

NLWJC - Kagan

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**Counsels Office - Memos to POTUS
etc.**

THE WHITE HOUSE
WASHINGTON

October 2, 1996

MEMORANDUM FOR MELANNE VERVEER

FROM: ELENA KAGAN *EK*

SUBJECT: SEN. BOXER'S PARTIAL-BIRTH LANGUAGE

The draft language you sent me the other day looks identical to the old Boxer Amendment, which failed by just a few votes when the Senate first considered the Partial Birth Act.

Sen. Boxer's proposal is far less restrictive of partial-birth abortions than the President's approach. Sen. Boxer would permit all partial-birth abortions prior to viability, even if these abortions are not necessary to protect the woman's life or prevent her from suffering serious adverse health consequences. The President, by contrast, would insist that pre-viability, as well as post-viability, partial-birth abortions be necessary for these reasons.

Let me know if you hear of anything else or if you have any questions.

Melanne Verveer

Elena - you said
I have 7 Boxes
this . . .
dropped it after
the vote yesterday

O:\BAI\BAI96.681

S.L.C.

104TH CONGRESS
2D SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

introduced the following bill; which was read twice and referred
to the Committee on _____

A BILL

To amend title 18, United States Code, to ban partial-
birth abortions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Partial-Birth Abortion
5 Ban Act of 1995".

6 SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.

7 (a) IN GENERAL.—Title 18, United States Code, is
8 amended by inserting after chapter 73 the following:

9 "CHAPTER 74—PARTIAL-BIRTH ABORTIONS

"Sec.
"1531. Partial-birth abortions prohibited.

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S.I.C.

2

1 **“§ 1531. Partial-birth abortions prohibited**

2 “(a) Whoever, in or affecting interstate or foreign
3 commerce, knowingly performs a partial-birth abortion
4 and thereby kills a human fetus shall be fined under this
5 title or imprisoned not more than two years, or both. The
6 preceding sentence shall not apply to any abortion per-
7 formed prior to the viability of the fetus, or after viability
8 where, in the medical judgment of the attending physician,
9 the abortion is necessary to preserve the life of the woman
10 or avert serious adverse health consequences to the
11 woman. !

12 “(b) As used in this section, the term ‘partial-birth
13 abortion’ means an abortion in which the person perform-
14 ing the abortion partially vaginally delivers a living fetus
15 before killing the fetus and completing the delivery.

16 “(c)(1) The father, and if the mother has not at-
17 tained the age of 18 years at the time of the abortion,
18 the maternal grandparents of the fetus, may in a civil ac-
19 tion obtain appropriate relief, unless the pregnancy re-
20 sulted from the plaintiff’s criminal conduct or the plaintiff
21 consented to the abortion.

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S.L.C.

1 “(2) Such relief shall include—

2 “(A) money damages for all injuries, psycho-
3 logical and physical, occasioned by the violation of
4 this section; and

5 “(B) statutory damages equal to three times
6 the cost of the partial birth abortion.

7 “(d) A woman upon whom a partial-birth abortion
8 is performed may not be prosecuted under this section,
9 for a conspiracy to violate this section, or for an offense
10 under section 2, 3, or 4 of this title based on a violation
11 of this section.

12 “(e) It is an affirmative defense to a prosecution or
13 a civil action under this section, which must be proved by
14 a preponderance of the evidence, that the partial-birth
15 abortion was performed by a physician who reasonably be-
16 lieved—

17 “(1) the partial-birth abortion was necessary to
18 save the life of the mother; and

19 “(2) no other procedure would suffice for that
20 purpose.”

21 (b) CLERICAL AMENDMENT.—The table of chapters
22 for part I of title 18, United States Code, is amended by
23 inserting after the item relating to chapter 73 the follow-
24 ing new item:

 “74. Partial-birth abortions 1591”.



O:\BAI\BAI96.C06

S.T.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To clarify the application of certain provisions with respect to abortions where necessary to preserve the life or health of the woman.

IN THE SENATE OF THE UNITED STATES—104th Cong., 1st Sess.

H.R. 1833

To amend title 18, United States Code, to ban partial-birth abortions.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mrs. BOXER

Viz:

- 1 On page 2, line 9, add after the period the following
- 2 new sentence: "The preceding sentence shall not apply to
- 3 any abortion performed prior to the viability of the fetus,
- 4 or after viability where, in the medical judgment of the
- 5 attending physician, the abortion is necessary to preserve
- 6 the life of the woman or avert serious adverse health con-
- 7 sequences to the woman."

ack

THE WHITE HOUSE

WASHINGTON
June 22, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: PARTIAL BIRTH ABORTION

1. Override votes on the partial-birth veto are scheduled for mid-July in the House (where a 2/3 vote is probable) and mid-September in the Senate (where a 2/3 vote is very unlikely). The idea, of course, is to stretch out the issue over as many months as possible. I am attaching materials put out by the Catholic Church indicating what it will do during these months. At a recent meeting of the White House "abortion team" (sans George), it was decided (assuming George signs off) (1) to send the DNC and Re-Elect the President's 3-page letter and a revamped set of talking points, for distribution as they think appropriate; and (2) to send to religious and regional press, around the time of the July override vote, a 750-word op-ed, with Secretary Shalala as possible signatory. I was tasked with the job of doing the talking points and op-ed, which I will send to you.

2. Melanne, Todd, Jennifer Klein, John Hart, and someone from Betsy Myers's office met a few days ago with the former President and the current chief lobbyist for the American College of Obstetrics and Gynecology (ACOG). For many months, the folks at ACOG had been unwilling to speak with us about the medical issues surrounding the partial birth ban, but Marilyn Yeager convinced them to do so, and this meeting was the result. It was something of a revelation.

Two important points emerged from the meeting. First, there are an exceedingly small number of partial birth abortions that could meet the standard the President has articulated. In the vast majority of cases, selection of the partial birth procedure is not necessary to avert serious adverse consequences to a woman's health; another option -- whether another abortion procedure or, in the post-viability context, birth through a caesarean section, induced labor, or carrying the pregnancy to term -- is equally safe. I will spare you all the medical details here. Suffice it to say that we went through every circumstance imaginable -- post- and pre-viability, assuming malformed fetuses, assuming other medical conditions, etc., etc. -- and there just aren't many where use of the partial-birth abortion is the least risky, let alone the "necessary," approach. No one should worry about being able to drive a truck through the President's proposed exception; the real issue is whether anything at all can get through it.

Jack - Of course you're right. I will make sure the talking points get more general use - as aren't sure at all. Elena

PLS
Flame
You (we) cannot let
talking points
Dnc/ Campaign
going to call
Congress
only just
regard of
George
outreach
George
outreach
outreach

THE WHITE HOUSE

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Second and relatedly, of the five women who came to the White House, only two can truly say (though they all apparently believe) that the partial birth procedure was the least risky of their alternatives. Again, I'll spare you the details, but the other three -- all of whom were carrying malformed fetuses in the third trimester -- could have given birth, either through induction or through carrying the fetus to term, without serious risk to their health. (The partial birth procedure in these cases was the least risky method of abortion, but this is not a strong argument, given that all these fetuses were post-viability -- when most states, and the President himself, would prohibit all abortions except for life or health reasons.)

Those present at the meeting all agreed, on the basis of the thoroughness and care of the ACOG presentation, that these two points are probably just true, rather than a matter of medical opinion. (Betsy Myers and Jeremy Ben-Ami, neither of whom attended the meeting, have expressed the view that some other doctor might say something different.)

At the same time, none of us think that this information should cause us to change the standard the President has articulated or the rhetoric he has used. The letters and written materials we have used are really pretty accurate -- even though the proposed amendment the President has offered would allow fewer abortions than we knew. So too for the President's oral statements. Melanne believes that an appropriate time, prior to the debates or when the veto becomes an issue again, we should make sure the President knows that some of the women's stories are tighter than others; otherwise, she sees no need for any further briefing. I agree, but I also would keep a close eye out for -- so we can clamp down quickly on -- any extension of our rhetoric, whether by the President or others.



ARCHDIOCESE OF WASHINGTON

5001 EASTERN AVENUE
POST OFFICE BOX 29260
WASHINGTON, D.C. 20007

OFFICE OF THE ARCHBISHOP

June 5, 1996

Prot. N. 18/96

Dear Brother in Christ,

Thank you for the many prayers and good wishes for my speedy recovery. The outpouring of love and concern has been truly overwhelming and I am convinced that your prayers are greatly responsible for my progress. While the doctors have cautioned me to avoid letter writing, I am compelled to share our response to the expanding "culture of death" that the Holy Father has so clearly identified in our society.

Recently, I joined other U.S. cardinals in expressing dismay and profound disappointment with the presidential veto of enacted federal legislation to ban the partial-birth abortion procedure. In a letter to the President, we conveyed our intention to be uncompromising and unstinting in efforts to inform our own Catholic faithful and other Americans of good faith about the horrible reality of partial-birth abortions, and to promote support for a congressional veto override. In the face of this latest manifestation of a "culture of death," it also is our intention to encourage prayerful reflection and a renewed commitment to life and its Giver.

My intention is to provide an outline of our plan to participate in this nationwide prayer-and-action effort. With your assistance and the cooperation of the good people in your parish, it is my hope that we may educate our people about the partial-birth abortion procedure and exhort them to urge their congressional representatives to vote for an override. Importantly, this effort should be pursued in an atmosphere of prayer -- prayer for our nation, for our elected officials, and for the great cause of life.

Here, then, is the plan of action.

- **Early June:** Prayer card distribution accompanied by a pulpit announcement describing our local effort and the importance of prayer in reversing the partial-birth-abortion-ban veto. As with the prayer cards developed for the referendum effort several years ago, it is hoped that these prayer cards will be used in the homes of parishioners as well as incorporated into your liturgical celebrations. Each parish is encouraged to develop individual prayer activities in support of this national campaign.

June 5, 1996

Page Two

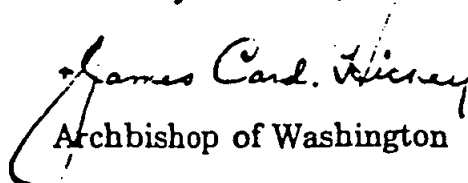
- **Late June:** Distribution to all parishioners of an "Action Alert", encouraging phone calls to the appropriate members of the U.S. House of Representatives, and providing an explanation of the partial-birth abortion procedure.
- **July:** National Day of Prayer and Fasting for an override of the president's veto on Thursday, July 11.
- **September:** Distribution and collection of pre-printed postcards to our two U.S. senators, these to be delivered to the senators' Washington offices by representatives of the Archdiocese. The details of this effort will be announced later; however, we do not plan an "in-pew" effort but will offer several other options.
- **October:** Participation in a special pro-life liturgy as part of our Annual Shrine Pilgrimage, with special focus on reversing the "culture of death" signified particularly by the partial-birth abortion procedure and attempts to legalize assisted suicide.
- **Ongoing:** The inclusion over time of "culture-of-life" petitions in general intercessions at weekend Masses.

