

Confirmation letter
from POTUS

Heather
FHF

March 16, 2000

Ms. Kate Britton
8708 Brook Road
McLean, Virginia 22102

Dear Kate:

Thank you for your February 14 letter and the information you enclosed. I'm grateful, as always, for your counsel, and I've shared the materials with Chris Jennings, my advisor for health issues.

As you probably already know, the House Commerce Committee held a hearing last week to determine whether federal prohibitions on the for-profit sale of fetal tissue are being violated. As this investigation proceeds, I hope the Committee will examine the allegations surrounding this issue in an even-handed, objective manner. If laws prohibiting the trafficking of human tissue are being violated, those who've broken the law should be prosecuted.

As I've said many times, late-term abortions trouble me deeply, and I continue to hope that the Congress will send me a bill that I can sign. Thanks again for sharing your thoughts. God bless you.

Sincerely,

BILL

BC/JHC/SH/SH/lynn-ws-lynn (Corres. #7127120)
(3.britton.k)

cc: Lauren Supina, 122 OEOB

cc: w/copy of inc to Chris Jennings, DPC

cc: Ann O'Leary, DPC

cc: John Corcoran, 97 OEOB

cc: Heather Howard, DPC

Xeroxed copy of personally signed original to NH
through Sean Maloney

CLEAR THRU SEAN MALONEY

PRESIDENT TO SIGN



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

September 30, 1999
(House)

STATEMENT OF ADMINISTRATION POLICY

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

H.R. 2436 - Unborn Victims of Violence Act of 1999

(Rep. Graham (R) SC and 66 cosponsors)

The Administration strongly opposes enactment of H.R. 2436, which would make it a separate Federal offense to cause "death or bodily injury" to a "child in utero" in the course of committing certain specified Federal crimes. If H.R. 2436 were presented to the President, his senior advisers would recommend that he veto the bill.

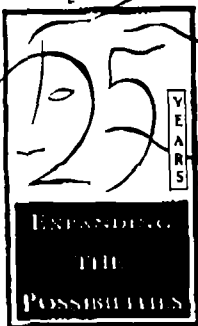
The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, marked a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created Federal domestic violence offenses with strong penalties to hold violent offenders accountable. To date, the Department of Justice has brought 179 VAWA and VAWA-related Federal indictments and awarded over \$700 million in VAWA grants to communities to assist in combating violence against women.

Unfortunately, H.R. 2436 is not designed to respond to violence against women. The Administration has significant public policy concerns with the legislation, as described in the Department of Justice letter to the House Committee on the Judiciary on September 9, 1999. For example, H.R. 2436 would: (1) trigger an excessive increase in the length of the sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant; (2) depart from the traditional rule that criminal punishment should correspond to the knowledge and intent of the defendant; and (3) identify a fetus as a separate and distinct victim of a crime, which is unprecedented as a matter of Federal statute, and unnecessary to achieve the goal of increasing the punishment for violence against pregnant women.

H.R. 2436 is careful to recognize that abortion-related conduct is constitutionally protected; however, this does not remove all doubt about the bill's constitutionality, as explained in the Department of Justice letter to the House Committee on the Judiciary on September 9th.

The Administration understands that Representative Lofgren will offer an alternative that appropriately focuses on increasing the punishment for violence against pregnant women without identifying a fetus as a separate and distinct victim of a crime. The Administration is willing to work with Congress to develop legislation that would strengthen the punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by VAWA.

NATIONAL WOMEN'S LAW CENTER



**** FAX COVER SHEET ****

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Nicole Rabrer

LOCATION: _____

FAX NO. 456-2878 PHONE NO: 456-7263WE ARE TRANSMITTING A TOTAL OF 3 PAGES INCLUDING THIS COVER SHEET.FROM: Sharon LowLOCATION: NATIONAL WOMEN'S LAW CENTERFAX NO: (202) 588-5185 PHONE NO: (202) 588-5180

DATE: _____ TIME: _____

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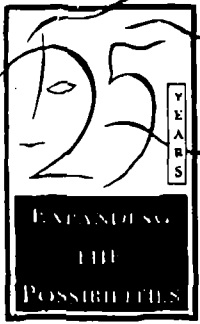
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**** QUICK FAX MESSAGE ****

Nicole - Thanks for your help. Feel free to call if you need anything.

Sharon

NATIONAL WOMEN'S LAW CENTER



September 8, 1999

Dear Representative:

On behalf of the National Women's Law Center, I am writing to ask you to oppose H.R. 2436, The "Unborn Victims of Violence Act," which the House Judiciary Committee will consider this Thursday. Although the co-sponsors of this bill – Lindsey Graham, Chris Smith and Charles Canady – purport that it is merely a crime bill, the reality is that this legislation sets a dangerous federal precedent that will undermine a woman's right to choose.

If enacted, this legislation would be the first law to recognize a zygote, blastocyst, embryo or fetus as an independent victim of a crime, and thus as a "legal person." The bill would create a separate offense for harm or termination of a pregnancy at any stage of development during the commission of any of several federal criminal acts. Punishment for violation of this separate offense would be the same as if the offense had occurred to a person. By vesting the zygote, blastocyst, embryo or fetus with the same legal rights as a live-born individual, this legislation would elevate all stages of prenatal development in the eyes of the law. Thus, this legislation conflicts with the legal principles underlying the Supreme Court's decision in *Roe v. Wade*.

Acts of violence against women, and most certainly pregnant women, are abhorrent, and the criminal justice system should respond decisively and strongly to them. But, H.R. 2436 is not the proper response. Rather, this bill ignores the problem of domestic violence, sexual assault and other violent crimes against women. In fact, H.R. 2436 fails to recognize the violence to the woman at all, and even ignores the reality that any attack that harms a pregnancy inherently is an attack on the pregnant woman herself. At the Subcommittee Hearing on this bill, domestic violence expert Julie Fulcher testified against the bill, stating, "The 'Unborn Victims of Violence Act' is not designed to protect women . . . The result is that the crime committed against a pregnant woman is no longer about the woman victimized by violence. Instead, the focus often will be switched to the impact of that crime on the unborn fetus, once again diverting the attention of the legal system away from domestic violence or other violence against women."

With the law on your side, great things are possible

11 Dupont Circle, NW • Suite 800 • Washington, DC 20036 • (202) 588-5180 • FAX (202) 588-5185

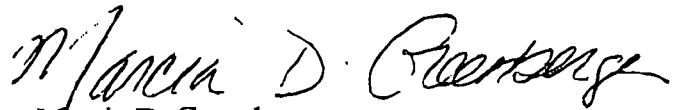


Revised 9/99

Finally, this legislation would unnecessarily inject the abortion debate into the federal criminal system. The bill's construction and vague language ensures that prosecutions will get bogged down in arguments about when life begins – discussions better held by constitutional scholars, academics, clerics and philosophers, not by juries in criminal courts. Ultimately, the bill as crafted provides a vehicle for yet another challenge to *Roe* and its progeny before the United States Supreme Court. A much simpler bill could have been crafted to create new federal anti-crime legislation – rather than anti-abortion legislation.

We look forward to working with you on legislation that truly addresses the tragedy of a pregnancy lost due to a violent crime. Such a bill would focus on the harm caused the woman due to the loss, would allow for swift and efficient prosecution of criminal wrongdoers, and would not undermine the legal principles underlying a woman's right to choose. We urge you to oppose H.R. 2436 – although it purports to aid women, in reality this bill not only ignores women crime victims but undermines their constitutional rights.

Sincerely,

A handwritten signature in cursive script, reading "Marcia D. Greenberger".

Marcia D. Greenberger
President



Groups: alt.
• ↑ penalties
No sep offense

OFFICE FOR WOMEN'S INITIATIVES AND OUTREACH

TO: Shelly Peterson, Nicole Robner, Ann Lewis

FAX: 62878

DATE: 7/21/99

NUMBER OF PAGES (INCLUDING COVER SHEET): 4

FROM: _____ Jenny Luray, Director
_____ Sondra Seba, Agency Representative
_____ Robin Leeds, Agency Representative
_____ Kelley O'Dell, Special Assistant to the Director
_____ Other

NOTES:

NARAL analysis of
"Fetal Protection" bill.

THE WHITE HOUSE
OFFICE FOR WOMEN'S INITIATIVES AND OUTREACH
OLD EXECUTIVE OFFICE BUILDING, ROOM 15
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NARAL Promoting Reproductive Choice**CONGRESS SHOULD NOT DEPLOY FEDERAL PROSECUTORS
ON BEHALF OF THE UNBORN**

For the first time, Congress is poised to hold hearings on a "fetal protection" bill, H.R. 2436. The bill, entitled the "Unborn Victims of Violence Act of 1999," would amend the criminal code and the Uniform Code of Military Justice to create new federal crimes for bodily injury or death of an "unborn child" who is "in utero" at the time the act took place. "Bodily injury" is defined by reference in such a sweeping manner that it would encompass even such speculative harms as "fetal pain." Although the bill properly includes exceptions for consensual or emergency abortions, medical treatment and the woman's conduct, it nonetheless forges new ground in attempting to recognize the fetus as a person with the same legal status as the woman or anyone else who has been born. H.R. 2436 opens the way to litigation over when life begins and mini-trials on fetal pain embedded within criminal prosecutions. It marks a major departure from existing federal law and threatens to erode the foundations of the right to choose as recognized in *Roe v. Wade*, 410 U.S. 113 (1973).

We recognize that intentional criminal acts that cause a miscarriage or interrupt normal fetal development are indeed tragedies for the woman and her family that are worthy of redress. But the approach taken by H.R. 2436 is misguided and threatening to women's rights. Congress should instead enact the Violence Against Women Act II and support a range of programs that promote healthy childbearing. In the criminal arena, it should enhance penalties imposed for a range of federal crimes when the crime results in a miscarriage or an interruption of normal fetal development.

Reject the Agenda of the Bill's Sponsors.

- The sponsors of this bill are not supporters of a woman's right to choose. *Roe v. Wade* rejected the suggestion that "by adopting one theory of life," that is, granting personhood to the fetus, "Texas may override the rights of the pregnant woman that are at stake." 410 U.S. at 162. It noted that except in narrowly defined situations and except when the rights are contingent upon live birth, "the unborn have never been recognized in the law as persons in the whole sense." *Id.* Yet *Roe* and the state cases liberalizing abortion rights that preceded it sparked a movement to grant the fetus legal recognition as full persons. H.R. 2436 is a manifestation of this effort to endow fetuses themselves with rights -- such as recognition as being a victim of a crime -- and to thus erode the foundational premise of *Roe v. Wade*.

