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HR1833 - Partial Birth Abortions

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U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

November 16, 1995

TO: THE ATTORNEY GENERAL
THE DEPUTY ATTORNEY GENERAL
THE ASSISTANT ATTORNEY GENERAL FOR LEGISLATIVE AFFAIRS
THE WHITE HOUSE COUNSEL

FROM: WALTER DELLINGER

The attached is testimony I would be willing to sign for submission at tomorrow morning's hearing before the Senate Judiciary Committee. I leave to others to decide whether we should submit this testimony.

Testimony Before
the Committee on the Judiciary
United States Senate

on

H.R. 1833

Walter Dellinger
Assistant Attorney General

Office of Legal Counsel
United States Department of Justice

November 16, 1995

Mr. Chairman, and Members of the Committee:

Thank you for inviting the Department to testify on H.R. 1833, a bill that would ban what it calls "partial-birth abortions." Due to circumstances arising from the lapse in agency appropriations, I am limited to submitting abbreviated written testimony.

H.R. 1833 would criminalize all performance of a procedure now used to perform certain second- and third-trimester abortions. The criminal prohibition on what is termed "partial-birth abortions" is complete; the bill contains no exceptions. Instead, the bill would provide an affirmative defense for doctors who could bear the burden of proving that they reasonably believed partial-birth abortion was the only means of saving a woman's life.

This legislation is inconsistent with the constitutional standards established in Roe v. Wade[1] and recently reaffirmed in Planned Parenthood v. Casey.[2] Perhaps most significantly, the bill fails to provide adequately for preservation of a woman's health. As

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[1] 410 U.S. 113 (1973).

[2] 112 S. Ct. 2791 (1992).

both Roe and Casey make clear, even in the post-viability period, when the government's interest in regulating abortion is at its weightiest, that interest must yield not only to preservation of a woman's life but also to preservation of a woman's health.[3]

The constitutionally required protection for women's health has two distinct components, both of which must be accommodated by any exception to the bill under consideration. First, the government may not deny access to abortion, even in the post-viability period, to a woman whose life or health is threatened by pregnancy.[4] Second, and especially important here, the government may not regulate access to abortion in a manner that effectively "require[s] the mother to bear an increased medical risk" in order to serve a state interest.[5]

In Thornburgh v. American College of Obstetricians and Gynecologists, for instance, the Court invalidated a "choice of method" restriction requiring that doctors use the abortion procedure most protective of fetal life unless it would pose a "significantly greater medical risk" to the woman. With the exception limited to medical risks that qualified as "significant," the Court reasoned, the provision as a whole continued to mandate an impermissible degree of "'trade-off' between a woman's health and fetal survival." In plainest terms, the provision was facially unconstitutional because it "failed to require that maternal health be the physician's paramount consideration."[6]

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Casey, with its continued emphasis on the importance of protecting women's health, simply does not call into question this fundamental principle. Were there any doubt on that score, it should be resolved by the very recent Tenth Circuit decision considering a "choice of method" provision in the post-Casey regime. The provision at issue in Jane L. v. Bangerter required doctors performing post-viability abortions to use the procedure most protective of fetal life unless it would cause "grave damage to the woman's medical health." Relying on Thornburgh, the Tenth Circuit invalidated the provision, and expressly rejected an argument that Casey had somehow "discredited" the relevant principle from Thornburgh:

> The importance of maternal health is a unifying thread that runs from Roe to Thornburgh and then to Casey. In fact, defendants [elsewhere] concede that Thornburgh's admonition that a woman's health must be the paramount concern remains vital in the wake of Casey. The Utah choice of method provisions violate this consistent strain of abortion jurisprudence.[7]

The same "consistent strain of abortion jurisprudence" is implicated by the legislation at issue here. Doctors who perform the procedure in question reportedly believe that it poses the fewest medical risks for women in the late stages of pregnancy. It therefore is likely that in a large fraction of the very few cases in which the procedure actually is used, it is the technique most protective of the woman's health. A prohibition on the method, in the absence of an adequate exception covering such cases, would relegate women's health to a secondary concern, subordinate to state regulatory interests, and hence violate the well-established constitutional principle running from Roe to Casey.

