

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. email	re: Ann O'Leary personal (2 pages)	02/17/2000	Personal Misfile
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Ann O'Leary
OA/Box Number: 19577

FOLDER TITLE:

Child Custody Protection Act

2013-0436-S

rc1240

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Joel K. Wiginton



02/16/2000 06:54

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Brooke B. Livingston/OMB/EOP@EOP, Lisa J. Macecevic/OMB/EOP@EOP
bcc:
Subject: Child Custody Protection Act SAP 

As you all know, this afternoon Patty First (DoJ OLA) and I met with the Senate pro-choice staff and pro-choice groups regarding the CCPA. Again, no one knows for sure if and when this bill will come up on this Senate floor, but it may be as early as Tuesday afternoon. We had decided at the meeting this morning to simply reissuing last year's SAP with a cover letter noting that the bill hasn't changed. The Senate staff asked that we do two things: (1) issue the SAP with this year's date and bill number; and (2) add a point about the difficulties and expense associated with enforcing this bill if it becomes law (see pgs. 10-12 of the DoJ letter distributed this morning in which they opine on this issue) -- the Senate staff believe that the enforcement and federal issues (not the straight "choice issues") will be the most persuasive to moderate Repubs and Dems. Patty and I agree.

This being the case, if no one has any objections, I will put into OMB clearance tomorrow morning the exact same SAP as last year with a new date and an additional bullet point generally describing our enforcement concerns (currently the SAP has three bullet points addressing: (1) the lack of a family member exception; (2) the lack of a counselor exception; and (3) general constitutional concerns).

Joel K. Wiginton



Joel K. Wiginton



02/14/2000 10:27

Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: Child Custody Protection Act

When the Senate returns from recess next week, it is quite likely that it will take up the Child Custody Protection Act, which proscribes the transportation of minors across states lines in an effort to circumvent state parental abortion notification laws. As you'll recall, we issued a veto threat on this bill in the House, and the bill passed by 270 -159 (enough to sustain a veto). We should get together soon to discuss Senate strategy.

Joel

Message Sent To: _____

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U.S. Department of Justice

Office of Legislative Affairs

Patty Frost

Office of the Assistant Attorney General

Washington, D.C. 20530

June 15, 1999

The Honorable Henry Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hyde:

We understand the Committee on the Judiciary is marking up H.R. 1218, "The Child Custody Protection Act of 1999". The Administration's position on this bill is contained in the Statement of Administration Position of July 14, 1998 (copy enclosed).

Sincerely,

Jon P. Jennings

Jon P. Jennings
Acting Assistant Attorney General



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 14, 1998
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 3682 - Child Custody Protection Act
(Rep. Ros-Lehtinen (R) FL and 136 others)

The Administration strongly opposes enactment of H.R. 3682 in its current form. If a bill is presented to the President that fails to address the concerns that are described below, the President's senior advisers would recommend that he veto it.

As stated in recent letters from White House Chief-of-Staff Erskine Bowles to the House and Senate Committees on the Judiciary, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. Unfortunately, H.R. 3682, as reported by the House Committee on the Judiciary, fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

- Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress.
- Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability.
- Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998.

The Administration is concerned that H.R. 3682 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement requirements, would mitigate the federalism and the Administration's other concerns.

Pay-As-You-Go Scoring

H.R. 3682 could 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.

DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS CONTROL DATA SHEET

From: OLA (HYDE, CONG. HENRY) (106TH CONG) (H.R.1218)
To: HYDE, CONG. HENRY CHMN, HOUSE JUDICIARY COMTE
Date Received: 06-15-99 Date Due: NONE Control # : L99061601280
Subject & Date
06-15-99 (CHILD CUSTODY PROTECTION ACT OF 1999) ATTACHED
IS A LETTER TO CHAIRMAN HYDE PROVIDING THE ADMINISTRATION'S
POSITION ON H.R.1218, THE CHILD CUSTODY PROTECTION ACT OF
1999 (H.R.1218)

	Referred To:	Date:		Referred To:	Date:	
(1)	OLA;FILES	06-15-99	(5)			Type:
(2)			(6)			
(3)			(7)			Cat
(4)			(8)			LEG
	Interim by:			Date:		ATTY:
	Sig. For: OLA			Date Released: 06-15-99		PF

Remarks

(1) 06-15-99: OLA/JPJ LETTER. CC: DAG, CRM, CIV, OJP,
OLC, OPD, FBI, DEA, USM, COPS, OMB, EXEC SEC. DJC

Other Remarks:

Remarks: OLA ATTY: PATTY FIRST, 514-4810
Exec Sec Ctrl #: NONE

THIS DOCUMENT MUST BE DISPOSED OF BY SHREDDING

HR 1218 PCS

Calendar No. 203

106th CONGRESS

1st Session

H. R. 1218

IN THE SENATE OF THE UNITED STATES

July 1, 1999

Received and read the first time

July 12, 1999

Read the second time and placed on the calendar

AN ACT

To amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Child Custody Protection Act'.

SEC. 2. TRANSPORTATION OF MINORS IN CIRCUMVENTION OF CERTAIN LAWS RELATING TO ABORTION.

(a) IN GENERAL- Title 18, United States Code, is amended by inserting after chapter 117 the following:

'CHAPTER 117A--TRANSPORTATION OF MINORS IN CIRCUMVENTION OF CERTAIN LAWS RELATING TO ABORTION

'Sec.

'2431. Transportation of minors in circumvention of certain laws relating to abortion.

'Sec. 2431. Transportation of minors in circumvention of certain laws relating to abortion

'(a) OFFENSE-

'(1) GENERALLY- Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State

where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.

`(2) DEFINITION- For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the individual, in a State other than the State where the individual resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the individual resides.

`(b) EXCEPTIONS- (1) The prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself.

`(2) An individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 based on a violation of this section.

`(c) AFFIRMATIVE DEFENSE- It is an affirmative defense to a prosecution for an offense, or to a civil action, based on a violation of this section that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

`(d) CIVIL ACTION- Any parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action.

`(e) DEFINITIONS- For the purposes of this section--

`(1) a law requiring parental involvement in a minor's abortion decision is a law--

`(A) requiring, before an abortion is performed on a minor, either--

`(i) the notification to, or consent of, a parent of that minor; or

`(ii) proceedings in a State court; and

`(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph;

`(2) the term `parent' means--

`(A) a parent or guardian;

`(B) a legal custodian; or

`(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides,

who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required;

`(3) the term `minor' means an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring

parental involvement in a minor's abortion decision; and

'(4) the term 'State' includes the District of Columbia and any commonwealth, possession, or other territory of the United States.'.

(b) CLERICAL AMENDMENT- The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 117 the following new item:

117A. Transportation of minors in circumvention of certain laws relating to abortion

--2431'.

Passed the House of Representatives June 30, 1999.

Attest:

JEFF TRANDAH, *author*

Clerk.

Calendar No. 203

106th CONGRESS

1st Session

H. R. 1218

AN ACT

To amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions.

