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additionally that they anticipated future advertisements in compliance with the guidelines established by the Supreme Court. The announcement was published subsequent to the receipt of the Grievance Commission's letter.

The next move belongs to the Grievance Commission; but movement and comment have not been forthcoming.

Stagnation is obviously not tolerated at LEGUM, COCHRAN & CHARTRAND, P.A. any more than is intimidation. On July 28 ad "B" appeared in *The Evening Capital*.

The jury is still out on this noteworthy episode, but the verdict, no matter how slow in coming, seems certain; lawyer advertising has arrived.

Medicaid Funds Aborted

by Janis A. Riker

As a result of two decisions by the Supreme Court permitting States to refuse to pay for nontherapeutic abortions with Medicaid funds, A Brooklyn Federal District Court judge opened the doors for Congressional action to prohibit Medicaid payments for all abortions except those cases where the life of the mother would be in danger if the pregnancy were carried to term.

In *Beal v. Doe*, 97 S.Ct. 236, (June 20, 1977), and *Maher v. Roe*, 97 S.Ct. 2366, (June 20, 1977), the Supreme Court held that neither Title XIX of the Social Security Act nor the Equal Protection Clause of the Fourteenth Amendment requires states participating in the Medicaid program to spend Medicaid funds for nontherapeutic abortions.

Following these decisions regarding state action, the Supreme Court ordered the District Court judge to reconsider his previous injunction prohibiting enforcement of the Hyde Amendment, which limits federal Medicaid funds for abortions to those in which the life of the mother is

in danger (Department of Labor and Health, Education and Welfare Appropriation Act, 1977, sec. 209, Pub. L. No. 94-439 (1976)). As a result the injunction was withdrawn. The Hyde Amendment remained in effect only until September 30, 1977, but Congress is deadlocked in considering a continuation of its restrictions on abortion funding.

Further Congressional action to limit federal payments for abortions would be necessary if Congress wants to prohibit states from using Medicaid funds. The Court held in *Beal* that Pennsylvania's refusal to provide Medicaid coverage for nontherapeutic abortions is not inconsistent with Title XIX of the Social Security Act, but that the statute does permit a state to provide such coverage if it so desires. The Hyde Amendment prohibited such coverage, however, for the current fiscal year.

The 6-3 *Beal* decision (Justices Brennan, Marshall and Blackmun dissenting) is based on the Court's interpretation of the language of the statute itself, the intent of Congress and the federal agency interpretation of the statute.

Quoting the statute's specific language, the Court concludes that the act confers broad discretion upon states to adopt standards for determining the extent of medical assistance provided.

Noting that nontherapeutic abortions were unlawful in most states when Congress passed Title XIX in 1965, Justice Powell said in the opinion that it was not likely that it was the intent of Congress to require states to fund nontherapeutic abortions.

Furthermore, unless there are compelling indications that the agency interpretation of the statute is erroneous, the Court

will follow its construction, and the Department of Health, Education and Welfare concluded that Title XIX permits, but does not require, funding of nontherapeutic abortions.

In its companion *Maher* decision, the Court held that the Equal Protection Clause of the Constitution does not require a state participating in Medicaid to pay for nontherapeutic abortions even though it pays for childbirth. It is this holding which provides the basis for federal legislation restricting abortion coverage by Medicaid funds.

A regulation of the Connecticut Welfare Department limiting state Medicaid benefits for first trimester abortions to those that are "medically necessary" (a term defined to include psychiatric necessity) was challenged by two indigent women who were unable to obtain physicians' certificates of medical necessity.

A three-judge District Court panel enjoined the state from requiring a certificate of medical necessity for Medicaid-funded abortions, holding that the Equal Protection Clause requires a state to fund nontherapeutic abortions if it generally provides for funds for medical expenses related to pregnancy and childbirth.

The Supreme Court disagreed, finding neither discrimination against a suspect class nor interference with a fundamental right protected by the Constitution.

In its "strict scrutiny" analysis, the Court said that it has never held that financial need alone creates a suspect class for equal protection purposes.