More specific information will precede or accompany materials provided to your parish. Please look to your parish's Respect Life Committee for assistance with the various activities. If the name of your Parish Pro-Life Coordinator is *not* already on file at the Pro-Life Office, please return the enclosed form as soon as possible. This will allow our local Catholic Conferences to coordinate this effort directly with your personal representative on pro-life matters.

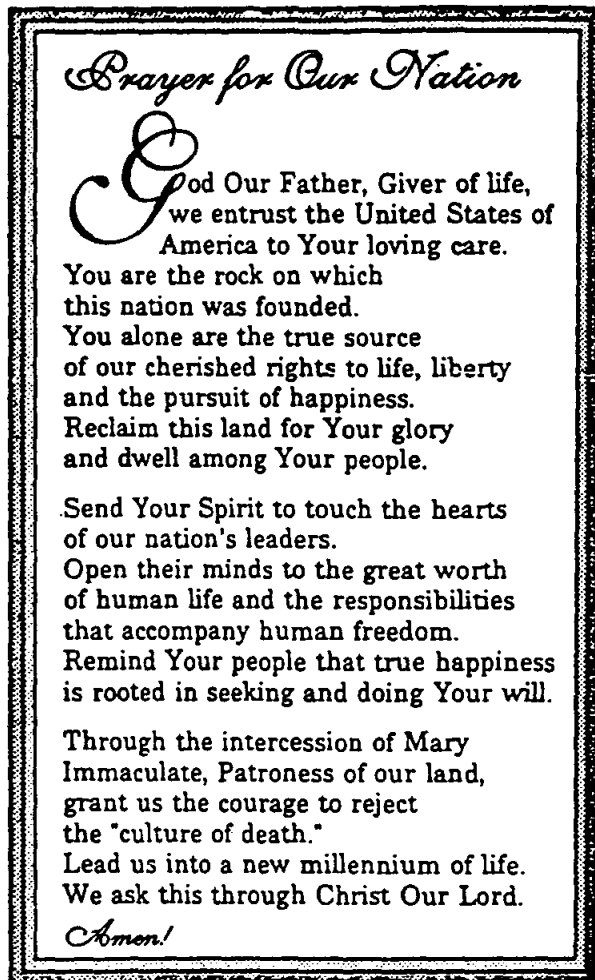
I recognize that the effort outlined here will come at a time when parish activity is reduced and pastor, staff and parishioners look forward to summer vacations. Unfortunately, the timetable is not of our making, but determined by congressional scheduling. With advance planning and shared responsibility, I am confident each parish can participate effectively.

Thank you for your own continuing support of the Gospel of Life. With the prayer that the Holy Spirit may bless our efforts to reverse the tide that increasingly puts human life at constant risk in our country, I am

Sincerely in Christ,


Archbishop of Washington

Prayer Card Distribution and Pulpit Announcement



The weekend of June 15/16 is the suggested time to introduce the "Prayer for Our Nation" prayer cards to parishioners. Like the prayer cards distributed and used during the Maryland Abortion Referendum several years ago, it is recommended that these cards be available in the pews or inserted in hymnals for recitation by the congregation. Many parishes found that the best time to use the prayer as part of the liturgy was during the general intercessions or just before the final blessing. It is asked that this prayer be used from now through Respect Life Month in October. Extra cards have been printed for families who wish to use the prayer at home as well.

Prayer cards are being distributed at meetings with parish pro-life coordinators or they will be delivered directly to the parish offices/rectory. Parishes may request prayer cards printed in a label/sticker format so that they can be conveniently applied inside of hymnals. The prayer card is also being translated into Spanish and copies will be delivered to parishes with Spanish speaking communities. Call the Pro-Life Office 301-853-5318 for more information.

If your parish is still using the prayer card that was distributed during the referendum effort, please continue to use that prayer if you choose not to replace it with the "Prayer for Our Nation" card.

Suggested Pulpit Announcement for June 15/16:

Today, (your church's name) joins parishes across the nation in launching an "Override Campaign" – a prayer and education effort directed toward a Congressional override of President Clinton's veto of a bill banning a particularly grotesque abortion procedure bordering on infanticide – the partial birth abortion. Today we will begin by praying together for our nation's return to a respect for all life. As override voting dates draw near, you will be asked to communicate with your Congressional representatives. The Catholic community, through prayer and action, can make a difference.

PARTIAL BIRTH ABORTION BAN VETO OVERRIDE CAMPAIGN

SUNDAYS NOTED - HOLIDAY WEEKENDS UNDERLINED

EVENT / ACTIVITY	DATE	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV
		5 12 19 26	2 9 16 23 30	7 14 21 28	4 11 18 25	1 8 15 22 29	6 13 20 27	3 10 17 24
MAILINGS FROM BISHOP			☐					
REGIONAL MEETINGS			☐					
FULPIT ANNOUNCEMENT PRAYER CARD DISTRIBUTION	JUN 16		🏛️					
PARISH SPIRITUAL ACTIVITIES			🏛️	ON-GOING HOLY HOURS, ROSARIES, MASSES, ETC.			🏛️	
ALERT & HOMILY NOTES	JUN 30		🏛️	EDUCATION & PHONE ACTION ALERT AIMED AT HOUSE				
POTENTIAL NATIONAL EVENT				RALLY, MARCH OR PRAYER VIGIL				
POST-CARDS & HOMILY NOTES	SEP 8 (BIRTHDAY OF MARY)					🏛️	IN-CHURCH EDUCATIONAL & POST-CARD EFFORT AIMED AT SENATE	
RESPECT LIFE SUNDAY BISHOP'S CALL TO PRAYER	OCT 6						🏛️	SHRINE PILGRIMAGE
ANNUAL RESPECT LIFE MONTH 'THE GOSPEL OF LIFE'							🏛️	ANNUAL ACTIVITIES



THE MARYLAND CATHOLIC CONFERENCE

ARCHDIOCESE OF BALTIMORE ♦ ARCHDIOCESE OF WASHINGTON ♦ DIOCESE OF WILMINGTON

188 Duke of Gloucester Street · Annapolis, Maryland 21401-2515 · 410/269-1155

**Re: Partial-Birth Abortion Ban
Veto Override**

June 12, 1996

Dear Pastor and Parish Staff,

I write to follow-up on Cardinal Hickey's letter to you outlining a parish-based campaign designed to override the President's veto of the federal legislation which banned the partial-birth abortion procedure.

Several items are enclosed for your use and information:

1. The inclusion of the "Prayer for our Nation" as part of Sunday liturgies and the pulpit announcement (which is intended for use on the weekend of June 15/16) will introduce your parishoners to the campaign.

You might already have received your parish's prayer cards; if not, they will be delivered to you within a few days. Numbers have been expanded to allow extra cards for those parishes that wish to affix a prayer card to a page of the hymnal or other parish publication. Placement of the prayer within the liturgy will vary from parish to parish. Some will want to recite the prayer after the Prayer of the Faithful; others might prefer to say it before the final blessing.

2. The "Special Alert" draft previews the effort scheduled the weekend of June 29/30 to urge parishioners to communicate their support of the partial-birth abortion ban to members of the House of Representatives. These alerts will be delivered to you prior to the June 29/30 weekend. The most appropriate method of distribution, whether as a bulletin enclosure or as a handout to each family leaving church, is up to you.

3. A sample bulletin announcement encouraging participation in the observance of Thursday, July 11, as a National Day of Prayer and Fasting for Life. Every diocese, each parish and individual parishioners are encouraged to join in this nationwide observance. The Pro-Life Activities Office of the National Conference of Catholic Bishops has prepared materials for your use which will be sent to you by the Archdiocese Pro-Life Office.

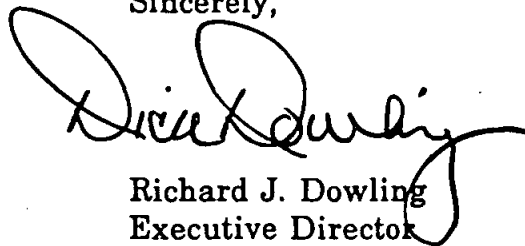
June 12, 1996
Page Two

Information about a September 7/8 postcard effort directed to U.S. Senators will be sent to you in early August. While the override vote in the House is expected to occur in mid-July, the Senate is not expected to vote until mid-September. Our intention is to sustain interest in the partial-birth issue as long as possible.

Allow me to express my gratitude to you for all your good work in bringing the reality of the partial-birth abortion procedure to the attention of the Catholic faithful.

Best regards.

Sincerely,



Richard J. Dowling
Executive Director

Enclosures

Prayer for Our Nation

God Our Father, Giver of life,
we entrust the United States of
America to Your loving care.

You are the rock on which
this nation was founded.

You alone are the true source
of our cherished rights to life, liberty
and the pursuit of happiness.

Reclaim this land for Your glory
and dwell among Your people.

Send Your Spirit to touch the hearts
of our nation's leaders.

Open their minds to the great worth
of human life and the responsibilities
that accompany human freedom.

Remind Your people that true happiness
is rooted in seeking and doing Your will.

Through the intercession of Mary
Immaculate, Patroness of our land,
grant us the courage to reject
the "culture of death."

Lead us into a new millennium of life.

We ask this through Christ Our Lord.

Amen!

Pulpit Announcement

June 15/16

Today, (your Church's name) joins parishes across the nation in launching an "Override Campaign" -- prayer, education and action directed toward a Congressional override of President Clinton's veto of a bill banning a particularly grotesque abortion procedure bordering on infanticide -- the partial birth abortion. Today we will begin by praying together for our nation's return to a respect for all life. As override voting dates draw near you will be asked to communicate with your Congressional representatives. The Catholic community, through prayer and action, can make a difference.

Bulletin Announcement

(for the weekends preceding July 11)

National Day of Prayer and Fasting for Life

As part of the campaign to override the presidential veto of the Partial-Birth Abortion Ban, Thursday, July 11 has been designated as a day of prayer and fasting for life. Every diocese, each parish and individual parishioners are encouraged to join in this nationwide observance. Plan now to observe the day. We will keep you informed as information about specific events becomes available.