July 12, 1999

Read the second time and placed on the calendar

END



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 8, 1998

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

As was stated in the June 17, 1998, letter from White House Chief of Staff Erskine Bowles to Chairman Hyde of the House Judiciary Committee, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding laws respecting parental involvement in a minor's decision to obtain an abortion. The Administration appreciates the concerns of the sponsors of S. 1645, the Child Custody Protection Act of 1998, about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about preventing overhearing and sometimes predatory adults from improperly influencing minors to choose an abortion.

This letter provides the views of the Department of Justice concerning the amendment in the nature of a substitute to S. 1645, which we understand may be proposed by Senator Abraham. Although, in our view, the bill's civil and criminal provisions, as drafted, are overbroad and raise serious constitutional, legal, and law enforcement concerns, we believe that legislation could be crafted that would appropriately target non-relatives who transport minors across state lines for the purpose of avoiding parental involvement requirements.

I. OPERATION OF S. 1645

S. 1645 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a)(1) would read as follows:

Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law, requiring parental involvement

in a minor's abortion decision, of the State where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.¹

The restriction on interstate transport would be triggered if the law in the state where the minor resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.² Under proposed § 2401(a)(2), an "abridgement of the right of a parent" under such a law would occur if an abortion were performed on a minor in a state other than the state where she resides, "without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the [minor] resides." As we construe the provision, it

¹ Proposed § 2401(b) would contain two exceptions. Under § 2401(b)(1), the prohibition of subsection (a) would not apply "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Under § 2401(b)(2), "[a]n individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 [of Title 18] based on a violation of this section."

Subsection (c)(1) would define the operative phrase "a law requiring parental involvement in a minor's abortion decision" as:

a law--

(A) requiring, before an abortion is performed on a minor, either--

(i) the notification to, or consent of, a parent of that minor; or

(ii) proceedings in a State court; and

(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

Subsection (c)(2) would define "parent" as someone "who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required," and who also is "(A) a parent or guardian; (B) a legal custodian; or (C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides."

Subsection (c)(3) would define a "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

² In section III, below, we discuss the constitutional requirements for such a state notice or consent regime.

appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites that would have been applicable if the abortion had been performed in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not seek to impose such restrictions on out-of-state abortions.³

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, S. 1645 would create a civil cause of action: Proposed 18 U.S.C. § 2401(d) would provide that "[a]ny parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action." Under proposed § 2401(c), it would be an affirmative defense to prosecution or to a civil action

that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

As was stated in White House Chief of Staff Erskine Bowles's letter, the proposed legislation must be amended to exclude close family members from civil and criminal liability. While S. 1645 does exempt parents from liability, the defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(d), could well be another member of the minor's own family. The same considerations that support exempting parents from liability also support a somewhat broader exemption that would encompass other family members. Imposing criminal and civil sanctions on family members, requiring family members to testify against each other, and raising the prospect of lawsuits by one family member against another could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard of the minor's best interests. In addition, the prospect of criminal or civil action against family members would discourage a minor

³ There is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992).

from seeking the advice and counsel of those closest to her. We therefore recommend that S. 1645 incorporate an exception for family members who transport the minor.

Chief of Staff Bowles's letter also stated that the proposed legislation must be amended to ensure that persons who provide information, counseling, or referral or medical services to the minor are not subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interest of promoting family communication and would not deter those who inappropriately transport minors across state lines to obtain abortions. The threat of accessory liability against such persons, moreover, would likely impair the ability of physicians, clergy, counselors, and their staffs to care for and counsel both minors and adults. The bill also could provide an unintended basis for vexatious litigation against individuals and organizations, and could allow private citizens suing under the extraordinarily open-ended civil liability provision of the statute to inappropriately invade the privacy of patients.

To address the risk of civil or criminal liability for persons who provide information, counseling, or referral or medical services, we would propose adding a provision with language along the following lines:

This section shall not give rise to liability of any person or entity based upon provision of information, advertising, counseling, provision of medical services, or referral for medical services.⁴

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a state may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (collecting cases). Nevertheless, although a state has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

[t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made

⁴ Given § 2401(d)'s open-endedness and broad potential for unintended abuse, we recommend eliminating the provision from the bill or, in the alternative, limiting the provision to suits against persons who have been convicted under the criminal liability provision of § 2401(a).

by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (plurality opinion) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions -- such as parental notice or consent requirements -- are impermissible if they "do[] not reasonably further any legitimate state interest." Hodgson v. Minnesota, 497 U.S. 417, 450 (1990); see also Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I").

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").⁵ The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

A state that requires parental notification or consent may do so in a constitutional manner if it provides a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity.⁶

⁵ All citations to Casey herein are to the joint opinion of Justices O'Connor, Kennedy, and Souter.

⁶ The Court has held that such a bypass mechanism is required with respect to parental consent statutes. See Bellotti II, 443 U.S. at 643-44 (plurality opinion); id. at 655-56 (Stevens, J., concurring in the judgment); Lambert v. Wicklund, 520 U.S. 292, 117 S. Ct. 1169, 1171-72 (1997) (per curiam); see also Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 511-13 (1990). The Court also has held that such a bypass mechanism is required with respect to a two-parent notification statute. See Hodgson, 497 U.S. at 450-55; id. at 461 (O'Connor, J., concurring in the judgment); id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Supreme Court has not decided whether a bypass procedure is mandatory if the statute requires notification of only one parent (rather than notification of both parents or parental consent). See Lambert, 117 S. Ct. at 1171; Akron Ctr. for Reproductive Health, 497 U.S. at 510. However, the only appellate courts to have decided the issue have held that such bypass mechanisms are necessary in one-parent notification states. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997). But cf. Planned Parenthood v. Camblos, 116 F.3d 707, 715-16 (Luttig, Circuit Judge, granting motion for stay of district court judgment pending appeal) (questioning whether five Justices on current Supreme Court would conclude that bypass procedures are constitutionally necessary in a one-parent notification setting), motion to vacate stay denied, 125 F.3d 884 (4th Cir. 1997).

B. Constitutional Problems Raised by S. 1645

For some minors, out-of-state abortions might be significantly safer or otherwise medically indicated. For others, the closest facilities will be out of state. Yet it appears that proposed § 2401(a) would require -- in order for the criminal prohibition not to apply -- that a minor satisfy the requirements that her home state law would have imposed had she obtained an abortion in her home state, even though the requirements of her home state's law would not apply to an out-of-state abortion. As a result of this unique feature, proposed § 2401(a) would appear to be unconstitutional in two respects.

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases, the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when they would have been able to satisfy a constitutionally valid state parental involvement law. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state: The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack authority under state law to provide a legal bypass for an abortion to be performed out of state.⁷

⁷ Montana's parental involvement law illustrates the concern. In Montana, a "physician," defined as "a person licensed to practice medicine under [Montana law]," Mont. Code Ann. § 50-20-203 (1997), may not perform an abortion without notifying one of the minor's parents (unless a referring physician certifies that he has previously provided notice), *id.* § 50-20-204. The legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." *Id.* § 50-20-212(2)(a). Montana law does not purport to impose a notice requirement in connection with a minor's out-of-state abortion; there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of a "requirement" that does not apply. In the case of an out-of-state abortion, then, it is not clear that state law provides a means of obtaining a judicially authorized bypass.

