

Memorandum

WR-D05



Subject Welfare Reform -- Personal Responsibility Act	Date January 30, 1995
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To
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Associate Counsel to the President

From
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The following is a summary of the major issues raised by H.R. 4, the Personal Responsibility Act, that OLC has identified as possibly meriting comment.

1. The provisions that condition receipt of benefits on a young mother's marrying the child's father or marrying another who legally adopts the child may improperly interfere with "freedom of personal choice in matters of marriage and family life." These freedoms are protected by the due process clause. Conditioning the receipt of benefits on marriage thus raises serious constitutional concerns.

2. The provisions excluding illegitimate children born to young mothers from eligibility for benefits discriminate on the basis of illegitimacy, and might not survive review under the rational relationship test.

3. Requiring a husband who is not the father to adopt the child of a young mother for the family to qualify for benefits might not survive review under a rational relationship test.

4. The basic bar on providing benefits for illegitimate children born to young mothers except when the mother marries the father or someone else who adopts the child contains no exception for births resulting from rape or other escape hatches, and would thus, in some circumstances, encourage undesirable, even dangerous, marriages. Consonant with sound policy and to avoid litigation, these provisions should be amended to include good cause exceptions.

5. Section 103 requires state employees and officers who learn that an unmarried woman is pregnant in the course of their official duties to inform her, orally and in writing, inter alia, that she will be ineligible for aid under the state plan unless she informs the state of the prospective father and, after the

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child is born, cooperates in establishing paternity. This provision is overbroad, and, with respect to women not seeking or in need of assistance, the duties it imposes on states are unrelated to any federal interest in the administration of the joint state-federal AFDC program. It thus should be limited to only those state employees whose duties are directly concerned with the woman's medical or family status, or only those employees whose duties relate to administration of the joint federal-state benefits program.

6. Section 103 also fails to require that state officers also inform the woman of "good cause" exceptions, 42 U.S.C. § 602(a)(26)(B)-(C), thereby requiring over-simplified instructions that, if followed, could sometimes result in danger to the woman. It should be amended to require inclusion of the "good cause" exceptions in any required statement.

7. Section 106 bans AFDC assistance with respect to additional children of persons already receiving state aid under the plan, and to those children born to persons who received aid any time during the ten months ending with the birth of the child. It should include an exception for births resulting from rape.

8. Many of the provisions of the bill appear to be predicated on the concept that AFDC benefits facilitate or encourage out-of-wedlock births by women needing assistance. If this proposition is accepted, it follows that the cut-off of aid for additional children set to take place on October 1, 1995, should be delayed for ten months following passage of the bill, so as to permit adjustments resulting from the changed aid provisions.

9. Relatedly, the bill imposes a lifetime ban on receipt of benefits for children who were born out-of-wedlock to young mothers, even if the mother was not on welfare when she became pregnant but received aid sometime during her pregnancy. Although the courts are deferential to Congressional line-drawing in establishing eligibility for benefits, this lifetime ban may be irrational, insofar as it applies even to children born to mothers who may never have expected to require government assistance.

10. Section 401 would exclude legal aliens from a wide range of government benefits programs. Although the provision is within Congress' power to enact, we urge against erecting legal distinctions between persons lawfully residing here under color of law and the citizenry along the lines proposed in Section 401, as such distinctions would contribute to the establishment of an objectionable caste system.

11. Barring aliens from the programs listed in Section 401 would also serve to exclude citizens who are family members of aliens applying for some of the programs, giving rise to a colorable constitutional challenge on behalf of a United States citizen who was excluded simply because he or she was born to or married to an alien. We recommend providing an exception for the exclusion as to all programs benefitting families, when the family contains a United States citizen.

12. With respect to a limited number of the programs, the exclusion of both legal and illegal alien children may not survive rational relationship review: that is, some programs such as immunization programs designed to combat communicable diseases, may be intended to benefit not only the direct recipient, but also society at large. If a program's operation with respect to the citizen community would be significantly harmed by excluding aliens, funding should be maintained.

13. Section 602 authorizes states to treat residents who have lived in that state for less than one year as they would have been treated had they not moved into the state, thereby unconstitutionally burdening the right to travel.