SPECIAL ALERT

PARTIAL-BIRTH ABORTION

4/5 INFANTICIDE - 1/5 ABORTION! The baby is forcefully turned to a breech position and delivered feet first, except for the head. Scissors are thrust into the base of the infant's skull and then the brain is suctioned out, killing the infant. The delivery of the dead child is then completed.

CONGRESS VOTED TO BAN THE PROCEDURE PRESIDENT CLINTON VETOED THE BILL CONGRESS CAN OVERRIDE THE VETO

Congress will have an opportunity to override the presidential veto. If two-thirds of the members of the House and Senate vote to override the veto, the partial-birth abortion procedure will be banned in our country. The House will vote first, possibly within 2 weeks. The Senate vote will come later this summer.

ACT TODAY! YOU CAN MAKE A DIFFERENCE!

Call your House Representative.

Message: "Please vote to override the presidential veto of HR 1833 - Partial-Birth Abortion Ban."

Pray for President Clinton and our U.S. representatives, that God will open their eyes to this horrible abortion procedure and soften their hearts toward the unborn in our nation.

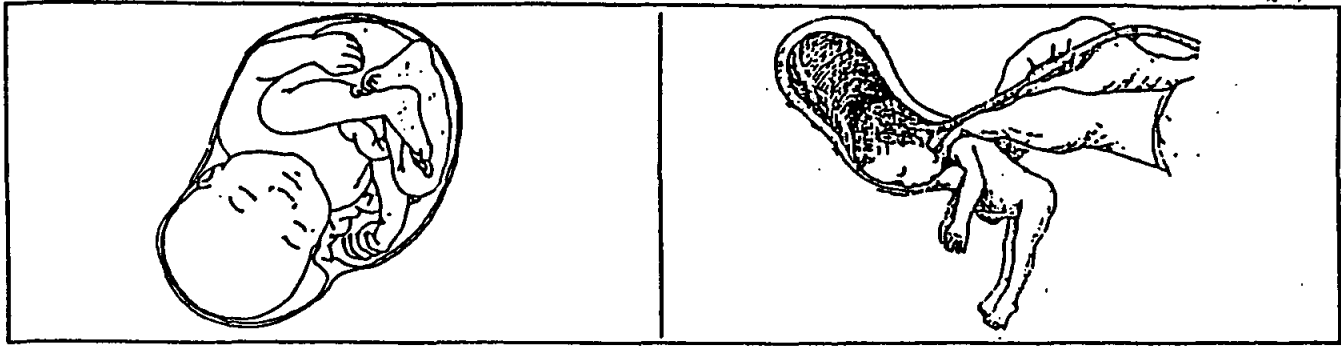
Check below for your representative's position on a ban of the partial-birth abortion procedure..

<u>District</u>	<u>Position</u>	<u>Phone</u>	<u>FAX</u>
1 Wayne Gilchrist (R)	For the ban	(202) 225-5311	(202) 225-0254
2 Robert L. Ehrlich, Jr. (R)	For the ban	(202) 225-3061	(202) 225-3094
3 Benjamin L. Cardin (D)	Against the ban	(202) 225-4016	(202) 225-9219
4 Albert R. Wynn (D)	Against the ban	(202) 225-8699	(202) 225-8714
5 Steny H. Hoyer (D)	Against the ban	(202) 225-4131	(202) 225-4300
6 Roscoe G. Bartlett (R)	For the ban	(202) 225-2721	(202) 225-2913
7 Elijah Cummings (D)	Elected after vote	(202) 225-4741	(202) 225-3178
8 Constance A. Morella (R)	Against the ban	(202) 225-5341	(202) 225-1389
DC Eleanor Holmes-Norton	Against the ban	(202) 225-8050	(202) 225-3002

Key: For the ban = Pro-Life Position

Against the ban = Pro-Abortion Position

MORE ON PARTIAL-BIRTH ABORTION



- The partial-birth abortion procedure is typically done on babies who are 20 or more weeks' gestational age. These are fully-formed, conscious infants who can feel pain.
- While the bill makes an exception for cases where the life of the mother is endangered and no other procedure would suffice, medical authorities have testified that this is *never* the case. Dr. Pamela E. Smith, director of medical education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital in Chicago has said, "There are absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life or health of the mother."
- Dr. Warren Hern, author of the most widely used textbook on abortion, *Abortion Practice*, disputes claims that this procedure can ever be the safest for women with late-term pregnancies. Indeed, he says that turning the baby to a breech position is "potentially dangerous" for the woman and could cause amniotic fluid embolism.
- Dr. William Rashbaum, a professor of obstetrics and gynecology in New York City, says that he and his colleagues have performed partial-birth abortions "routinely since 1979." It is not a rare procedure -- 600 to 2000 of these abortions are performed each year in this country.
- Recent polls demonstrate that 71% of American voters, and 78% of American women, support a ban on this abhorrent procedure.
- In the infamous case of *Roe v Wade*, the only Texas law which was not challenged was the one which reads:

"Whoever shall, during parturition of the mother, destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

It remains criminal in the state of Texas to kill a partially-delivered child.

THE WHITE HOUSE

WASHINGTON

April 25, 1996

MEMORANDUM FOR LEON PANETTA

FROM: JACK QUINN *JQ/EK*

SUBJECT: PARTIAL-BIRTH ABORTION

We may be asked, as we explain our position on the Partial Birth Act, whether our proposed exception for "serious adverse health consequences" could include psychological harm. One possible answer goes as follows:

No; that is a real red herring. Psychological reasons can never justify a doctor's decision to use the "partial birth" procedure as a way to perform an abortion. That's because it can't possibly matter to a woman's mental health whether a doctor chooses one procedure rather than another. And that's all this legislation is about: not whether a woman can have an abortion, but whether she can have this kind of abortion. When that's the question, the woman's mental health is and should be entirely irrelevant. No doctor can make the choice of procedure on that basis.

To explain this answer a bit further: what we are arguing about here is the justification for using a particular procedure -- not the justification for choosing to have an abortion at all. That's because the partial-birth legislation has to do only with the choice of procedure and not with the availability of abortion generally. It prohibits the use of a particular procedure in cases where an abortion is otherwise available.

Because the above is true, the whole issue of mental health is a ruse. Mental health (though it may be a reason for having an abortion at all) just isn't a justification for choosing one procedure from the range of alternatives: no one procedure is better for the psyche than any other. Thus, we can say with certainty that the President's exemption -- which sets forth the circumstances in which a doctor can choose this procedure rather than another -- does not include the risk of psychological harm.

The downsides of using an answer along these lines are: (1) Though the ultimate conclusion is easy to state, the rationale behind it is more difficult. If a person has to explain the conclusion, this complexity could cause trouble. (2) The answer suggests another question: Would the President allow a woman, in the post-viability stage, to get some kind of abortion for mental health reasons? Our answer says mental health is never a reason for choosing one procedure over another; but that leaves open whether it may be a reason for having an abortion at all. In suggesting that question, the answer may buy us trouble.

THE WHITE HOUSE

WASHINGTON

April 25, 1996

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We may be asked, as we explain our position on the Partial Birth Act, whether our proposed exception for "serious adverse health consequences" could include psychological harm. One possible answer goes as follows:

No; that is a real red herring. Psychological reasons can never justify a doctor's decision to use the "partial birth" procedure as a way to perform an abortion. That's because it can't possibly matter to a woman's mental health whether a doctor chooses one procedure rather than another. And that's all this legislation is about: not whether a woman can have an abortion, but whether she can have this kind of abortion. When that's the question, the woman's mental health is and should be entirely irrelevant. No doctor can make the choice of procedure on that basis.

To explain this answer a bit further: what we are arguing about here is the justification for using a particular procedure -- not the justification for choosing to have an abortion at all. That's because the partial-birth legislation has to do only with the choice of procedure and not with the availability of abortion generally. It prohibits the use of a particular procedure in cases where an abortion is otherwise available.

Because the above is true, the whole issue of mental health is a ruse. Mental health (though it may be a reason for having an abortion at all) just isn't a justification for choosing one procedure from the range of alternatives: no one procedure is better for the psyche than any other. Thus, we can say with certainty that the President's exemption -- which sets forth the circumstances in which a doctor can choose this procedure rather than another -- does not include the risk of psychological harm.

The downsides of using an answer along these lines are: (1) Though the ultimate conclusion is easy to state, the rationale behind it is more difficult. If a person has to explain the conclusion, this complexity could cause trouble. (2) The answer suggests another question: Would the President allow a woman, in the post-viability stage, to get some kind of abortion for mental health reasons? Our answer says mental health is never a reason for choosing one procedure over another; but that leaves open whether it may be a reason for having an abortion at all. In suggesting that question, the answer may buy us trouble.

cc: Elena Kagan

THE WHITE HOUSE

WASHINGTON
April 24, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN
FROM: ELENA KAGAN
SUBJECT: PARTIAL-BIRTH ABORTION

*low/EK
I still think, better late, than never.
but it's not making sense.
I'll move that to another page.
I'll move that to another page.*

Yesterday, I gave you proposed legislative language on partial-birth abortion. In addition, Todd received back from the President a copy of the three-page letter Todd and I prepared last week explaining the President's position. The President wrote that it was an excellent letter and that we should "proceed." All this raises the question what, if any, further action we should take on this matter: Should we send up legislation? Release the letter (if so, to whom)? Both? Neither? We should put these choices to the President; here are some of my preliminary thoughts on the matter.

Learn as much as you can about the letter. It's a good letter. I'll give you the religious leaders.

This is the argument to carry through.

There is something to be said for not doing anything at this time. For now, at least, the issue has subsided. Releasing the letter and/or sending up legislation will only revive press interest in the controversy. More, sending up legislation will anger the pro-choice community. And finally (perhaps most importantly), sending up proposed legislation may involve the President in some very sticky questions about why he chose the language he did, what it means, and what amendments he would accept. If (and this is an if) Congress has any interest in negotiating on the bill, the President might find himself facing some very difficult choices. (For example, Congress could redefine the proposed health exception to make it much narrower and then ask why the President will not accept Congress's version of the exception.)

On the other hand, sending up legislation may be the only way to show that the President is serious about the position he has taken. Given that this issue will not disappear, the President should try to position himself so as to minimize the damage from it. That means backing up rhetoric with action -- in much the same way as it made sense to submit a balanced budget rather than just saying the President favored deficit reduction. Submitting legislation, though again raising the issue to the surface, will provide the President with the long-term cover he needs on this issue. And if Congress is willing to negotiate, perhaps that is all to the good -- because perhaps there is a compromise position that the President would favor and that would turn this issue to his advantage.

