

Abortion—Unborn Victims

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FINAL

# Department of Justice

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STATEMENT

OF

ELEANOR D. ACHESON  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF POLICY DEVELOPMENT

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

S. 1673, THE UNBORN VICTIMS OF VIOLENCE ACT

PRESENTED ON

FEBRUARY 23, 2000

Eleanor D. Acheson  
Assistant Attorney General, United States Department of Justice  
Unborn Victims of Violence Act  
Senate Judiciary Committee  
February 23, 2000 10:00 am

Good morning. I appreciate the opportunity to appear before this Committee to express the Justice Department's views regarding the proposed Unborn Victims of Violence Act (S. 1673).

S. 1673 would amend the criminal code and the Uniform Code of Military Justice to 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 offenses against a pregnant woman. The new crime created by S. 1673 has an expansive reach. The bill does not require that the perpetrator know, or even suspect, that the adult woman he harms is pregnant. The punishment for this new offense is the same as if the perpetrator had harmed the pregnant woman, except that the death penalty is not permitted.

Halting violence against all women, including pregnant women, has been a top priority of this Administration for the past seven years. In 1994, the Administration, with the bipartisan support of Congress and the support of the President, made the Violence Against Women Act (VAWA) the law of the land. VAWA marked a critical turning point in the national effort to address domestic violence, sexual assault, and stalking. VAWA, for the first time, created federal domestic violence offenses with strong penalties to supplement state and local efforts to hold violent offenders accountable. To date, the Department of Justice has complemented state

and local prosecutions by filing over 200 VAWA and VAWA-related indictments, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$800 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence, sexual assault, and stalking. 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.

While we agree with the sponsors of S. 1673 that the federal government can and should play an important role in the campaign to end violence against women, S. 1673 is, in our view, a flawed federal response to the evils of such violence. It is, moreover, one that has several troubling collateral consequences. The Administration accordingly opposes this bill, and the President's senior advisors would recommend that he veto it.

Our first concern is that S. 1673 reaches only pregnant women, and then only if they happen already to be protected by one of the 68 enumerated federal offenses listed in S. 1673. Because it penalizes harm only to a subset of women, S. 1673 is a less effective means of combating violence against all women, and may have the side effect of devaluing the gravity of violence done to women not falling under S. 1673's auspices.

Second, the bill 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.

We strongly object to this “Russian roulette” aspect of S. 1673, which dramatically increases the penalty for harming a pregnant woman – in some cases, from as little as a year in jail to life imprisonment – based on the existence of an element, harm to the unborn, for which liability is strict. To be sure, strict liability enhancements are not unheard of in the American criminal law. The Federal felony-murder rule, for example, increases the punishment for homicides committed in the course of certain enumerated felonies.<sup>1</sup> Similarly, American tort law often holds a tortfeasor liable for injury no matter what the special sensitivities of the injured party. But in both situations, liability is usually tied to culpability and is limited to the legal consequences the wrongdoer can reasonably foresee. That is why the felony-murder rule is limited to the subclass of felonies from which a death is reasonably likely to occur – arson, escape, murder, kidnapping, burglary, to name a few. S. 1673's new crime, by contrast, has no such limitations and applies to a range of crimes for which harm to the unborn is not necessarily

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<sup>1</sup> See 18 U.S.C. § 1111 (listing among first-degree murder “[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery”).

foreseeable, such as damaging religious property<sup>2</sup> or animal enterprise terrorism.<sup>3</sup> This infirmity might be cured on a case-by-case basis if the crime were defined to require that an offender know, or have reason to suspect, that his female victim is pregnant, but S. 1673 goes out of its way to expressly disavow any such requirement. And by automatically and steadfastly equating harm to the unborn with harm to the pregnant woman, S. 1673 replaces judicial discretion in sentencing with mandatory and substantial increases in sentencing without regard to individual culpability. In short, S. 1673's blunderbuss decoupling of punishment and culpability – combined with its heavy, mandatory increases in sentences that leaves little room for judicial discretion – is far too broad a brush to paint with in this arena.

