

Originally Processed With FOIA(s):
2012-2218-F

FOIA Number:
2012-2218-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the George Bush Presidential Library Staff.

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Counsels Office, White House
Series: Liberman, Lee S., Files
Subseries: General Subject Files

OA/ID Number: 45270
Folder ID Number: 45270-012

Folder Title:
Abortion (Planned Parenthood v. Casey) [1]

Stack:	Row:	Section:	Shelf:	Position:
G	17	12	3	1

THE WHITE HOUSE

WASHINGTON

June 25, 1992

Abortion
Casey

MEMORANDUM FOR THE CHIEF OF STAFF
MARLIN FITZWATER
EDE HOLIDAY
BILL KRISTOL

FROM: JAY LEFKOWITZ 

SUBJECT: Abortion

Given the possibility that the Supreme Court may hand down its decision in Casey tomorrow, it may be useful to keep in mind the following facts about public opinion on the restrictions on abortion adopted by the Pennsylvania legislature, which are at issue in Casey.

Pennsylvania's restrictions on abortion are consistent with mainstream American values on the need to prevent unrestricted abortion on demand. Recent surveys confirm that a majority of Americans support each of the restrictions enacted by Pennsylvania's legislature:

- **Overall Support:** When told what the Pennsylvania restrictions entail, Americans oppose overturning the law by a 57%-38% majority. (NBC News/Wall Street Journal)
- **Waiting Periods:** At least seven of ten Americans support a requirement that women seeking an abortion observe a 24-hour waiting period to consider information provided by doctors on the risks of and alternatives to abortion.
- **Parental Consent of Minors:** Three surveys taken this year found that at least seven of ten Americans favor a requirement that women under 18 get the consent of at least one parent before having an abortion.
- **Spousal Notification:** Between 60% and 70% of Americans -- a clear majority -- favor a requirement that a woman notify her husband if she decides to have an abortion.

Additionally, 29 states have already passed restrictions on abortion similar to those at issue in Casey. Thirty-three states including Arkansas have some kind of requirement of parental consent or notification for minors seeking an abortion. Ten states have spousal notification or consent requirements for married women seeking an abortion.

**OFFICE OF THE VICE PRESIDENT
WASHINGTON**

DATE: 5/15/92

TO: Lee Liberman

FROM: Richard W. Porter
Counselor to the Vice President

Food for thought. What do you think?

Abortion - Casey

WILL ROE BE OVERTURNED?

Some argue no:

- o The Justices would not want to make abortion a political issue.
- o They do not have to reach the question of Roe's continued viability to decide the case. The Supreme Court rarely decides an issue on broad grounds when a narrow decision is possible.
- o Thomas and Souter would hesitate to strike down Roe in the first case presenting the issue after temporizing on the issue during their confirmation hearings.
- o If Roe were going to be struck down, it would have leaked out of one of the liberal chambers by now -- even though leaks are considered a serious breach of ethics.

But, on the other hand:

- o Four justices expressed a willingness to overturn Roe in the Webster case. Scalia expressed scorn for O'Connor's attempt to rationalize parts of Roe and would be expected to argue strongly again for it to be overturned. Since 1989, two new conservative justices have replaced Brennan and Marshall.
- o Thomas and Souter might prefer to strike down Roe in a case presenting the issue in terms of whether a minor burden -- such as notification -- is legal instead of a case that presents the question of whether a state can make abortion illegal and criminal -- as in the Guam case coming in 1993. It may be tough on politicians to decide the issue now, but better for the Court.
- o The conservatives on the Court may not see the politics of this decision the way others do. Or, in keeping with a conservative judicial philosophy, they may ignore the politics of the decision and do the right thing.
- o Thomas and/or Souter may wish to make a clean break with the past. This is their first crack at the issue -- and that may make it easier for them to join Scalia, Rehnquist, White and Kennedy in a principled opinion.

No matter what the Court's rationale, the opposition will argue that upholding the Pennsylvania law effectively overturns Roe.

WHAT SHOULD THE ADMINISTRATION'S RESPONSE BE?

- o First, salute the wisdom of the decision if Roe is overturned and describe the issue in democratic and federalist terms:
 - This is a victory for democracy. Roe was a classic example of judges taking onto themselves the power of the people. Today, the Court expressed faith in democracy and returned that power to the people.
 - This decision did not outlaw abortion. Outlawing abortion was never the issue -- the issue was democracy. The American people are smart enough to decide this issue without the interference of judges. On a tough moral issue like this, the decisions about the right mix of rules should be made by those closest to home.
- o Walk down the Roe framework to ease people into the new world -- and try to shift the debate onto friendly territory. For instance, say:
 - Look, only the radicals think it is okay to have an abortion at 5, 6, 7, or 8 months. At that point the baby is fully formed and just putting on weight.
 - I do not think there is anything wrong with requiring a period of contemplation. This is a tough moral issue. I think if everyone reflected on this before making a final decision there would be fewer abortions.
 - I do not think we should approach tough questions like this hysterically. I do not agree with scare tactics on either side. I denounced the behavior of some on my side, like Operation Rescue. Let my opponent state his position on late-term abortions, sex-selection abortions, or killing babies because they might be retarded. I hope my opponents have the good sense to denounce the radicals on their side too.
- o Sound reasonable and reassuring to pro-choice Bush/Quayle voters without waffling on our committed pro-life stance. Shift the issue back to where it belongs -- the states:
 - I do not think abortion is murder, but I do think it is wrong. On tough moral issues like this, though, I do not think there is only one right answer. That's why

it is best left to the states to decide. Different communities should have the right to come to different conclusions when weighing the rights of women against the rights of unborn children.