What some have termed an "exception" to H.R. 1833 does not begin to meet this concern. First, of course, the provision in question -- what would be section 1531(e) --

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covers only cases in which partial-birth abortion is necessary to preserve a woman's life, and does not reach cases in which health is at issue. Second, the provision is not really an exception at all. Instead, the provision creates an affirmative defense, so that a doctor facing criminal charges must carry the burden of proving, by a preponderance of the evidence, both that pregnancy threatened the life of the woman and that the method in question was the only one that could save the woman's life. By exposing doctors to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute would have a chilling effect on doctors' willingness to perform even those abortions necessary to save women's lives. Providing an affirmative defense, under which doctors rather than the government bears the burden of proof, can be no adequate protection of the lives and health of pregnant women.

Finally, the bill contains one additional constitutional flaw. Courts following current Supreme Court precedent will find the bill unconstitutional not only if it fails to protect women's health, but also if it otherwise imposes an "undue burden" on the ability of women to obtain pre-viability abortions.[8] That is, even under the legal analysis applied in Casey, the government may not place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[9]

There are likely to be areas of the country in which access to second-trimester abortion procedures is severely limited, and even areas where the procedure at issue here may be the only one available. In such circumstances, a bar on the procedure, in Casey

[8] Casey, 112 S. Ct. at 2819-21.

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Moreover, because the bill's definition of the outlawed procedure is so broad, and the term "partial-birth abortion" so unfamiliar to the medical community, doctors who perform second-trimester abortions by any method cannot be certain that their procedures fall outside the scope of the criminal prohibition. As a recent newspaper article reported, one group of doctors considering the legislation was "unable to agree on what the law would cover -- but did agree that it posed a threat to anyone who did second-trimester abortions."[10] Given this confusion, and the threat of criminal prosecution, doctors might well decide to forego the performance of second-trimester abortions altogether. In that event, the practical effect of the bill would be to limit severely the availability of all second-trimester abortions, again imposing an "undue burden" on women seeking late-term, previability abortions.

The procedure -- or procedures -- that would be banned by H.R. 1833 are performed primarily at or after 20 weeks in the gestational period. Generally, such late-term abortions are performed when a woman's health or life is threatened or when a fetus is diagnosed with severe abnormalities such as anencephaly; these are rare and tragically sad events, occurring under circumstances that are unlikely to benefit from the intervention of government regulators. The proposed imposition of criminal penalties in such cases would violate the Constitution and would pose a real risk to women's lives and health.

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[10] Tamar Lewin, Wider Impact is Foreseen for Bill to Ban Type of Abortion, New York Times, Nov. 6, 1995, at B7.

To: George Stephanopoulous
Martha Foley
James Castello
Patrick Griffin
Barbara Chow
Janet Murguia
Jeremy Ben-Ami

From: James Murr

Date: November 17, 1995

Re: Dellinger Testimony before Senate Judiciary Committee

Please provide comments on the attached testimony to Nancy-Ann Min by 2 PM, Monday, November 18.

cc: Nancy-Ann Min

Attachment

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

November 16, 1995

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October 26, 1995

MEMORANDUM TO CAROL RASCO
PAT GRIFFIN
GEORGE STEPHANOPOULOS ✓
JAMES CASTELLO
MARTHA FOLEY
BARBARA CHOW
KAREN HANCOX
BETSY MYERS
JEREMY BENAMI
DEBBIE FINE

CC: ALICE M. RIVLIN

FROM: Nancy-Ann Min NAM

SUBJECT: Meeting on Choice Issues

Alice Rivlin asked that I schedule a meeting with all of you quickly to discuss a number of issues relating to abortion that are moving forward in the Congress, including the riders on appropriations bills, Medicaid, and the so-called "partial birth abortion" bill that may be on the House Floor late next week.