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and Reproductive Rights
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E-Mail: naral@naral.org

- At a rhetorical level, the current version of H.R. 2436 reveals its intent to endow fetuses with rights by calling the fetus -- and perhaps even an embryo -- a "child." It thus elevates the fetus to the status of a person, attacking the premise of *Roe v. Wade*. And this rhetoric renders the bill vague, perhaps in some instances unconstitutionally so. It is unclear as to when during pregnancy these new felonies may arise -- at fertilization? implantation? when the woman realizes she's pregnant? when the defendant realizes the woman is pregnant? when the fetus is viable? At a legal minimum, this ambiguity should be clarified, and rhetorically, the embryo or fetus should be called its medical term, not an "unborn child."
- Pro-choice groups are properly concerned with legislation like this that recognizes fetal rights because of our experience in the states with state action to protect fetuses and fetal protection statutes, most of which significantly infringe upon public health and women's rights. That is, H.R. 2436 takes a first step down a slope we already know to be slippery.
 - ▶ For instance, South Carolina now prosecutes women whose babies are found to have drugs in their system. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998). Such prosecutions deter women from seeking prenatal care, and, according to the General Accounting Office (GAO), such prosecutions will discourage women from seeking care during delivery. Women using drugs fear that medical professionals will discover their drug use and turn them over to the authorities for prosecution. Lack of prenatal care or assistance in delivery dramatically increases the dangers for both the mother and the baby.
 - ▶ Other state statutes, creating civil causes of action that may be brought by persons other than the woman when she miscarries due to negligence or recklessness, could result in trimming pregnant women's liberty. That is, if an airline feared that it would be subject to a complaint for allowing a pregnant woman who miscarried to travel, airlines would be reluctant to sell tickets to pregnant women. Similarly, gyms might refuse to allow pregnant women to work out, fearing that any miscarriages would be attributable to them. Very quickly, pregnant women would become "protected" in a cage of restrictive private rules.
 - ▶ The situation only worsens if the woman herself can be sued by the "father" of the fetus or other third parties. Then all her conduct during and perhaps even before pregnancy become subject to judicial scrutiny. Whether she works or stays in bed, exercises or doesn't exercise, takes medicine or toughs out an illness -- all her conduct could be second-guessed in a court of law when such civil actions arising from harms or death of a fetus are recognized.
 - ▶ In other instances, judges and prison officials have elevated the fetus to a status on par with or above the woman -- denying women abortions, incarcerating them to prevent possible harm to the fetus, and coercing sterilization or long-term contraception. See The NARAL Foundation®, *Unjust Punishment, Forced*

Contraception, and Poor Treatment of Women by the Courts and Prisons. (Copy attached).

**Intentional Harms Against A Pregnant Woman that Result in Harm
to or Death of a Fetus are a Proper Subject of Punishment,
but the Focus must be on the Harm to the Woman.**

- Society is of course properly concerned with assaults and murders, and this is reflected in our criminal code. These crimes are particularly offensive to Americans when they are committed upon a pregnant woman, causing her to miscarry or to deliver an injured baby. To address this problem, Congress should focus on the fact that the principal harm arising from such acts is to the woman who was pregnant. Instead, by creating a new criminal statute such as in H.R. 2436, it makes the government the protector of "unborn children" — a role with troublesome ramifications for a woman's right to choose.
- ▶ **Violence Against Women.** To deter crimes against pregnant women and provide punishment for those who commit assaults or murders upon pregnant women, thereby causing the death of or injury to a fetus, Congress should pursue other avenues that focus on the harm to the woman. One limited step Congress has commendably taken already was enacting the Violence Against Women Act (VAWA), 18 U.S.C. § 2261. It is well known that domestic abuse in particular often escalates when a woman is pregnant. "Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 889 (1992) (citing expert witness testimony).

Congress should follow up on this 1994 law by enacting VAWA II, H.R. 357, which, among other things, would continue the commitment of VAWA I by providing grants for law enforcement and prosecution to combat violent crimes against women and expanding victims' services. In fact, co-sponsoring VAWA II would be an important first step to take by the sponsors of H.R. 2436, Representatives Graham, Smith of New Jersey, and Canady, who have not signed on to VAWA II as of July 19, 1999.
- ▶ **Augment Sentences in the Event of Miscarriage or Interruption of Normal Fetal Development.** Congress could bolster its efforts on behalf of pregnant women -- without upending years of law on personhood -- by enhancing the penalties provided for the underlying crime against the woman if she suffered injury to her fetus or a miscarriage.

Enhancing the penalty would recognize that the harm from the underlying offense was indeed greater as a result of the injury or death to the fetus, and the enhanced penalty could steepen as the pregnancy progressed.

FETAL PROTECTION LEGISLATION

Q&A

September 30, 1999

Q. Today, the House of Representatives will vote on H.R. 2436, the Unborn Victims of Violence Act of 1999, which would make it a separate Federal offense to cause “death of bodily injury” to a “child in utero” in the course of committing certain specified Federal crimes. What’s the Administration’s position?

A. The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which the President signed in 1994, has been a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created Federal domestic violence offenses with strong penalties to hold offenders accountable. To date, the Department of Justice has brought 179 VAWA and VAWA-related Federal indictments and awarded over \$700 million in VAWA grants to communities to assist in combating violence against women.

This bill, however, is not about addressing violence against women. The Administration strongly opposes the Unborn Victims of Violence Act of 1999 and, if presented to the President, his senior advisors would recommend that he veto it. While additional punishment for harm to a pregnant woman is an appropriate goal, we believe that this bill is an unwise means to that end. The legislation identifies the fetus as a separate and distinct victim of a crime, which is unprecedented as a matter of Federal statute and unnecessary to achieve the goal of increasing the punishment for violence against pregnant women. The Administration has other public policy and constitutional problems with the bill, which are described in our SAP and the Department of Justice’s letter to the House Judiciary Committee on September 9, 1999.

Q. How can you be against increasing punishment to perpetrators of violence against pregnant women?

A. Many of the underlying crimes in Mr. Graham’s bill are horrible – no one should have to experience them. And for women who are pregnant, any crime which causes harm or death to the fetus is made all the more painful. We should protect women by doing more to end all forms of violence against them. Congress can help do this by reauthorizing the Violence Against Women Act. But the answer to the problem of violence against women, pregnant or not, is not to identify the fetus as a separate and distinct victim of a crime.

Q. What would you support?

A. The Administration would support a bill that strengthens punishment for intentional violence against a women whom the perpetrator knows or should know is pregnant.

Q. Do you support the Democratic substitute, to be offered by Representative Lofgren?

A. The substitute offered by Representative Lofgren is a step in the right direction, because it appropriately focuses on increasing the punishment for violence against pregnant women without identifying a fetus as a separate and distinct victim of a crime. Although we cannot offer our full support, we are willing to work with the sponsors to craft legislation that would strengthen the punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by VAWA.

[Background: The strength of the Lofgren amendment is that it exposes the underlying bill for what it is: an attempt, under the guise of protecting women, to treat a fetus as a life. The weakness of the Lofgren amendment is that, like the underlying bill, 1) it fails to take into account whether a perpetrator knew or should have known the woman was pregnant; and 2) it triggers an excessive increase in the length of the sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant.]

Sandra Yamin
09/28/99 01:24:46 PM

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

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

Subject: REVISED -- FINAL DRAFT House Rules SAP -- H.R. 2436 - Unborn Victims of Violence Act of 1999

Per the conference call yesterday, attached for your clearance is the revised final draft SAP on H.R. 2436 - Unborn Victims of Violence Act of 1999. Please note that the position has been upgraded to senior advisors veto recommendation (pending WW clearance). DoJ has signed-off on this draft. H.R. 2436 is scheduled for House Rules on Wed 9/29 with House Floor consideration expected Thurs 9/30. Appreciate your sign-off/comments by 6:00PM TODAY. Thank you!

DRAFT -- NOT FOR RELEASE

September 28, 1999
(House Rules)

H.R. 2436 - Unborn Victims of Violence Act of 1999
(Rep. Graham (R) SC and 66 cosponsors)

The Administration strongly opposes enactment of H.R. 2436, which would make it a separate Federal offense to cause "death or bodily injury" to a "child in utero" in the course of committing certain specified Federal crimes. **If H.R. 2436 were presented to the President, his senior advisers would recommend that he veto the bill. [PENDING APPROVAL OF WH SENIOR STAFF]**

The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, has been a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created Federal domestic violence offenses with strong penalties to hold violent offenders accountable. To date, the Department of Justice has brought 179 VAWA and VAWA-related Federal indictments and awarded over \$700 million in VAWA grants to communities to assist in combating violence against women.

Unfortunately, H.R. 2436 is not designed to respond to violence against women. The Administration has significant public policy concerns with the legislation, as described in the Department of Justice letter to the House Committee on the Judiciary on September 9, 1999. For example, H.R. 2436 would: (1) trigger an excessive increase in the length of the sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant; (2) depart from the ordinary rule that punishment should correspond to culpability, as evinced by the defendant's mental state; and (3) identify a fetus as a separate and distinct victim of a crime, which is unprecedented as a matter of Federal statute, and unnecessary to achieve the goal of increasing the punishment for violence against pregnant women.

H.R. 2436 is careful to recognize that abortion-related conduct is constitutionally protected; however, this does not remove all doubt about the bill's constitutionality, as explained in the Department of Justice letter to the House Committee on the Judiciary on September 9th.

Although the Administration strongly opposes H.R. 2436, it is willing to work with Congress to develop legislation that would strengthen the punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by VAWA.

* * * * *

(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 NSD (White) and HD (Garcia). The Department of Justice (per Greg Jones, Office of Legislative Affairs) concurs in the position. The Departments of Defense (per Sam Brick) and Health and Human Services (per Richard Friedman) have no comment.

OMB/LA Clearance:

The Department of Justice strongly opposed H.R. 2436 in a letter to the House Judiciary Committee on September 9, 1999. H.R. 2436 was ordered reported by the House Judiciary Committee on September 14th by a vote of 14-11.

Summary of H.R. 2436

As ordered reported, H.R. 2436 would make it a separate Federal offense to cause "death or bodily injury" to "a child in utero" in the course of committing any one of 68 enumerated Federal crimes. The enumerated crimes cover a broad range of activities - from assault or murder, to damaging religious property, and animal enterprise terrorism. H.R. 2436 would prohibit prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency," and of any persons for medical treatment of the

pregnant woman or her unborn child. Under the bill, the punishments correspond to those in current law, but could be doubled to take into account injury to, or death of, a fetus. H.R. 2436 would not permit the imposition of the death penalty for convictions under this legislation. The bill's provisions would also apply to crimes committed under military jurisdiction.

Pay-As-You-Go Scoring

According to NSD (White), H.R. 2436 would not affect direct spending or receipts; therefore, it is not subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990.

LEGISLATIVE REFERENCE DIVISION DRAFT
09/28/99 - 12:45 p.m.

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

September 29, 1999
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

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

H.R. 2436 - Unborn Victims of Violence Act of 1999

(Rep. Graham (R) SC and 66 cosponsors)

The Administration strongly opposes enactment of H.R. 2436, which would make it a separate Federal offense to cause "death or bodily injury" to a "child in utero" in the course of committing certain specified Federal crimes. If H.R. 2436 were presented to the President, his senior advisers would recommend that he veto the bill.

The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, marked a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created Federal domestic violence offenses with strong penalties to hold violent offenders accountable. To date, the Department of Justice has brought 179 VAWA and VAWA-related Federal indictments and awarded over \$700 million in VAWA grants to communities to assist in combating violence against women.