Proposed § 2401(a) also would give rise to constitutional concerns where the specified procedure for manifesting parental notice or consent, as opposed to the judicial bypass, would not be effective for out-of-state abortions. If, for example, the parental consent portion of the home state's law is directed at state-licensed physicians, it would appear to be satisfied only when the patient provides proof of consent to one of those physicians. *See, e.g.,* S.C. Code Ann. §§ 44-41-10, 44-41-31 (Law. Co-op 1985 and Supp. 1997) (defining "physician" as "a person licensed to practice medicine in this State" and providing that the attending or referring "physician" may perform an abortion on an unemancipated minor only after "secur[ing] the informed written consent, signed and witnessed," of a parent, legal guardian, grandparent, or a person who has been standing in loco parentis for at least 60 days). Thus, to the extent that proposed § 2401(a) is intended to require literal compliance with the home state's law, it would not be at all clear

Where the requirements of the state of residence could not be met for an out-of-state abortion, it would appear that proposed § 2401(a) -- unlike constitutionally permissible parental consent or notification laws -- could not be justified as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. As in Hodgson, the restriction would not appear to "reasonably further any legitimate [government] interest." Id.

In Hodgson, the Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a requirement of one-parent notification with a bypass option. Id. at 450. The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision." Id. Similarly, it would appear that proposed § 2401(a) would be unconstitutional in states where there is no constitutionally adequate provision for securing consent or notice, and bypass, for out-of-state abortions. With respect to minors residing in such states for whom an abortion out of state might be safer, less expensive, or otherwise more accessible than an in-state abortion, proposed § 2401(a) would not "reasonably further any legitimate [government] interest," id. (emphasis added), at least insofar as the absence of available notice (or consent) and bypass mechanisms for out-of-state abortions under either federal or state law would preclude such minors from obtaining adult assistance in traveling interstate for abortions. In circumstances where no mechanism existed that would enable a minor seeking an out-of-state abortion to demonstrate that she had complied with the parental involvement requirements of her home state, proposed § 2401(a) could inhibit interstate travel for abortions even though such travel would have resulted from a knowing, intelligent, and deliberate choice of the minor.

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state of residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate

how a minor seeking an out-of-state abortion could satisfy the consent portion of such a law in a manner that would permit a "transporter" of the minor to avoid criminal liability under proposed § 2401(a).

governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.⁸

The constitutional infirmities identified above could appropriately be alleviated (1) by creating an exemption for travel from states that have not established a constitutionally sufficient consent/notice and bypass mechanism for out-of-state abortions, and (2) by making clear that the prohibition effected by § 2401(a) would not apply in cases where the state in which the abortion is performed requires parental notice or consent.

C. Mens Rea

Proposed § 2401(a) should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. In other words, individuals should be subject to criminal sanction only if they know that they are acting unlawfully. As currently drafted, proposed § 2401(a) would target one who knowingly transports a minor across state lines to obtain an abortion, if "in fact" an abortion is performed on the minor in a state other than the minor's state of residence, "without the parental consent or notification, or the judicial authorization, that would have been required" by the law of the minor's state of residence had the abortion been performed in that state. Proposed § 2401(c) would create an affirmative defense for a defendant who "reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts" that the requirements of the state of residence had been met.

We agree that it is sensible and equitable not to impose criminal liability on persons who reasonably believe the law has been followed. In this regard, it is important to recognize that S. 1645 as written still could reach persons who had no reason to recognize that their conduct might have violated any state or federal law. As a general matter, citizens who engage in conduct that is legal in the state where they undertake it but not in their home state would not think that they are thereby violating the law of their home state or federal criminal law. As written, the affirmative defense would still permit the imposition of liability on those who are unaware that a federal statute has, in effect, given state law an extraterritorial reach, and who therefore reasonably believe they

⁸ In light of both of the types of constitutional infirmities discussed above, the statute might be facially invalid (i.e., inoperative nationwide) if, in "a large fraction of the cases in which [proposed § 2401(a)] is relevant," Casey, 505 U.S. at 895, the criminal prohibition effectively would preclude minors from obtaining adult assistance in traveling interstate for abortions. Cf. id. (holding provision to be "invalid" as an "undue burden" because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (opinion of Stevens, J., respecting the denial of cert.). The Casey standard for facial invalidity was developed in the context of state-law abortion restrictions. It is uncertain how that standard would be applied or modified in light of a facial challenge to a congressional enactment such as S. 1645.

are acting lawfully. In order to fulfill the apparent policy goals behind the affirmative defense, Congress should specify a willfulness standard in S. 1645.

Congress has used a willfulness standard in criminal statutes in a range of contexts. See, e.g., Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (sale of firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (currency transactions in violation of reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (felony and misdemeanor tax statutes). Congress has opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. See Bryan, slip op. at 10. Many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend -- will be people with little or no experience with abortion or knowledge of the relevant law, let alone its finer points. They might well engage in conduct they reasonably believe to be lawful -- seeking to aid a minor who is a granddaughter, a niece, a parishioner, or a friend by driving her across state lines to a place where she can legally have an abortion. In such circumstances, they would completely unwittingly violate a federal criminal law and expose themselves to criminal and civil sanction.

In addition, Congress has employed a willfulness standard where the criminal statute incorporates complex elements. Criminal liability under § 2401(a) would turn in large part on whether the state of residence's statutory requirements concerning parental consent or notification and judicial bypass when a minor seeks an abortion had been satisfied. The federal provision would give these state statutes an extraterritorial effect that even an individual aware of all requirements of his own state's abortion laws would not be able to discern from those laws. In addition, it might well require considerable legal sophistication to determine the meaning of the home state's statutes in this new federal context. Finally, as noted below, it is novel to tie federal criminal liability to conduct that is lawful in the state in which it occurs.

To avoid these problems, the proposed statute should be revised to require a "willful" violation to create liability. Thus revised, those who are acting to help the minor and are unaware of the statutory regime will not be subject to prosecution.

D. Federalism Concerns

S. 1645 raises novel and important federalism issues. First, S. 1645 would broadly undermine the ability of a state to vindicate its own policy determinations within its own borders. The thrust of the proposed bill would be to use the federal criminal and civil law to trump the policy determinations of those states that have opted not to implement a parental involvement requirement. In this respect, S. 1645 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular federal interest by making it a crime to engage in interstate transport or commerce for the purpose of carrying out proscribed conduct in a neighboring state. In such circumstances,

the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. In contrast, the proposed bill would make unlawful travel for the purpose of engaging in conduct that is lawful in the state in which it occurs.

Second, by extending the reach of one state's policy choice into neighboring states, S. 1645 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens -- should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under S. 1645, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

IV. PRACTICAL ENFORCEMENT PROBLEMS

Proposed § 2401(a) would present a myriad of serious enforcement problems. Compared with violations of other federal criminal statutes, violations of proposed § 2401(a) would be notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, for reasons discussed in section III-C, supra, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. S. 1645 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of S. 1645 would fall entirely to the FBI -- in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is

a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources: Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

Third, the principal targets of proposed § 2401(a) are likely to be adult and teenage relatives and friends of young women seeking abortions. Such defendants would be highly sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overreaching. Relatedly, a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system.