We will meet on Monday, October 29, from 11:00am to 12:00 noon in the OMB Director's office, room 252 of the OEOB. Please call Jim Blount at 5-5178 to confirm your attendance.

cc: Chuck Kieffer

THE WHITE HOUSE

WASHINGTON

October 27, 1995

MEMORANDUM FOR CAROL RASCO AND ALICE RIVLIN

FROM: Jeremy Ben-Ami
Nancy-Ann Min
Debbie Fine

SUBJECT: The Partial Birth Abortion Bill

This memorandum provides brief background on the pending "Partial Birth Abortion Ban Act of 1995," identifies options for administration action, and provides some assessment of the pros and cons of those options.

I. Background

Description of the bill
The bill bans "abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

It imposes criminal penalties on "whoever knowingly performs a partial birth abortion, thereby killing a human fetus" and subjects them to civil suit as well. To avoid criminal liability, a physician must prove affirmatively that 'partial birth abortion' was necessary to save the **life** (not health) of the mother and that no other procedure would suffice for that purpose. The woman cannot be prosecuted.

It is critical to note that "partial birth abortion" is not a medical term. Many feel that at a minimum it describes a procedure called Dilation and Extraction (D&X), a type of Dilation and Elimination(D&E). D&X is a rare procedure used for late term abortions, estimated at no more than 600 per year, while D&E is somewhat more commonly practiced. Late term abortions are very rare, occurring when a woman's health or life is threatened or when a fetus is diagnosed with severe abnormalities. These are usually families that have planned and wanted pregnancies, but that face a life-threatening medical condition for the mother or a severe fetal abnormality.

Current Status on the Hill
Earlier this summer, the Bill was passed by the House Judiciary Committee and is expected to be taken up on the House floor at some point in the next few weeks; the Senate timeline is not as clear. The Judiciary Committee reported out by a party-line vote, with 3 Democrats absent.

The prospects for passage in both Houses are very good, according to those who follow choice issues on the Hill. It is estimated that there may be approximately 140–150 votes against it in the House and approximately 40 in the Senate.

Profile of the Medical Community Views

American Medical Association: Legislative Council voted twice to support the legislation; the Board did not accept this recommendation and will not take a position on this bill.

California Medical Association: Strongly opposes this bill as an intrusion into the physician–patient relationship and as a burden on families.

American College of Obstetricians and Gynecologists: They have not taken a position, and do not plan to.

American Medical Women's Association: They oppose this bill because it makes a medical judgement, and have tried to convince the AMA and ACOG to at best oppose and in the least stay neutral.

American Academy of Family Physicians: They do not plan to take a position because this is not a priority for them, however, they felt that if they were to take a position it would be to oppose the bill.

The medical community seems unified in their opposition to the government legislating medical procedures; however, the strength of that opposition is not sufficient at this point to cause the national organizations or their memberships to work together to oppose it.

This is largely for several reasons:

- 'Partial birth abortion' is not a medical term so there is not unanimity about what precise procedure this language describes. This seems to cause some to feel stronger about the need to oppose the bill because it could be interpreted to ban much more commonly used medical procedures, while it causes others to hesitate.

- The D&X procedure that is ostensibly described is extremely rare, and only 2 or 3 doctors in the country perform it. As a result, there is not necessarily a large natural base of doctors to respond to this ban.

- Some in and out of the medical community identify this as the safest method for the mother under certain circumstances for several reasons; however, there does not seem to be consensus about this because there are so few doctors who perform it and so few women who undergo it.

- The bill is not yet widely known about around the country to those who do not normally follow choice issues closely.

- People are afraid of the politics of this issue.

Profile of Women and Pro-Choice Group Views

The women's and pro-choice groups feel that this is an assault on the right to choose and on the availability of safe abortion to women in this country. They feel it is unconstitutional because it imposes an undue burden; that it is an attempt to ban all abortions because of the broad language used which could be interpreted to include other procedures or situations; that doctors will be afraid to perform abortions because they will fear conviction; and that doctors will no longer consider the health of the mother their primary responsibility (particularly because they may need to second-guess what fits this vague definition) -- rather they will weigh it against their fear of conviction. (Note the bill states that the only exception is the life of the mother, not the health of the mother as stated in the constitution.) They are extremely hopeful that we will oppose this legislation.