Most importantly, the Court stated that the fundamental Constitutional right protected in *Roe v. Wade*, 410 U.S. 113 (1973) was a woman's *freedom to decide* to terminate her pregnancy, not an unqualified right to the abortion itself. *Roe* prohibits undue state interference with a woman's decision to have an abortion, but it does not impose an affirmative obligation on states to make abortions available.

Justice Brennan in his *Maher* dissent argues that the Connecticut statute infringes on the woman's constitutionally protected right of privacy by placing financial pressures on indigent women to carry their pregnancies to term. However, the six-justice majority concluded that *Roe* did not limit a state's authority to use



Photo by Andrew S. Katz

public funds to encourage its own values, such as favoring childbirth over abortion. The Court said that the Connecticut regulation:

“... places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.” 97 S.Ct. 2382-2383.

Connecticut’s regulation can be sustained under the “rational basis” test that applies in the absence of a suspect classification or the interference with a fundamental right; i.e. whether the legislative scheme rationally furthers some legitimate, articulated purpose.

The Court concluded that the Connecticut regulation meets the requirement that the distinction between childbirth and nontherapeutic abortion is rationally related to a constitutionally permissible state purpose. That according to the Court, is the protection of the potential life of the fetus by encouraging normal childbirth.

The Court cited *Roe v. Wade* as recognizing the state’s strong interest existing throughout the pregnancy, including the first trimester. The subsidy of costs related to childbirth, which are greater than the costs of a first trimester abortion, is a rational means of furthering the state’s interest. In *Dandridge v. Williams*, 397 U.S. 471, 475 (1970), the court held that classifications survive equal protection challenges when a “reasonable basis” for the classification is shown, despite a recognition that laws and regulations allocating welfare funds involve “the most basic economic needs of impoverished human beings. . . .”

Marshall’s dissent in *Beal* actually is a challenge to the Court’s holding in *Maier*. Marshall calls for a new equal protection analysis, which would weigh three factors: the importance of the governmental benefits denied, the character of the class, and the asserted state interests.

The Court in *Maier*, however, refuses to engage in a weighing and balancing of benefits, class characteristics and strength of state interests. Rather, the Court stated that “[w]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.” 97 S.Ct. at 2385-2386.

Nixon Loses Bid To Control “The Tapes”

by Charles F. Chester

In *Nixon v. Administrator of General Services*, 97 S.Ct. 2777 (1977), the Supreme Court decided by a vote of 7-2 that it was necessary to prevent a president from concealing information of interest to the public simply because the information would reveal embarrassing yet truthful facts about him. By sustaining the constitutionality of the Presidential Recording and Materials Preservation Act (PRMPA) 44 U.S.C. §2107, the Court has taken a positive step in the direction of curbing the abuse of presidential power.

The PRMPA was the congressional reaction to an agreement between a former president, Richard M. Nixon and a former General Services Administrator, Arthur F. Sampson. They agreed that General Services Administration would possess the infamous “Nixon Tapes”, but that Nixon would retain all property rights to them. One of these rights was to have the tapes destroyed at Nixon’s will, upon his death, or by September 1, 1984.

Congress, disturbed by this prospective and arbitrary power reserved for Nixon, passed legislation to control custody of 42 million pages of documents and 880 reels of tape. The PRMPA provides for a screening process by which materials of a personal nature would be returned to Nixon

and those of historical significance would be released to the public. The destruction of a President’s materials is prohibited and specific items necessary for judicial proceedings are subject to subpoena.

Although a president still had the right of access to his materials, Nixon wished to retain full control over his presidential materials.

Nixon sought declaratory and injunctive relief and enforcement of his agreement with the GSA in the District Court for the District of Columbia. The district court dismissed his case and the decision was affirmed by the U.S. Court of Appeals for the District of Columbia.

In response to Nixon’s claim that he was being unlawfully deprived of constitutionally delegated executive powers, the Supreme Court decided that Congress did have the authority to pass legislation affecting the disposition of presidential materials. The opinion acknowledged that Nixon retained the full executive control to which he was entitled because the release of any tapes is subject to “any legally or constitutionally based right of privilege.” In the Court’s opinion Congress was not attempting to gain any new authority or take away any legitimate presidential powers. The legislative intent of the PRMPA was held to be the protection of the public’s right to know the truth about Watergate and the restoration of public confidence in government.