In addition to having these broader policy defects, S. 1673 is also likely to be ineffective – if not counter-productive – as a practical matter. S. 1673 may be ineffective because it cannot be used to prosecute any persons who are not already subject to federal prosecution. Because one element of S. 1673's new crime is that the offender “engage in conduct that violates” one of 68 specifically enumerated crimes, S. 1673 would not in any way expand the universe of violent individuals subject to federal prosecution.

S. 1673 may also be counterproductive to federal efforts to stop domestic violence. Because S. 1673 does not require that the government first obtain a conviction for the underlying conduct against a pregnant woman, S. 1673 may actually reduce the number of prosecutions

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<sup>2</sup> 18 U.S.C. § 247.

<sup>3</sup> 18 U.S.C. § 43.

brought for injury to the pregnant woman. If, for example, a person "forcibly . . . intimidates" a female postal worker during the first month of her pregnancy, and she miscarries, a prosecutor would have two options in prosecuting the aggressor: (i) for violating 18 U.S.C. § 111, which carries a one-year maximum sentence; or (ii) for violating the offense created by S. 1673, which would carry a maximum life sentence because causing the miscarriage is treated as if the aggressor murdered the pregnant woman, a federal officer. This is a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to the woman who is not pregnant. A prosecutor faced with this choice may therefore proceed solely under S. 1673's new offense. Even if the prosecutor initiated a dual prosecution for both crimes, the prosecution for injury to the "unborn child" is likely to overshadow the prosecution for injury to the pregnant woman. In either event, rather than reinforcing the federal government's commitment to ending violence against women, this bill would downplay or ignore the significance of the injury to the woman.

S. 1673 may also be unconstitutional in some of its applications. The drafters of S. 1673 were careful to recognize that abortion-related conduct is constitutionally protected.<sup>4</sup> 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."<sup>5</sup> Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt

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<sup>4</sup> See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

<sup>5</sup> 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."

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 the constitutionally protected conduct.

Most troubling, however, is the fact that S.1673 may be perceived as gratuitously plunging the federal government into one of 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. The bill's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. Moreover, such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women.

Other, more effective means of federal intervention to stop domestic violence and other violence against women currently exist. If the progress over the past 5 years is any harbinger of the potential for success, reauthorizing VAWA is a straight-forward and effective way to diminish violence against women. Moreover, there are other available avenues that are better tailored than S. 1673 to addressing the additional harm a pregnant woman suffers when her fetus is injured. We are willing to work with Congress to strengthen the criminal provisions of VAWA, and to develop alternative legislation to strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant. The availability of these better tailored alternatives makes enactment of S. 1673 unnecessary, and even more unwise as a policy matter.

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For all of these reasons, the Administration strongly opposes S. 1673, and the President's senior advisors would recommend that he veto the bill. Instead, we urge the Senate to support the reauthorization of VAWA as a more direct and effective way to combat violence against women and violence against the unborn.

Thank you for the opportunity to testify on this legislation.

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
LEGISLATIVE AFFAIRS

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TO: *Anna Richter*

DATE: *2/22*

FROM:

☐ CHUCK KIEFFER

☐ ELIZABETH GORE

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☐ LISA ZWEIG

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☐ NANCY BRANDEL

☐ KATE ELTRICH

Comments: *This version was passed back to Justice.  
Let me know if you need anything else.*

*Thanks.*

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(includes cover page)

Eleanor D. Acheson  
Assistant Attorney General, United States Department of Justice  
Unborn Victims of Violence Act  
Senate Judiciary Committee  
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S. 1673 would amend the criminal code and the Uniform Code of Military Justice to 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 offenses against a pregnant woman. The new crime created by S. 1673 has an expansive reach. <sup>The bill</sup> ~~It defines "child in utero" to reach a "member of the species homo sapiens at any stage of development"~~ and does not require that the perpetrator know, or even suspect, that the adult woman he harms is pregnant. The punishment for this new offense is the same as if the perpetrator had harmed the pregnant woman, except that the death penalty is not permitted.