I thought so. But there is no real hook of that. We've done something like it before. I think it's very strange. I'll give you the letter about it.

If we do decide to send up legislation, I would cover it with a letter to Congress similar to the one Todd and I prepared,

What is Todd's all time?

explaining the President's overall position on this issue and his proposed health exception. I do not think it makes sense to release the letter without sending up legislation; this would provoke renewed interest in the issue without particularly enhancing the president's credibility. Likewise, I do not think it makes sense to send up legislation without also issuing a letter; this would ignore an opportunity to provide a clear and cogent explanation of why the President vetoed the original bill and why he is now offering an amended version.

THE WHITE HOUSE

WASHINGTON

April 24, 1996

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THE WHITE HOUSE
WASHINGTON

MEMORANDUM FOR LEON PANETTA
CHIEF OF STAFF

FROM: KATHLEEN WALLMAN *KW*
SUBJECT: PARTIAL BIRTH ABORTION ACT
DATE: FEBRUARY 16, 1996

Pursuant to our meeting this morning, here are some talking points concerning the constitutional infirmity of Option 1 and why Option 2 is the best way to reconcile the desire for limits on the availability of the partial birth abortion procedure with *Roe v. Wade*.

With respect to the letter, I believe that the bracketed language should be restored because it makes the letter more consistent with Option 2. More important than changing the letter, however, is guidance from the President that he agrees that Option 1 should not be embraced because of its constitutional infirmity, and that Option 2 suffices to effect his will on this difficult issue. This guidance is important because, whatever the final wording of the letter, we will need to be prepared to explain to the pro-choice groups, who will call promptly upon release of this letter, what it means in terms of *Roe v. Wade*.

I also wanted to remind you that, as stated in the February 2nd memorandum, the Office of Legal Counsel at Justice agrees with the White House Counsel's Office that Option 1 is unconstitutional. OLC also thinks that Option 2 is unconstitutional, but White House Counsel's Office disagrees. We believe that Option 2 is one of three options that have been presented to the President that are at least arguably constitutional.

Please let me know if you need anything further.

cc: Martha Foley
Harold Ickes
Elena Kagan
Evelyn Lieberman
Nancy-Ann Min
Jack Quinn
Carol Rasco
Todd Stern
Melanne Verveer
Marilyn Yager

1. Why Option 1 is unconstitutional.

Option 1 allows a doctor to use the partial birth abortion procedure in an abortion, whether pre- or post-viability, **only** when the abortion is necessary to preserve the life of the mother or prevent serious adverse health consequences to her -- that is, where **the pregnancy itself** poses a threat to the life or serious health interests of the mother and must be terminated to end that threat.

This means that a doctor could not elect to use the partial birth abortion procedure in the following circumstances:

A woman in her tenth week of pregnancy decides to have an abortion. It is an elective abortion; the **pregnancy** presents no risk to her life or health. However, the doctor determines that the use of the partial birth abortion procedure, rather than some other procedure, is necessary to avoid serious adverse consequences to the woman's health. Under Option 1, the doctor **may not** use the procedure. And the woman could not have a safe abortion, because the only method that the doctor judges to be safe is not permitted.

Roe v. Wade broadly protects a woman's right to choose during these early, pre-viability weeks of pregnancy. To embrace an option that would prevent a woman, as in the above example, from having a safe elective abortion altogether during the pre-viability period will be viewed by pro-choice groups as an extremely significant undercutting of the President's previously and often stated commitment to *Roe v. Wade*. This will cause tumult in that community and in the President's relations with them.

2. Option 2 is the best way to reconcile the desire for limits on the use of the procedure with *Roe v. Wade*.

Option 2 allows a doctor to use the partial birth abortion procedure --

post-viability: only when the abortion is necessary to end a pregnancy that poses a threat to the life of the woman or presents serious adverse consequences to her health (identical to Option 1); and

pre-viability: both (i) when the abortion is necessary to end a pregnancy that poses a threat to the life or serious health interests of the mother; AND (ii) when the abortion is performed for "elective" reasons, but the doctor determines that he must use the partial birth abortion procedure to avoid a threat to the life or serious health interests of the mother.

Option 2 solves the difficulty presented in the pre-viability scenario described above, because the doctor would be permitted to use the partial birth abortion procedure, based on his determination that it is the only method that will avoid a serious injury to the woman's health.

Option 2 thus allows the President to endorse a position that says that this procedure may never be used unless necessary to avoid risk to life or serious health consequences, without raising the major constitutional problems raised by Option 1, or raising questions about the consistency of his commitment to upholding *Roe v. Wade*.

THE WHITE HOUSE
WASHINGTON

kw/ek

MEMORANDUM FOR JACK QUINN AND ELENA KAGAN

FROM: KATHLEEN WALLMAN *W*
SUBJECT: POSITION ON LATE TERM ABORTION
DATE: APRIL 22, 1996

In the preparatory session for Secretary Shalala's appearance for the Brinkley show, it occurred to me that we need a succinct way of describing where the President is on this issue and why his position is not the equivalent of partial birth abortion on demand. I would appreciate your reaction to the following as a summation that could be used by people who are called upon to talk about this issue for the President.

Rather, *Now he*
The President does not support late term abortion on demand, and does not support use of this procedure on demand. He supports making it available to mothers who, without it, would die or suffer serious adverse consequences to their health. If the proponents of the legislation do not believe that the incorporating the term "serious adverse health consequences" into the legislation is sufficient to rule out the use of this procedure on demand, we welcome the opportunity to talk with them.

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Another difficult question came up at the briefing session: "Does the President believe that psychological injury could be a serious adverse health consequence?" We need to develop an answer to this question. Elena, is there learning from the choice groups or in the case law about whether this is a real issue or a made up one?

*The President has long said that
abortion should be safe, legal
and rare. Late term abortion
is particularly should be rare
more specifically,*

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THE WHITE HOUSE
WASHINGTON

MEMORANDUM FOR JACK QUINN AND ELENA KAGAN ✓
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THE WHITE HOUSE

WASHINGTON

January 29, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN

SUBJECT: PARTIAL BIRTH ABORTION ACT

You have asked for a response to a memo from Lee Strobel urging you to sign the partial birth abortion act. The memo you received argues: (1) that many partial birth abortions are performed in "routine" cases, where there is no life or safety issue; (2) that even in non-routine cases, there are always equally sound medical alternatives to the partial birth procedure; and (3) that some of the non-routine cases highlighted by pro-choice groups (notably, the Coreen Costello and Viki Wilson cases) would not be affected by the legislation. Each of these arguments is not quite accurate, for the reasons described below. At bottom, even acknowledging that medical opinion on this procedure is divided, the best available information, viewed in light of Supreme Court law, suggests that a veto of the bill is appropriate on grounds that it does not sufficiently protect the health of the woman.

1. With regard to the claim that many partial birth abortions are performed in routine cases, you have objected -- and should continue to object -- to the use of this procedure in any "routine" case, not involving a woman's life or safety. If the bill were amended as you have insisted it be, such that you could sign it, then the procedure would be banned in routine cases -- i.e., where the life or health of the mother is not at risk.

2. Doctors have offered a range of different views as to whether and when use of the partial birth procedure is medically necessary or appropriate. Some doctors, as the memo to you indicates, believe that alternative medical procedures are always as safe or safer than the partial birth procedure. Other doctors claim that the partial birth procedure is often the safest surgical alternative for women late in pregnancy. These other doctors, among other things, say that the procedure poses the least risk to a woman's future reproductive capacity.

A federal district court in Ohio recently addressed this matter in ruling on the constitutionality of a state statute banning partial birth procedures. After six days of hearings, during which several medical experts testified on each side of the issue, the district court concluded that the partial birth procedure "appears to pose less of a risk to maternal health" than do other procedures available late in pregnancy.


Given the state of medical evidence on this subject, it

seems appropriate to leave to doctors themselves the decision whether the procedure is medically necessary. The question the Act presents is whether to prevent such doctors from acting on a judgment that the procedure is the safest available in a particular circumstance. In this regard, the Supreme Court has recognized that abortion regulations must "allow the attending physician the room he needs to make his best medical judgment." Such an approach, which allows the medical community to make clearly medical decisions, seems the surest way to protect the health of women.

3. The facts relating to the Costello and Wilson cases are somewhat uncertain, but this uncertainty tends to reinforce, rather than undermine, the Administration's current position on the Partial Birth Act. The Strobel memo claims that Coreen Costello did not have a partial birth procedure as defined by the Act. Some doctors would support this claim; others would dispute it. There is enormous uncertainty within the medical community as to exactly which procedures this Act covers. The Act does not use any medically recognized terms, and although the definition in the Act of "partial birth abortion" may seem clear to a layman, many doctors say that they do not know how it would apply to particular medical procedures. The dispute over whether Costello's procedure was covered by the Act thus points to a real problem with the legislation: its vagueness and lack of clarity as applied to the real world of medicine.

Similarly, it is not clear whether the Costello and Wilson procedures would fall within the bill's current "life of the mother" exemption. Even if Costello and Wilson were in life-threatening (as opposed to health-threatening) pregnancies, which is itself unclear, a partial birth abortion may not have been "necessary" to save their lives, as the current exemption requires. Under this exemption, it is apparently not enough that a woman is in a life-threatening pregnancy and that her doctor has determined that the partial birth procedure is the most medically appropriate; a partial birth procedure falls within the exemption only if that procedure, and no other, is capable of saving the woman's life. No one knows -- indeed, given the state of medical evidence on these matters, it seems impossible to know -- whether Costello or Wilson (or any other woman in their situation) would get any relief from this very limited exemption.

In any event, it seems indisputable that this bill, if it passes, will operate in certain cases to prevent women from receiving the medical procedures that their doctors believe to be the safest for them. As you know, this result is forbidden by current constitutional law, which insists that at every stage of a pregnancy, the state's interest in regulating abortion yield to preservation of a woman's health. It is this infirmity alone that impels me to advise you that the proposed Act does not pass constitutional muster.

A handwritten signature in cursive script, appearing to be 'J. A. W.', located at the bottom right of the page.

THE PRESIDENT HAS SEEN

2/14/96

THE WHITE HOUSE
WASHINGTON

January 29, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN

SUBJECT: PARTIAL BIRTH ABORTION ACT

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procedure to protect the life or health of the woman. If the Administration's position were accepted, Congress could pass legislation banning any partial birth abortion not meant to protect the life or health of the woman -- roughly speaking, in layman's language, any "elective" partial birth abortion. In sum, you can object to this bill because it applies to other than purely elective abortions, and you can make clear that you would support a bill that, by including a properly drafted life and health exception, applied only to "elective" abortions.