- I would veto any bill from Congress, either creating a new right to abortion -- or outlawing it across the whole country. I think those decisions should be left to states.
- I am not a state legislator. If I were, my position on this issue is clear -- I am pro-life. I would try to protect the life of the unborn child because I don't think abortion is right. But I am not going to get into sketching out for you what I think states ought to do. It should be left to each state to decide this tough moral issue as they think best.
- Republican's don't agree on every issue. Many in our party will have a different judgement about this issue -- and I think that is okay. I don't think there should be a litmus test. I will campaign for both pro-life and pro-choice candidates.
- o If this is a tough moral decision and if there is no right answer, why not leave the decision to the woman?
 - State government has to make tough moral calls all the time, whether to teach sex education in schools, whether to hand out condoms, the death penalty and so on. I think government should be moral. I don't buy the idea that government should be amoral. You can put me down as thinking that you should not hide from morality -- we should be promoting it.
 - I think if we approach this debate calmly -- if we steer clear of the radicals on both sides -- most legislators will end up working out compromises that reflect the conflicting moral views on this issue. That's democracy at work, and I think that's good. Personally, I hope most people see their way clear to increase the protection for unborn children.

If Roe is overturned, the political effect is not clear cut

- o Both of our opponents in the Fall are likely to be pro-choice. If Perot remains viable, the pro-choice vote will split.

Recommendation:

- o This issue should be discussed with the President in the next few weeks -- and a contingency plan developed to assure the best possible response, depending on what the Court decides.
- o We should probably not pursue a low-key strategy in response to Roe being overturned -- it is not a low-key issue. If we do not respond in a high-profile, primetime way, the press will control the spin on the likely result of the decision and we will quickly find ourselves in trouble.
- o Few will expect the President to come out swinging on this issue because most people wonder how serious he is about being pro-life. Going on the offense in a way that deflects the issue to the states will quell doubts about the President's commitment to principle and minimize the fallout from the decision.

The decision is likely to come out right before July 4 but could come out any time between now and then. It is almost certain that the Court will uphold the constitutionality of the Pennsylvania statute. As for the standard of review, realistically it can only take three forms: (1) the Scalia view in Webster -- abortion has no special constitutional protection (10 percent); (2) the Rehnquist-White-Kennedy view -- an "interest" not a right (80 percent); (3) the O'Connor view -- "undue burden." Pro-abortion forces will attempt to define views (1) and (2), and possibly (3), as a de facto overruling of Roe.

1. What should be our first-day reaction to the decision? Should we characterize decision as changing anything? Does it change at all based on the standard of review the Court employs? Or should we focus exclusively on modest nature of the Pennsylvania statute upheld in this case?
2. What should we say about the Freedom of Choice Act? What about Mitchell's proposal for a constitutional amendment protecting abortion rights? How do we reconcile our opposition to those proposals based on federalism concerns with support for the Human Life Amendment?
3. What if anything should we say about the Human Life Amendment? Will the President now press Congress harder for the Amendment?
4. What if anything should we say about state legislation proposing new and constitutionally permissible restrictions on abortion? Supportive or best left to states?
5. How do we respond to questions about future Supreme Court nominations (e.g., "Hasn't the Court now swung too far out of balance to the 'right'")?
6. Who should be the Administration's spokesman on the issue? The Attorney General? Marlin? Boyden?
7. What if any other communications contingency plans should we develop (congressional or cabinet surrogate speeches or TV appearances, op-eds, etc.)?
8. Anything else we need to prepare?

Abortion - Casey

THE WHITE HOUSE

WASHINGTON

Q: If Roe v. Wade is overruled, will you propose federal legislation to outlaw abortion or leave the question to the States?

A: I am reluctant to get into too much of a "what if" game while there is a case pending before the Court.

[What I can tell you is this. The question in the case before the Court is whether it should strike down a specific Pennsylvania law. One of the provisions in that law, for example, is that young girls need to get parental consent before having an abortion. That seems like a perfectly sensible provision.]

By contrast, look at what this Congress is coming up with. They have this bill they have called the "Freedom of Choice Act" that would block State laws requiring that parents even be informed about abortions being performed on their young daughters. That is an extreme pro-abortion law.

Realistically, right now, for the most part, the choice is between sensible State laws like Pennsylvania's and extreme pro-abortion federal laws. So I would definitely go with letting Pennsylvania take the approach of requiring parental consent rather than the type of extreme pro-abortion law this Congress would be likely to pass.]