Unfortunately, H.R. 2436 is not designed to respond to violence against women. The Administration has significant public policy concerns with the legislation, as described in the Department of Justice letter to the House Committee on the Judiciary on September 9, 1999. For example, H.R. 2436 would: (1) trigger an excessive increase in the length of the sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant; (2) depart from the traditional rule that criminal punishment should correspond to the knowledge and intent of the defendant; and (3) identify a fetus as a separate and distinct victim of a crime, which is unprecedented as a matter of Federal statute, and unnecessary to achieve the goal of increasing the punishment for violence against pregnant women.

H.R. 2436 is careful to recognize that abortion-related conduct is constitutionally protected; however, this does not remove all doubt about the bill's constitutionality, as explained in the Department of Justice letter to the House Committee on the Judiciary on September 9th.

~~The Administration strongly opposes H.R. 2436.~~ We understand, however, that Representative Lofgren will offer an alternative that appropriately focuses on increasing the punishment for violence against pregnant women without identifying a fetus as a separate and distinct victim of a crime.

The Administration is willing to work with Congress to develop legislation that would strengthen the punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by VAWA.

* * * * *

H.R. 2436 – the “Unborn Victims of Violence Protection Act”

Background: H.R. 2436 creates a new federal offense for causing “death or bodily injury” to a “child in utero” in the course of committing certain specified federal crimes. The bill contains exceptions for legal abortions, and acts by the woman or persons providing medical treatment. The bill has passed subcommittee and committee on party-line votes, and is scheduled for consideration by the full House on Thursday, September 30, 1999. DoJ sent a letter to Chairman Hyde on September 9, 1999 strongly opposing the bill, and the White House has issued a Statement of Administration Position with a veto threat by the President’s senior advisors.

Q & A:

Q: Why do you oppose this bill?

A: This bill creates a new federal offense for injuring or killing a fetus during the commission of certain federal crimes that are enumerated in the bill. H.R. 2436 identifies the fetus as a separate and distinct victim of crime. While additional punishment for harm to a pregnant woman is an appropriate goal, we believe this bill is an unwise means to that goal. Fetal protection is unprecedented as a matter of federal statute, and we believe it is unwise policy that comes dangerously close to defining when life begins. For our additional specific concerns, I would refer you to the views letter we sent to Chairman Hyde on September 9th.

Q: Don’t you care about babies being killed?

A: Many of the underlying crimes in Mr. Graham’s bill are horrible, and no one should have to experience any of these crimes. For women who have chosen to have a child, any crime which causes harm or death to the fetus they are carrying is made all the more painful. We should help these women by doing more to address the violence that continues to haunt our society. Congress can help us do this by passing a reauthorization of the Violence Against Women Act. The answer to the problem of violence against women, pregnant or not, is not to give fetus’ rights in our federal criminal laws.

Q: Will this bill be vetoed?

A: Should this bill reach the President’s desk, his senior advisors have stated that they will recommend a veto.

Q: What would you support?

A: We would support a bill that would strengthen punishment for intentional violence against a woman whom the perpetrator knows or should know is pregnant.

Q: Do you support the Democratic/Congresswoman Lofgren’s alternative to this bill?

A: Congresswomen Lofgren and Lowey have worked very hard on this issue, and we believe

their alternative is a critical step in the right direction, although we cannot offer our full support. We would offer to work with them on legislation which protects pregnant women from violence.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 9, 1999

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

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2436, the "Unborn Victims of Violence Act of 1999."

Section 2 of H.R. 2436 would make it a separate federal offense to cause "death or bodily injury" to "a child in utero" in the course of committing any one of 68 enumerated federal crimes.¹ The punishment for the new crime under H.R. 2436 is the same as if the harm had been inflicted upon the "unborn child's mother," except that the death penalty is not permitted. Section 3 of H.R. 2436 would make substantively identical amendments to the Uniform Code of Military Justice.

The Justice Department strongly objects to H.R. 2436 as a matter of public policy and also believes that in specific circumstances, illustrated below, the bill may raise a constitutional concern. The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, has been a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created federal domestic violence offenses with strong penalties to hold violent offenders accountable. While most domestic violence

¹ The enumerated crimes cover a broad range of activities -- from assault or murder within United States jurisdiction, 18 U.S.C. §§ 113-115, 1111-1119, to damaging religious property, 18 U.S.C. § 247, and animal enterprise terrorism, 18 U.S.C. § 43.

crimes are appropriately prosecuted at the state and local level, the Department of Justice has brought 179 VAWA and VAWA-related federal indictments to date, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$700 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence and sexual assault. These funds have made a difference in women's lives, and in how communities respond to violence against women. Indeed, these funds have helped save the lives of many victims of domestic violence.

If the Committee wants to make a difference in the lives of women victims of violence, it should reauthorize the Violence Against Women Act. We hope that Congress will work with us on this common goal. H.R. 2436, however, is not an adequate response to violence against women. Our three main objections to H.R. 2436 are described below.

First, H.R. 2436 provides that the punishment for a violation shall be the same as the punishment that would have been imposed had the pregnant woman herself suffered the injury inflicted upon her fetus. The Department agrees that some additional punishment may be warranted for injury to pregnant women. H.R. 2436, however, would trigger a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant.

Second, H.R. 2436 expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, for example, if a police officer uses a slight amount of excessive force to subdue a female suspect -- without knowing or having any reason to believe that she was pregnant -- and she later miscarries, the officer could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evinced by the defendant's mental state.²

² H.R. 2436 also could be read to impose two punishments for the same injury. Under the newly created § 1841(a)(2)(C), intentional injury to the "child in utero" is to be treated as murder or manslaughter, but the bill does not specify whether

Third, H.R. 2436's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. Such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women. Additionally, such an approach is unwise to the extent that it may be perceived as gratuitously plunging the federal government into one of the most -- if not the most -- difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues.

Our policy concerns with H.R. 2436 are exacerbated by the likelihood that the bill will yield little practical benefit. Because the criminal conduct that would be addressed by H.R. 2436 is already the subject of federal law (since any assault on an "unborn child" cannot occur without an assault on the pregnant woman), H.R. 2436 would not provide for the prosecution of any additional criminals. At the same time, prosecutors proceeding under H.R. 2436 would be likely to encounter difficulty collecting evidence to support their prosecutions. For instance, the prosecutor would have to establish that the defendant's conduct "cause[d]" the injury -- given the inherent risk of miscarriage and birth defects that occur absent any human intervention, causation may be very difficult to establish.

Finally and critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.³ The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."⁴ Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face,

this treatment supplants or supplements H.R. 2436's default punishment -- the punishment the defendant would receive had he injured the pregnant woman.

³ See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

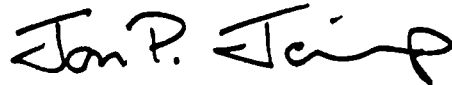
⁴ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her "unborn child."

encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

For these reasons, we strongly oppose H.R. 2436. The Administration, however, would work with Congress to develop alternative legislation that would strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by this historic legislation.

Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon P. Jennings". The signature is fluid and cursive, with the first name "Jon" and last name "Jennings" clearly distinguishable.

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member

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Unborn Victims of Violence Act of 1999 (Introduced in the House)

HR 2436 IH

106th CONGRESS

1st Session

H. R. 2436

To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

July 1, 1999

Mr. GRAHAM (for himself, Mr. SMITH of New Jersey, and Mr. CANADY of Florida) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes.

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 'Unborn Victims of Violence Act of 1999'.

SEC. 2. PROTECTION OF UNBORN CHILDREN.

(a) IN GENERAL- Title 18, United States Code, is amended by inserting after chapter 90 the following:

CHAPTER 90A--PROTECTION OF UNBORN CHILDREN

Sec.

1841. Protection of unborn children.

Sec. 1841. Protection of unborn children

(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2) The punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother, except that the death penalty shall not be imposed.

(b) The provisions referred to in subsection (a) are the following:

(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229A(a)(2), 242, 245, 247, 248, 351, 831, 844(d), (f), and (i), 924(j), 930, 1111, 1112, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203(a), 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1952(a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261a, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848).

(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

(c) Nothing in this section shall be construed to permit the prosecution--

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) As used in this section, the term 'unborn child' means a child in utero.'

(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 90 the following new item:

1841'.

SEC. 3. MILITARY JUSTICE SYSTEM.

(a) PROTECTION OF UNBORN CHILDREN- Subchapter X of chapter 47 of title 10, United States

Code (the Uniform Code of Military Justice), is amended by inserting after section 919 (article 119) the following new section:

'Sec. 919a. Art. 119a. Protection of unborn children

'(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

'(2) The punishment for that separate offense is the same as the punishment provided for that conduct under this chapter had the injury or death occurred to the unborn child's mother, except that the death penalty shall not be imposed.

'(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

'(c) Subsection (a) does not permit prosecution--

'(1) for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency;

'(2) for conduct relating to any medical treatment of the pregnant woman or her unborn child; or

'(3) of any woman with respect to her unborn child.

'(d) In this section, the term 'unborn child' means a child in utero.'

(b) CLERICAL AMENDMENT- The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 919 the following new item:

'919a. 119a. Protection of unborn children.'

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<http://www4.law.cornell.edu/cql-bin/tx>
Just enter in the cite, e.g. 18 USC 36.

List of sections referenced in Section 2(b)(1). Protection of Unborn Children of HR 2436:
Note: All of these sections are Title 18, USC:

Sec. 36. Drive-by shooting
Sec. 37. Violence at international airports
Sec. 43. Animal enterprise terrorism
Sec. 111. Assaulting, resisting, or impeding certain officers or employees
Sec. 112. Protection of foreign officials, official guests, and internationally protected persons
Sec. 113. Assaults within maritime and territorial jurisdiction
Sec. 114. Maiming within maritime and territorial jurisdiction
Sec. 115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member
Sec. 229A(a)(2) Death penalty: any person who violates section 229 [chemical weapons]
Sec. 242. Deprivation of rights under color of law
Sec. 245. Federally protected activities
Sec. 247. Damage to religious property; obstruction of persons in the free exercise of religious beliefs
Sec. 248. Freedom of access to clinic entrances
Sec. 351. Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault; penalties
Sec. 831. Prohibited transactions involving nuclear materials
Sec. 844(d). Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive
Sec. 844(f). Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive
Sec. 844(l). Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive
Sec. 924(j). A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm
Sec. 930. Possession of firearms and dangerous weapons in Federal facilities
Sec. 1111. Murder
Sec. 1112. Manslaughter
Sec. 1114. Protection of officers and employees of the United States
Sec. 1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons
Sec. 1118. Murder by a Federal prisoner
Sec. 1119. Foreign murder of United States nationals
Sec. 1120. Murder by escaped prisoners
Sec. 1121. Killing persons aiding Federal investigations or State correctional officers
Sec. 1153(a). Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming
Sec. 1201. Kidnapping (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person
Sec. 1203. Hostage taking