Fourth, the proof of the critical elements in these cases generally will have to come through either the defendant or the minor, both of whom would be extraordinarily problematic witnesses. To prove that the defendant had the requisite intent, the government in the run of cases would have to rely on either the minor or the defendant (who would of course have a constitutional right not to testify). Given that the minor will, in many if not most cases, have relied on the aid of the defendant, who may be her boyfriend, aunt, grandmother, sister, best friend, etc., she is likely to be a hostile and uncooperative witness. (Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.) This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution.

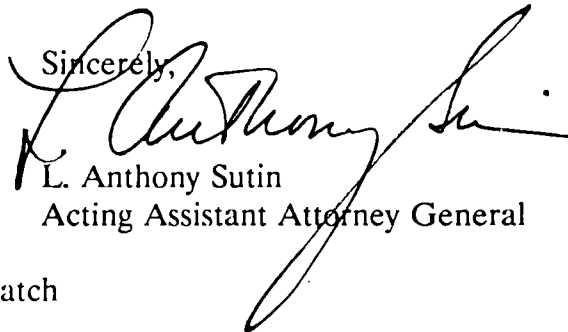
Fifth, the affirmative defense contained in the proposal is somewhat unwieldy. In typical cases in which a criminal statute incorporates a defense, the prosecution conducts its investigation with an eye toward ensuring that the defendant cannot raise the defense. Here, that will be difficult because it is unclear what the statute contemplates as "compelling facts." The reasonable belief standard also is framed in a way that is atypical of affirmative defenses in other criminal laws, which generally do not require that the belief be premised on "compelling facts" or on information from a specific source.

Sixth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that the statute would require, of making the

federal government appear overzealous and heavyhanded.⁹

Seventh, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws -- to prevent and punish the abduction or mistreatment of minors.¹⁰ The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that S. 1645 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means -- for example, hitchhiking or traveling alone -- of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors' conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

Please let us know if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary

The Honorable Spencer Abraham

⁹ A similar problem arises in the context of a civil action under the statute. Such an action would likely involve discovery requests for medical information. Those requests would be likely to conflict with state privacy and privilege laws concerning doctor-patient or counselor-client communications and medical records. The consequence will be either an unwelcome struggle between state and federal interests or an effective preemption of state privacy law (with the strain on federalism interests that entails).

¹⁰ Thus, for example, in the much-cited case in which the mother of a 13-year-old girl alleged that her daughter had been raped by an 18-year-old and taken by the boy's mother to another state for an abortion, the 18-year-old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference-with-the-custody-of-children statute. The case against the mother was remanded for a new trial, however, due to an error in jury instruction.



**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503**

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

June 28, 1999
(House)

H.R. 1218 - Child Custody Protection Act (Rep. Ros-Lehtinen (R) FL and 129 cosponsors)

The Administration strongly opposes enactment of H.R. 1218 in its current form. If a bill is presented to the President that fails to address the concerns that are described below, the President's senior advisers will recommend that he veto it.

During Congressional consideration of almost identical bills during the 105th Congress, the Administration, in Statements of Administration Policy and in letters from former White House Chief of Staff Erskine Bowles to the House and Senate Committees on the Judiciary, stated that it would support properly crafted legislation that would make it illegal to transport minors across State lines for the purpose of avoiding parental involvement requirements. Unfortunately, H.R. 1218, as reported by the House Committee on the Judiciary, also fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

- Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress.
- Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability.
- Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998, and again on June 15, 1999.

The Administration continues to be concerned that H.R. 1218 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement requirements, would mitigate the federalism concerns and the Administration's other concerns.

Pay-As-You-Go Scoring

H.R. 1218 could 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 that it would have a net effect of less than \$500,000.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 8, 1998

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

As was stated in the June 17, 1998, letter from White House Chief of Staff Erskine Bowles to Chairman Hyde of the House Judiciary Committee, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding laws respecting parental involvement in a minor's decision to obtain an abortion. The Administration appreciates the concerns of the sponsors of S. 1645, the Child Custody Protection Act of 1998, about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about preventing overbearing and sometimes predatory adults from improperly influencing minors to choose an abortion.

This letter provides the views of the Department of Justice concerning the amendment in the nature of a substitute to S. 1645, which we understand may be proposed by Senator Abraham. Although, in our view, the bill's civil and criminal provisions, as drafted, are overbroad and raise serious constitutional, legal, and law enforcement concerns, we believe that legislation could be crafted that would appropriately target non-relatives who transport minors across state lines for the purpose of avoiding parental involvement requirements.

I. OPERATION OF S. 1645

S. 1645 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a)(1) would read as follows:

Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law, requiring parental involvement

in a minor's abortion decision, of the State where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.¹

The restriction on interstate transport would be triggered if the law in the state where the minor resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.² Under proposed § 2401(a)(2), an "abridgement of the right of a parent" under such a law would occur if an abortion were performed on a minor in a state other than the state where she resides, "without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the [minor] resides." As we construe the provision, it

¹ Proposed § 2401(b) would contain two exceptions. Under § 2401(b)(1), the prohibition of subsection (a) would not apply "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Under § 2401(b)(2), "[a]n individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 [of Title 18] based on a violation of this section."

Subsection (e)(1) would define the operative phrase "a law requiring parental involvement in a minor's abortion decision" as:

a law--

(A) requiring, before an abortion is performed on a minor, either--

(i) the notification to, or consent of, a parent of that minor; or

(ii) proceedings in a State court; and

(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

Subsection (e)(2) would define "parent" as someone "who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required," and who also is "(A) a parent or guardian; (B) a legal custodian; or (C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides."

Subsection (e)(3) would define a "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

² In section III, below, we discuss the constitutional requirements for such a state notice or consent regime.

appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites that would have been applicable if the abortion had been performed in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not seek to impose such restrictions on out-of-state abortions.³

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, S. 1645 would create a civil cause of action: Proposed 18 U.S.C. § 2401(d) would provide that "[a]ny parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action." Under proposed § 2401(c), it would be an affirmative defense to prosecution or to a civil action

that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

As was stated in White House Chief of Staff Erskine Bowles's letter, the proposed legislation must be amended to exclude close family members from civil and criminal liability. While S. 1645 does exempt parents from liability, the defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(d), could well be another member of the minor's own family. The same considerations that support exempting parents from liability also support a somewhat broader exemption that would encompass other family members. Imposing criminal and civil sanctions on family members, requiring family members to testify against each other, and raising the prospect of lawsuits by one family member against another could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard of the minor's best interests. In addition, the prospect of criminal or civil action against family members would discourage a minor

³ There is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992).

from seeking the advice and counsel of those closest to her. We therefore recommend that S. 1645 incorporate an exception for family members who transport the minor.

Chief of Staff Bowles's letter also stated that the proposed legislation must be amended to ensure that persons who provide information, counseling, or referral or medical services to the minor are not subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interest of promoting family communication and would not deter those who inappropriately transport minors across state lines to obtain abortions. The threat of accessory liability against such persons, moreover, would likely impair the ability of physicians, clergy, counselors, and their staffs to care for and counsel both minors and adults. The bill also could provide an unintended basis for vexatious litigation against individuals and organizations, and could allow private citizens suing under the extraordinarily open-ended civil liability provision of the statute to inappropriately invade the privacy of patients.