[Possible follow-up Q: Does that mean you no longer support a constitutional Human Life Amendment?

A: No. My position is unchanged on that. As I've said in the past, I am in favor of a Human Life Amendment, with an exception for life of the mother, rape, and incest. I thought you were asking about federal legislation, and I was talking about the kind of federal legislation this Congress would be likely to pass?]

[Possible follow up Q: What about the Louisiana abortion law, which would prohibit all abortions except where necessary to save the life of the mother?

A: I'm not going to go into all the possible laws that any State could pass.]

THE WHITE HOUSE
WASHINGTON

June 6, 1992

MEMORANDUM FOR BILL KRISTOL
CHARLIE KOLB
LEIGH ANN METZGER
LEE LIBERMAN ✓
JUDY SMITH
JAY LEFKOWITZ
BILL GRIBBEN

FROM: CAM FINDLAY 

SUBJECT: Talking Points for Casey Aftermath

Attached is a first cut at the talking points we discussed last week. I would appreciate any suggestions, comments, additions or deletions.

I would like to follow up on the end of our discussion with another meeting early this week. My assistant, Julie Nash, will contact you soon.

Thanks very much for your help.

Abortion - Cruz

TALKING POINTS ON CASEY

- o I am gratified that the Supreme Court agreed with the Justice Department's position in this case. The Court's decision does not make abortion illegal. It simply permits states, if they wish, to enact reasonable restrictions on abortion, such as parental consent requirements and 24-hour waiting periods. Those moderate restrictions are supported by the overwhelming majority of the American people.
- o I recognize that abortion is an extremely emotional issue in this country. For just that reason, it is critical that decisions about abortion be left to the democratic process and not to unelected Federal judges.
- o I am not a state legislator, but if I were it is well-known what sorts of laws I would support: I oppose abortion in all cases except rape or incest or where the life of the mother is at stake.
- o I continue to oppose the so-called Freedom of Choice Act. That bill would impose a National regime of abortion-on-demand on all 50 states. It would outlaw even the most modest and reasonable restrictions on abortions, such as parental notice requirements. For the same reason, I oppose Senator Mitchell's proposal to amend the Constitution to forbid all restrictions on abortion.
- o I am on record supporting the Human Life Amendment, and this decision does not change my position on the Amendment.

Clinton - Casey

6/10/92

Revised Talking Points on Casey

- I am pleased that the Supreme Court has upheld Pennsylvania's reasonable restrictions on abortion, which are supported by the vast majority of Americans. The Court's decision does not make abortion illegal. It simply permits citizens of a state, if they so choose, to enact reasonable restrictions on abortion in the interest of protecting the life and health of pregnant women, the integrity of families, and the life of an unborn child.
- The modest restrictions adopted by the citizens of Pennsylvania, including the requirement that teenage girls receive parental consent before undergoing abortions, are both reasonable and moderate.
- I recognize that abortion is an extremely emotional issue, and that people feel very strongly about their positions. For me, it's a moral issue. That is precisely why I believe this is an issue best left to the decisions of elected representatives in state legislatures rather than to the opinions of unelected Federal judges.
- My position opposing abortion in all cases except rape or incest or where the life of the mother is at risk is well known. If I were a state legislator, I would support the reasonable restrictions on abortion contained in the Pennsylvania law. I hope that restrictions such as these would substantially reduce the number of abortions (about 1.5 million) that take place each year in the United States.
- I continue to oppose the so-called Freedom of Choice Act. This bill would impose a National regime of abortion-on-demand in all 50 states. It would outlaw even the most nominal and reasonable restrictions on abortions, such as parental notification requirements.
- I am on record supporting the Human Life Amendment, and this decision does not change my position on this issue.

June 4, 1992

Abortion
Casey

MEMORANDUM

RE: THOUGHTS ON ABORTION DECISION SCENARIOS

The Stakes

If the Supreme Court reaches any decision that retains some of the limitations established by the Pennsylvania law, the pro-choice lobby will characterize that decision as an effort to, as Kathryn Kolbert (the ACLU's lawyer in the case) argued, "either overrule Roe directly or so eviscerate its meaning that we will effectively lose it."

The appeal of the Kolbert argument will depend, however, on (1) the reasoning the Court uses to sustain any or all restrictions, and (2) how the Court divides, i.e. is the controlling opinion a concurrence with a plurality of four or a majority opinion? Two other imponderables to keep in mind -- the Justices' health, and the Justices' political sensibilities.

Following is a brief discussion of the various Justices, including how they may reason and why, followed by a discussion of potential outcomes and the political ramifications of each. I have discussed the Justices first, rather than potential scenarios, since the process of molding an opinion is dynamic; whereas the personalities molding it and reacting to internal Court politics, are constant.

The Justices

I think the key to this case is Rehnquist, not Scalia or the new Justices -- Thomas and Souter. Thomas is more likely to go with Scalia than Rehnquist, if for no other reason than Scalia's rational basis test more closely reflects Thomas' mode of statutory interpretation than Rehnquist's State power rationales.