As Walter Dellinger has opined, an objection of this kind is constitutionally required. Even in the post-viability period, the government's interest in regulating abortion must yield to preservation of a woman's life and health. This means both that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy and that the government may not regulate access to abortion in a manner that effectively requires a woman to bear an increased medical risk from the procedure. Because the Act does not allow partial birth abortions when such procedures will most fully protect a woman's health, it fails to satisfy this standard.

Descriptions of the partial birth procedure should make anyone uncomfortable (though other abortion procedures also can be described in a grizzly manner). Because of the procedure's disturbing qualities, I do not recommend that you object to the Act on any grounds suggestive of the position that all regulation of the procedure is improper. I recommend that you instead object to the Act on the narrow ground that this particular regulation fails to protect sufficiently the health of the woman and indicate your willingness to sign a bill that includes such protection.

THE WHITE HOUSE

WASHINGTON

January 22, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN ^{✓ 1-23}

SUBJECT: PARTIAL-BIRTH ABORTION BAN

You have raised questions about the Partial Birth Abortion Ban Act -- most notably, about when the procedure prohibited in the Act is used. Hard facts on such questions are difficult to find. The interest groups use wildly different statistics, and the medical community has largely declined comment on these issues. But the best available information, when viewed in light of current Supreme Court precedent, indicates that the current Administration position -- opposing the bill because it does not sufficiently protect the health of the woman -- is correct.

The number of partial birth abortions performed each year is very small. All or almost all partial birth abortions occur after twenty weeks of pregnancy. About 13,000 (of 1.5 million) abortions each year occur at this stage. Partial birth abortions probably account for between 400 and 600 of these 13,000 abortions, although some doctors have warned that the Act, because worded vaguely, may apply to more.

There is little firm data on the circumstances in which these abortions are performed. The pro-choice groups claim that almost all partial birth abortions (like almost all late-term abortions generally) are performed to protect the life or health (including future reproductive capacity) of the woman or in cases of severe fetal deformity. Pro-life groups claim that many of these abortions are performed in other kinds of cases. One doctor who performs these abortions has said that up to 80% of his procedures are "elective," but this may mean only that they are non-emergency surgery; the procedures still may be necessary to protect the life or health of the woman. (In addition, this doctor performs only pre-viability partial-birth abortions, which are comparatively rare and which are much more likely to be "elective.") The leading medical groups have not offered any statistics on these matters. The most that any medical group has said is that the partial birth procedure sometimes best protects the life and health of the woman and that doctors often choose the procedure for that reason.

Whatever the facts on the circumstances in which the procedure is used, the Administration has objected to the bill only because it prohibits using the partial birth

procedure to protect the life or health of the woman. If the Administration's position were accepted, Congress could pass legislation banning any partial birth abortion not meant to protect the life or health of the woman -- roughly speaking, in layman's language, any "elective" partial birth abortion. In sum, you can object to this bill because it applies to other than purely elective abortions, and you can make clear that you would support a bill that, by including a properly drafted life and health exception, applied only to "elective" abortions.

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Jae

THE WHITE HOUSE

WASHINGTON

April 11, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*
SUBJECT: FUTURE ABORTION BILLS?

It seems possible to me that Congress could present the President with one or both of the following pieces of abortion legislation:

1. A bill prohibiting all post-viability abortions except those necessary to protect life or health; and/or
2. A bill prohibiting all partial-birth abortions (post- or pre-viability) except those necessary to protect life or health.

Each bill would define the health exception as narrowly as possible -- say, to apply only when the abortion itself (not, in the case of the partial-birth legislation, the particular procedure) is necessary to prevent serious and permanent physical (not psychological) injury.

Of course, the Republicans may not wish to give the President the opportunity to sign these bills. But if I were them, I'd think pretty seriously about placing the President in this position.

Something to think about?

February 15, 1996

MEMORANDUM FOR JACK QUINN

FROM: ELENA KAGAN

SUBJECT: PARTIAL BIRTH ABORTION ACT

As you recall, Leon suggested to you a few days ago that the President does not want to distinguish at all between the pre-viability and post-viability stages of pregnancy in regulating partial birth abortions. I am not sure why the President would resist this distinction; he, the public, and the Court all have accepted the meaningfulness of this distinction in a wide variety of contexts. But if he insists that no distinction be made, there seem to be only two possible Administration positions.

1. The first position is set forth as Option 1 in our February 2 memo. This approach would allow use of the partial birth procedure, whether in the pre-viability or post-viability stage, in only one circumstance: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman.

The problem with this approach is twofold. First, it is unconstitutional, because it prohibits use of the partial birth procedure in any pre-viability case in which the woman desires the abortion for non-health related reasons, even if the partial birth procedure (as compared to other procedures) is necessary to protect her from serious adverse health consequences. Second, the groups will go crazy, exactly because the approach effects this broadscale pre-viability prohibition.

2. The second position is not offered in our February 2 memo. This approach would allow use of the partial birth procedure, whether in the pre-viability or post-viability stage, in two circumstances: (a) as above, where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman; or (b) where the abortion is performed for non-health-related reasons, but the use of the partial birth procedure (as opposed to other abortion procedures) is necessary to avert a threat to the life or the serious health interests of the woman.

In the vast majority of states, this approach effectively would distinguish between the pre- and post-viability stages because circumstance (b) above would have no actual consequence after viability. This is because most states prevent a woman from getting any post-viability abortion (partial birth or any other) for non-health related reasons. Whatever the scope of the federal law on partial birth abortions, such broadscale state

restriction of post-viability abortions would continue. In these states, then, the position outlined here would operate in the exact same way as (though look different than) Option 2 in our February 2 memo: it would allow partial birth abortions post-viability in circumstance (a) and pre-viability in circumstances (a) and (b).

In these states, of course, the real effect of the federal law would be on pre-viability partial birth abortions. After viability, such abortions would be available exactly where they are today: where the pregnancy endangers the woman's life or health. But before viability, such abortions would be available only where there is some health link; today, they are available in any case at all, regardless whether either the abortion itself or the election of the particular procedure is medically necessary.

In the small minority of states that do allow post-viability abortions for non-health-related reasons, the approach outlined here would operate identically on pre- and post-viability partial birth abortions. That is, the approach would allow partial birth abortions both before and after viability in circumstances (a) and (b).

In these states, the federal law would cut into the incidence of both pre-viability and post-viability partial birth abortions. Whereas today a woman always can get such an abortion (whether pre- or post-viability), the federal law will limit the availability of such abortions (again, either pre- or post-viability) to cases in which either the abortion itself or the election of the particular procedure is medically necessary.

This approach is far preferable to the first position set out above. First, it does not suffer from the constitutional defect associated with the first position because it allows partial birth abortions where use of that particular procedure (even if not the abortion itself) is medically necessary. Second, it will not make the groups go crazy, again because it fully protects the right of the woman to any medically necessary procedures.

If we have to treat pre- and post-viability abortions alike, then, this is how we should do it: by allowing use of the partial birth procedure whenever either the abortion or the election of the particular procedure is medically necessary. Stated in statutory language (as in our other memo), this option goes as follows:

The prohibition of the Act shall not apply to any abortion if, in the medical judgment of the attending physician, the abortion or election of particular method of abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

January 31, 1996

MEMORANDUM FOR LEON PANETTA

FROM: JACK QUINN
SUBJECT: BOXER AMENDMENT

The Boxer Amendment protects the use of "partial birth abortions" in the following circumstances:

- at any time prior to the viability of the fetus
- after viability when the abortion is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

The protection the Boxer Amendment gives to the partial birth procedure may go beyond the President's current position in the following way:

- The Boxer Amendment protects all pre-viability partial birth abortions, even when the abortion is being performed for non-health-related reasons and there are equally safe medical procedures available.
- The President may wish to allow regulation of partial birth abortions when there are no health issues involved -- that is, when the abortion is not being performed for health-related reasons and when there are equally safe medical procedures available.
- Note, however, that a decision to allow regulation of partial birth abortions when there are no health issues involved would raise a constitutional question: whether such a regulation imposes an "undue burden" on a woman's ability to obtain an abortion. It is not clear how the courts would decide this question.

The Boxer Amendment raises one constitutional question of its own:

- The Amendment protects partial birth abortions after viability only to preserve life or avert "serious" health consequences.
- The Court has always insisted that abortions be protected when necessary to protect the health of the woman: it has never used the word "serious" or any other qualifier. A requirement of serious risk may be implicit in the Court's statements. But this is currently an open question.

4/9/96

THE WHITE HOUSE

WASHINGTON

96 APR 8 8:51

April 8, 1996

Handwritten: Must to discuss H.R. 1833

MEMORANDUM FOR THE PRESIDENT

FROM: TODD STERN *TS*

SUBJECT: Veto of H.R. 1833 -- "Partial Birth" Abortion bill

Your advisors (Melanne, George, Counsel's Office, DPC and others) seek your guidance on how you want to handle the veto of this bill, which will probably be scheduled for Thursday (last day for action is April 17). All agree that the veto event should be relatively low-key, but three different options have been discussed:

Option 1: You sign privately. No press. (There could be a White House photo.) This has the advantage of keeping the veto, which is highly unpopular with pro-life and religious groups, as low key as possible. The disadvantages are that (i) it may look as though you are trying to hide the veto -- something that won't work anyway and won't look forthright; and (ii) by not speaking orally to the press, you will give your opponents an advantage in defining the issue rather than getting your own message out.

Option 2: You first meet privately with a woman or, if possible, a couple who have a powerful story to tell. White House photo only. You then sign the veto message in the Oval alone, before the pool. In your brief remarks, you would reference your conversation with them. Public Liaison has been in touch with a number of women who have moving stories to tell -- women, for example, who were staunchly pro-life but came to see, through their own painful experience, that, on rare and painful occasions, this procedure is necessary to save a women's life or spare her truly serious adverse consequences to her health.

Option 3: You meet with the couple privately, then bring them into the Oval Office, where they witness you sign the veto message before the pool, but do not speak. This option goes the furthest in putting a human face on why you are vetoing the bill.

Most of your advisors, including George and Melanne, favor Option 3.

Option 1

Option 2

Option 3

Discuss

Handwritten notes:
AT-11-11-2
For discussion
Law
PC

Tach - E - He DOES. JQ

You're right - this is a problem.
It seems as if he wants Option 1
(which was also Leon's preference).
Call me whenever.

