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**OA/ID Number:** 45272  
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**Folder Title:**  
Abortion (Webster v. Reproductive Health Services) [1]

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THE WHITE HOUSE  
WASHINGTON

TO: John P. Schnitz

FROM: LEE S. LIBERMAN  
Associate Counsel  
to the President

- FYI — <sup>An official</sup> ~~the argument~~ transcript of the argument in Webster.
- Comment
- Action

ok done  
5/8/89  
XOXOX

Jessie - pls make 4  
copies (for  
Boyd, John  
Hans & others + Bill  
Roper) + send them  
w/ a ~~note~~ back slip  
to each + ~~rest to~~ F.Y.I. Deere is indicate

WBJE

July 3, 1989  
Revised 12:47 p.m./FINAL

We welcome this decision and will be studying its implications. By upholding the Missouri statute, the Court appears to have begun to restore to the people the ability to ~~legislate~~ protections for the unborn. We continue to believe that Roe v. Wade was incorrectly decided, and will work for its full reversal.]

Americans obviously differ over the difficult issue underlying this case--the morality and appropriate legal status of abortion. Therefore, any decision in this area will stir strong feelings. Nevertheless, I have confidence that the American people will continue to express their deeply held convictions on this subject within the bounds of civility and our legal institutions.

Webster

THE WHITE HOUSE  
WASHINGTON

June 23, 1989

MEMORANDUM FOR THE PRESIDENT

THROUGH: GOVERNOR JOHN H. SUNUNU  
FROM: C. BOYDEN GRAY  
COUNSEL TO THE PRESIDENT

WILLIAM L. ROPER  
DEPUTY ASSISTANT TO THE PRESIDENT FOR DOMESTIC  
POLICY AND DIRECTOR, OFFICE OF POLICY  
DEVELOPMENT

SUBJECT: White House Response to Supreme Court Decision in  
Webster v. Reproductive Health Services

I. ACTION-FORCING EVENT

The Supreme Court has pending before it in the case of Webster v. Reproductive Health Services the question of the future constitutional status of abortion. It could decide this case as early as Monday, June 26, although it may also wait until Thursday, June 29 or Friday, June 30. This past Wednesday, our offices convened a meeting to discuss possible Administration responses. This memorandum grows out of that meeting.

II. BACKGROUND

The Supreme Court is expected to finish its term no later than Friday, June 30. That means that within the next week, it is likely to hand down its decision in Webster v. Reproductive Health Services. That is the case in which the Court has before it the question whether to overrule, substantially cut back on, or leave standing its 1973 decision in Roe v. Wade, in which it discovered that the Constitution protects the right to abortion.

Two days after the election, the Department of Justice filed a brief in the Webster case urging that Roe be overruled. It orally argued that position in Court this April. Regardless of how the Court rules, the Administration's response will be carefully watched.

Traditionally, the White House has not tried to respond immediately to Supreme Court decisions. There are sound reasons for this practice. There are sufficient variations in the way the Court can decide any case that it is almost impossible to prepare a response in advance that would anticipate all the possibilities, and an off the cuff response arrived at without careful study of the opinion in a case and its ramifications for future cases could be disastrous.

On the other hand, the Administration's position in this case has been extremely important to a significant part of your constituency. Because of that, enough people could read sinister motives into the lack of an immediate response to a decision in this case that an exception might be warranted. Were we to attempt to do so on the spot, however, these issues are sufficiently emotionally charged that any misstep could be disastrous. For all these reasons, we thought it might be useful to set out some fairly detailed options for you to consider in responding to various possible scenarios. If you feel comfortable making some of these decisions in advance, that might provide sufficient guidance to allow a response other than "We're studying the decision."

Accordingly, this memorandum sets out possible Court decisions and options for how to respond. One thing to remember while going through this memorandum is that the Court has a choice between overruling Roe directly or undermining it indirectly over a period of years.

### III. Possible Court Decisions

The Missouri statute at issue places several different kinds of restrictions on the performance of abortions. Each of these restrictions is being challenged as a violation of the right protected by Roe v. Wade.

The Supreme Court can basically do one of four things.

- o First, it can overrule Roe and find that there is no constitutional right to abortion. If it takes that route, it would then uphold the Missouri statute (except possibly the provisions challenged on other grounds) as within the State's power to enact, since the Constitution would no longer be read as an obstacle. This would leave the States and arguably the Congress a great deal of latitude to pass restrictions on abortions in the future.