~~At the outset, it is important to emphasize the Administration's position -- shared by the sponsors of S. 1673 -- that violence against the unborn is simply intolerable. We are all familiar with the story of how Airman Gregory Robbins brutally beat his wife when she was 34 weeks pregnant, and how that beating induced a miscarriage. Such deplorable behavior must not go unpunished. For the reasons set forth below, however, the Administration believes that federal efforts to curtail violence against the unborn are better directed toward preventing violence against women, since pregnant women are also victimized whenever the unborn are harmed.~~

Halting violence against all women, including pregnant women, has been a top priority of

this Administration for the past seven years. In 1994, the Administration, with the bipartisan support of Congress and the support of the President, made the Violence Against Women Act (VAWA) the law of the land. VAWA marked a critical turning point in the national effort to address domestic violence, sexual assault, and stalking. VAWA, for the first time, created federal domestic violence offenses with strong penalties to supplement state and local efforts to hold violent offenders accountable. To date, the Department of Justice has complemented state and local prosecutions by filing over 200 VAWA and VAWA-related indictments, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$800 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence, sexual assault, and stalking. 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.

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Our first concern is that S. 1673 reaches only pregnant women, and then only if they happen already to be protected by one of the 68 enumerated federal offenses listed in S. 1673. Because it penalizes harm only to a subset of women, S. 1673 is a less effective means of combating violence against all women, and may have the side effect of devaluing the gravity of violence done to women not falling under S. 1673's auspices.

[ INSERT language from Justice's letter of 9/9/99 - See  
~~It is no answer, in our view, that S. 1673 might nevertheless deter violence against all women. Some proponents of S. 1673 have noted that the bill explicitly disavows any requirement that the offender know or even have reason to know that the victim is pregnant.~~ noted paragraph ]

~~Because the Act defines "child in utero" as a "member of the species homo sapiens, at any stage of development, who is carried in the womb," the victim herself need not know that she is pregnant. As a result, the argument goes, a person who harms any woman of child-bearing age is always in danger of also committing the offense created by S. 1673.~~

We strongly object to this "Russian roulette" aspect of S. 1673, which dramatically increases the penalty for harming a pregnant woman – in some cases, from as little as a year in jail to life imprisonment – based on the existence of an element, harm to the unborn, for which liability is strict. To be sure, strict liability enhancements are not unheard of in the American criminal law. The Federal felony-murder rule, for example, increases the punishment for homicides committed in the course of certain enumerated felonies.<sup>1</sup> Similarly, American tort law often holds a tortfeasor liable for injury no matter what the special sensitivities of the injured party. But in both situations, liability is usually tied to a culpability and is limited to the legal consequences the wrongdoer can reasonably foresee. That is why the felony-murder rule is limited to the subclass of felonies from which a death is reasonably likely to occur – arson, escape, murder, kidnapping, burglary, to name a few. S. 1673's new crime, by contrast, has no such limitations and applies to a range of crimes for which harm to the unborn is not necessarily foreseeable, such as damaging religious property<sup>2</sup> or animal enterprise terrorism.<sup>3</sup> This infirmity might be cured on a case-by-case basis if the crime were defined to require that an offender know, or have reason to suspect, that his female victim is pregnant, but S. 1673 goes out of its way to expressly disavow any such requirement. And by automatically and steadfastly equating

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harm to the unborn with harm to the pregnant woman, S. 1673 replaces judicial discretion in sentencing with mandatory and substantial increases in sentencing without regard to individual culpability. In short, S. 1673's blunderbuss decoupling of punishment and culpability – combined with its heavy, mandatory increases in sentences that leaves little room for judicial discretion – is far too broad a brush to paint with in this arena.