Sec. 1365. Tampering with consumer products (a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury
Sec. 1501. Assault on process server Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States
Sec. 1503. Influencing or injuring officer or juror generally (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication
Sec. 1505. Obstruction of proceedings before departments, agencies, and committees
Sec. 1512. Tampering with a witness, victim, or an informant
Sec. 1513. Retaliating against a witness, victim, or an informant
Sec. 1751. Presidential and Presidential staff assassination, kidnapping, and assault
Sec. 1864. Hazardous or injurious devices on Federal lands
Sec. 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
Sec. 1958. Use of interstate commerce facilities in the commission of murder-for-hire
Sec. 1959. Violent crimes in aid of racketeering activity
Sec. 1992. Wrecking trains
Sec. 2113. Bank robbery and incidental crimes
Sec. 2114. Mail, money, or other property of United States
Sec. 2116. Railway or steamboat post office Whoever, by violence, enters a post-office car
Sec. 2118. Robberies and burglaries involving controlled substances
Sec. 2119. Motor vehicles Whoever, with the intent to cause death or serious bodily harm
Sec. 2191. Cruelty to seamen
Sec. 2231. Assault or resistance (a) Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants
Sec. 2241. Aggravated sexual abuse
Sec. 2245. Sexual abuse resulting in death
Sec. 2261(a). Interstate domestic violence. Offenses
Sec. 2280. Violence against maritime navigation
Sec. 2281. Violence against maritime fixed platforms
Sec. 2332. Criminal penalties (a) Homicide (b) Attempt or Conspiracy With Respect to Homicide
Sec. 2340A. Torture
Sec. 2441. War crimes

List of sections referenced in Section 2(b)(2). Protection of Unborn Children of HR 2436:

Note: All of these sections are Title 21 USC:

Sec. 848. Continuing criminal enterprise (a) Penalties; forfeitures Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment

List of sections referenced in Section 2(b)(3). Protection of Unborn Children of HR 2436:

Note: All of these sections are Title 42 USC:

Sec. 2283. Protection of nuclear inspectors (a) Homicide Whoever kills any person who performs any inspections which - (1) are related to any activity or facility licensed by the Commission

List of Sections Referenced in Sec. 3. Military Justice System of HR 2436:

Note: These are all Title 10 USC:

Sec. 918. Art. 118. Murder Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being

Sec. 919. Art. 119. Manslaughter (a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being

Sec. 919(b)(2). Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being ... while perpetrating or attempting to perpetrate an offense, other than those named in clause

Sec. 920. Art. 120. Rape and carnal knowledge

Sec. 922. Art. 122. Robbery Any person subject to this chapter who with intent to steal takes anything of value from the person

Sec. 924. Art. 124. Maiming Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury

Sec. 926. Art. 126. Arson (a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure

Sec. 928. Art. 128. Assault (a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person

THE WHITE HOUSE

OFFICE OF LEGISLATIVE AFFAIRS

HOUSE LIAISON

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TO: Eric Liu, Nicole Rabner, Maria
Echaveste

FAX: 6-2878, 6-1907

FROM:

☒ BRODERICK JOHNSON
☐ AL MALDON
☐ LISA KOUNToupES
☐ JANELLE ERICKSON

☐ JOSH ACKIL
☐ ERICA MORRIS
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☐ BRIAN MASON

(202)456-6620 (TELEPHONE)

(202)456-2604 (FAX)

SUBJECT:

Revised version of Lofgren Substitute to
meet parliamentary concerns

1 OF 4

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ILLU.

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2436, AS REPORTED
OFFERED BY MS. LOFGREN OF CALIFORNIA

Strike all after the enacting clause and insert the
following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Motherhood Protection
3 Act of 1999".

4 SEC. 2. CRIMES AGAINST A WOMAN—TERMINATING HER
5 PREGNANCY.

6 (a) Whoever engages in any violent or assaultive con-
7 duct against a pregnant woman resulting in the conviction
8 of the person so engaging for a violation of any of the
9 provisions of law set forth in subsection (c), and thereby
10 causes an interruption to the normal course of the preg-
11 nancy resulting in prenatal injury (including termination
12 of the pregnancy), shall, in addition to any penalty im-
13 posed for the violation, be punished as provided in sub-
14 section (b).

15 (b) The punishment for a violation of subsection (a)
16 is—

17 (1) if the relevant provision of law set forth in
18 subsection (c) is set forth in paragraph (1), (2), or
19 (3) of that subsection, a fine under title 18, United

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1 States Code, or imprisonment not more than 20
2 years, or both, but if the interruption terminates the
3 pregnancy, a fine under title 18, United States
4 Code, or imprisonment for any term of years or for
5 life, or both; and

6 (2) if the relevant provision of law is set forth
7 in subsection (c)(4), the punishment shall be the
8 such punishment (other than the death penalty) as
9 the court martial may direct.

10 (c) The provisions of law referred to in subsection (a)
11 are the following:

12 (1) Sections 36, 37, 43, 111, 112, 113, 114,
13 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f),
14 (h)(1), and (i), 924(j), 930, 1111, 1112, 1114,
15 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a),
16 1203(a), 1365(a), 1501, 1503, 1505, 1512, 1513,
17 1751, 1864, 1951, 1952(a)(1)(B), (a)(2)(B), and
18 (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116,
19 2118, 2119, 2191, 2231, 2241(a), 2245, 2261,
20 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A,
21 and 2441 of title 18, United States Code.

22 (2) Section 408(e) of the Controlled Substances
23 Act of 1970 (21 U.S.C. 848).

24 (3) Section 202 of the Atomic Energy Act of
25 1954 (42 U.S.C. 2283).

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- 1 (4) Sections 918, 919(a), 919(b)(2), 920(a),
- 2 922, 924, 926, and 928 of title 10, United States
- 3 Code (articles 118, 119(a), 119(b)(2), 120(a), 122,
- 4 124, 126, and 128).

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Edrie Acheson	DOJ/OPD	514-4601	514-2424
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~~Brian Hoffstad~~



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

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FROM: R. Robin

PHONE NO. 4-2141

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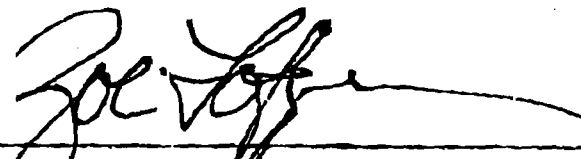
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COMMENTS _____

**Summary of Lofgren-Conyers Amendment
in the Nature of a Substitute to HR 2436**

The Lofgren-Conyers Amendment, the "Motherhood Protection Act of 1999," is an overall substitute to the committee bill, the "Unborn Victims of Violence Act," HR 2436, and creates a crime for any violent or assaultive conduct against a pregnant woman that interrupts or terminates her pregnancy and makes any interruption punishable by a fine and imprisonment up to twenty years but, if the pregnancy is terminated, punishable by a fine and imprisonment up to life.


Congresswoman Zoe Lofgren

Contact: John Flannery (Phone: 226-2211, or 225-3072)

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H.L.C.

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2436, AS REPORTED
OFFERED BY MS. LOFGREN OF CALIFORNIA**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Motherhood Protection
3 Act of 1999".

**4 SEC. 2. CRIMES AGAINST A WOMAN—TERMINATING HER
5 PREGNANCY.**

6 (a) Whoever engages in any violent or assaultive con-
7 duct against a pregnant woman resulting in the conviction
8 for any of the provisions of law set forth in subsection
9 (b), and thereby causes the interruption of the normal
10 course of the pregnancy, shall, in addition to any penalty
11 imposed for the violation, be fined under title 18, United
12 States Code, or imprisoned not more than 20 years, or
13 both, but if the interruption terminates the pregnancy, the
14 defendant shall, in addition to any penalty imposed for
15 the violation, be fined under this title or imprisoned for
16 any term of years or for life, or both.

17 (b) The provisions of title 18, United States Code,
18 referred to in subsection (a) are the following:

*resulting
in
prenatal
injury*

ZOE LOFGREN
18TH DISTRICT, CALIFORNIA

COMMITTEES
COMMITTEE ON THE JUDICIARY
 SUBCOMMITTEE ON COURTS AND
 INTELLECTUAL PROPERTY
 SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
COMMITTEE ON SCIENCE
 SUBCOMMITTEE ON SPACE AND AERONAUTICS
 SUBCOMMITTEE ON ENERGY AND ENVIRONMENT
**COMMITTEE ON STANDARDS OF
 OFFICIAL CONDUCT**

Congress of the United States
House of Representatives
 Washington, DC 20515-0515

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STATEMENT BY CONGRESSWOMAN ZOE LOFGREN
MARKUP, UNBORN CHILD PROTECTION BILL
 September 14, 1999

This amendment is simple. It proposes to substitute sections one and two of the unborn child protection act, and only those sections. I don't seek to change section three as I'm informed by the parliamentarian to do so would raise a germaneness objection. This amendment, offered by the Ranking Member and myself, recognizes that there are existing crimes in Federal law that protect women from violence... such as violent assault. Further, this amendment recognizes that, when such crimes not only hurt the woman, but also cause her to miscarry, there is additional harm to that woman. This amendment enhances the sentence one can receive for causing this additional harm for up to a life sentence.

Why is it important for us to pass this amendment for such crime and to enhance the penalty?

All of us here on the Committee have had exciting moments. Sometimes even fame or at least notoriety. We've had moments of meaning, even thrilling moments. But, for me, the most excitement, the biggest thrill of my entire life, were the two moments when my children were born.

Nothing compares. All the richness and goodness I've been fortunate to experience has been pallid compared to becoming a mother and raising those children.

I have two wonderful kids, but I lost the chance for our third. I'll never forget the disappointment, really the devastation, I felt on that day, my 39th birthday, when I suffered a miscarriage in my fifth month of pregnancy.

Now, why would I bring such a personal matter up in public? Because, although we are, as usual, engaged in a political contest here in the House Judiciary Committee, the subject of this political contest concerns matters quite personal to a woman.

The bill before us, let's be clear, is another attempt to cut away at the rights of women to determine their own reproductive choices.

The men who have promoted this bill in committee today are, I believe, sincere in their zealotry in behalf of their cause, namely, that the government makes the choice of whether or not a woman gives birth, not the woman.

Now, I don't agree with that position. But I do recognize that is what this bill is about.

That's why, although dressed up as a crime bill, this bill was never reviewed by the Crime subcommittee — no, it was a product of the Constitution subcommittee whose Chairman has, as a goal, to repeal the reproductive freedoms now available to women in America.

Like so many other products of that subcommittee, it advances a political cause while overlooking what really matters to the mothers of America.

Indeed, if someone violently assaults a pregnant woman and that woman miscarries and loses the child she so much desires, that is, indeed, a great offense.

While my own miscarriage was at the hand of God, not the hand of an assailant, I understand the loss.

I feel that loss still. Life goes on, as it must, but that sense of loss, the sadness and disappointment, stays with a woman — maybe forever.

So that is why I offer this substitute to Mr. Canady's bill.

Assaults that cause a woman to miscarry — that cause the suffering that other women and I personally have felt, that destroy the hope that pregnant woman has — are offenses of such dire consequence that they must be considered extraordinary.

A wanted and hoped-for child lost to miscarriage, whether through violence or fate, is an injury to the woman who would be a mother that is monumental and everlasting.