II. OPTIONS

1. Express No Opinion: The administration can remain silent during the coming House floor debate. There is no requirement that we send up a SAP, and we could wait to see how the debate plays out in the Senate.

2. Express Opposition: The administration could express its opposition to the bill in a SAP to the House. If this option is chosen, we recommend basing opposition on the following: (1) It is unconstitutional because of it fails to include an exception for situations when certain procedures are necessary in order to protect the health or life of the woman, and because it poses an undue burden on women seeking an abortion by criminalizing the use of abortion methods that may best protect them and their child bearing capacity; and (2) It is not the business of Congress to regulate medical procedures.

3. Veto Threat: The President could choose to make it clear from the start that he would veto this bill. This would be an unusually strong statement, but it has been used more in recent times than earlier in the administration.

III. ANALYSIS

- This is a bad bill, the passage of which would be a setback for women's right to choose in this country and potentially creating a situation where women are forced to make decisions that are not the safest or healthiest for them.

- The politics are incredibly tough: on the one hand, this is a critical issue for the women's community and those who believe in choice, yet, on the other, no one is comfortable with affirmatively supporting a procedure that can be so graphically misrepresented by pro-lifers. It is important to note here that the right-to-lifers are already engaging in a campaign that effectively depicts this procedure in an extremely graphic and gruesome way -- and it is safe to assume that they will intensify this effort when the bill comes up.

- If we were to remain neutral, the women's groups would be extremely disappointed. They would likely see neutrality as a signal that we are willing to compromise on choice despite our otherwise strong record. We would also be allowing a clear victory for the right-to-lifers without a fight.

- If we oppose, with or without a veto threat, we will have the strong and active support of the women's community. At the same time, there is no guarantee that we will be able to mobilize opposition and or even find strong support in the medical community.

- If we take a strong position on this issue, it will be critical -- yet very difficult -- to define this debate on our terms; i.e. challenging its constitutionality and its inappropriate intervention in medical practice. It is clear that we cannot win if we argue this in terms of the credibility or safety of the procedure itself.

IV. RECOMMENDATION

We recommend opposing the bill without a veto threat for now. This bill poses a significant threat to the Constitutional protection of a woman's right to choose. It is the first time Congress has gotten into the business of regulating particular procedures. No abortion procedure is particularly pleasant, and it will always be politically difficult to defend any particular procedure. But if Congress begins to criminalize abortion procedures one by one, it will gradually erode the right it has been unable to eliminate by other legislative means.

At this point, for the House vote, it seems sufficient to state our strong opposition without a veto threat. It is unclear when or in what form this legislation will come to the Senate so we may want to wait until a later point to make a decision on vetoing the bill.

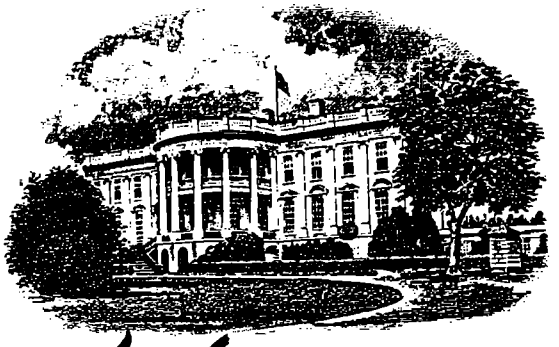
cc: Abner Mikva
James Castello
Martha Foley
Elena Kagen
George Stephanopoulos ✓
Pat Griffin
Barbara Chow
Alexis Herman
Betsy Myers
Karen Hancox
Chuck Kieffer
Barbara Woolley
Judy Gold

FAX COVER

Health and Personnel Division

Executive Office of the President
Office of Management and Budget
OEOB, Room 262
Washington, D.C. 20503

RM



DATE: 10/2/95

TO: George Stephanopoulos

AGENCY: WH

FAX NO: 6-2883

FROM: Nancy-Ann Min
Associate Director for Health and Personnel

Phone Number (202) 395-5178
Fax number (202) 395-9119

Number of pages (including cover) 3

COMMENTS: The circled language is the SAP I'd propose. Could this be the basis of a statement for McCurry. Please let me know of any changes you want.