Elena

When we have settled on approach
should respond to Bill H. who
got me Stobel letter. They might
buy #1 especially since testimony
shows alternative procedure in
late term abortion also pretty
rough.

THE WHITE HOUSE
WASHINGTON
February 2, 1996

7:25 pm

Wright

MEMORANDUM FOR THE PRESIDENT

FROM: LEON PANETTA, JACK QUINN *Jmq*,
GEORGE STEPHANOPOULOS, NANCY-ANN MIN

SUBJECT: PARTIAL BIRTH ABORTION ACT

Detailed below are four ways of amending the Partial Birth Abortion Act. They differ with respect to (1) the meaning and appropriate scope of a life and health exception and (2) the permissibility of imposing any restrictions on use of the procedure in the pre-viability setting. Of course, we need not propose any statutory language. But these formulations will help to bring into sharper focus the question of when the regulation of partial birth abortions is impermissible.

The Office of Legal Counsel of the Justice Department believes that only one of the following proposals meets constitutional standards -- namely, Option 4 (the option, of the ones presented here, allowing greatest use of the partial birth procedure). The White House Counsel's Office disagrees, believing that Options 2, 3, and 4 are all at least arguably constitutional. On the other hand, the White House Counsel's Office agrees with OLC that Option 1 is unconstitutional because it prevents a doctor from using the partial birth procedure in any previability case in which the woman desires the abortion for non-health related reasons, even if the partial birth procedure (as compared to other procedures) is necessary to protect her from serious adverse health consequences.

Attached to this memo is a draft of a letter, which sets out your basic position on the Partial Birth Abortion Act. The penultimate paragraph of the letter, in which you say what kind of bill you could sign, is most consistent with Option 1 in the absence of the bracketed words and is most consistent with Option 2 when those words are included.

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1. The prohibition of the Act shall not apply to any abortion performed where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This option allows use of the partial birth procedure, whether in the pre-viability or post-viability stage, in only one circumstance: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman.

2. The prohibition of the Act shall not apply to any abortion if, in the medical judgment of the attending physician, the abortion (or, in the case of pre-viability abortions, the abortion or election of particular method of abortion) is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This option allows use of the partial birth procedure in the post-viability stage in the same circumstance described in Option 1: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman. It allows use of the of the partial birth procedure in the pre-viability stage in that circumstance and another: where the abortion is performed for non-health related ("elective") reasons, but the use of the partial birth procedure (as opposed to other abortion procedures) is necessary to avert a threat to the life or the serious health interests of the woman.

3. The prohibition of the Act shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This is the Boxer Amendment. It allows use of the partial birth procedure in the post-viability stage in the same circumstance described in Option 1: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman. It allows use of the partial birth procedure in the pre-viability stage in any case at all, regardless whether the abortion is performed for health-related reasons and also regardless whether in "elective" cases, the use of the partial birth procedure (as opposed to other procedures) is medically necessary.

4. The prohibition of the Act shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert an adverse health consequence to the woman.

This option allows use of the partial birth procedure in the post-viability stage where the abortion is performed because the pregnancy poses a threat to the life or the health interests of the woman. Note that in this formulation, the adverse health consequences to the woman do not have to be "serious." The option allows use of the partial birth procedure in the pre-viability stage in any case at all, as does Option 3. This is the option preferred by the Justice Department's OLC.

THE PRESIDENT HAS SEEN

THE WHITE HOUSE
WASHINGTON

2-13-96

February 5, 1996

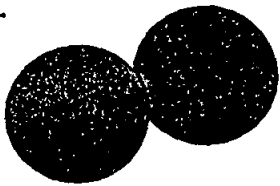
MR. PRESIDENT:

Attached is a memo from Leon, Jack, George and Nancy-Ann Min on the partial birth abortion bill, setting forth four policy options and attaching a proposed letter to Senator Hatch. DOJ believes that only Option 4 is constitutional, while our Counsel's office believes any of Options 2-4 are constitutionally sound. In essence these are the options:

1. No use of this procedure in pre- or post-viability stage unless the abortion is being performed because the pregnancy itself threatens life or serious adverse health consequences.
2. Same as Option 1 post-viability, but broader use pre-viability -- namely, if woman chooses an elective (non-health) abortion, she could choose to use this procedure as long as the procedure (as opposed to other procedures) were necessary to avert risk to life or serious adverse health consequences.
3. (Boxer) Same as Option 1 post-viability, but still broader use pre-viability -- namely, procedure could be used in any pre-viability abortion, irrespective of a health rationale.
4. Same as Option 3 pre-viability; differs from Options 1-3 post-viability by requiring only "adverse" rather than "serious adverse" health consequences.

The attached draft letter embodies Option 1 without the bracketed language; Option 2 with such language.


Todd Stern



Leon

agony
#1



THE WHITE HOUSE

WASHINGTON

February 2, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: LEON PANETTA, JACK QUINN *Jmq*
GEORGE STEPHANOPOULOS, NANCY-ANN MIN

SUBJECT: PARTIAL BIRTH ABORTION ACT

Detailed below are four ways of amending the Partial Birth Abortion Act. They differ with respect to (1) the meaning and appropriate scope of a life and health exception and (2) the permissibility of imposing any restrictions on use of the procedure in the pre-viability setting. Of course, we need not propose any statutory language. But these formulations will help to bring into sharper focus the question of when the regulation of partial birth abortions is impermissible.

The Office of Legal Counsel of the Justice Department believes that only one of the following proposals meets constitutional standards -- namely, Option 4 (the option, of the ones presented here, allowing greatest use of the partial birth procedure). The White House Counsel's Office disagrees, believing that Options 2, 3, and 4 are all at least arguably constitutional. On the other hand, the White House Counsel's Office agrees with OLC that Option 1 is unconstitutional because it prevents a doctor from using the partial birth procedure in any previability case in which the woman desires the abortion for non-health related reasons, even if the partial birth procedure (as compared to other procedures) is necessary to protect her from serious adverse health consequences.

Attached to this memo is a draft of a letter, which sets out your basic position on the Partial Birth Abortion Act. The penultimate paragraph of the letter, in which you say what kind of bill you could sign, is most consistent with Option 1 in the absence of the bracketed words and is most consistent with Option 2 when those words are included.

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1. The prohibition of the Act shall not apply to any abortion performed where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This option allows use of the partial birth procedure, whether in the pre-viability or post-viability stage, in only one circumstance: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman.

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THE WHITE HOUSE

WASHINGTON
February 2, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: LEON PANETTA, JACK QUINN *Jmq*
GEORGE STEPHANOPOULOS, NANCY-ANN MIN

SUBJECT: PARTIAL BIRTH ABORTION ACT

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DRAFT

Dear Senator Hatch:

I understand that the House is preparing to consider H.R. 1833, as amended by the Senate, which would prohibit doctors from performing a certain type of abortion. I want to make the Congress aware of my position on this extremely complex issue.

I have always believed that the decision to have an abortion should be between a woman, her conscience, her doctor, and her God. I strongly believe that legal abortions--those abortions that the Supreme Court ruled in Roe v. Wade must be protected--should be safe and rare. I have long opposed late-term abortions except, as the law requires, where they are necessary to protect the life of the mother or where there is a threat to her health. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions except where they were necessary to protect the life or health of the woman, consistent with the Supreme Court's rulings.

The procedure described in H.R. 1833 is very disturbing, and I cannot support its use on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available. As I understand it, however, there are rare and tragic situations that can occur in a

DRAFT

woman's pregnancy in which, in a doctor's medical judgment, this procedure may be necessary to save a woman's life or to preserve her health. In those situations, the Constitution requires that a woman's ability to choose this procedure be protected.

I have studied and prayed about this issue, and about the families who must face this awful choice, for many months. I believe that we have a duty to try to find common ground: a resolution to this issue that respects the views of those--including myself--who object to this particular procedure, but also upholds the Supreme Court's requirement that laws regulating abortion protect both the life and the health of American women.

I have concluded that H.R. 1833 as drafted does not meet the constitutional requirements that the Supreme Court has imposed upon us, in Roe and the decisions that have followed it, to provide protections for both the life and the health of the mother in any laws regulating abortions.

I am prepared to support H.R. 1833, however, if it is amended to make clear that the prohibition of this procedure does not apply to situations in which the [election of the] procedure, in the medical judgment of the attending physician, is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

DRAFT

I urge the Congress to amend H.R. 1833 to ensure that it protects the life and the health of the woman, as the law we have been elected to uphold requires.

Sincerely,

THE WHITE HOUSE

WASHINGTON

February 2, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: LEON PANETTA, JACK QUINN *Jmq*
GEORGE STEPHANOPOULOS, NANCY-ANN MIN

SUBJECT: PARTIAL BIRTH ABORTION ACT

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DRAFT

Dear Senator Hatch:

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I have always believed that the decision to have an abortion should be between a woman, her conscience, her doctor, and her God. I strongly believe that legal abortions--those abortions that the Supreme Court ruled in Roe v. Wade must be protected--should be safe and rare. I have long opposed late-term abortions except, as the law requires, where they are necessary to protect the life of the mother or where there is a threat to her health. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions except where they were necessary to protect the life or health of the woman, consistent with the Supreme Court's rulings.

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DRAFT

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I have studied and prayed about this issue, and about the families who must face this awful choice, for many months. I believe that we have a duty to try to find common ground: a resolution to this issue that respects the views of those-- including myself--who object to this particular procedure, but also upholds the Supreme Court's requirement that laws regulating abortion protect both the life and the health of American women.

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DRAFT

I urge the Congress to amend H.R. 1833 to ensure that it protects the life and the health of the woman, as the law we have been elected to uphold requires.

Sincerely,

THE WHITE HOUSE

WASHINGTON

April 16, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: ABORTION

Handwritten notes:
Stewart
Kathy's
Jag

1. Kathy: Just a reminder that you're covering for me at the 1:00 meeting called by Don Baer to address message issues.

2. See the attached article. It alleges that the President's position is that all partial birth abortions are necessary for health-related reasons. In reading over the transcript of last week's event, I noticed a couple of times where the President came close to making this claim. In our meetings before the event, I urged people not to take this line. Our position must be that the legislation needs a health exception for those partial-birth abortions that are health-related (however many they may be) -- not that all partial birth abortions are health-related. It is difficult to move the women's office people off the stronger position that partial birth abortions are in all (or at least most) cases a justified and even benign procedure. We must, though, continue to resist that position; it is factually vulnerable and it will only lead to articles like this one.