In addition to having these broader policy defects, S. 1673 is also likely to be ineffective – if not counter-productive – as a practical matter. S. 1673 may be ineffective because it cannot be used to prosecute any persons who are not already subject to federal prosecution. Because one element of S. 1673's new crime is that the offender "engage in conduct that violates" one of 68 specifically enumerated crimes, S. 1673 would not in any way expand the universe of violent individuals subject to federal prosecution.

S. 1673 may also be counterproductive to federal efforts to stop domestic violence. Because S. 1673 does not require that the government first obtain a conviction for the underlying conduct against a pregnant woman, S. 1673 may actually reduce the number of prosecutions brought for injury to the pregnant woman. If, for example, a person "forcibly . . . intimidates" a female postal worker during the first month of her pregnancy, and she miscarries, a prosecutor would have two options in prosecuting the aggressor: (i) for violating 18 U.S.C. § 111, which carries a one-year maximum sentence; or (ii) for violating the offense created by S. 1673, which would carry a maximum life sentence because causing the miscarriage is treated as if the aggressor murdered the pregnant woman, a federal officer. This is a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to the woman who is not pregnant. A prosecutor faced with this choice may therefore proceed solely under S. 1673's new offense. Even if the prosecutor initiated a dual prosecution for both crimes, the prosecution for injury to the "unborn child" is likely to overshadow the prosecution for injury to the pregnant woman. In either event, rather than reinforcing the federal government's

commitment to ending violence against women, this bill would downplay or ignore the significance of the injury to the woman.

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Most troubling, however, is the fact that S. 1673 may be perceived as gratuitously plunging the federal government into one of 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. The bill's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. Moreover, such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women.

Other, more effective means of federal intervention to stop domestic violence and other violence against women currently exist. ~~Right now, Senators Biden and Hatch have introduced~~

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~~legislation that would reauthorize the grant programs established by the original VAWA in 1994.~~

If the progress over the past 5 years is any harbinger of the potential for success, reauthorizing VAWA is a straight-forward and effective way to diminish violence against women. Moreover, there are other available avenues that are better tailored than S. 1673 to addressing the additional harm a pregnant woman suffers when her fetus is injured. We are willing to work with Congress to strengthen the criminal provisions of VAWA, and to develop alternative legislation to strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant. The availability of these better tailored alternatives makes enactment of S. 1673 unnecessary, and even more unwise as a policy matter.

For all of these reasons, the Administration strongly opposes S. 1673, and the President's senior advisors would recommend that he veto the bill. Instead, we urge the Senate to support the reauthorization of VAWA as a more direct and effective way to combat violence against women and violence against the unborn.

Thank you for the opportunity to testify on this legislation.



## Office of Legislative Affairs

FINAL

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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup>

<sup>2</sup> 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

← insert language from this paragraph into testimony as noted.

INSERT

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.<sup>3</sup> 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."<sup>4</sup> 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,

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

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

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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,



Jon P. Jennings  
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.  
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

September 9, 1999

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Committee on the Judiciary  
U.S. House of Representatives  
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<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> 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,

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

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

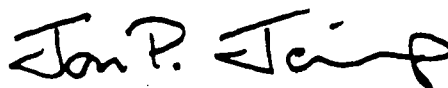
<sup>4</sup> The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her "unborn child."

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

**Eleanor D. Acheson**  
**Assistant Attorney General, United States Department of Justice**  
**Unborn Victims of Violence Act**  
**Senate Judiciary Committee**  
**February 23, 2000 10:00 am**

Good morning. I appreciate the opportunity to appear before this Committee to express the Justice Department's views regarding the proposed Unborn Victims of Violence Act (S. 1673).

S. 1673 would amend the criminal code and the Uniform Code of Military Justice to 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 offenses against a pregnant woman. The new crime created by S. 1673 has an expansive reach. It defines "child in utero" to reach a "member of the species homo sapiens at any stage of development" and does not require that the perpetrator know, or even suspect, that the adult woman he harms is pregnant. The punishment for this new offense is the same as if the perpetrator had harmed the pregnant woman, except that the death penalty is not permitted.