If the goal in criminal law is over properly vengeance, then this loss calls out for vengeance.

If the goal is justice, then contrast the proposed penalty for this grievous injury to a woman with other offenses deemed worthy of up to a maximum sentence of life. You may sentence the accused up to life for exploiting children, for drug trafficking, for aggravated sexual assault of an underage child and for many more crimes.

I offer this substitute that would recognize the crime and enhance the sentence for anyone who would assault a pregnant woman if that assault causes her to miscarry.

Such a penalty is warranted and it should be huge. If the woman will mourn and all her life wistfully consider her denied opportunity to raise the child lost as a product of the assault, then her assailant should consider the gravity of his offense to that woman in a prison cell, and perhaps for the same amount of time.

My substitute focuses on what is real for American women: Oppose violence against women. Don't use that violence as an excuse to eliminate personal choice about reproduction for American women.

Decisions made by the Republican Congressmen on this Committee and the Republicans in this House should not boss around the women of America. Women in America need protection against violence. Of course, they may also need protection against the Republican Party who wants to tell them what to do in their lives and who think it is acceptable to use the tragedy of miscarriage to advance the political goal of repealing reproductive rights.

NARAL Promoting Reproductive Choice

CONGRESS SHOULD NOT DEPLOY FEDERAL PROSECUTORS ON BEHALF OF THE UNBORN

For the first time, Congress is poised to hold hearings on a "fetal protection" bill, H.R. 2436. The bill, entitled the "Unborn Victims of Violence Act of 1999," would amend the criminal code and the Uniform Code of Military Justice to create new federal crimes for bodily injury or death of an "unborn child" who is "in utero" at the time the act took place. "Bodily injury" is defined by reference in such a sweeping manner that it would encompass even such speculative harms as "fetal pain." Although the bill properly includes exceptions for consensual or emergency abortions, medical treatment and the woman's conduct, it nonetheless forges new ground in attempting to recognize the fetus as a person with the same legal status as the woman or anyone else who has been born. H.R. 2436 opens the way to litigation over when life begins and mini-trials on fetal pain embedded within criminal prosecutions. It marks a major departure from existing federal law and threatens to erode the foundations of the right to choose as recognized in *Roe v. Wade*, 410 U.S. 113 (1973).

We recognize that intentional criminal acts that cause a miscarriage or interrupt normal fetal development are indeed tragedies for the woman and her family that are worthy of redress. But the approach taken by H.R. 2436 is misguided and threatening to women's rights. Congress should instead enact the Violence Against Women Act II and support a range of programs that promote healthy childbearing. In the criminal arena, it should enhance penalties imposed for a range of federal crimes when the crime results in a miscarriage or an interruption of normal fetal development.

Reject the Agenda of the Bill's Sponsors.

- The sponsors of this bill are not supporters of a woman's right to choose. *Roe v. Wade* rejected the suggestion that "by adopting one theory of life," that is, granting personhood to the fetus, "Texas may override the rights of the pregnant woman that are at stake," 410 U.S. at 162. It noted that except in narrowly defined situations and except when the rights are contingent upon live birth, "the unborn have never been recognized in the law as persons in the whole sense." *Id.* Yet *Roe* and the state cases liberalizing abortion rights that preceded it sparked a movement to grant the fetus legal recognition as full persons. H.R. 2436 is a manifestation of this effort to endow fetuses themselves with rights -- such as recognition as being a victim of a crime -- and to thus erode the foundational premise of *Roe v. Wade*.

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- At a rhetorical level, the current version of H.R. 2436 reveals its intent to endow fetuses with rights by calling the fetus — and perhaps even an embryo — a “child.” It thus elevates the fetus to the status of a person, attacking the premise of *Roe v. Wade*. And this rhetoric renders the bill vague, perhaps in some instances unconstitutionally so. It is unclear as to when during pregnancy these new felonies may arise — at fertilization? implantation? when the woman realizes she’s pregnant? when the defendant realizes the woman is pregnant? when the fetus is viable? At a legal minimum, this ambiguity should be clarified, and rhetorically, the embryo or fetus should be called its medical term, not an “unborn child.”
- Pro-choice groups are properly concerned with legislation like this that recognizes fetal rights because of our experience in the states with state action to protect fetuses and fetal protection statutes, most of which significantly infringe upon public health and women’s rights. That is, H.R. 2436 takes a first step down a slope we already know to be slippery.
 - ▶ For instance, South Carolina now prosecutes women whose babies are found to have drugs in their system. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998). Such prosecutions deter women from seeking prenatal care, and, according to the General Accounting Office (GAO), such prosecutions will discourage women from seeking care during delivery. Women using drugs fear that medical professionals will discover their drug use and turn them over to the authorities for prosecution. Lack of prenatal care or assistance in delivery dramatically increases the dangers for both the mother and the baby.
 - ▶ Other state statutes, creating civil causes of action that may be brought by persons other than the woman when she miscarries due to negligence or recklessness, could result in trimming pregnant women’s liberty. That is, if an airline feared that it would be subject to a complaint for allowing a pregnant woman who miscarried to travel, airlines would be reluctant to sell tickets to pregnant women. Similarly, gyms might refuse to allow pregnant women to work out, fearing that any miscarriages would be attributable to them. Very quickly, pregnant women would become “protected” in a cage of restrictive private rules.
 - ▶ The situation only worsens if the woman herself can be sued by the “father” of the fetus or other third parties. Then all her conduct during and perhaps even before pregnancy become subject to judicial scrutiny. Whether she works or stays in bed, exercises or doesn’t exercise, takes medicine or toughs out an illness -- all her conduct could be second-guessed in a court of law when such civil actions arising from harms or death of a fetus are recognized.
 - ▶ In other instances, judges and prison officials have elevated the fetus to a status on par with or above the woman -- denying women abortions, incarcerating them to prevent possible harm to the fetus, and coercing sterilization or long-term contraception. See The NARAL Foundation®, *Unjust Punishment, Forced*

Contraception, and Poor Treatment of Women by the Courts and Prisons. (Copy attached).

Intentional Harms Against A Pregnant Woman that Result in Harm to or Death of a Fetus are a Proper Subject of Punishment, but the Focus must be on the Harm to the Woman.

- Society is of course properly concerned with assaults and murders, and this is reflected in our criminal code. These crimes are particularly offensive to Americans when they are committed upon a pregnant woman, causing her to miscarry or to deliver an injured baby. To address this problem, Congress should focus on the fact that the principal harm arising from such acts is to the woman who was pregnant. Instead, by creating a new criminal statute such as in H.R. 2436, it makes the government the protector of "unborn children" -- a role with troublesome ramifications for a woman's right to choose.

- ▶ **Violence Against Women.** To deter crimes against pregnant women and provide punishment for those who commit assaults or murders upon pregnant women, thereby causing the death of or injury to a fetus, Congress should pursue other avenues that focus on the harm to the woman. One limited step Congress has commendably taken already was enacting the Violence Against Women Act (VAWA), 18 U.S.C. § 2261. It is well known that domestic abuse in particular often escalates when a woman is pregnant. "Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 889 (1992) (citing expert witness testimony).

Congress should follow up on this 1994 law by enacting VAWA II, H.R. 357, which, among other things, would continue the commitment of VAWA I by providing grants for law enforcement and prosecution to combat violent crimes against women and expanding victims' services. In fact, co-sponsoring VAWA II would be an important first step to take by the sponsors of H.R. 2436, Representatives Graham, Smith of New Jersey, and Canady, who have not signed on to VAWA II as of July 19, 1999.

- ▶ **Augment Sentences in the Event of Miscarriage or Interruption of Normal Fetal Development.** Congress could bolster its efforts on behalf of pregnant women -- without upending years of law on personhood -- by enhancing the penalties provided for the underlying crime against the woman if she suffered injury to her fetus or a miscarriage.

Enhancing the penalty would recognize that the harm from the underlying offense was indeed greater as a result of the injury or death to the fetus, and the enhanced penalty could steepen as the pregnancy progressed.

By contrast, under the current version, it appears that the crime is of the same magnitude regardless of whether the pregnancy is visible and known -- or hidden and unknown -- to the perpetrator. Defendants will inevitably lodge due process challenges as a result. Instead, judges could and should enhance the penalty as the pregnancy progresses. And the penalty should be very harsh indeed at the later stages of pregnancy.

In fact, if protecting the woman's interest in her developing fetus is accomplished through sentencing enhancements, prosecutors would actually be more likely to bring such matters to justice and to prevail. That is, if a separate crime is charged, as is proposed in H.R. 2436, it must be presented to a grand jury or otherwise indicted and charged separately, and each element of the offense must be proven beyond a reasonable doubt, generally without using hearsay testimony. On the other hand, if the penalty were simply enhanced, prosecutors could prove the death or injury of the fetus under a preponderance of the evidence standard at a sentencing hearing and any pertinent facts would be easier to prove because hearsay evidence could be admitted. In fact, prosecutors might well shy away from prosecutions under current version of H.R. 2436, because complicated -- and sometimes constitutional -- issues of what an "unborn child" is, for instance, could muddle the central issues in the case. Jurors would get tangled up in questions of whether the defendant knew the woman was pregnant, whereas if a sentence is enhanced, the judge alone can consider the scope of harms to the woman and enhance the sentence accordingly.

**If Congress Wants to Protect the Unborn, it Should Focus on Giving Babies
a Healthy Start by Protecting Women's Health.**

- Other policies that do not break new ground in recognizing "fetal rights" would surely benefit the health of pregnant women and the fetuses they carry. Pregnancies are healthier and babies are healthier when pregnancies are planned. So Congress should do everything in its power to ensure access to contraception, such as by enacting the Equity in Prescription Contraceptive Coverage Act (EPICC), to ensure equitable treatment by insurers of women's contraceptive needs. Title X -- which not only funds contraception but also a range of reproductive health services -- has for years been grossly underfunded and could serve far more low-income women with better funding. Approximately 43 million Americans are uninsured; of these, women of childbearing age and their fetuses are thus at risk. In addition, it is well known that women with addictions to drugs or alcohol who seek treatment while they are pregnant face grave problems in locating such treatment programs. Funding voluntary treatment programs could help to alleviate this problem. In sum, in addition to enacting VAWA II, Congress could take a range of steps to promote women's reproductive health, thereby helping to ensure a healthy start for millions of babies.

September 24, 1999
(House)

H.R. 2436 - Unborn Victims of Violence Act of 1999
(Rep. Graham (R) SC and 26 cosponsors)

The Administration strongly opposes enactment of H.R. 2436, which would make it a separate Federal offense to cause "death or bodily injury" to a "child in utero" in the course of committing certain specified Federal crimes.

The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, has been a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created Federal domestic violence offenses with strong penalties to hold violent offenders accountable. To date, the Department of Justice has brought 179 VAWA and VAWA-related Federal indictments and awarded over \$700 million in VAWA grants to communities to assist in combating violence against women.