Nancy-Ann

DRAFT -- NOT FOR RELEASE

October 30, 1995
House

H.R. 1833 -- Partial-Birth Abortion Ban Act of 1995
(Rep. Canady (R) FL and 115 others)

The President believes that abortion should be safe, legal, and rare. He has long opposed late-term abortions except when they are necessary to protect the life or health of the mother, consistent with the Supreme Court's decision in Roe v. Wade. The Administration strongly opposes H.R. 1833 because it fails to provide any exception to protect the health of the mother.

Pay-As-You-Go Scoring

H.R. 1833 would affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

* * * * * * *

(Do Not Distribute Outside Executive Office of the President)

This Statement of Administration Policy was developed by the Legislative Reference Division (Pellicci) in consultation with Associate Director HP (Min).

OMB/LA Clearance: _____.

To date, the Administration has not taken a position on H.R. 1833.

As reported by the House Committee on the Judiciary, H.R. 1833 would ban an abortion procedure referred to by the Committee as "partial-birth abortion". According to the Committee report, under this procedure, a doctor extracts a fetus, feet first, from the womb until all but the head is exposed. Then the doctor inserts scissors into the base of the fetus' skull and uses a catheter to suction out the brain before completing the abortion.

H.R. 1833 would subject doctors who perform the procedure to civil and criminal fines and/or up to two years imprisonment. The bill would also allow the father and certain other family members the right to sue the doctor for damages.

Opponents of the legislation say that most late-term abortions are performed when the fetus is severely deformed or when the women's life is at risk. Opponents are also concerned that enactment of H.R. 1833 would erode the 1973 Supreme Court decision in Roe v. Wade.

On September 23, 1995, the Council on Legislation of the American Medical Association (AMA) voted unanimously to support enactment of H.R. 1833. The Council felt that the procedure the bill would ban is not a recognized medical technique.

Pay-As-You-Go Scoring

According to BASD ( ), H.R. 1833 could increase both direct spending and receipts, the amounts involved would be less than $500,000 annually. Violators of the bill's provisions would be subject to criminal fines. These fines would be deposited in the Crime Victims Fund and spent in the following year. Direct spending from the Fund would match the increase in revenues. CBO agrees.

LEGISLATIVE REFERENCE DIVISION DRAFT
October 30, 1995 - 4:30 p.m.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-Oct-1995 09:51am

TO: Laura Capps for George

FROM: Jeremy D. Benami
Domestic Policy Council

CC: Nancy-Ann E. Min
CC: Martha Foley
CC: James Castello
CC: Elena Kagan

SUBJECT: Abortion issues

Wanted to update you on two abortion issues:

1. Defense bill -- Martha, Nancy Ann, James, I and others met yesterday on the Defense bill. As you know, availability of abortion on military bases exploded the conference last week. We decided to recommend sending a second letter to conferees which would reiterate veto threat over the $7 billion and over the language in the conference report that was defeated. As you recall this language said even private money could not be used to pay for an abortion at a military facility with a life of the mother exception. In light of our foreign ops veto threat and the fact that this is also a Presidential EO from the first week, we felt it appropriate to recommend a veto threat over this as well. Martha will bring this to Leon for his approval.

2. Partial Birth Abortion -- This bill could make it to the House floor next week or the following week. It will probably pass as a stand-alone measure. Unclear when it would come up for Senate consideration. Issue is whether we should send a SAP. We are looking into the medical community's position on the bill (we understand the AMA may be supportive of the bill and the ObGyns unwilliing to stand behind the procedure) and we are gauging the opinions of the women's groups. We will set a half hour meeting for next week (and will invite you) to discuss.