3. Judging from a long note the President sent to Don and Alexis, as well as a cryptic statement he made at the event, the President may have become convinced of the following argument: that the bill covers not only "real" partial birth abortions, but a different, more benign procedure; that the women he spoke to had this benign procedure; that the problem with the bill is that it includes this benign procedure within its prohibition.

I'm not sure where this argument comes from. It is related to the claim some doctors have made that the bill, in failing to use medical terminology, is so vague as to deter doctors from doing even routine procedures. But I suspect it comes from the President's conversation with the women, who protest the way the partial birth procedure has been characterized and insist on its essential humanity.

Once again, this seems an argument to avoid. The medical "vagueness" point is not strong given the bill's definition of partial birth abortion, which I suspect will seem very clear to laymen. More critically, the factual predicate is missing for any claim about the procedure performed on the women with whom the President met and others in their position. There simply is no evidence that I know of to suggest that these women had some "other," "better" procedure than the one described in the bill.

Betty Myers

THE PRESIDENT HAS SEEN
4-14-96

What's our return
to them, ~~just~~ ~~forward~~?
B

Commentary

'The Eternity Within' — Signed Away by a Pro-Abortion Veto

■ Abortion: Clinton cynically used five families' personal tragedies to deflect our revulsion at the partial birth procedure.

By HELEN ALVARE

On Good Friday, President Clinton visited the scene of the Oklahoma City bombing where so many children were killed one year ago. There, he delivered this message: On Easter, he said, Christians the world over would "bear witness to our faith" that the miracles of Jesus and those of the human spirit seen in Oklahoma City, "only reflect the larger miracle of human nature—that there is something eternal within each of us . . . no bomb can blow away, even from the littlest child, that eternity which is within each of us."

Five days later and Easter past, the president vetoed a bill that would have protected the tiniest child from being killed

in the process of delivery by partial birth abortion.

Surrounding himself with five women who had faced tragedy during their pregnancies, and condemning those who would use them as "political pawns," the president proceeded to use them as just that. And fraudulently as well.

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We cannot fail to note the disturbing implications of using the aborted children

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of the five women as political pawns in their own right. The disabilities these children had, the short lives they might have had, were held up only as reasons to perform the most brutal procedure the abortion industry has ever invented. The president chose to mourn these dead children only insofar as it was useful for evoking sympathy.

The president also said over and over again that partial birth abortions are needed to protect a mother's health. The preponderance of medical evidence, supplied by the very people who perform these brutal abortions, says the exact opposite.

So does common sense. It absolutely defies reason to claim that once a child is almost completely delivered vaginally, with only its head remaining inside the mother's body, that it could possibly be essential to her medical health that the child be stabbed and the contents of its head suctioned out. Once delivery is that far along, delivering the child a few more inches does not imperil a woman's health. It does, however, produce a dead child, rather than a live child. Even children with hydrocephalus are able to be safely delivered vaginally after excess fluid is removed from their heads with a needle designed for that purpose. Many live long and happy lives.

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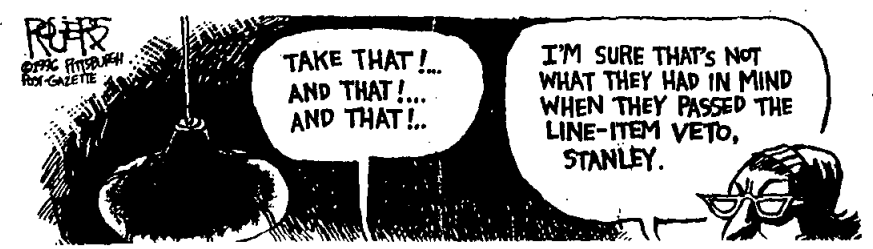
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Rather than deal with the facts about partial birth abortions, President Clinton chose instead to toe the line drawn by the abortion lobby and to confront the nation with women who had experienced personal tragedies regarding their pregnancies. And in so doing, he dared all of us to judge them. It is not our place to judge them. But, as citizens of the United States, we have every right and every reason to condemn the veto that puts our nation one step closer to legalizing infanticide.

Shame on the president. Congress should vote—overwhelmingly and quickly—to override this inexcusable veto.

Helen Alvare is director of planning and information of the Secretariat for Pro-Life Activities of the National Conference of Catholic Bishops in Washington.

DRAWINGBOARD / ROGERS



PERSPECTIVE ON ASSISTED SUICIDE

Walk a Mile in My Wheelch



Quality of life consists of more than the physical;

humane than continuing to live in "a childlike state of helplessness."

Why is that? Why choice m

CC f

THE WHITE HOUSE

WASHINGTON

April 16, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: ABORTION

1. Kathy: Just a reminder that you're covering for me at the 1:00 meeting called by Don Baer to address message issues.
2. See the attached article. It alleges that the President's position is that all partial birth abortions are necessary for health-related reasons. In reading over the transcript of last week's event, I noticed a couple of times where the President came close to making this claim. In our meetings before the event, I urged people not to take this line. Our position must be that the legislation needs a health exception for those partial-birth abortions that are health-related (however many they may be) -- not that all partial birth abortions are health-related. It is difficult to move the women's office people off the stronger position that partial birth abortions are in all (or at least most) cases a justified and even benign procedure. We must, though, continue to resist that position; it is factually vulnerable and it will only lead to articles like this one.
3. Judging from a long note the President sent to Don and Alexis, as well as a cryptic statement he made at the event, the President may have become convinced of the following argument: that the bill covers not only "real" partial birth abortions, but a different, more benign procedure; that the women he spoke to had this benign procedure; that the problem with the bill is that it includes this benign procedure within its prohibition.

I'm not sure where this argument comes from. It is related to the claim some doctors have made that the bill, in failing to use medical terminology, is so vague as to deter doctors from doing even routine procedures. But I suspect it comes from the President's conversation with the women, who protest the way the partial birth procedure has been characterized and insist on its essential humanity.

Once again, this seems an argument to avoid. The medical "vagueness" point is not strong given the bill's definition of partial birth abortion, which I suspect will seem very clear to laymen. More critically, the factual predicate is missing for any claim about the procedure performed on the women with whom the President met and others in their position. There simply is no evidence that I know of to suggest that these women had some "other," "better" procedure than the one described in the bill.

Handwritten: Betsy Myers

THE PRESIDENT HAS SEEN
4-11-96

Handwritten: What's our answer to this, ~~just~~ BC

Commentary

'The Eternity Within'—Signed Away by a Pro-Abortion Veto

■ Abortion: Clinton cynically used five families' personal tragedies to deflect our revulsion at the partial birth procedure.

By HELEN ALVARE

On Good Friday, President Clinton visited the scene of the Oklahoma City bombing where so many children were killed one year ago. There, he delivered this message: On Easter, he said, Christians the world over would "bear witness to our faith" that the miracles of Jesus and those of the human spirit seen in Oklahoma City, "only reflect the larger miracle of human nature—that there is something eternal within each of us . . . no bomb can blow away, even from the slightest child, that eternity which is within each of us."

Five days later and Easter past, the president vetoed a bill that would have protected the tiniest child from being killed

in the process of delivery by partial birth abortion.

Surrounding himself with five women who had faced tragedy during their pregnancies, and condemning those who would use them as "political pawns," the president proceeded to use them as just that. And fraudulently as well.

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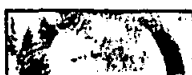
Helen Alvare is director of planning and information of the Secretariat for Pro-Life Activities of the National Conference of Catholic Bishops in Washington.

DRAWINGBOARD / ROGERS



PERSPECTIVE ON ASSISTED SUICIDE

Walk a Mile in My Wheelch



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Jack + Kathy -

All this went to the President last night.

The first full paragraph on p. 2 is in the midst of being changed. On re-reading the letter this morning, I decided I wasn't 100% comfortable with it.

Elena

April 17, 1996

MEMORANDUM TO THE PRESIDENT

FROM: TODD STERN
SUBJECT: Partial Birth Abortion

Following a meeting yesterday chaired by Don Baer, I drafted the attached letter on partial birth abortion, and Elena Kagan drafted the attached talking points, summarizing your position. (As noted in the accompanying memo from Don and Alexis, there is some ongoing discussion about how best to get the letter out -- e.g., as a response to the Cardinals, or as an open letter.)

I wanted to call one point to your attention. Elena and I do not make the argument -- suggested in your note to Don and Alexis -- that the women who came to the White House last week underwent a procedure not described in the bill, or that Congress could or should have exempted the procedure they underwent from the bill's prohibition.

The reason is that this argument isn't accurate. The women who visited with you *did* undergo a dilation and evacuation procedure, and that is precisely the procedure targeted by the bill. The bill uses a layman's term, "partial birth abortion", so it is conceivable that more than one procedure might be covered. But there is no question that the bill's principal target is dilation and evacuation, which is what these women underwent.

Of course the procedure itself, as these women experienced it, might have been far less gory than the bill's supporters have claimed. But then the argument becomes that the procedure isn't as bad as people say, rather than that these women underwent a different procedure altogether, which shouldn't have been covered by the bill. And trying to argue that the procedure isn't as bad as people say is a losing ground for you. You need to keep the focus on saving women from serious health risks, not saying that dilation and evacuation isn't so bad. Indeed you have said in the past that it is very troubling.

This view is widely shared by your advisors (Melanne, George, Vicki, Elena, etc.).

Partial Birth Letter
(4/17[2]/96)

A great deal has been written in recent days and weeks about legislation banning a certain abortion procedure, commonly referred to in the press as partial birth abortion. In late March, Congress passed that legislation, H.R. 1833, and on April 10, I vetoed it because of its failure, in certain rare and compelling cases, to prevent serious threats to women's health.

My position on this bill has been widely misrepresented and misunderstood. Some, including those more interested in creating a political issue than in putting real, meaningful limits on the use of this procedure, have deliberately distorted my views. But I know that a great many people of good faith -- and of all faiths -- are sincerely perplexed about the veto. It is to these people that I address these comments -- not because I believe that you will necessarily come to share my view, but so that you will understand the genuine basis of my position.

Let me begin with a word of background. I am against late-term abortions and have long opposed them, except, as the Supreme Court requires, where necessary to protect the life or health of the mother. As Governor of Arkansas, I signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health, and I would sign a bill to do the same thing at the federal level if it were presented to me.

The particular procedure aimed at in H.R. 1833 -- generally referred to by doctors as dilation and evacuation -- poses a most difficult and disturbing issue, one which I studied and prayed about for many months. Indeed, when I first heard a description of this procedure, I anticipated that I would support the bill. But after I studied the matter and learned more about it, I came to believe that this rarely used procedure is justifiable as a last resort when doctors judge it necessary to save a woman's life or to avert serious consequences to her health.