Souter is a wild-card; the precursor of his thinking on Casey might be the nude dancing case from two years ago. Souter's justification of the municipal ordinance banning nude dancing was unusual in its reliance on broadly-defined "community standards." He may repeat with a quirky concurrence, or more likely sign on to a middle-of-the-road O'Connor opinion. (Note: the Harvard Law Journal statistical study of last term's Supreme Court voting correlations showed Souter and O'Connor voting together more often than any other pair of justices including, (I think), Blackmun and Stevens.

Many see Rehnquist as a political animal who understands political currents, and the need for a broader consensus on the Court to overturn Roe; than existed when Roe was decided, i.e. greater than a 5-4 margin to overrule. I think this notion misunderstands Rehnquist both personally and ideologically.

Personally, Rehnquist has no love for the President; this past year his wife passed away; it's no secret that Rehnquist sometimes gets up in the middle of oral arguments to take painkillers. In short, time is not on Rehnquist's side. Can he afford to wait another year for the Guam case to comprehensively overturn Roe? Perhaps; but, from the Court's perspective as an institution, that makes less sense than overturning Roe now. By waiting for Guam, the Court will most assuredly be seen as playing politics with the docket. Should an overruling come now, Rehnquist will be seen as pushing his legal conscience, justified or not, while at the same time pushing the Court's reputation as a simultaneously counter-majoritarian and "Ely-ian" Court (because the question of abortion will be thrown back to state legislatures, which is representation-reinforcing).

Potential Scenarios

1. Uphold Third Circuit Opinion with limited comment. This is the conventional wisdom choice of the most likely outcome. Upholding the Third Circuit would mean upholding parental consent and waiting periods, but striking down spousal notification. Conventional wisdom that this would be the most likely outcome was bolstered by the oral arguments, at which J. O'Connor got the Pennsylvania AG, Ernie Preate, to agree that spousal notification was a "peculiar provision." Preate's defense was less than spirited, and may have reflected a calculated strategy to reinforce the relative reasonableness of the other restrictions.

O'Connor's questioning of Preate might also point to another reason that the Court might uphold the Third Circuit with limited comment. Many saw her questioning of the spousal notification on First Amendment grounds as a desire to avoid Rust-like difficulties. Perhaps. I think it is more likely she did it to prove the limitations of rational basis -- that rationality, for all of its intellectual appeal -- requires every bit of hair-splitting and balancing as her own two-step "undue burden" test. In short, unless Scalia has the votes to overturn Roe now using rational basis, it is in his interest to prevent O'Connor from creating an alternative, and equally appealing construction of "rationality" that does not overturn Roe. This is what O'Connor did with Lynch v. Donnelly with respect to the Lemon test. Establishment Clause jurisdiction has been a mess ever since. To the extent that the Casey deliberations will be occurring concurrent with a decision on Lee v. Weisman, I think Scalia will want to undermine O'Connor's Establishment Clause rationale first, and then use that victory to beat her on abortion.

Conventional political wisdom is that the decision outlined above is the most advantageous for the President. Superficially, its the least-cost political outcome. It may not be the best politically. The political calculus has changed since the race will be three-way, and Perot has endorsed pro-choice positions. An unclear Supreme Court decision makes it harder for the President to take a decisive stand on abortion. Should Roe be overturned, the President could take a strong stand (w/ pro-lifers) that the pro-life position had been vindicated, and that the battle shifts to the states.

The Party can make the big umbrella point by getting the pro-choicers to change their state party platforms and organize at the state level. Similarly, the national platform could be changed from prescriptive to laudatory that Reagan/Bush judges have finally achieved what they were appointed to do -- get the federal courts out of the rights-making business. Remember, even Pat Buchanan said that he would vote for George Bush if for no other reason than a Bush victory would continue reformation of the judiciary. (This may be a good point to push with Lee, since it goes to how well she does her job!)

2. Uphold Casey using a rational basis test, potentially including a reversal of the Third Circuit re: spousal notification. This would be the worst of all worlds. The fate of abortion would be unclear. The pro-choicers could make the point -- successfully I think -- that Kolbert made in her oral arguments. And, from the Court's point of view, such a decision would come with Scalia running roughshod over O'Connor. Politically, the stakes would be raised over the Party's advocacy of a Human Life Amendment (a loser for us on both federalism and libertarian grounds), without giving us the benefit of saying the battle clearly moves to the states with the Republican federalist position vindicated. The President will be buffeted from the left and the right, and there would be an increasingly likelihood that the rad-fems would be legitimized on this issue. Very dangerous.
3. Overruling Roe. If there is an explicit overrule this year, the impetus will come from Rehnquist not Scalia. Scalia can afford to articulate a rational test basis for the Pennsylvania restrictions, uphold the Third Circuit, and wait for the Guam case for an explicit overrule. (This, to me, is also the most likely outcome of the Pennsylvania case.)