14. Section 606 proposes to authorize states to require permission before a person receiving AFDC may take an action requiring the dependent child to change schools, which also raises serious constitutional concerns.

DRAFT

Newt Gingrich
Speaker
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Dear Mr. Speaker:

This provides the views of the Department of Justice on the Personal Responsibility Act, H.R. 4. We have several concerns about this bill.

The provisions that seek to discourage young women from bearing children out-of-wedlock by conditioning receipt of benefits on the mother's marrying the child's father or marrying another who legally adopts the child (sections 105 and 107) improperly interfere with "freedom of personal choice in matters of marriage and family life," freedoms that are protected by the due process clause. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). See also Zablocki v. Redhail, 434 U.S. 374 (1978) (prohibition on marrying without court approval if one is under a support obligation); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (abortion); Boddie v. Connecticut, 401 U.S. 371 (1971) (filing fees in divorce actions); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (birth control). Although the Court has principally considered and invalidated governmental efforts to block decisions regarding intimate affairs, we believe that the Personal Responsibility Act's efforts to encourage marriage by withholding desperately needed welfare benefits may raise similar constitutional concerns as the prohibitions and legal hurdles previously held unconstitutional. The proposal's intrusion into intimate relationships is exacerbated because the condition of eligibility -- marriage -- is not wholly within the power of the mother to fulfill.

A related objection is that the provisions excluding illegitimate children born to young mothers from eligibility for benefits (Sec. 101, 105 and 107) improperly discriminate on the basis of illegitimacy. Accepting the state's interest in promoting marriage, reducing out-of-wedlock births, and encouraging responsibility on the part of fathers, we nonetheless have reservations about whether these ends are rationally served by cutting off certain illegitimate children from benefits. Much of our concern stems from the fact that illegitimate children cannot affect their parents' conduct nor their own status. Trimble v. Gordon, 430 U.S. 762, 770 (1977). Cf., Mathews v.

Lucas, 427 U.S. 495 (1976) (distinction in social security provision requiring illegitimate children to prove their dependent status before receiving survivor benefits upheld).

Requiring a husband who is not the father to adopt the child might not survive review under a rational relations test. Effecting an adoption is in some measure outside the power of the applicant. Moreover, the adoption requirement is unnecessary, because the income of the mother's spouse (if he is in the same household as the child for whom benefits are sought) is deemed available whether or not he adopts the child. 42 U.S.C. § 602(a)(7)(A). Although Congress admittedly has considerable scope to place conditions on federal benefits even when those conditions may bear on intimate relationships, Lyng v. Int'l Union, 485 U.S. 360 (1988), we believe that the intrusion authorized by sections 105 and 107 goes too far as a matter of policy, is sure to spark litigation, and may well be beyond constitutional limits.

If, notwithstanding our objection to the marriage and adoption requirements, sections 105 and 107 are given further consideration, they should be amended to include exceptions when the pregnancy is a result of rape, and for other good causes. If courts were to invoke a fundamental interest/due process analysis, they would likely find that pressuring women into marriage by withholding needed benefits when there has been rape or abuse would intrude on fundamental rights. Even under a rational relationship test, no apparent state interest is served when such marriages likely would be harmful to the woman, as when she believes she would suffer abuse in the marriage. Of course, Congress is not required to establish categories of eligibility with mathematical precision, United States v. Moreno, 413 U.S. 528, 537 (1973), but we do not believe that this principle of deference and sound public administration should be invoked so as to deny benefits to mothers who have reason to fear marrying the father of their child.

We also have some concerns with respect to Section 103. It appears to have a drafting problem, because 42 U.S.C. § 666(a)(5)(C) has no clauses designated (i) and (ii), which are referred to in the Personal Responsibility Act. The Personal Responsibility Act may intend to refer to § 666(a)(5)(A), which does contain paragraphs (i) and (ii).