At the outset, it is important to emphasize the Administration's position – shared by the sponsors of S. 1673 – that violence against the unborn is simply intolerable. We are all familiar with the story of how Airman Gregory Robbins brutally beat his wife when she was 34 weeks pregnant, and how that beating induced a miscarriage. Such deplorable behavior must not go unpunished. For the reasons set forth below, however, the Administration believes that federal

efforts to curtail violence against the unborn are better directed toward preventing violence against woman, since pregnant women are also victimized whenever the unborn are harmed.

Halting violence against all women, including pregnant women, has been a top priority of this Administration for the past seven years. In 1994, the Administration, with the bipartisan support of Congress and the support of the President, made the Violence Against Women Act (VAWA) the law of the land. VAWA marked a critical turning point in the national effort to address domestic violence, sexual assault, and stalking. VAWA, for the first time, created federal domestic violence offenses with strong penalties to supplement state and local efforts to hold violent offenders accountable. To date, the Department of Justice has complemented state and local prosecutions by filing over 200 VAWA and VAWA-related indictments, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$800 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence, sexual assault, and stalking. 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.

While we agree with the sponsors of S. 1673 that the federal government can and should play an important role in the campaign to end violence against women, S. 1673 is, in our view, a flawed federal response to the evils of such violence. It is, moreover, one that has several troubling collateral consequences. The Administration accordingly opposes this bill, and the President's senior advisors would recommend that he veto it.

Our first concern is that S. 1673 reaches only pregnant women, and then only if they happen already to be protected by one of the 68 enumerated federal offenses listed in S. 1673. Because it penalizes harm only to a subset of women, S. 1673 is a less effective means of combating violence against all women, and may have the side effect of devaluing the gravity of violence done to women not falling under S. 1673's auspices.

It is no answer, in our view, that S. 1673 might nevertheless deter violence against all women. Some proponents of S. 1673 have noted that the bill explicitly disavows any requirement that the offender know – or even have reason to know – that the victim is pregnant. Because the Act defines “child in utero” as a “member of the species homo sapiens, at any stage of development, who is carried in the womb,” the victim herself need not know that she is pregnant. As a result, they argument goes, a person who harms any woman of child-bearing age is always in danger of also committing the offense created by S. 1673.

We strongly object to this “Russian roulette” aspect of S. 1673, which dramatically increases the penalty for harming a pregnant woman – in some cases, from as little as a year in jail to life imprisonment – based on the existence of an element, harm to the unborn, for which liability is strict. To be sure, strict liability enhancements are not unheard of in the American criminal law. The Federal felony-murder rule, for example, increases the punishment for homicides committed in the course of certain enumerated felonies.<sup>1</sup> Similarly, American tort law

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<sup>1</sup> See 18 U.S.C. § 1111 (listing among first-degree murder “[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping,

often holds a tortfeasor liable for injury no matter what the special sensitivities of the injured party. But in both situations, liability is usually tied to a culpability and is limited to the legal consequences the wrongdoer can reasonably foresee. That is why the felony-murder rule is limited to the subclass of felonies from which a death is reasonably likely to occur – arson, escape, murder, kidnapping, burglary, to name a few. S. 1673's new crime, by contrast, has no such limitations and applies to a range of crimes for which harm to the unborn is not necessarily foreseeable, such as damaging religious property<sup>2</sup> or animal enterprise terrorism.<sup>3</sup> This infirmity might be cured on a case-by-case basis if the crime were defined to require that an offender know, or have reason to suspect, that his female victim is pregnant, but S. 1673 goes out of its way to expressly disavow any such requirement. And by automatically and steadfastly equating harm to the unborn with harm to the pregnant woman, S. 1673 replaces judicial discretion in sentencing with mandatory and substantial increases in sentencing without regard to individual culpability. In short, S. 1673's blunderbuss decoupling of punishment and culpability – combined with its heavy, mandatory increases in sentences that leaves little room for judicial discretion – is far too broad a brush to paint with in this arena.

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treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery”).