If Rehnquist pushes for an overrule, it will be because of Judge Starr's answer in the orals on the government's position on a fetus' personhood under the Fourteenth Amendment. Starr's non-answer will give Rehnquist the excuse to push for an overrule on procedural grounds, rather than having to broach head on the question of fundamental rights.

Rehnquist could hold that (1) a fetus is a person under the Due Process Clause of both the Fifth and Fourteenth Amendments, that (2) at the very least, the rights of the mother and fetus are equal and countervailing, that (3) the Pennsylvania restrictions are justified on Due Process Grounds with the State, in the absence of a threat to the mothers' life, advocating the fetus' personhood.

This argument would have intellectual appeal for three reasons: (1) it would link the rationale Rehnquist has used in criminal procedure cases like Payne v. Tennessee to overturn precedent, and reinforce the voice/interests of a party who cannot be represented (in that case, murder victims); (2) because of (1), give intellectual coherence to Rehnquist's reversal of Burger precedents; (3) re-subordinate equal protection under due process re: the 14th Amendment, but do so without resurrecting the legacy of substantive due process.

The Lochner era established a sphere of rights into which, following substantive due process be followed, the courts properly refrained from intervening. Rehnquist could turn that argument on its head, saying that in an age where equal protection is carving out fundamental rights over which the court should have no say, substantive due process provides new fences to limit the growth of rights. (Note: This argument may be undermined if one believes that a due process decision would require federal criminalization of abortion. I'm not fluent enough on this aspect to comment intelligently.)

A second basis for overturning Roe might be to defer to Pennsylvania's state Constitution. This would be a high-risk legal strategy but a political gold mine for the President -- all of the Republican pro-choicers will have to invest their time and efforts at the state level; the President could claim to have fulfilled the platform's commitment to appoint judges and effect a Roe overrule. At the same time, he will be able to say wait and see re: state legislatures before pushing for a Human Life Amendment. The intellectual heritage of deferring to states is a lot deeper in the Republican Party than the heritage for an activist, federal constitutional amendment. Finally, by premising the decision on a state's constitution, the Court will make explicit Findlay's otherwise esoteric point from last night's meeting -- that abortion will not become illegal with an overrule of Roe; the battle just shifts to the states.

One final point -- in the fight to influence state legislatures, womens' groups will organize from the grass roots up. Both the Ann Stones and the Phyllis Schlafleys of this world will have an immediate interest in focusing on the states rather than the national political stage. Those groups that do focus nationally, (i.e. rad-fems like NOW) will hurt pro-choice candidates: (1) rad-fems will generate enough

cultural dissonance among 40-64 year old men (versus younger men and women) to drive them back to Bush; and (2) pro-lifers will do the kinds of base energizing organization and GOTV work that up to this point has been lacking, and which would be costly for the President to do directly on pro-life grounds.

#

January 21, 1992

MEMORANDUM FOR JUDY SMITH
SPECIAL ASSISTANT TO THE PRESIDENT AND DEPUTY
PRESS SECRETARY

FROM: LEE S. LIBERMAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Planned Parenthood v. Casey

Planned Parenthood v. Casey involves a challenge by Planned Parenthood of Eastern Pennsylvania and others to various provisions of Pennsylvania's Abortion Control Act. These require, except in the case of a medical emergency, (1) the provision of certain information to women before the performance of an abortion, (2) a 24-hour waiting period before the performance of an abortion, (3) the consent of one parent for an abortion to be performed on a minor, (4) notice to the spouse for an abortion to be performed on a married woman, and (5) the keeping of certain records and filing of certain reports by abortion facilities. All these provisions were struck down by the U.S. District Court for the Eastern District of Pennsylvania, but all except the spousal notice provision (which was struck down on a 2-1 vote) were unanimously upheld by the U.S. Court of Appeals for the Third Circuit. Planned Parenthood petitioned the Supreme Court to review the portions of the Court of Appeals decision upholding provisions (1), (2), (3) and (5). Pennsylvania petitioned the Court to review the portion striking down provision (4).

The Court has granted both petitions. In the course of doing so, however, it took the somewhat unusual but far from unprecedented step of reformulating the questions presented. Planned Parenthood, represented by the ACLU, had framed its petition in highly polemical terms, asking the Court to address the question "Has the U.S. Supreme Court overruled Roe v. Wade, 410 U.S. 113 (1973), holding that a woman's right to choose is a fundamental right protected by the U.S. Constitution?" The Court instead framed the issue as "Did the Court of Appeals err in upholding the constitutionality of [various specific] provisions of the Pennsylvania Abortion Control Act ...?"

This allowed the Court not to fall into Planned Parenthood's rhetorical trap, as well as not to have to commit itself one way or the other on whether it will decide whether Roe should be overruled. I believe that is all there is to it, and that the Court has left perfectly open whether it will or will not

overrule Roe in this case. However, based on the evening news it seemed that some members of the press (NBC particularly) are reading more than that into the form of the Court's order, and believe that it indicates that the Court will not reach Roe. Although that is a possible explanation, I do not think it is especially likely; I think the Court simply has not decided whether it is going to reconsider Roe in this case, and may very well do so.