In addition, Section 103 is overbroad -- that is, the "state officials" required to make the admonitory statement to pregnant, unmarried women, include, for instance, highway patrol officers who learned of the pregnancy and the woman's marital status during a traffic stop. We are unaware of any federal interest in imposing such obligations on state officers who play no role in the administration of the joint state-federal AFDC program. We thus recommend that if this provision is given further

consideration, it be amended such that the state officials bound by it include only those officers who learn of the woman's pregnancy and unmarried status in the course of official duties that are directly concerned with the woman's medical or family status.

Section 103 calls for the state officers and employees to paraphrase the law regarding parental obligations and cooperation requirements. By failing to require that state officers also inform the woman of "good cause" exceptions, 42 U.S.C. § 602(a)(26)(B)-(C), the federal government would be requiring state officers to give over-simplified instructions that, if followed, could sometimes result in danger to the woman. We recommend that if the section is given further consideration, it be amended to require inclusion of the "good cause" exceptions so as to minimize the misleading nature of the required statement and eliminate predictable litigation risks.

With respect to the family cap provisions of Section 106, we recommend that in order to avoid litigation and to survive certain as-applied challenges under the applicable rational relationship test, Section 106 should be amended to provide an exception for births resulting from rape. Absent such an exception, it would serve no purpose to deny benefits for these additional children, as those mothers in no sense "chose" to run a risk of getting pregnant. Again, a court might rule that Congress need not legislate so precisely, but it is at a minimum unsound as a matter of policy not to include such an exception.

It also follows from the apparent logic of the proposal itself that the cut-off of aid for additional children should not take place immediately, but only nine to ten months after the effective date of the paragraph (unless the effective date of the paragraph is ten months after passage of the legislation). Delaying implementation of Section 106 would offer recipients the theoretical ability to conform their actions in the manner encouraged by the proposal itself. Relatedly, Sections 105 and 107 authorize the imposition of a lifetime ban on receipt of benefits for children who were born out-of-wedlock to young mothers. If the mother was not on welfare at the time she became pregnant, it is hard to fathom the rationality of forever precluding her children from receiving benefits she may never have expected to require.

We also have some concerns with the proposal's attempt to exclude all aliens, legal as well as illegal, from a wide range of government benefits programs. Although Congress undoubtedly has broad authority over immigration matters to establish such classifications, Mathews v. Diaz, 426 U.S. 67, 78 (1976); Moving Phones Partnership v. FCC, 998 F.2d 1051 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1369 (1994), we strongly urge against erecting legal distinctions between persons lawfully residing here under

color of law and the citizenry along the lines proposed in Section 401. While we would have no objection to extending the period when sponsors' income may be deemed to be available to aliens who become needy, Section 401 goes too far. It fails to recognize that legal aliens may often be fully qualified for citizenship, and may have been productive participants in the United States economy for many years, when the need for assistance begins. Delays, which may be beyond their control or even due to the government itself, sometimes prevent aliens from actually obtaining citizenship and thus eligibility. Flatly denying benefits from sixty different programs to legal aliens who have been part of our work force would contribute to the establishment of an objectionable caste system.

A colorable constitutional challenge might also lie on behalf of a United States citizen, if that citizen were excluded from public housing and rental assistance programs under Section 401(d)(19)-(31) simply because he or she was born to or married to an alien. A court might find that some of the programs specified in Section 401 benefit families rather than individuals, and that by precluding families with citizens that include an alien from participation, the distinctions violate equal protection principles. The most persuasive challenge would be an equal protection claim brought by a citizen child who is not treated similarly to citizen children who have equal needs but who are not the offspring of non-citizens. See, e.g., Oyama v. California, 322 U.S. 633 (1948) (provision of California's Alien Land Law that discriminated against American citizens of alien parents violated equal protection clause); Doe v. Reivitz, 830 F.2d 1441 (7th Cir. 1987) (under AFDC statute, states cannot exclude citizen and eligible alien children in families headed by illegal alien from AFDC-UP program; court did not reach constitutional issue, however); Darces v. Woods, 35 Cal.3d 871, 679 P.2d 458 (1984) (en banc) (California constitutional guarantee of equal protection violated by distinction between dependent children residing in a household with siblings who are undocumented, and dependent children not residing with undocumented); but see Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984) (upholding requirement of Omnibus Budget and Reconciliation Act requiring Social Security numbers as a condition of entitlement, despite impact on citizen children of illegal aliens).