Unfortunately, H.R. 2436 is not an adequate response to violence against women, because of public policy and constitutional concerns. For example, H.R. 2436 would: (1) trigger an excessive increase in the length of the sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant; (2) depart from the ordinary rule that punishment should correspond to culpability; as evinced by the defendant's mental state; and (3) identify a fetus as a separate and distinct victim of a crime, which is unprecedented as a matter of Federal statute, and unnecessary to achieve the goal of increasing the punishment for violence against pregnant women.

H.R. 2436 is careful to recognize that abortion-related conduct is constitutionally protected; however, it does not remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

Although the Administration strongly opposes H.R. 2436, it is willing to work with Congress to develop legislation that would strengthen the punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by VAWA.

The substitute offered by Rep. Lofgren is far pref. in that it moves in two directions.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2436, the "Unborn Victims of Violence Act of 1999."

Section 2 of H.R. 2436 would make it a separate federal offense to cause "death or bodily injury" to "a child in utero" in the course of committing any one of 68 enumerated federal crimes.¹ The punishment for the new crime under H.R. 2436 is the same as if the harm had been inflicted upon the "unborn child's mother," except that the death penalty is not permitted. Section 3 of H.R. 2436 would make substantively identical amendments to the Uniform Code of Military Justice.

*and
S.M.
vs
women*

The Justice Department strongly objects to H.R. 2436 as a matter of public policy and also believes that in specific circumstances, illustrated below, the bill may raise a constitutional concern. The Administration has made the fight against domestic violence a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, has been a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created federal domestic violence offenses with strong penalties to hold violent offenders accountable. While most domestic violence crimes are appropriately prosecuted at the state and local level, the Department of Justice has brought 179 VAWA and VAWA-related

¹ The enumerated crimes cover a broad range of activities -- from assault or murder within United States jurisdiction, 18 U.S.C. §§ 113-115, 1111-1119, to damaging religious property, 18 U.S.C. § 247, and animal enterprise terrorism, 18 U.S.C. § 43.

federal indictments to date, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$700 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence and sexual assault. These funds have made a difference in women's lives, and in how communities respond to violence against women. Indeed, these funds have helped save the lives of many victims of domestic violence.

If the Committee wants to make a difference in the lives of women victims of ~~domestic~~ violence, it should reauthorize the Violence Against Women Act. We hope that Congress will work with us on this common goal. H.R. 2436, however, is not an adequate response to ~~domestic~~ violence against women. Our three main objections to H.R. 2436 are described below.

First, H.R. 2436 provides that the punishment for a violation shall be the same as the punishment that would have been imposed had the pregnant woman herself suffered the injury inflicted upon her fetus. The Department agrees that some additional punishment may be warranted for injury to pregnant women. H.R. 2436, however, would trigger a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant.

Second, H.R. 2436 expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, for example, if a police officer uses a slight amount of excessive force to subdue a female suspect -- without knowing or having any reason to believe that she was pregnant -- and she later miscarries, the officer could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evinced by the defendant's mental state.²

Third, H.R. 2436's identification of a fetus as a separate

² H.R. 2436 also could be read to impose two punishments for the same injury. Under the newly created § 1841(a)(2)(C), intentional injury to the "child in utero" is to be treated as murder or manslaughter, but the bill does not specify whether this treatment supplants or supplements H.R. 2436's default punishment -- the punishment the defendant would receive had he injured the pregnant woman.

and distinct victim of crime is unprecedented as a matter of federal statute. Such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women. Additionally, such an approach is unwise to the extent that it may be perceived as gratuitously plunging the federal government into one of the most -- if not the most -- difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues.

Our policy concerns with H.R. 2436 are exacerbated by the likelihood that the bill will yield little practical benefit. Because the criminal conduct that would be addressed by H.R. 2436 is already the subject of federal law (since any assault on an "unborn child" cannot occur without an assault on the pregnant woman), H.R. 2436 would not provide for the prosecution of any additional criminals. At the same time, prosecutors proceeding under H.R. 2436 would be likely to encounter difficulty collecting evidence to support their prosecutions. For instance, the prosecutor would have to establish that the defendant's conduct "cause[d]" the injury -- given the inherent risk of miscarriage and birth defects that occur absent any human intervention, causation may be very difficult to establish.

Finally and critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.³ The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."⁴ Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

For these reasons, we strongly oppose H.R. 2436. The Administration, however, would work with Congress to develop

³ See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

⁴ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her "unborn child."

Editorial

The New York Times
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September 14, 1999

Congressional Moves on Violence: On a Dangerous Path to Fetal Rights

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Congressional opponents of abortion rights have come up with yet another scheme to advance their agenda. Called the "Unborn Victims of Violence Act," and scheduled for action today by the House Judiciary Committee, the measure aims to chip away at women's reproductive freedom by granting new legal status to "unborn children" -- under the deceptively benign guise of fighting crime.

The bill would add to the Federal criminal code a separate new offense to punish individuals who injure or cause the death of a "child" who is "in utero" -- regardless of the stage of gestation or whether the perpetrator knew of the pregnancy. Under the measure, a prosecutor could choose to pursue a person for harming a fetus independent of whether he prosecuted that same person for harming the mother.

No one would quarrel that an attack on a pregnant woman that results in a miscarriage or prevents normal fetal development is a tragedy. Extra severe penalties in such cases may be appropriate. But that can be done by prosecuting a defendant for assaulting the pregnant woman. The pending bill, however, treats the woman as a different entity from the fetus -- in essence raising the status of a fetus to that of a person for law enforcement purposes -- a longtime goal of the right-to-life movement.

The bill contains exceptions for medical treatment and legal abortions. That has allowed the bill's sponsors to assert that the measure has nothing to do with the abortion issue. But that view is disingenuous. By creating a separate legal status for fetuses, the bill's supporters are plainly hoping to build a foundation for a fresh legal assault on the constitutional underpinnings of the Supreme Court's ruling in *Roe v. Wade*. Sending the nation down a legal path that could undermine the privacy rights of women is not a

reasonable way to protect women or deter crime.

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NARAL

OPPOSE H.R. 2436, THE UNBORN VICTIMS OF VIOLENCE ACT

H.R. 2436 — introduced by Representatives Lindsey Graham, Chris Smith, and Charles Canady — is designed to erode the foundation of a woman's right to choose as set forth in *Roe v. Wade* by elevating the legal status of all stages of prenatal development under federal law. This bill would amend the Federal Criminal Code and the Uniform Code of Military Justice to create a separate offense if, during commission of specific federal and military crimes, an individual causes death or injury to what the sponsors call "a member of the species homo sapiens at all stages of development." If enacted, H.R. 2436 would be the first federal law to recognize a zygote (fertilized egg), a blastocyst (preimplantation embryo), an embryo (through week 8 of a pregnancy) or a fetus as a person who can be an independent victim of a crime.

Acts of violence against women, especially pregnant women, are tragic and should be punished. The true aim of this legislation, however, is not to stop violence against women. In fact, protections for women — the principal victims of these crimes — are notably absent from H.R. 2436.

- ◆ This bill undermines a woman's right to choose by recognizing — for the first time under federal law — a zygote, blastocyst, embryo, or fetus as a person, with rights separate and equal to that of a woman and worthy of legal protection. The Supreme Court has held that fetuses are not persons within the meaning of the Fourteenth Amendment. This is a position with which even as staunch an opponent of *Roe* as Justice Antonin Scalia agrees.
- ◆ If enacted, H.R. 2436 will improperly inject debates about abortion into federal and military criminal prosecutions across the country. This, unfortunately, is precisely what the bill's proponents seek. They have crafted the bill to inflame the national debate about when life begins. The federal criminal and military courts are inappropriate forums for another skirmish in the war on a woman's right to choose.
- ◆ The sponsors of H.R. 2436 claim that this is a moderate crime bill that has nothing to do with abortion because it exempts from prosecution legal abortion, medical treatment, and the conduct of the woman. However, when pressed during Judiciary Committee debate, the bill's proponents candidly admitted that their purpose is to recognize the existence of a separate legal "person" where none currently exists.
- ◆ The chief sponsor of the bill, Representative Graham, amended his own legislation to make explicit that no knowledge of the pregnancy or intent to cause harm is necessary. This would allow courts to impose a punishment normally associated with intentional killing without a finding of intent. In the absence of a conviction for the underlying criminal offense, this is entirely unprecedented in the criminal law. In addition, it punishes the harm to the zygote, embryo or fetus while utterly ignoring the harm to the pregnant woman.
- ◆ H.R. 2436 fails to address the very real need for strong federal legislation to prevent and punish violent crimes against women. Nearly one in every three adult women experiences at least one physical assault by a partner during adulthood. To deter crimes against pregnant women and to punish those who assault or murder pregnant women, Congress should pursue other avenues that focus on the harm to the woman and the promotion of healthy pregnancies.

9/22/99

H.R. 2436 Undermines *Roe v. Wade*

Roe v. Wade established a woman's right to choose to terminate a pregnancy, while also recognizing a state's valid interest in potential life, carefully balancing the two. During the early stages of pregnancy, a woman's right to choose is absolute; however, as the pregnancy progresses, the weight of the state's interest becomes stronger.

H.R. 2436 threatens to upset this carefully crafted balance.

- * Roe holds that a fetus, even when viable, is not a "person" for purposes of the Fourteenth Amendment to the Constitution.
- * Only a "person" recognized by the Constitution can be the victim of a federal or military crime. There is no other example in the federal criminal code in which the victim of a crime resulting in death or bodily injury was not a "person" recognized under the Fourteenth Amendment.
- * H.R. 2436 recognizes a "member of the species homo sapiens at all stages of development" as a victim of a separate criminal offense, regardless of whether harm to the pregnant woman also occurred, and, if it did, regardless of whether the perpetrator is charged with an offense against the woman.
- * By recognizing a zygote, blastocyst, embryo, or fetus as a "person" for purposes of H.R. 2436, the sponsors of the bill embark down a path that threatens to chip away at Roe and the basic right of choice that it established.