- o Second, it can decline to address the continuing validity of Roe on the ground that even if Roe places limitations on the States' power to regulate abortions, this statute is well within those limitations. That would also result in upholding the Missouri statute. It would also

leave the States and arguably the Congress much freer to restrict abortions than they are at present, although less so than under the first scenario.

o Third, it can address the continuing validity of Roe, find that it remains valid, but find that some of the Missouri statute's provisions are nevertheless constitutional. That could result in upholding the Missouri statute in whole or in part. As a practical matter, this outcome might well be very similar to the second scenario. Nevertheless, anti-abortion groups might not see it as providing as much additional leeway, thus requiring the Administration to address whether it will continue to attack Roe frontally (which might be the better political course) or chip away at it (which might be the better litigation strategy).

o Finally, the Court can reaffirm Roe and invalidate all of the provisions of the Missouri statute as in conflict with the constitutional right to abortion. This would basically leave present law intact.

We should add that although we state that "the Court" can do each of these things, it is also possible that there will not be five votes to do any of these things. The most likely scenario of that sort is some combination of Rehnquist, White, Scalia and Kennedy voting to overrule Roe, O'Connor voting to leave it standing but uphold some or all of the Missouri statute, and Brennan, Marshall, Blackmun and Stevens voting to strike down the statute.

Any of the first three options is likely to be viewed as a victory by the anti-abortion groups. Conversely, the pro-abortion groups will view anything short of option four as a defeat, although they may not say so publicly about some forms of option three.

#### IV. POSSIBLE ADMINISTRATION RESPONSES

The Administration should be ready with an internal decision regarding how to respond for each of the four scenarios described above. That decision should encompass both the contents of the response and the method of giving it.

##### A. Court Overrules Roe

Option 1: No immediate response ("We're studying the decision")

Pros:

- The traditional White House and Department of Justice immediate reaction to Supreme Court decisions.
- Avoids placing the Administration at the center of the firestorm that will inevitably ensue.

Cons:

- Would be viewed as an abandonment of the President's campaign commitment to oppose Roe.
- Would be viewed as backsliding from the Administration's litigation position.

Option 2: Express delight at the decision, no opinion on what future policy on abortion should be

"Today's decision is a great step forward for assuring the protection of the unborn. It is also a welcome sign of the Court's confidence in the American people's ability to make decisions themselves through their legislatures."

Pros:

- Consistent with the President's campaign position and litigation position.
- Chooses a side on this emotional issue and therefore helps gain the strong support of an important combination of constituencies (anti-abortion groups, evangelicals) in the Republican Party.

Cons:

- Places the Administration closer to the center of what will surely be an emotional and divisive debate.
- The anti-abortion position may become a great deal more unpopular once it has a chance of being realized through legislation, rather than simply being an abstraction. (This is obviously a hard proposition to test).

Option 3: Same as above, but add brief expression of policy view on abortion.

Add at the end of Option 2 answer: "This offers the American people an opportunity to move away from abortion on demand. It does not, in and of itself, place any restrictions on abortions, but leaves the States free to place those that they see fit."

Pros:

- Same advantages as Option 2.
- Takes a substantive position on the underlying issue (what kinds of abortions should be illegal) consistent with the President's prior statements and with the views of a majority of the American people.
- Reassures proponents of abortion that there is a political battle yet to be fought.

Cons:

- Same disadvantages as Option 2.
- Involves the Administration immediately in the merits of the abortion debate.

DECISION: \_\_\_\_\_ Option 1  
\_\_\_\_\_ Option 2  
\_\_\_\_\_ Option 3  
\_\_\_\_\_ Other

B. Court Does Not Reach Roe, but Upholds Missouri Statute

(Same answer can be used if less than a majority of the Court reaches Roe and would overrule it, e.g. four to overrule, one not to reach Roe, and four to keep it in place, with additional phrase in brackets at the end.)

Option 1: No response for several days. "We're studying the opinion"

Pros:

- There are a lot of different ways the Court could reach this result. Therefore it is hard to prepare an immediate response in advance that will definitely work.

Cons:

- This would lose an opportunity for the President to claim credit for this outcome.
- A lot of people will be very interested in whether the President remains committed to seeking the reversal of Roe. It would be best to give an answer to that question as soon as possible.

Option 2: A response sometime during the day the opinion is handed down.

"My Administration will be studying the precise implications of this decision. I can tell you that we are very pleased that the Court has seen fit to restore to the people considerable latitude to legislate in this area, and believe this decision is an appropriate intermediate step. We will continue to seek the overruling Roe v. Wade [and are delighted that \_\_\_ Justices indicated a willingness to do so]."

Pros:

- Would be consistent with the President's campaign commitments and the Administration's litigation position.

Cons:

- Pledge to return to the Roe question might seem divisive.