To address the risk of civil or criminal liability for persons who provide information, counseling, or referral or medical services, we would propose adding a provision with language along the following lines:

This section shall not give rise to liability of any person or entity based upon provision of information, advertising, counseling, provision of medical services, or referral for medical services.⁴

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a state may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (collecting cases). Nevertheless, although a state has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

[t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made

⁴ Given § 2401(d)'s open-endedness and broad potential for unintended abuse, we recommend eliminating the provision from the bill or, in the alternative, limiting the provision to suits against persons who have been convicted under the criminal liability provision of § 2401(a).

by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (plurality opinion) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions -- such as parental notice or consent requirements -- are impermissible if they "do[] not reasonably further any legitimate state interest." Hodgson v. Minnesota, 497 U.S. 417, 450 (1990); see also Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I").

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").⁵ The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

A state that requires parental notification or consent may do so in a constitutional manner if it provides a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity.⁶

⁵ All citations to Casey herein are to the joint opinion of Justices O'Connor, Kennedy, and Souter.

⁶ The Court has held that such a bypass mechanism is required with respect to parental consent statutes. See Bellotti II, 443 U.S. at 643-44 (plurality opinion); id. at 655-56 (Stevens, J., concurring in the judgment); Lambert v. Wicklund, 520 U.S. 292, 117 S. Ct. 1169, 1171-72 (1997) (per curiam); see also Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 511-13 (1990). The Court also has held that such a bypass mechanism is required with respect to a two-parent notification statute. See Hodgson, 497 U.S. at 450-55; id. at 461 (O'Connor, J., concurring in the judgment); id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Supreme Court has not decided whether a bypass procedure is mandatory if the statute requires notification of only one parent (rather than notification of both parents or parental consent). See Lambert, 117 S. Ct. at 1171; Akron Ctr. for Reproductive Health, 497 U.S. at 510. However, the only appellate courts to have decided the issue have held that such bypass mechanisms are necessary in one-parent notification states. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997). But cf. Planned Parenthood v. Camblos, 116 F.3d 707, 715-16 (Luttig, Circuit Judge, granting motion for stay of district court judgment pending appeal) (questioning whether five Justices on current Supreme Court would conclude that bypass procedures are constitutionally necessary in a one-parent notification setting), motion to vacate stay denied, 125 F.3d 884 (4th Cir. 1997).

B. Constitutional Problems Raised by S. 1645

For some minors, out-of-state abortions might be significantly safer or otherwise medically indicated. For others, the closest facilities will be out of state. Yet it appears that proposed § 2401(a) would require -- in order for the criminal prohibition not to apply -- that a minor satisfy the requirements that her home state law would have imposed had she obtained an abortion in her home state, even though the requirements of her home state's law would not apply to an out-of-state abortion. As a result of this unique feature, proposed § 2401(a) would appear to be unconstitutional in two respects.

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases, the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when they would have been able to satisfy a constitutionally valid state parental involvement law. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state: The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack authority under state law to provide a legal bypass for an abortion to be performed out of state.

⁷ Montana's parental involvement law illustrates the concern. In Montana, a "physician," defined as "a person licensed to practice medicine under [Montana law]," Mont. Code Ann. § 50-20-203 (1997), may not perform an abortion without notifying one of the minor's parents (unless a referring physician certifies that he has previously provided notice), *id.* § 50-20-204. The legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." *Id.* § 50-20-212(2)(a). Montana law does not purport to impose a notice requirement in connection with a minor's out-of-state abortion; there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of a "requirement" that does not apply. In the case of an out-of-state abortion, then, it is not clear that state law provides a means of obtaining a judicially authorized bypass.

Proposed § 2401(a) also would give rise to constitutional concerns where the specified procedure for manifesting parental notice or consent, as opposed to the judicial bypass, would not be effective for out-of-state abortions. If, for example, the parental consent portion of the home state's law is directed at state-licensed physicians, it would appear to be satisfied only when the patient provides proof of consent to one of those physicians. *See, e.g.,* S.C. Code Ann. §§ 44-41-10, 44-41-31 (Law. Co-op 1985 and Supp. 1997) (defining "physician" as "a person licensed to practice medicine in this State" and providing that the attending or referring "physician" may perform an abortion on an unemancipated minor only after "secur[ing] the informed written consent, signed and witnessed," of a parent, legal guardian, grandparent, or a person who has been standing in loco parentis for at least 60 days). Thus, to the extent that proposed § 2401(a) is intended to require literal compliance with the home state's law, it would not be at all clear

Where the requirements of the state of residence could not be met for an out-of-state abortion, it would appear that proposed § 2401(a) -- unlike constitutionally permissible parental consent or notification laws -- could not be justified as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. As in Hodgson, the restriction would not appear to "reasonably further any legitimate [government] interest." Id.

In Hodgson, the Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a requirement of one-parent notification with a bypass option. Id. at 450. The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision." Id. Similarly, it would appear that proposed § 2401(a) would be unconstitutional in states where there is no constitutionally adequate provision for securing consent or notice, and bypass, for out-of-state abortions. With respect to minors residing in such states for whom an abortion out of state might be safer, less expensive, or otherwise more accessible than an in-state abortion, proposed § 2401(a) would not "reasonably further any legitimate [government] interest," id. (emphasis added), at least insofar as the absence of available notice (or consent) and bypass mechanisms for out-of-state abortions under either federal or state law would preclude such minors from obtaining adult assistance in traveling interstate for abortions. In circumstances where no mechanism existed that would enable a minor seeking an out-of-state abortion to demonstrate that she had complied with the parental involvement requirements of her home state, proposed § 2401(a) could inhibit interstate travel for abortions even though such travel would have resulted from a knowing, intelligent, and deliberate choice of the minor.

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state of residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate

how a minor seeking an out-of-state abortion could satisfy the consent portion of such a law in a manner that would permit a "transporter" of the minor to avoid criminal liability under proposed § 2401(a).

governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.⁸

The constitutional infirmities identified above could appropriately be alleviated (1) by creating an exemption for travel from states that have not established a constitutionally sufficient consent/notice and bypass mechanism for out-of-state abortions, and (2) by making clear that the prohibition effected by § 2401(a) would not apply in cases where the state in which the abortion is performed requires parental notice or consent.

C. Mens Rea

Proposed § 2401(a) should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. In other words, individuals should be subject to criminal sanction only if they know that they are acting unlawfully. As currently drafted, proposed § 2401(a) would target one who knowingly transports a minor across state lines to obtain an abortion, if "in fact" an abortion is performed on the minor in a state other than the minor's state of residence, "without the parental consent or notification, or the judicial authorization, that would have been required" by the law of the minor's state of residence had the abortion been performed in that state. Proposed § 2401(c) would create an affirmative defense for a defendant who "reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts" that the requirements of the state of residence had been met.