<sup>2</sup> 18 U.S.C. § 247.

<sup>3</sup> 18 U.S.C. § 43.

In addition to having these broader policy defects, S. 1673 is also likely to be ineffective – if not counter-productive – as a practical matter. S. 1673 may be ineffective because it cannot be used to prosecute any persons who are not already subject to federal prosecution. Because one element of S. 1673's new crime is that the offender “engage in conduct that violates” one of 68 specifically enumerated crimes, S. 1673 would not in any way expand the universe of violent individuals subject to federal prosecution.

S. 1673 may also be counterproductive to federal efforts to stop domestic violence. Because S. 1673 does not require that the government first obtain a conviction for the underlying conduct against a pregnant woman, S. 1673 may actually reduce the number of prosecutions brought for injury to the pregnant woman. If, for example, a person “forcibly . . . intimidates” a female postal worker during the first month of her pregnancy, and she miscarries, a prosecutor would have two options in prosecuting the aggressor: (i) for violating 18 U.S.C. § 111, which carries a one-year maximum sentence; or (ii) for violating the offense created by S. 1673, which would carry a maximum life sentence because causing the miscarriage is treated as if the aggressor murdered the pregnant woman, a federal officer. This is a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to the woman who is not pregnant. A prosecutor faced with this choice may therefore proceed solely under S. 1673's new offense. Even if the prosecutor initiated a dual prosecution for both crimes, the prosecution for injury to the “unborn child” is likely to overshadow the prosecution for injury to the pregnant woman. In either event, rather than reinforcing the federal government's

commitment to ending violence against women, this bill would downplay or ignore the significance of the injury to the woman.

S. 1673 may also be unconstitutional in some of its applications. The drafters of S. 1673 were careful to recognize that abortion-related conduct is constitutionally protected.<sup>4</sup> 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.”<sup>5</sup> 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 the constitutionally protected conduct.

Most troubling, however, is the fact that S.1673 may be perceived as gratuitously plunging the federal government into one of 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. The bill’s identification of a fetus as a separate and distinct victim of crime is

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<sup>4</sup> See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

<sup>5</sup> 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.”

unprecedented as a matter of federal statute. Moreover, such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women.

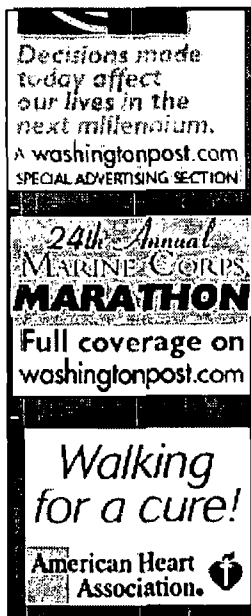
Other, more effective means of federal intervention to stop domestic violence and other violence against women currently exist. Right now, Senators Biden and Hatch have introduced legislation that would reauthorize the grant programs established by the original VAWA in 1994. If the progress over the past 5 years is any harbinger of the potential for success, reauthorizing VAWA is a straight-forward and effective way to diminish violence against women. Moreover, there are other available avenues that are better tailored than S. 1673 to addressing the additional harm a pregnant woman suffers when her fetus is injured. We are willing to work with Congress to strengthen the criminal provisions of VAWA, and to develop alternative legislation to strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant. The availability of these better tailored alternatives makes enactment of S. 1673 unnecessary, and even more unwise as a policy matter.

For all of these reasons, the Administration strongly opposes S. 1673, and the President's senior advisors would recommend that he veto the bill. Instead, we urge the Senate to support the reauthorization of VAWA as a more direct and effective way to combat violence against women and violence against the unborn.

Thank you for the opportunity to testify on this legislation.



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## House Votes on Violence to Fetuses

By Jim Abrams  
 Associated Press Writer  
 Thursday, Sept. 30, 1999; 6:12 p.m. EDT

WASHINGTON — The House voted Thursday to make it a crime to harm a fetus during a violent act against a pregnant woman. It is a key bill this year for opponents of legalized abortion, and the administration threatened a veto.