Federal crimes mentioned in H.R. 2436 (Protection of Unborn Children bill)

<u>U.S. Code Section</u>	<u>Crime</u>
18 U.S.C. § 36	drive-by shooting (injuring or killing a person by firing a weapon into a crowd while committing a drug offense)
18 U.S.C. § 37	violence at international airports
18 U.S.C. § 43	animal enterprise terrorism (death or serious bodily injury in act of disrupting animal enterprise makes this aggravated offense)
18 U.S.C. § 111	assaulting, resisting, or impeding federal officers or employees
18 U.S.C. § 112	assaulting a foreign official, official guest, or internationally protected person
18 U.S.C. § 113	assault within U.S. maritime or territorial jurisdiction
18 U.S.C. § 114	maiming within U.S. maritime or territorial jurisdiction
18 U.S.C. § 115	assault, kidnap, or murder (or attempt or conspiracy) the family member of a federal official or employee, or the threat to do so as retaliation
18 U.S.C. § 229A(a)(2)	causing death through use of chemical weapons (this provision is actually a sentencing provision, not an actual offense)
18 U.S.C. § 242	deprivation of rights under color of law
18 U.S.C. § 245	protects a variety of federal activities (e.g., voting, jury service, receiving federal benefits and service) from force or threat of force, including for reasons of race, religion color, etc.
18 U.S.C. § 247	damaging religious property or obstructing free exercise of religion
18 U.S.C. § 248	use of force to injure, intimidate, or interfere with person obtaining or providing reproductive services or exercise of freedom of religion at place of religious worship
18 U.S.C. § 351	assassination, kidnap, or assault of member of Congress, Cabinet, Supreme Court, or Presidential/Vice Presidential candidate
18 U.S.C. § 831	causing death or serious bodily injury through use of nuclear material
18 U.S.C. § 844(d)	injuring or killing through transportation of explosive through interstate or foreign commerce
18 U.S.C. § 844(f)	injuring or killing by exploding or setting fire to a federal building, vehicle, or property
18 U.S.C. § 844(i)	injuring or killing by means of using fire or explosives to attempt to destroy building, vehicle, or property used in interstate or foreign commerce
18 U.S.C. § 930	unlawful possession of firearms and dangerous weapons in federal facilities
18 U.S.C. § 1111	murder in U.S. maritime and territorial jurisdictions
18 U.S.C. § 1112	manslaughter in U.S. maritime and territorial jurisdictions
18 U.S.C. § 1114	murder or manslaughter (or attempt) of federal officers and employees
18 U.S.C. § 1116	murder or manslaughter (or attempt) of foreign officials, official guests, and internationally protected persons
18 U.S.C. § 1118	murder committed by federal prisoner
18 U.S.C. § 1119	murder of U.S. national by another U.S. national outside of U.S. territory

18 U.S.C. § 1120	murder by escaped prisoner
18 U.S.C. § 1121	killing state or local officials aiding in federal investigations
18 U.S.C. § 1153(a)	murder, assault, etc. by Indian within Indian country
18 U.S.C. § 1201(a)	kidnap in federal jurisdiction (e.g., interstate commerce, maritime/territorial jurisdiction)
18 U.S.C. § 1203(a)	hostage taking
18 U.S.C. § 1365(a)	tampering with consumer products that affect interstate or foreign commerce
18 U.S.C. § 1501	assault of federal process server
18 U.S.C. § 1503	killing or injuring a federal juror or officer of court
18 U.S.C. § 1505	obstruction of justice
18 U.S.C. § 1512	tampering (killing or attempt) with witness, victim, or informant
18 U.S.C. § 1513	retaliating (killing or attempt) against witness, victim, or informant
18 U.S.C. § 1751	assassination of President or Vice President
18 U.S.C. § 1864	use of hazardous or injurious devices on federal lands
18 U.S.C. § 1952(a)(1)(B);	committing a violent crime after aiding in racketeering enterprises
18 U.S.C. § 1952(a)(2)(B);	affecting interstate commerce
18 U.S.C. § 1952(a)(3)(B)	
18 U.S.C. § 1958	use of interstate commerce for murder-for-hire
18 U.S.C. § 1959	violent crimes in aid of racketeering enterprises
18 U.S.C. § 1992	wrecking a rail (e.g., derailling, exploding)
18 U.S.C. § 2113	bank robbery and incidental crimes (e.g., assault, homicide)
18 U.S.C. § 2114	assault of person in charge of mail, money, or U.S. property
18 U.S.C. § 2116	assault of postal carrier in postal vehicle
18 U.S.C. § 2118	robberies and burglaries involving controlled substances
18 U.S.C. § 2119	taking a motor vehicle (that has been in interstate or foreign commerce) through the use of violence with the intent of causing death or serious bodily injury
18 U.S.C. § 2191	flogging, beating, injuring, or inflicting cruel and unusual punishment upon the crew of a U.S. vessel (by the ship's master)
18 U.S.C. § 2231	assault, resistance, or use of deadly weapon against person serving or executing warrants or making searches and seizures
18 U.S.C. § 2241(a)	aggravated sexual abuse in U.S. maritime or territorial jurisdictions
18 U.S.C. § 2245	sexual abuse in federal jurisdiction that results in death
18 U.S.C. § 2261	interstate domestic violence
18 U.S.C. § 2261A	interstate stalking
18 U.S.C. § 2280	violence against maritime navigation
18 U.S.C. § 2281	violence against maritime fixed platforms (artificial islands, installations, etc.)
18 U.S.C. § 2332	international terrorism (killing a U.S. national outside the U.S.)
18 U.S.C. § 2332a	use of weapons of mass destruction (not including chemical weapons)
18 U.S.C. § 2332b	act of terrorism (or threat) transcending national boundaries
18 U.S.C. § 2340A	torture by someone outside of the U.S.
18 U.S.C. § 2441	war crimes
21 U.S.C. § 848	continuing criminal enterprise (drug crimes)
42 U.S.C. § 2283	killing or assaulting a nuclear inspector

<u>U.S. Code Section</u>	<u>Military Justice System Offense</u>
10 U.S.C. § 918	murder
10 U.S.C. § 919(a)	voluntary manslaughter
10 U.S.C. § 919(b)	involuntary manslaughter
10 U.S.C. § 920(a)	rape
10 U.S.C. § 922	robbery
10 U.S.C. § 924	maiming
10 U.S.C. § 926	arson
10 U.S.C. § 928	assault

alternative legislation that would strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by this historic legislation.

Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

9 - burden of
proof
Drug dealer

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

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2436, the "Unborn Victims of Violence Act of 1999."

Section 2 of H.R. 2436 would make it a separate federal offense to cause "death or bodily injury" to "a child in utero" in the course of committing any one of 68 enumerated federal crimes.¹ The punishment for the new crime under H.R. 2436 is the same as if the harm had been inflicted upon the "unborn child's mother," except that the death penalty is not permitted. Section 3 of H.R. 2436 would make substantively identical amendments to the Uniform Code of Military Justice.

The Justice Department strongly objects to H.R. 2436 as a matter of public policy and also believes that in specific circumstances, illustrated below, the bill may raise a constitutional concern. The Administration has made the fight against domestic violence a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, has been a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created federal domestic violence offenses with strong penalties to hold violent offenders accountable. While most domestic violence crimes are appropriately prosecuted at the state and local level, the Department of Justice has brought 179 VAWA and VAWA-related

¹ The enumerated crimes cover a broad range of activities -- from assault or murder within United States jurisdiction, 18 U.S.C. §§ 113-115, 1111-1119, to damaging religious property, 18 U.S.C. § 247, and animal enterprise terrorism, 18 U.S.C. § 43.

(66/68 offenses line - list a few silly)

If the Committee wants to make a difference in the lives of women victims of violence, it should

federal indictments to date, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$700 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence and sexual assault. These funds have made a difference in women's lives, and in how communities respond to violence against women. Indeed, these funds have helped save the lives of many victims of domestic violence. Reauthorizing the Violence Against Women Act is the best way to make a difference in the lives of women victims of violence. We hope that Congress will work with us on this common goal. H.R. 2436, however, is not a well tailored response to domestic violence against pregnant women. Our three main objections to H.R. 2436 are described below.

adequate
replace w/
"meaningful"
or
"really about"

First, H.R. 2436 provides that the punishment for a violation shall be the same as the punishment that would have been imposed had the pregnant woman herself suffered the injury inflicted upon her fetus. While the Department agrees that some additional punishment may be warranted for injury to pregnant women, H.R. 2436 would subject a defendant who caused the miscarriage of a three-week old embryo to the same punishment he would face if he had killed a 30-year old woman. H.R. 2436 ~~therefore~~ ^{earlier} trigger a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant.

forcefully subdues a who later miscarries

Second, H.R. 2436 expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, for example, a police officer who, with a slight amount of excessive force, places a female suspect in a police car and thereby causes her to miscarry -- without knowing or having any reason to believe that she was pregnant -- could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evinced by the defendant's mental state.²

excessive use of force

² H.R. 2436 also could be read to impose two punishments for the same injury. Under the newly created § 1841(a)(2)(C), intentional injury to the "child in utero" is to be treated as murder or manslaughter, but the bill does not specify whether this treatment supplants or supplements H.R. 2436's default punishment - the punishment the defendant would receive had he

Third, H.R. 2436's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. Such an approach is unnecessary for legislation that would augment punishment of intentional violence against pregnant women. Additionally, such an approach is unwise to the extent that it may be perceived as gratuitously plunging the federal government into one of the most -- if not the most -- difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues.

~~strike?~~

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Finally and critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.³ The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."⁴ Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

juries would be left to decide difficult medical questions.

injured the pregnant woman.

³ See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

⁴ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her "unborn child."

strengthen
For these reasons, we strongly oppose H.R. 2436. The Administration, however, would ~~consider~~ alternative legislation that would ~~augment~~ punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, ~~and~~ *work with Congress to develop* ~~legislation which~~ strengthens the criminal provisions of VAWA, ~~as~~ *and* ~~well as~~ reauthorizes the grant programs established by this historic legislation.

Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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

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For these reasons, we strongly oppose H.R. 2436. The Administration, however, would consider alternative legislation that would augment punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, and legislation which strengthens the criminal provisions of VAWA as well as reauthorizes the grant programs established by this historic legislation.

Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member

THE WHITE HOUSE

OFFICE OF LEGISLATIVE AFFAIRS

HOUSE LIAISON

—FAX COVER SHEET—

DATE:

9/8

TO:

Nicole Rabner

FAX:

6-2878

FROM:

☐ CHUCK BRAIN
☒ BRODERICK JOHNSON
☐ JOSH ACKIL
☐ BROOKE LIVINGSTON

☐ AL MALDON
☐ LISA KOUNToupES
☐ JANELLE ERICKSON

(202)456-6620 (TELEPHONE)

(202)456-2604 (FAX)

SUBJECT:

FYI - today's conf. call

Note: number change 456-2565
code: 6921

1 OF 2

**Amendment in the Nature of a Substitute to H.R. 2436
Offered by Rep. Lofgren, Rep. Conyers**

Strike all after the enacting clause and insert the following:

Section 1. Short title

This Act may be cited as the "Motherhood Protection Act of 1999."

Section 2. Crimes against the Mother - Terminating the Pregnancy

(a) Whoever, without the consent of the pregnant woman, engages in any violent or assaultive conduct that violates any of the provisions of law as enumerated in subsection (b), causing the interruption of the normal course of the pregnancy or its termination, commits a felony and shall be fined under this title or imprisoned up to a maximum term of twenty years, or both, unless the pregnancy is terminated and, in such case, the defendant shall be fined under this title or imprisoned up to a maximum term of life, or both.

(b) The provisions referred to in subsection (a) are the following:

(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229A(a)(2), 242, 245, 247, 248, 351, 831, 844(d), (f), and (i), 924(j), 930, 1111, 1112, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203(a), 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1952(a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261a, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

(2) Section 408(c) of the Controlled Substances Act of 1970 (21 U.S.C. 848).

(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

Section 3. Sentencing - Vulnerable Victim

Pursuant to its authority under section 994 of Title 28, United States Code, the United States Sentencing Commission shall consider a pregnant woman to be a "vulnerable victim" for purposes of Section 3A1.1 of the Guidelines.

Section 4. Civil Cause of Action

Whoever engages in activity described in section 2 shall be liable to that pregnant woman for appropriate relief in a civil action in federal district court.