We agree that it is sensible and equitable not to impose criminal liability on persons who reasonably believe the law has been followed. In this regard, it is important to recognize that S. 1645 as written still could reach persons who had no reason to recognize that their conduct might have violated any state or federal law. As a general matter, citizens who engage in conduct that is legal in the state where they undertake it but not in their home state would not think that they are thereby violating the law of their home state or federal criminal law. As written, the affirmative defense would still permit the imposition of liability on those who are unaware that a federal statute has, in effect, given state law an extraterritorial reach, and who therefore reasonably believe they

⁸ In light of both of the types of constitutional infirmities discussed above, the statute might be facially invalid (i.e., inoperative nationwide) if, in "a large fraction of the cases in which [proposed § 2401(a)] is relevant," Casey, 505 U.S. at 895, the criminal prohibition effectively would preclude minors from obtaining adult assistance in traveling interstate for abortions. Cf. id. (holding provision to be "invalid" as an "undue burden" because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (opinion of Stevens, J., respecting the denial of cert.). The Casey standard for facial invalidity was developed in the context of state-law abortion restrictions. It is uncertain how that standard would be applied or modified in light of a facial challenge to a congressional enactment such as S. 1645.

are acting lawfully. In order to fulfill the apparent policy goals behind the affirmative defense, Congress should specify a willfulness standard in S. 1645.

Congress has used a willfulness standard in criminal statutes in a range of contexts. See, e.g., Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (sale of firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (currency transactions in violation of reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (felony and misdemeanor tax statutes). Congress has opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. See Bryan, slip op. at 10. Many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend -- will be people with little or no experience with abortion or knowledge of the relevant law, let alone its finer points. They might well engage in conduct they reasonably believe to be lawful -- seeking to aid a minor who is a granddaughter, a niece, a parishioner, or a friend by driving her across state lines to a place where she can legally have an abortion. In such circumstances, they would completely unwittingly violate a federal criminal law and expose themselves to criminal and civil sanction.

In addition, Congress has employed a willfulness standard where the criminal statute incorporates complex elements. Criminal liability under § 2401(a) would turn in large part on whether the state of residence's statutory requirements concerning parental consent or notification and judicial bypass when a minor seeks an abortion had been satisfied. The federal provision would give these state statutes an extraterritorial effect that even an individual aware of all requirements of his own state's abortion laws would not be able to discern from those laws. In addition, it might well require considerable legal sophistication to determine the meaning of the home state's statutes in this new federal context. Finally, as noted below, it is novel to tie federal criminal liability to conduct that is lawful in the state in which it occurs.

To avoid these problems, the proposed statute should be revised to require a "willful" violation to create liability. Thus revised, those who are acting to help the minor and are unaware of the statutory regime will not be subject to prosecution.

D. Federalism Concerns

S. 1645 raises novel and important federalism issues. First, S. 1645 would broadly undermine the ability of a state to vindicate its own policy determinations within its own borders. The thrust of the proposed bill would be to use the federal criminal and civil law to trump the policy determinations of those states that have opted not to implement a parental involvement requirement. In this respect, S. 1645 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular federal interest by making it a crime to engage in interstate transport or commerce for the purpose of carrying out proscribed conduct in a neighboring state. In such circumstances,

the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. In contrast, the proposed bill would make unlawful travel for the purpose of engaging in conduct that is lawful in the state in which it occurs.

Second, by extending the reach of one state's policy choice into neighboring states, S. 1645 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens -- should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under S. 1645, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

IV. PRACTICAL ENFORCEMENT PROBLEMS

Proposed § 2401(a) would present a myriad of serious enforcement problems. Compared with violations of other federal criminal statutes, violations of proposed § 2401(a) would be notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, for reasons discussed in section III-C, *supra*, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. S. 1645 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of S. 1645 would fall entirely to the FBI -- in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is

a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources: Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

Third, the principal targets of proposed § 2401(a) are likely to be adult and teenage relatives and friends of young women seeking abortions. Such defendants would be highly sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overreaching. Relatedly, a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system.

Fourth, the proof of the critical elements in these cases generally will have to come through either the defendant or the minor, both of whom would be extraordinarily problematic witnesses. To prove that the defendant had the requisite intent, the government in the run of cases would have to rely on either the minor or the defendant (who would of course have a constitutional right not to testify). Given that the minor will, in many if not most cases, have relied on the aid of the defendant, who may be her boyfriend, aunt, grandmother, sister, best friend, etc., she is likely to be a hostile and uncooperative witness. (Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.) This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution.

Fifth, the affirmative defense contained in the proposal is somewhat unwieldy. In typical cases in which a criminal statute incorporates a defense, the prosecution conducts its investigation with an eye toward ensuring that the defendant cannot raise the defense. Here, that will be difficult because it is unclear what the statute contemplates as "compelling facts." The reasonable belief standard also is framed in a way that is atypical of affirmative defenses in other criminal laws, which generally do not require that the belief be premised on "compelling facts" or on information from a specific source.

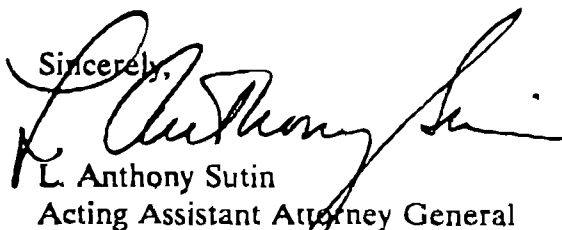
Sixth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that the statute would require, of making the

federal government appear overzealous and heavyhanded.⁹

Seventh, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws -- to prevent and punish the abduction or mistreatment of minors.¹⁰ The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that S. 1645 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means -- for example, hitchhiking or traveling alone -- of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors' conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

Please let us know if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary

The Honorable Spencer Abraham

⁹ A similar problem arises in the context of a civil action under the statute. Such an action would likely involve discovery requests for medical information. Those requests would be likely to conflict with state privacy and privilege laws concerning doctor-patient or counselor-client communications and medical records. The consequence will be either an unwelcome struggle between state and federal interests or an effective preemption of state privacy law (with the strain on federalism interests that entails).

¹⁰ Thus, for example, in the much-cited case in which the mother of a 13-year-old girl alleged that her daughter had been raped by an 18-year-old and taken by the boy's mother to another state for an abortion, the 18-year-old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference-with-the-custody-of-children statute. The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

HR 1218 PCS

Calendar No. 203

106th CONGRESS

1st Session

H. R. 1218

IN THE SENATE OF THE UNITED STATES

July 1, 1999

Received and read the first time

July 12, 1999

Read the second time and placed on the calendar

AN ACT

To amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Child Custody Protection Act'.

SEC. 2. TRANSPORTATION OF MINORS IN CIRCUMVENTION OF CERTAIN LAWS RELATING TO ABORTION.

(a) IN GENERAL- Title 18, United States Code, is amended by inserting after chapter 117 the following:

'CHAPTER 117A--TRANSPORTATION OF MINORS IN CIRCUMVENTION OF CERTAIN LAWS RELATING TO ABORTION

'Sec.

'2431. Transportation of minors in circumvention of certain laws relating to abortion.

'Sec. 2431. Transportation of minors in circumvention of certain laws relating to abortion

'(a) OFFENSE-

'(1) GENERALLY- Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State

where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.

`(2) DEFINITION- For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the individual, in a State other than the State where the individual resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the individual resides.