The United States has not yet said anything about this case or this statute. That is not surprising: Traditionally, we have not participated in these state law abortion cases until the Supreme Court has decided whether to hear them (unless there is a federal statute directly implicated by a lower court decision). The flip side is that since 1985 (in a case called Thornburgh v. American College of Obstetricians, which involved an earlier Pennsylvania statute), after the Court has decided to take a state law abortion case, our consistent practice has been to file an amicus brief arguing both that Roe should be overruled and that if the Court decides not to do so, whatever statutory provisions remain defensible should be upheld as constitutional on other grounds. The Justice Department has not yet looked closely at this case, and therefore does not know what kind of amicus brief, if any, it expects to be filing.

To: State NRLC Affiliates
From: Nancy Myers, NRLC Communications Director
Re: Casey oral arguments
Date: April 21, 1992

Following are points to be made on the most-asked questions we have been getting on the PA law and related issues. This supplements the materials you have been sent previously. This memo is internal, but incorporate these arguments in your media appearances and interviews. We have a great opportunity over the next several days to get out the following key points, but it's important to stick to these major points and not get sidetracked on other issues.

Talking Points, Casey case and related issues

What will happen when Roe v. Wade is overturned? Will the Supreme Court overturn Roe v. Wade?

*No one knows what the Court will do, but if the Supreme Court does overturn Roe v. Wade, it will simply give the people of each state the ability to once again consider laws regulating abortion.

Won't this energize the pro-abortion sleeping giant?

*If Roe v. Wade is overturned, it will energize pro-lifers like we've never seen because we will finally have the opportunity to protect unborn children and provide alternatives to abortion.

What is the significance of the Pennsylvania law, the Pennsylvania case, etc.?

*The Pennsylvania law is a modest law which provides for parental consent and informed consent--giving women the right to know about abortion risks and alternatives. The pro-abortion forces show their extremism by opposing these kinds of laws and by supporting radical efforts like the federal FOCA, which would invalidate the PA law and mandate unlimited abortion, even as a method of birth control or sex selection.

*The pro-abortion movement is out of step with the American people, who overwhelmingly support the Pennsylvania law; the law provides for parental consent and informed consent, giving women information about abortion risks and alternatives.

What about FOCA?

*FOCA is an extreme bill which goes far beyond Roe v. Wade, and shows how out of step the pro-abortion movement is. FOCA would invalidate the Pennsylvania law, which provides for informed consent and parental consent and would also mandate unlimited abortion, even as a method of birth control or sex selection.

Won't the abortion issue hurt pro-life candidates like President Bush?

*Abortion will continue to be the most important social issue, and the abortion issue will help strong, principled pro-life candidates like George Bush, as it helped him in 1988.

*Pro-abortion forces have made it an election-year tradition to make wild predictions about their political strength, but when it comes right down to it most Americans oppose most abortions. More Americans vote pro-life than vote pro-abortion.

*President George Bush has been a strong, principled defender of unborn children and has earned the gratitude of millions of pro-life Americans who will be voting for him in November.

*The court will uphold Pennsylvania's modest regulations, and Congress will then quickly act on the so-called "Freedom of Choice Act" (FOCA) which would prohibit any limits on abortion. That helps President Bush, because the great majority of Americans agree with the President that there should be limits on abortion. The extremism of FOCA, which goes far beyond Roe v. Wade, will hurt candidates such as Bill Clinton who support FOCA, by showing that they oppose even parental notice or consent laws.

Won't overturning Roe v. Wade just cause abortions to become unsafe and dangerous, and for women to die?

*Both sides agree that there will be far fewer abortions when unborn children are protected. The tragedy of pro-abortion thinking is that they believe someone always has to die when women are faced with crisis pregnancies, and in the U.S. nearly 1.6 million unborn children die by abortion each year. The pro-life movement says that no one has to die--not the woman, not the baby. There are life-affirming alternatives to abortion.

*Overturning Roe v. Wade simply gives the people of each state the opportunity to consider laws regulating abortion. The reality is: you'd have to look back before mass production of penicillin in 1942 to find the number of maternal abortion deaths that abortion advocates claim. The fact is, medical advances, not legalizing abortion, reduced the maternal abortion deaths.

Q. Walter -
Cesly

Press ALT-H for Research Software Help; Press ESC for the Utilities Menu

Abortion Report, May 29, 1992

round one in a three-round prize fight. And although the victory is sweet, we can lose it in the appeals court. ... I think people now realize it's possible to run back to the state courts for a more generous interpretation of the individual liberties." Americans United for Life lawyer Kevin Todd: "State courts are going to be the next hot area of activity if the Supreme Court makes clear abortion is not fundamentally protected. That protection is going to be sought at the state level. And the battles there are going to be creative because this is the next frontier. ... We're going to be excited when Roe is overturned. But in no way does that mean abortion is something that can be immediately regulated. The hands of the people in these states are going to be tied" (5/29).