Total Pages: 5

LRM ID: RJP163

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Friday, September 3, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Robert J. Pellicci
E-Mail: Robert_J_Pellicci@omb.eop.gov
PHONE: (202)395-4871 FAX: (202)395-6148

SUBJECT: JUSTICE Report on HR2436 Unborn Victims of Violence Act of 1999

DEADLINE: 10:00 a.m. Friday, September 10, 1999

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: House Judiciary Committee markup could occur during the week of September 13th.

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52-HEALTH & HUMAN SERVICES - Sondra S. Wallace - (202) 690-7760

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James J. Jukes
Janet R. Forsgren

State Law
g

URGENT

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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

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Critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.² The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."³ Without

¹ The enumerated crimes cover a broad range of activities -- from assault or murder within United States jurisdiction, 18 U.S.C. §§ 113-115, 1111-1119, to damaging religious property, 18 U.S.C. § 247, and animal enterprise terrorism, 18 U.S.C. § 43.

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this exception, the bill plainly would be unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

Apart from these constitutional concerns, the Justice Department strongly objects to H.R. 2436 as a matter of public policy. The Administration is firmly committed to protecting pregnant women from domestic abuse and other violence. For three reasons, however, H.R. 2436 is a poorly tailored response to those problems. X

First, H.R. 2436 provides that punishment for a violation shall be the same as the punishment that would have been imposed had the pregnant woman herself suffered the injury inflicted upon her fetus. While the Department agrees that some additional punishment may be warranted for injury to pregnant women, H.R. 2436 would subject a defendant who caused the miscarriage of a three-week old embryo to the same punishment he would face if he had killed a 30-year old woman. H.R. 2436 can therefore trigger a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to a non-pregnant woman.

Second, H.R. 2436 expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, a police officer who, with a slight amount of excessive force, places a female suspect in a police car and thereby causes her to miscarry -- without knowing or having any reason to believe that she was pregnant -- could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to

any woman with respect to her "unborn child."

culpability, as evidenced by the defendant's mental state.'

Third, H.R. 2436's description of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. In our view, such a novel approach is unwarranted.

Our policy concerns with H.R. 2436 are exacerbated by the likelihood that the bill will yield little practical benefit. Because the criminal conduct that would be addressed by H.R. 2436 is already the subject of federal law (since any assault on an "unborn child" cannot occur without an assault on the pregnant woman), H.R. 2436 would not provide for the prosecution of any additional criminals. At the same time, prosecutors proceeding under H.R. 2436 would be likely to encounter difficulty collecting evidence to support their prosecutions. For instance, the prosecutor would have to establish that the defendant's conduct "cause[d]" the injury -- given the inherent risk of miscarriage and birth defects that occur absent any human intervention, causation may be very difficult to establish.

For these reasons, we strongly oppose H.R. 2436. Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

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Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member

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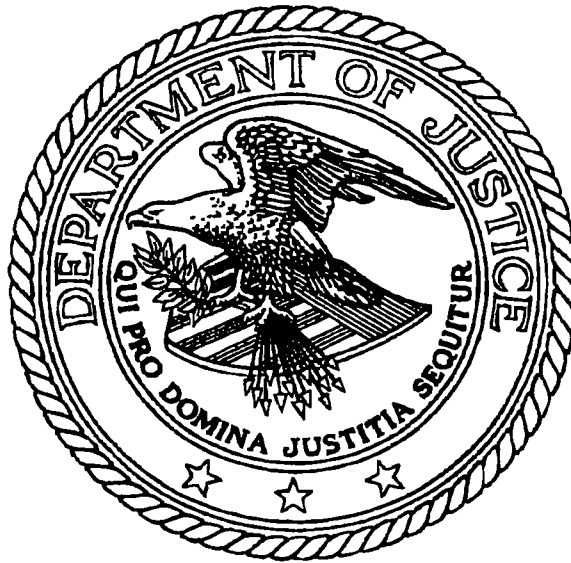
DRAFT -- August 31, 1999 (9:25AM)

Page 3

TOTAL P.04

SUBJECT: JUSTICE Report on HR2436 Unborn Victims of Violence Act of

☐ Concur
☐ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet



Office of Policy Development
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D. C. 20530

TO: *Nicole Rabner*

FAX: *456-2878*
VOICE:

FROM: **Lisa R. Graves**
Counsel

FAX: **202.353.9164**
VOICE: **202.616.2004**

PAGES:

RE: *Unborn Victim's Act*

MESSAGE:

Draft for [signature] 4:30 PM.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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Committee on the Judiciary
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Third, H.R. 2436's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. **To the extent such an approach might be taken as a declaration of federal "policy" that life begins at conception, it would gratuitously plunge the federal government into one of the most--if not the most -- difficult and complex issues of religious and scientific consideration and debate. Any doubt as to that point should be resolved by looking at the variety of different positions taken by States on this issue. Such an approach is unnecessary to the drafting of legislation that would punish knowing or intentional violence that could harm a pregnant woman and her fetus. [Not yet approved].**

² H.R. 2436 also could be read to impose two punishments for the same injury. Under the newly created § 1841(a)(2)(C), intentional injury to the "child in utero" is to be treated as murder or manslaughter, but the bill does not specify whether this treatment supplants or supplements H.R. 2436's default punishment - the punishment the defendant would receive had he injured the pregnant woman.

Our policy concerns with H.R. 2436 are exacerbated by the likelihood that the bill will yield little practical benefit. Because the criminal conduct that would be addressed by H.R. 2436 is already the subject of federal law (since any assault on an "unborn child" cannot occur without an assault on the pregnant woman), H.R. 2436 would not provide for the prosecution of any additional criminals. At the same time, prosecutors proceeding under H.R. 2436 would be likely to encounter difficulty collecting evidence to support their prosecutions. For instance, the prosecutor would have to establish that the defendant's conduct "cause[d]" the injury -- given the inherent risk of miscarriage and birth defects that occur absent any human intervention, causation may be very difficult to establish.

Finally and critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.³ The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."⁴ Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

For these reasons, we strongly oppose H.R. 2436. Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

³ See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

⁴ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her "unborn child."

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member



Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2436, the "Unborn Victims of Violence Act of 1999."

Section 2 of H.R. 2436 would make it a separate federal offense to cause "death or bodily injury" to "a child in utero" in the course of committing any one of 68 enumerated federal crimes.¹ The punishment for the new crime under H.R. 2436 is the same as if the harm had been inflicted upon the "unborn child's mother," except that the death penalty is not permitted. Section 3 of H.R. 2436 would make substantively identical amendments to the Uniform Code of Military Justice.

Critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.² The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."³ Without

¹ The enumerated crimes cover a broad range of activities -- from assault or murder within United States jurisdiction, 18 U.S.C. §§ 113-115, 1111-1119, to damaging religious property, 18 U.S.C. § 247, and animal enterprise terrorism, 18 U.S.C. § 43.

² See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

³ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or

this exception, the bill plainly would be unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

Apart from these constitutional concerns, the Justice Department strongly objects to H.R. 2436 as a matter of public policy. The Administration is firmly committed to protecting pregnant women from domestic abuse and other violence. For three reasons, however, H.R. 2436 is a poorly tailored response to those problems.

First, H.R. 2436 provides that punishment for a violation shall be the same as the punishment that would have been imposed had the pregnant woman herself suffered the injury inflicted upon her fetus. While the Department agrees that some additional punishment may be warranted for injury to pregnant women, H.R. 2436 would subject a defendant who caused the miscarriage of a three-week old embryo to the same punishment he would face if he had killed a 30-year old woman. H.R. 2436 can therefore trigger a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to a non-pregnant woman.

Second, H.R. 2436 expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, a police officer who, with a slight amount of excessive force, places a female suspect in a police car and thereby causes her to miscarry -- without knowing or having any reason to believe that she was pregnant -- could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to

any woman with respect to her "unborn child."

culpability, as evidenced by the defendant's mental state.'

Third, H.R. 2436's description of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. In our view, such a novel approach is unwarranted.

Our policy concerns with H.R. 2436 are exacerbated by the likelihood that the bill will yield little practical benefit. Because the criminal conduct that would be addressed by H.R. 2436 is already the subject of federal law (since any assault on an "unborn child" cannot occur without an assault on the pregnant woman), H.R. 2436 would not provide for the prosecution of any additional criminals. At the same time, prosecutors proceeding under H.R. 2436 would be likely to encounter difficulty collecting evidence to support their prosecutions. For instance, the prosecutor would have to establish that the defendant's conduct "cause[d]" the injury -- given the inherent risk of miscarriage and birth defects that occur absent any human intervention, causation may be very difficult to establish.

For these reasons, we strongly oppose H.R. 2436. Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member

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DRAFT -- August 31, 1999 (9:25AM)

Page 3

for
VOWA
what we wd sup.

6/6/68

bill does not appear
to be designed
to address real life
violence against poor
women

→ If Cong is
serious
about
VOWA
which is
part of
Crime bill - x y z

impractical & poorly tailored

TONY

Jan

repeatedly

This bill does none of that
Senone concerns.

substitute —
old VOWA.

street liability issue.

punish knowing & catatonic violence.

collective

*Adverse 53496

*Brod.

for
51005

9/8/99 Conf call

expectation - valuing subs for persons coming &
floor

subs: ap offense strict liability offense
no intent requirement - liability issue.
no victim status for fetus

intent to cause harm to woman rec.
if caused

2 Iowa² 2261, 2261(a)

Congress - environ, health care crimes add'l

we would be able to support substitute

→ couldn't align w/ NARAL



declaration that life begins at conception - not
- State interest in life or prot.

crim

life is defined

*



Implied in the 2006 def
of crime is a
fact notion about
when life begins,
this notion causes
problems

and causes numerous
policy considerations
which demand careful review

9/7/99 Conf

Lofgreen -

substitute - don't have it yet. - WGA in progress

stuff why -
ind.

focusing
on
women

provide fed crime where there is an
~~interrupt~~ ^{interrupt} ~~exception~~ ^{for interrupt} penalties

up to 25 ~~years~~

life for termination

VAWA

known a shd have known. *

not more than 1

nearly full Dem support.

Veto:

Whip's - solid enough to sustain a veto

Bran H.

Lisa Gray, OPD

616 2004

353-9164

Patti

ph 514-4810

fax 514-9149

Adrienne

51005

Amor, NARAL

Waltz -
50 yrs
gen.

reunion
child out

From: Robert J. Pellicci on 09/07/99 10:37:14 AM

Record Type: Record

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

cc: James J. Jukes/OMB/EOP@EOP, Janet R. Forsgren/OMB/EOP@EOP

Subject: Justice letter on Unborn Victims Bill

On Friday I circulated to you for review and comment Justice's letter strongly opposing HR 2436 the "Unborn Victims of Violence Act of 1999." Justice had advised that full House Judiciary Committee action would not occur until the week of September 13th. **Justice now advises that the Committee has moved the markup to this Thursday, September 9th.**

Accordingly, please provide your comments to me by **NOON TOMORROW, September 8th.** In reviewing the Justice letter, the Department has requested guidance regarding a senior advisers or Presidential veto threat. As written, the letter strongly opposes the bill.

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