`(b) EXCEPTIONS- (1) The prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself.

`(2) An individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 based on a violation of this section.

`(c) AFFIRMATIVE DEFENSE- It is an affirmative defense to a prosecution for an offense, or to a civil action, based on a violation of this section that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

`(d) CIVIL ACTION- Any parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action.

`(e) DEFINITIONS- For the purposes of this section--

`(1) a law requiring parental involvement in a minor's abortion decision is a law--

`(A) requiring, before an abortion is performed on a minor, either--

`(i) the notification to, or consent of, a parent of that minor; or

`(ii) proceedings in a State court; and

`(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph;

`(2) the term 'parent' means--

`(A) a parent or guardian;

`(B) a legal custodian; or

`(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides,

who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required;

`(3) the term 'minor' means an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring

parental involvement in a minor's abortion decision; and

`(4) the term `State' includes the District of Columbia and any commonwealth, possession, or other territory of the United States.'

(b) CLERICAL AMENDMENT- The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 117 the following new item:

 `117A. Transportation of minors in circumvention of certain laws relating to abortion
--2431'.

Passed the House of Representatives June 30, 1999.

Attest:

JEFF TRANDAHL,

Clerk.

Calendar No. 203

106th CONGRESS

1st Session

H. R. 1218

AN ACT

To amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions.

July 12, 1999

Read the second time and placed on the calendar

END

THE PROPOSED CHILD CUSTODY PROTECTION ACT WOULD AFFECT PERSONS IN EVERY STATE IN THE COUNTRY

The proposed Child Custody Protection Act (CCPA) would expose persons across the country in all fifty states to liability, whether or not their home state had enacted a narrow parental involvement law. The CCPA on its face applies to states that have a parental involvement law that does not allow anyone other than a parent to be notified and that contains a judicial bypass. (Section (a)(2)). That is, if enacted, the bill would apply to (and violate the right to travel of) minors and persons assisting them in obtaining an out-of-state abortion who live in the 22 states with narrow parental involvement laws that may fall within the bill's ambit (AL, AR, GA, IN, KS, KY, LA, MA, MI, MN, MS, MO, NC, NE, ND, PA, RI, SD, TN, TX, VA, WY). (As noted in the footnotes, five of these states have very narrow exceptions for sexual abuse, and one state has a grandparent consent law. In each of these states, therefore, zealous prosecutors might lodge charges under CCPA, but the statute's ambiguity would certainly trigger motions to dismiss by defense counsel).

However, don't be fooled by these claims of narrow applicability. The CCPA would apply throughout the land to chill the lawful, constitutionally-protected conduct of persons in all fifty states. Health care providers and counselors in particular would have reason to fear prosecution if this law is enacted. ***Any suggestion that the CCPA merely provides federal backup for narrow state laws mandating parental involvement must be rejected.***

If enacted, the CCPA would stand alongside other federal criminal in Title 18. These laws would be read in conjunction with the CCPA, and people in all fifty states could be charged with conspiracy, accomplice liability, accessory after the fact, or misprision of a felony. The breadth of these statutes is vast. Anyone familiar with the government's

Saenz v. Roe, 119 S. Ct. 1518 (1999).

Arkansas, Kansas, Minnesota, Nebraska and Virginia have laws allowing a minor to sign an affidavit saying she has been sexually assaulted, in which case neither the parental involvement requirement nor the judicial bypass appears to be applicable. While there is doubt about the CCPA's applicability, therefore, in these five states, we believe at least some prosecutors would believe that the law applies.

North Carolina does provide that a grandparent may consent, if the minor has been residing with the grandparent for at least six months. Under § (e)(2)(3) of the CCPA, a person stands in loco parentis (and thus within the bill) if he or she has "care and control of the minor, and with whom the minor regularly resides," so North Carolina might fall within the bill's narrow definition of states with parental involvement laws. However, the second requirement, that the person be "designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required" may place North Carolina's law outside the sweep of the CCPA.

Tennessee's parental involvement law, which has been enjoined for several years, is scheduled to go into effect on February 28, 2000.

The NARAL Foundation/NARAL, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights*, 9th edition 240-241 (2000); The NARAL Foundation, *2000 Guide to Legislative Bills* (available at <www.naral.org>).

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prosecuting authority is aware of the prosecutor's discretion in charging myriad offenses, including those prohibiting conspiracies to violate any of the laws of the United States (18 U.S.C. § 371), accomplice liability (18 U.S.C. § 2), accessory after the fact (18 U.S.C. § 3), or misprision of a felony (18 U.S.C. § 4). Congress clearly envisioned at least conspiracy prosecutions and charges under sections 2 and 3 of Title 18 in conjunction with the CCPA, as it immunized the transported minor and her parents from any charges under these sections.

Thus, if someone helped a minor to travel from Massachusetts to Vermont to obtain an abortion because the minor feared telling her abusive parents of her pregnancy or because a clinic in Vermont was actually closer and more convenient, anyone else who helped plan or carry out the trip to evade Massachusetts' laws could be charged as a conspirator. Anyone who assisted her could be charged as an accomplice. Anyone who knew that the transporter was acting in violation of law who helped and failed to report the violation could be charged with misprision of a felony.

The range of persons who could be indicted is sweeping: the receptionist who answered her query for directions from Massachusetts to the clinic could be charged and found guilty of a federal offense. Anyone performing an intake interview or counseling, who knew of her Massachusetts address would risk federal criminal liability. If she were spending the night before the abortion at a sympathetic aunt's house in Vermont and the aunt knew of why her niece was in Vermont, the aunt would risk prosecution.

In sum, regardless of the number of states whose narrow parental consent definition would directly fall within the CCPA, if it is enacted, Congress will take a major step towards emboldening prosecutors across the land to intrude in the most intimate decisions regarding reproductive health care. It will also violate principles of federalism, as not one single state has attempted to enforce its parental involvement laws extraterritorially.

"If two or more persons conspire either to commit any offense against the United States. . . in any manner or for any purpose, and one or more of such persons do act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both . . ." 18 U.S.C. § 371.

"Principals – (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) however willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2 (West's 1999).

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

"Except as otherwise provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both . . ." 18 U.S.C. § 3 (West's 1999).

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both." 18 U.S.C. § 4 (West's 1999).

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Ann O'Leary
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FOLDER TITLE:

Child Custody Protection Act

2013-0436-S

rc1240

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

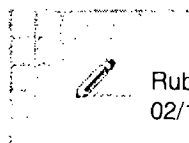
C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



Ruby Shamir
02/14/2000 01:20:13 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP@EOP

cc:

Subject: Child Custody Protection Act

I have more paper on this, but here is the SAP from last year:

STATEMENT OF ADMINISTRATION POLICY
(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED
AGENCIES.)

June 28, 1999
(House)

H.R. 1218 - Child Custody Protection Act
(Rep. Ros-Lehtinen (R) FL and 129 cosponsors)

The Administration strongly opposes enactment of H.R. 1218 in its current form. If a bill is presented to the President that fails to address the concerns that are described below, the President's senior advisers will recommend that he veto it.