Press ALT-H for Research Software Help; Press ESC for the Utilities Menu

LEVEL 1 - 2 OF 9 STORIES

Copyright 1992 American Political Network
Abortion Report

May 26, 1992

SECTION: '92 PRESIDENTIAL

LENGTH: 1694 words

HEADLINE: QUAYLE: THE MURPHY BROWN VERDICT

BODY:

Quayle continued his emphasis on "values" in his Memorial

Department of Justice Brief in Abortion Case

o President Bush has made clear since 1980 that he opposes Roe v. Wade.

o The Department of Justice has been filing briefs calling for State laws to be upheld in abortion cases decided since 1983 (Akron), and calling explicitly for the overruling of Roe in cases decided since 1986 (Thornburgh, Webster, Hodgson). Under the Bush Administration, the Solicitor General has twice argued for this position (Webster and Hodgson).

o In this case also, the Department of Justice brief argues that Roe was wrongly decided and should be overruled and that Pennsylvania's law should be upheld. This is hardly a new or newsworthy development. (In fact, even with respect to this case, the press reported over a week ago that the Department had asked for argument time. See March 27 USA Today.)

o The Justice brief also argues that the Court does not need to decide whether the holding in Roe is still good law. In other words, it can leave for another day whether States can pass laws outlawing abortion, as opposed to the very reasonable regulations Pennsylvania has enacted here.

o It then argues that the Pennsylvania law's provisions should be judged under the standard a plurality of the Court applied in Webster: whether they are reasonably related to a legitimate state purpose. Each of the provisions clearly is: the requirement of parental or judicial consent for a minor's abortion, the requirement of a 24 hour waiting period to allow informed consent, and the requirement that married women notify their husbands (with appropriate exceptions) all obviously serve important state objectives.

o Finally, it argues that the protection of fetal life is a compelling state interest throughout pregnancy, not, as Roe's trimester framework would have it, only before viability.

o President Bush's well-known position on this issue is based on principle, not politics. Therefore, those looking for political explanations for what the Administration does on this issue are doomed to a futile quest.

[o The press should check with the Department of Justice for further information about the legal details.]

THE WHITE HOUSE
WASHINGTON

Abortion
Planned Parenthood
v. Casey
(1992)

January 21, 1992

MEMORANDUM FOR JUDY SMITH
SPECIAL ASSISTANT TO THE PRESIDENT AND DEPUTY
PRESS SECRETARY

FROM: LEE S. LIBERMAN *LL*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Planned Parenthood v. Casey

Planned Parenthood v. Casey involves a challenge by Planned Parenthood of Eastern Pennsylvania and others to various provisions of Pennsylvania's Abortion Control Act. These require, except in the case of a medical emergency, (1) the provision of certain information to women before the performance of an abortion, (2) a 24-hour waiting period before the performance of an abortion, (3) the consent of one parent for an abortion to be performed on a minor, (4) notice to the spouse for an abortion to be performed on a married woman, and (5) the keeping of certain records and filing of certain reports by abortion facilities. All these provisions were struck down by the U.S. District Court for the Eastern District of Pennsylvania, but all except the spousal notice provision (which was struck down on a 2-1 vote) were unanimously upheld by the U.S. Court of Appeals for the Third Circuit. Planned Parenthood petitioned the Supreme Court to review the portions of the Court of Appeals decision upholding provisions (1), (2), (3) and (5). Pennsylvania petitioned the Court to review the portion striking down provision (4).

The Court has granted both petitions. In the course of doing so, however, it took the somewhat unusual but far from unprecedented step of reformulating the questions presented. Planned Parenthood, represented by the ACLU, had framed its petition in highly polemical terms, asking the Court to address the question "Has the U.S. Supreme Court overruled Roe v. Wade, 410 U.S. 113 (1973), holding that a woman's right to choose is a fundamental right protected by the U.S. Constitution?" The Court instead framed the issue as "Did the Court of Appeals err in upholding the constitutionality of [various specific] provisions of the Pennsylvania Abortion Control Act ...?"

This allowed the Court not to fall into Planned Parenthood's rhetorical trap, as well as not to have to commit itself one way or the other on whether it will decide whether Roe should be overruled. I believe that is all there is to it, and that the Court has left perfectly open whether it will or will not

overrule Roe in this case. However, based on the evening news it seemed that some members of the press (NBC particularly) are reading more than that into the form of the Court's order, and believe that it indicates that the Court will not reach Roe. Although that is a possible explanation, I do not think it is especially likely; I think the Court simply has not decided whether it is going to reconsider Roe in this case, and may very well do so.

The United States has not yet said anything about this case or this statute. That is not surprising: Traditionally, we have not participated in these state law abortion cases until the Supreme Court has decided whether to hear them (unless there is a federal statute directly implicated by a lower court decision). The flip side is that since 1985 (in a case called Thornburgh v. American College of Obstetricians, which involved an earlier Pennsylvania statute), after the Court has decided to take a state law abortion case, our consistent practice has been to file an amicus brief arguing both that Roe should be overruled and that if the Court decides not to do so, whatever statutory provisions remain defensible should be upheld as constitutional on other grounds. The Justice Department has not yet looked closely at this case, and therefore does not know what kind of amicus brief, if any, it expects to be filing.