The bill, said leading abortion foe Rep. Christopher Smith, R-N.J., "recognizes in law the self-evident truth that an assault on a pregnant woman is an attack on two victims."

The legislation, which passed 254-172, makes it a separate offense to injure or kill a fetus in the commission of a federal crime of violence against a pregnant woman.

A person need not have knowledge of the pregnancy to be charged separately for harming a fetus. When an assailant intentionally kills or attempts to kill a fetus, the punishment is the same as that for similar acts against a person.

But the death penalty does not apply and the bill does not apply to abortions performed with the mother's consent.

Some 24 states have laws that recognize the unborn as potential victims. Supporters led by Rep. Lindsey Graham, R-S.C., said federal laws too should allow prosecutors to bring murder charges in cases of violence where a fetus dies, even if the mother survives the attack.

"This bill recognizes that when a pregnant woman is assaulted it is a more serious situation," said Rep. Henry Hyde, R-Ill., the House Judiciary Committee chairman. "That second little victim deserves recognition."

But Democratic-led opponents argued that abortion opponents again were using a commendable goal, halting violence against women, to undermine abortion rights guaranteed in the 1973 Roe vs. Wade Supreme Court decision.

It recognizes "for the first time under federal law that an embryo fetus is a person with rights separate and equal to that of a woman," said Rep. Sheila Jackson Lee, D-Texas.

"Instead of addressing the real issue at hand," said Rep. Nita Lowey, D-N.Y. "this bill is an ideological marker for the anti-choice special interests."

The bill was the most contentious involving fetal rights to hit the House floor this year. In recent years the GOP-led Congress has concentrated on banning a late-term abortion procedure known as partial birth abortions, but has been thwarted twice by presidential vetoes. It was unclear whether the Senate would take up the legislation this year.

The Justice Department, in a letter to Hyde, said the bill was constitutionally suspect and "unprecedented as a matter of federal statute" in making the fetus and mother separate victims. It said the bill could be seen as "gratuitously plunging the federal government into one of the most, if not the most difficult, difficult and complex issues of religious and scientific consideration."

The White House issued a statement saying the president would be advised to veto the legislation in its current form.

Democrats offered a substitute, proposed by Rep. Zoe Lofgren, D-Calif., that would create a separate federal criminal offense for violence against pregnant women, with increased punishments when that pregnancy is harmed or terminated. The proposal, which does not mention the fetus, was defeated 224-201.

Douglas Johnson of the National Right to Life Committee denied that abortion foes were trying to make the bill a "proxy vote" on Roe vs. Wade. But he said it was one of the most important issues Congress is taking up this year. "The children who are killed in these crimes are just as dead as those who die in the abortion clinic."

But Gloria Feldt, president of Planned Parenthood, said "the intent of the law is clear – separate the fetus from the woman, and attach rights of personhood on the fetus."

The bill is H.R. 2436.

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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 9<sup>th</sup>.

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.

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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.

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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.

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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

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### 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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|                          |                               |                                  |
|--------------------------|-------------------------------|----------------------------------|
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Fulltext of any of these sections can be accessed through Cornell's web page  
<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. 1601. 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

—FAX COVER SHEET—

DATE: 9/29

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  
☐ LAUREN GILLESPIE  
☐ BRIAN MASON

(202)456-6620 (TELEPHONE)

(202)456-2604 (FAX)

SUBJECT:

Revised version of Lofgren Substitute to  
meet parliamentary concerns

1 OF 4

574  
4870  
9199

**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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H.L.C.

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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, 1158(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).

*ABORTION-*

*UNBORN VICTIMS*

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.



## U.S. Department of Justice

## Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

*ABORTION**CHOICE**ABORTION -**Unborn Victims Act*

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.<sup>1</sup> 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

<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> 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

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

<sup>4</sup> 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."

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

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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 can therefore 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, 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.<sup>2</sup>

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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. 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.

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<sup>4</sup> 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."

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  
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Ranking Minority Member