In addition, the bill's text is devoid of findings with respect to aliens. It thus provides no basis for ascertaining whether there is indeed a rational relationship between Congress' goals and the sixty exclusions. With respect to a limited number of the programs at issue, the exclusion of both legal and illegal alien children may not be rational: that is, some programs may be intended to benefit not only the direct recipient, but also society at large. A chief example would be immunization programs designed to combat communicable diseases, from which aliens would

be excluded pursuant to Section 401(d)(41). If the rationale of the bill is to deter immigration, to encourage progress by aliens towards citizenship, or simply to save government money, these goals may not be advanced by excluding all aliens from immunization programs.

Two provisions of Title VI would amend the Social Security Act in a manner that appears to burden the constitutionally protected right to travel. Section 602 authorizes states to treat residents who have lived in that state for less than one year as they would have been treated, had they not moved into the state. Under this section, then, newcomers could be treated differently from long-term residents with regard to public benefits, and might be deterred from moving. Section 606 would authorize states to require prior approval of any action that would result in a change of school for a dependent child. Under this provision, families that relied on AFDC would have to secure state permission before moving across school districts.

Landmark Supreme Court cases have held that the right to travel, including the freedom to enter and reside in any state, is implicated if a state law actually deters such travel, when impeding such travel is the primary objective of the statute, or if the state uses any classification to penalize the exercise of that right. Attorney General v. Soto-Lopez, 476 U.S. 898, 903 (1986) (Brennan, J., plurality). Although Supreme Court rationale has not coalesced upon a consistent standard, restrictions on the right to travel appear to be subject to an intensified equal protection analysis; any state choosing to enact a provision pursuant to Section 602, or Section 606 insofar as it bears on interstate travel, should be prepared to demonstrate that the distinction between long-term and recent residents is necessary to further a compelling state interest. Shapiro v. Thompson, 394 U.S. 618, 627-28 (1969). Moreover, the Court has been particularly likely to strike down state provisions that distinguish between long-term residents and recent arrivals with respect to welfare benefits and medical care. Id.; Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

The Supreme Court currently is considering whether state provisions limiting benefits to the amounts that the newcomer received in the state from which he or she departed are constitutional. The Court has granted certiorari and heard argument in Green v. Anderson, No. 90-147, a case in which the lower courts invalidated on equal protection grounds a demonstration project in California in which AFDC was limited until an applicant had resided in the state for at least twelve consecutive months. 811 F. Supp. 516 (E.D. Cal. 1993), aff'd, 26 F.3d 95 (9th Cir. 1994), cert. granted, 115 S. Ct. 306 (1994). Other courts have similarly ruled. Mitchell v. Steffan, 504 N.W. 2d 198 (Minn. 1993), cert. denied, 114 S. Ct. 902 (1994); Aumick

v. Bane, 161 Misc. 2d 271, 612 N.Y.S.2d 766 (1994). But see Jones v. Milwaukee, 485 N.W.2d 21 (Wisc. 1992) (upholding sixty day waiting period for general relief). Unless the Supreme Court overturns governing precedent, Section 602 is unconstitutional.

Although there are fewer close precedents for Section 606's proposal to authorize states to require permission before a person receiving AFDC may take an action requiring the dependent child to change schools, this proposal, too, appears to be unconstitutional. The apparent intent (nowhere stated) is to use such a law to address the constant upheaval in the lives of many of the poor occasioned by frequent moves, and the consequent disruptive effect on their children's education. Assuming the validity of the state's interest in ameliorating this problem, it seems unlikely that the Court would rule that the state's interest would rise to a compelling state interest under Shapiro, 394 U.S. at 634, at least with respect to those who seek to travel interstate, where the right to travel is most securely grounded as a matter of law. With respect to burdens on intrastate travel, under an equal protection analysis using a rational relationship standard, the restriction also appears to be unconstitutional. Of course, in its implementation, separate constitutional concerns could arise, depending on the state's criteria for approving such moves.

Thank you very much for considering our views on this bill.