During Congressional consideration of almost identical bills during the 105th Congress, the Administration, in Statements of Administration Policy and in letters from former White House Chief of Staff Erskine Bowles to the House and Senate Committees on the Judiciary, stated that it would support properly crafted legislation that would make it illegal to transport minors across State lines for the purpose of avoiding parental involvement requirements. Unfortunately, H.R. 1218, as reported by the House Committee on the Judiciary, also fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress.

Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability.

Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998, and again on June 15, 1999.

The Administration continues to be concerned that H.R. 1218 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement

requirements, would mitigate the federalism concerns and the Administration's other concerns.

Pay-As-You-Go Scoring

H.R. 1218 could 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 that it would have a net effect of less than \$500,000.



Anna Richter

02/18/2000 01:09:54 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP@EOP

cc:

Subject: FOR CLEARANCE: Senate SAP on HR 1218, Childcare Custody Protection Act -- DUE 7 PM TONIGHT

----- Forwarded by Anna Richter/OPD/EOP on 02/18/2000 01:07 PM -----



● **Brooke B. Livingston**

02/18/2000 12:20:50 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message

Subject: FOR CLEARANCE: Senate SAP on HR 1218, Childcare Custody Protection Act -- DUE 7 PM TONIGHT

MEMORANDUM FOR CLEARANCE

Subject: Senate SAP on HR 1218, Childcare Custody Protection Act

POSITION

Senior Advisers' veto threat.

BACKGROUND

On June 30, 1999, the House passed (270-159) HR 1218. The House SAP, issued June 28, contained a senior advisers' veto threat consistent with our position on this issue since 1998. **The Senate SAP attached for clearance is the same House SAP, issued June 28, except for (1) a new first sentence, (2) noting the most current House floor action and (3) adding the bolded fourth bullet point, at the request of WHLA, about enforcement concerns with the bill.**

I HAVE BOLDDED THE NEW PARTS OF THE SAP IN THE COPY BELOW.

WHLA does not know if this veto threat is sustainable, in fact, the numbers do not look as positive as originally thought. However, Maria Echaveste, Joel Wiginton, and LRD (in consultation with the agencies) expressed that the position should remain at the senior advisers' veto level. Also note, the House vote indicates that a veto would be sustained in that chamber.

Purpose: This bill prohibits taking a minor across State lines to avoid parental consent laws for abortions.

Objections: Would (1) subject grandmothers, aunts, and minor and adult siblings to criminal prosecution for coming to the aid of a relative in distress; (2) subject persons who only provide information, counseling, referral, or medical services to the minor to criminal and civil liability; and (3) raise a number of

constitutional concerns.

TIMING

Because this bill could be considered in the Senate as early as Tuesday, February 22, I would appreciate your comments/approval by 7 PM tonight, 2/18, so the SAP can be ready to transmit to the Hill. Please let me know if you have questions, 5-4790. THANKS!

CLEARANCE

Lew, Mathews, Mendelson, Deich, Gore (OMB);WHLA; OPL (Women's Office); DPC; WH Counsel; CoS.

*** The June 28th House SAP was cleared by Jack Lew, Sylvia Mathews, Dan Mendelson, Michael Deich, Elizabeth Gore, Larry Stein, Broderick Johnson, Jennifer Luray, Nicole Rabner, Charles Ruff and Karen Tramontano.*

February 22, 2000
(Senate)

H.R. 1218 - Child Custody Protection Act
(Rep. Ros-Lehtinen (R) FL and 131 cosponsors)

The Administration believes strongly in the need for parental and family involvement in a minor's decision to obtain an abortion and the importance of preventing non-relatives from improperly influencing minors' abortion decisions. The Administration, **however**, strongly opposes enactment of H.R. 1218 in its current form. If a bill is presented to the President that fails to address the concerns that are described below, the President's senior advisers will recommend that he veto it.

During Congressional consideration of almost identical bills during the 105th Congress, the Administration, in Statements of Administration Policy and in letters from former White House Chief of Staff Erskine Bowles to the House and Senate Committees on the Judiciary, stated that it would support properly crafted legislation that would make it illegal to transport minors across State lines for the purpose of avoiding parental involvement requirements. Unfortunately, H.R. 1218, **as passed by the House of Representatives**, also fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

- Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress.
- Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability.
- Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998, and again on June 15, 1999.
- **Remedy the serious enforcement problems outlined by the Department of Justice in its letter to the Senate Committee on the Judiciary on July 8, 1998. In the bill's current form, violations would be difficult to investigate and prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.**

The Administration continues to be concerned that H.R. 1218 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and

that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement requirements, would mitigate the federalism concerns and the Administration's other concerns.

Pay-As-You-Go Scoring

H.R. 1218 could 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 that it would have a net effect of less than \$500,000.

* * * * *

(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 the White House Office of Public Liaison (Luray), the Office of the White House Counsel (Ruff/Wilson), HD (Reilly), TCJS (Thompson), and BASD (Balis). The Department of Justice (per Patty First) concurs in the proposed position. The Department of Health and Human Services (per Sondra Wallace) has no objection.

OMB/LA Clearance:

The proposed position is consistent with that taken on June 15, 1999, in a letter from the Justice Department to the House Committee on the Judiciary. It also is consistent with SAPs and letters from former Chief of Staff Bowles to the House and Senate Committees on the Judiciary on almost identical bills in the 105th Congress.

The House of Representatives passed (270-159) HR 1218 on June 30, 1999. H.R. 1218 was ordered reported by the House Committee on the Judiciary by a vote of 16-13 along party lines on June 23, 1999.

Last year's bill (H.R. 3682) passed the House by a vote of 276-150, but the Senate was unable to invoke cloture on its version of the measure (S. 1645), and no further action was taken.

Summary of H.R. 1218

As ordered reported, H.R. 1218 would make it illegal for anyone -- other than the girl's parent or guardian -- to knowingly transport a minor across a State line to obtain an abortion in cases in which the minor has not satisfied her home State's laws regarding "parental involvement" (i.e., laws requiring parental consent or notification). H.R. 1218 would subject individuals violating the bill's provisions to civil and criminal penalties, including the possibility of imprisonment for up to one year. The bill would allow an out-of-State abortion without parental notification if the abortion was necessary to save the minor's life.

H.R. 1218 would make it an affirmative defense to prosecution under the bill that the defendant reasonably believed that before the individual obtained the abortion, parental consent or notification or judicial authorization that would have been required had the abortion been performed in the State where the individual resides, took place. In addition, under the bill any parent or guardian who is affected by the violation of a parental notification law would be allowed to seek civil action for damages.

Currently, 41 States have enacted laws requiring that at least one parent be notified before a minor can obtain an abortion. In certain cases, State law allow minors to instead seek permission from a judge to obtain an abortion.

Pay-As-You-Go Scoring

According to BASD (Balis), H.R. 1218 could affect direct spending and receipts; therefore, the bill is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. Individuals prosecuted and convicted under H.R. 1218 could be subject to criminal fines. Collections of such fines are governmental receipts, which are deposited in the Crime Victims Fund and spent in the following year. OMB estimates that the scoring estimate of this bill is that it would have a net effect of less than \$500,000.

LEGISLATIVE REFERENCE DIVISION DRAFT

06/28/99 - 9:30 a.m.

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