DECISION: \_\_\_\_\_ Option 1  
          \_\_\_\_\_ Option 2  
          \_\_\_\_\_ Other

C. Roe Reaffirmed But Statute Upheld

Option 1: No comment for several days ("We're studying the decision")

Pros:

- Because of the different forms opinions reaching this outcome could take, this may be the only approach actually available.
- The answer to the question people will be interested in, whether the President will continue to oppose Roe in litigation, will have to depend in part on how the opinion reads.

Cons:

- Even if this would ordinarily be true about litigation decisions, this is such an important political issue that it is worth taking significant litigation risks over.

Option 2: A response sometime during the day the decision is handed down, stating that we are partly pleased and partly disappointed.

"My Administration is studying the decision. I can tell you that I am very pleased that the Court upheld the Missouri statute, and is prepared to interpret Roe to allow state restrictions on abortion. I am disappointed that it declined to reconsider that decision.

Pros:

- Highlights the part of the decision that is a victory while expressing the disappointment that opponents of abortion would feel at such an outcome. That may be as much as people should reasonably expect in the immediate aftermath of the decision.
- Does not present much of a litigation risk, since it does not commit the Administration to a future litigation course.
- A decision of the sort described above would suggest that the approach most likely to lead to results in the short term would be to chip away at Roe, which this option would leave open as a

possibility. The Justices might be offended by a pledge of a frontal assault and be less responsive in the future.

Cons:

- Does not address one issue on which even people without an agenda may expect the Administration to have a position in advance, what we will do next on Roe itself.
- Politically, the Administration might be expected to commit itself on that issue immediately.

Option 3: Add to 2 an expression of the intention to press the point in the future.

Same as 2, but add at the end "and hope that it will see fit to do so in the future, as my Administration will continue to urge."

Pros:

- Avoids the political difficulties presented by failing to include a statement on this point.

Cons:

- Would lead to claims that the Administration lacks respect for the rule of law.
- Might antagonize some of the Justices.

DECISION: \_\_\_\_\_ Option 1  
 \_\_\_\_\_ Option 2  
 \_\_\_\_\_ Option 3  
 \_\_\_\_\_ Other

D. Roe Reaffirmed, Statute Struck Down

Option 1: No immediate response ("We're studying the decision")

Pros:

- Even a decision of this sort could be more or less bad depending on how it is written.
- Appropriate response would also depend in part on the margin of loss. A 5-4 decision might call for a very different response from a 9-0 one.

Cons:

- It would be surprising for the Administration not to express disappointment at a loss of this magnitude in an ordinary case, let alone this one.
- Disappointed opponents of abortion would be very puzzled about why the President did not share their feelings.

Option 2: Express disappointment at the decision, but do not describe Administration's future plans

"We're studying the decision. I can say that I am very disappointed that the Court did not accept our contention that the people have the constitutional power to accord some protection to the unborn."

Pros:

- Shows that the President cares.
- Not outside the bounds of decorum in dealing with Supreme Court decisions to be disappointed that you lost.

Cons:

- Any criticism of the Court can lead to charges that the Administration lacks respect for the rule of law.
- Any criticism of the Court could be taken personally by the Justices voting in the majority and held against the Administration in the future.
- Does not address the Administration's plans with respect to Roe in the future, which could leave

some opponents of abortion feeling that the Administration has not gone far enough.

Option 3: Express disappointment at the decision, and state an intention to continue to challenge Roe

Add to the previous answer: "We will continue to make this argument to the courts."

Pros:

- Is the most that anyone could expect the Administration to do.
- Failure to go this far might leave opponents of abortion uncertain that we are serious and accordingly unhappy.
- Could be a useful signal of our seriousness to Justices voting with us.

Cons:

- Would certainly lead to loud accusations of lawlessness on the part of the Administration.
- Might jeopardize the Administration's credibility with the Court in other cases.

DECISION: \_\_\_\_\_ Option 1  
                  \_\_\_\_\_ Option 2  
                  \_\_\_\_\_ Option 3  
                  \_\_\_\_\_ Other

V. OTHER ISSUES CONNECTED WITH THE RESPONSE

In addition to the question of what to say, there is the question of who should say it and in what context. The options appear to be a live Presidential statement, a statement by Marlin Fitzwater, the release of a prepared statement, a statement by the Attorney General, or some combination of these. Depending on what decision the Court reaches, a different option for who should give the response might also be appropriate.

VI. OTHER ISSUES LIKELY TO ARISE IMMEDIATELY

(This portion of the memorandum is informational only.)

Unless the Court both reaffirms Roe and strikes down the statute, other issues resulting from the decision are sure to arise requiring your prompt attention. The most significant of these is that various legislators will undoubtedly introduce new federal legislation and will want your support. For example, Congressman Smith plans to introduce legislation forbidding abortions in federal enclaves except to save the life of the mother. There may be other legislative proposals that will go even further. We recommend that you assign somebody the task of developing a position on these questions.