and their policy regarding military abortions at overseas military medical facilities are difficult to justify and of questionable utility.