4/21

See:

Democratic Governor Casey of Pa. has been doing the TV news, granting media interviews, and even gave an excellent speech at Notre Dame in preparation for oral argument at the Sup. Ct. on the law he signed.

Any game plan to respond to any decision this summer, should surely include steering the media to him for a bipartisan response.
Judy Smith could figure out a way to do so.
PS see sample attached of Mackey

Chicago Tribune

Abortion Casey
U. Planned Parenthood
DATE: 4-20-92
PAGE: 1

High court abortion case a prelude to political flurry

By Linda P. Campbell
Chicago Tribune

WASHINGTON—As the U.S. Supreme Court prepares to hear arguments in the most potentially explosive case of this term, it is becoming clear that whatever the justices decide about abortion this summer could reverberate in the political arena far beyond any change in the law.

The abortion restrictions in the Pennsylvania law at issue in the case of *Planned Parenthood vs. Casey* were drafted with an eye toward a confrontation over *Roe vs. Wade*, the 1973 Supreme Court ruling that recognized a constitutional right to end a pregnancy and legalized the procedure nationwide.

Planned Parenthood's appeal to the justices was calculated to force

the issue before the 1992 presidential election.

Activist groups both for and against abortion rights are gearing up their efforts to use the court's ruling, expected by July, to press their message come November.

And leaders of the Republican and Democratic parties are worried about how hard they will be hit over the issue.

"There is a lot of discussion and

debate on both sides as to whether or not the overturning of *Roe vs. Wade* is going to be a positive polarizing political effect or a negative polarizing political effect," said Rich Bond, chairman of the Republican National Committee.

The court has given no indication whether it will, in fact, abolish its key abortion decision, which has been under attack for

years. But many of those watching the case believe the justices will, at the very least, continue to expand states' powers to regulate abortion. That could undermine *Roe* even without the court explicitly saying so; it also could turn the spotlight on the battle in Congress over a bill to guarantee a federal statutory right to abortion.

American University law professor Mark Hager predicts that a ruling overturning *Roe* would "provoke a very significant mobilization" on behalf of the Democratic Party.

But Pennsylvania Gov. Robert Casey (the same Casey in the case's title), an anti-abortion Democrat, earlier this month disputed the notion that such a decision would backfire on Republicans.

"If being pro-life is such a political negative, then will somebody please explain to me how Ronald Reagan and George Bush got elected in the first place?" he told and audience recently at the University of Notre Dame Law School.

Casey called abortion "the hottest button in American politics today" and said his party won't capture the White House until it changes its position on the issue to win back disaffected voters.

Some Republican leaders see a different scenario developing. They worry that an increasing number of Republicans who support abortion rights will be angry enough over the issue to vote Democratic this autumn.

In the last two years, voters in

California, Illinois and Massachusetts have elected Republican governors supporting abortion rights. Efforts are mounting to change provisions in the Republican Party platform that currently call for a constitutional right-to-life amendment and the appointment of anti-abortion federal judges. And a GOP poll conducted in March showed that 49 percent of Republicans interviewed identified themselves as "pro-choice"; 42 percent called themselves "pro-life."

Catholic University law professor Robert Destro, acting spokesman for the group Americans United for Life, which opposes abortion, called predictions of voter backlash "wishful thinking" because Americans "are just too ambivalent about the whole thing to know whether to be upset."

But abortion-rights groups counter that abortion foes are framing their message to blunt the political consequences.

"I have no doubt there will be an immediate reaction" to a decision upholding the Pennsylvania regulations, said Lynn Paltrow, senior staff lawyer with the ACLU's Reproductive Freedom Project.

Paltrow acknowledged that her side faces a challenge in having to explain the ramifications of a ruling that doesn't explicitly do away with *Roe*.

Pennsylvania was one of the first states to adopt abortion restrictions after the court's 1989 ruling in *Webster vs. Reproductive Health Services*, a Missouri case that gave states broader leeway to regulate the procedure.

Under the Pennsylvania law:

■ Doctors must tell women

seeking abortions about the age of the fetus, the risks of abortions and alternatives to the procedure; offer them information about fetal development; and inform them about possible sources of financial support if they continue their pregnancy.

■ A woman must wait at least 24 hours after receiving this information to have the procedure done.

■ Unmarried women under age 18 seeking abortions must have consent from at least one parent or a court order waiving the requirement.

■ A married woman must inform her husband before obtaining an abortion, except in limited cases.

The regulations don't apply in a medical emergency, but Planned Parenthood also is challenging the definition of emergency because it is limited to cases in which the mother's life or "major bodily functions" are at risk.

Con't

Chief Justice William Rehnquist raised concerns that a high court ruling in favor of Massachusetts would incite a slew of appeals by other states and localities disputing various aspects of the census.

The high court is expected to decide the case by July.

The case is Franklin vs. Massachusetts, 91-1502.

AP-NF-04-21-92 1418EDT<