Last week, I was joined in the White House by five women who desperately wanted to have their babies and were devastated to learn that their babies had fatal conditions and would not live. These women wanted anything other than an abortion, but were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to bear children. These women gave moving, powerful testimony. For them, this was not about choice. This was not about choosing against having a child. Their babies were certain to perish before, during or shortly after birth. The only question was how much grave damage they were going to suffer. Here is what one of them had to say:

"Our little boy had...hydrocephaly. All the doctors told us there was no hope. We asked about in utero surgery, about shunts to remove the fluid, but there was absolutely nothing

we could do. I cannot express the pain we still feel. This was our precious little baby, and he was being taken from us before we even had him. This was not our choice, for not only was our son going to die, but the complications of the pregnancy put my health in danger, as well. If I carried to term, he might die in utero, and the resulting toxins could cause a hemorrhage and possibly a hysterectomy. The hydrocephaly also meant that a natural labor risked rupturing my cervix and my uterus."

Some have raised the question whether, as a matter of medical practice, this procedure is ever the safest for a woman. I can only say that there are many doctors -- some of whom testified before Congress -- who believe that this procedure is, in certain rare cases, the safest one to use. In those rare cases, where a woman's serious health interests are at stake, I believe her doctors, in the best exercise of their medical judgment, should have the option to use the procedure.

The problem with H.R. 1833 is that it provides an exception to the ban on this procedure only when a doctor can be certain that a woman's life is at risk, but not when the doctor is sure that she faces real, grave risks to her health.

Let me be clear. I do not contend that this procedure, today, is always used in circumstances that meet my standard -- namely, that the procedure must be necessary to prevent death or serious adverse health consequences. The procedure may well be used in situations where a woman's serious health interests are not at issue. But I do not support such uses, I do not defend them, and I would sign appropriate legislation banning them.

At the same time, I cannot and will not countenance a ban on this procedure in those cases where it represents the best hope for a woman to avoid serious risks to her health. I recognize that there are those who believe it appropriate to force a woman to endure real, serious risks to her health -- including, sometimes, the loss of her ability to bear children -- in order to deliver a baby who is already dead or about to die. But I am not among them.

I also understand that many who support this bill believe that any health exception is untenable. In a letter sent to me on April 16 by our leading Catholic Cardinals, they contend that a "health" exception for the use of this procedure could be used to cover most anything -- for example, youth, emotional stress, financial hardship or inconvenience.

That is not the kind of exception I support. I support an exception that takes effect *only* where a woman faces real, serious adverse health consequences. Those who oppose this procedure may wish to cite cases where fraudulent health reasons are relied upon as an excuse -- excuses I could never condone. But people of good faith must recognize that there are also cases

where the health risks facing a woman are deadly serious and real. *It is in those cases that I believe an exception to the general ban on the procedure must be allowed.*

Further, I flatly reject the view of those who suggest that it is impossible to draft a bill imposing real, stringent limits on the use of this procedure -- a bill making absolutely clear that the procedure may be used only in cases where a woman risks death or serious damage to her health, and in no other case. I know that it is not beyond the ingenuity of Congress, working together with this Administration, to fashion such a bill.

Indeed, that is why I implored Congress, by letter dated February 28, to add a limited exemption for the small number of compelling cases where use of the procedure is necessary to avoid serious health consequences. Congress ignored my proposal and did so, I am afraid, because there are too many there who prefer creating a political issue to solving a human problem. But I reiterate my offer now: if Congress will work with me to produce a bill that meets the concerns outlined in this letter, I will sign it the moment it reaches my desk.

As I said at the outset of this letter, I know that many people will continue to disagree with me about this issue. But they should all know the truth about where I stand: I do not support the use of this procedure on demand. I do not support the use of this procedure on the strength of mild or fraudulent health complaints. But I do believe that we cannot abandon women, like the women I spoke with, whose doctors advise them that they need the procedure to avoid serious injury. That, in my judgment, would be the true inhumanity.

I continue to hope that a solution can be reached on this painful issue. I hope as well that the deep dialogue between my Administration and people of faith can continue with regard to the broad array of issues on which we have worked and are working together.

Sincerely,

TALKING POINTS ON H.R. 1833

- The President vetoed H.R. 1833 because the bill, which prohibits a certain kind of abortion procedure, fails to protect women from serious threats to their health, as both the Constitution and humane public policy require.
- The procedure described in the bill troubles the President deeply. He does not support use of that procedure on an elective basis. He would allow it only where necessary to save the life of the mother or prevent serious injury to her health.
- This bill went too far because it would ban use of the procedure even when it is the only or best hope of saving the woman's life or averting a serious threat to her health, including her ability to have children in the future.
- Before vetoing this bill, the President heard from women who desperately wanted babies, who were devastated to learn that their babies had fatal conditions, who wanted anything other than an abortion, but who were advised by their doctors that this procedure was their best hope of preventing death or grave harm, including the loss of reproductive ability. For these women and others, this was not about choice. These babies were certain to perish before, during, or shortly after birth, and the only question was how much grave harm was going to be done to the woman.
- Criminalizing use of the procedure in such cases, where women and their families must make a tragic choice, poses a danger of grave harm to women. A ban of this kind, aside from violating the Constitution, would be the true inhumanity.
- That is why the President, by letter dated February 28, implored Congress to add an exemption for the small number of compelling cases where selection of the procedure, in the medical judgment of the physician, is necessary to preserve the life of the woman or avert serious adverse consequences to her health. A bill amended in this way would have struck a proper balance, remedying the constitutional and human defect of H.R. 1833.
- The charge that the President's proposed exemption would create a huge loophole, allowing the widespread use of this procedure, is simply not true. The President's exemption would apply only when there is serious harm to health. Surely Congress, working with this Administration, can write legislation making clear that serious harm to health means just that -- that it doesn't include, as some have suggested, youth, low income, or inconvenience. Attacks such as this trivialize profoundly tragic situations. All one needs to do is to listen to some of the women who have had this procedure to understand what kind of harm the President is talking about.
- The President will not sign a bill showing, as this one does, total indifference to the health of women. He will sign a bill amended to protect women from serious harm by allowing this procedure in rare cases. He regrets that Congress, more interested in creating a political issue than solving a problem, has so far rejected this approach.

Elena

THE WHITE HOUSE
WASHINGTON

MEMORANDUM TO THE PRESIDENT

FROM:

ABNER MIKVA, PAT GRIFFIN, CAROL RASCO, GHR
GEORGE STEPHANOPOULOS

THROUGH:

LEON PANETTA

CC:

ALICE RIVLIN, ALEXIS HERMAN, MELANNE VERVEER

Earlier this summer, the House Judiciary Committee reported out (by a party-line vote, with three Democrats absent) a bill introduced by Congressman Canady (R-Fla.) known as the "Partial Birth Abortion Ban Act." The Office of Legal Counsel at DOJ believes the bill is "constitutionally flawed." Given your opposition to most post-viability abortions and the controversy surrounding the topic, we thought you should decide how to respond to this bill.

Background

As you know, Roe v. Wade and its progeny forbid significant restrictions upon abortion prior to viability but permit the government to ban post-viability abortions except those that protect maternal life or health. As governor, you signed a law making abortion illegal after the 25th week of pregnancy, with an exception for life and health (as well as one for rape or incest, in the case of minors).

The Canady bill criminalizes the conduct of any doctor who performs (but not of the mother who obtains) what is medically termed a "dilation and extraction" abortion. D & X abortions are usually performed only after 20 weeks of pregnancy. At least some doctors regard it as the safest method of late-term abortion under certain circumstances. The method involves bringing the lower part of the fetus out of the uterus before completing the abortion.

We are not aware that the medical community regards this method of abortion as morally distinct (or medically different in a meaningful way) from other late-term methods. However, abortion foes have given the procedure a new, emotionally charged name of "partial birth abortions" in order to suggest otherwise. Pro-choice activists warn that the bill interferes with a doctor's choice of medical procedure, and they accuse right-to-life partisans of targeting this procedure in order to show disturbing pictures that will arouse general opposition to abortion.

Only three or four doctors in the United States perform this specialized procedure, and the total number of D & X abortions annually is probably under 500. By contrast, about 1.5 million abortions are performed each year in the U.S., of which about 13,000 are performed after 20 weeks. We do not know what proportion of D & X abortions occur between 20 weeks and viability (a point that usually arises following the 24th week), but D & X abortions seem to comprise a higher percentage of post-viability procedures. A more traditional method of performing late-term abortions is known as the D & E procedure, in which the fetus is dismembered within the uterus and then removed.

Although the D & X procedure can be used for purely elective abortions, it is also used in pregnancies that physically threaten a mother (e.g., severe diabetes) or when a severely deformed fetus is discovered late in the pregnancy. During a subcommittee hearing on the Canady bill, the most emotional testimony was given by a mother whose severely deformed fetus was detected late. She decided to have a D & X abortion because the trauma of watching a young child die a certain and painful death after birth was more excruciating.

Discussion

Mother's Health: The most significant constitutional objection to the Canady bill is that it permits D & X procedures only if the *life* of the mother is threatened. Extending the exception to include the health of the mother would be consistent with the bill that you signed in Arkansas and would probably be required by the Supreme Court, which recently affirmed that "*Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." The Court indicated that such health threats would have to be "substantial," which seems to include threats to mental health but only of a serious nature. To the extent that barring D & X abortions would force women who needed abortions for health reasons to forgo what may be the safest abortion method, OLC believes the ban is constitutionally invalid.

Pre-Viability Abortions: Another potential constitutional problem is that the Canady bill bars D & X procedures even in the pre-viability period. The Court has held that states may not place an "undue burden" on pre-viability abortions, and this bars any regulation that "has the purpose or effect of placing a substantial obstacle in the [woman's] path." OLC expresses its "concern" that barring a particular method of safe abortion could constitute an "undue burden." It is difficult to predict whether a court would so hold -- both because the contours of the recently announced "undue burden" standard are not fully known and because the risks of using other methods of pre-viability abortions (instead of the D & X) are unclear. It would be consistent with your prior views, however, to remove pre-viability abortions from the scope of the bill. In 1990, for example, you stated: "While I ... supported restrictions on public funding and a parental notification requirement for minors, I think the government should impose no further restrictions. Until the fetus can live outside the mother's womb, I believe the decision on abortion should be the woman's not the government's."

if it is
that
what if
it's not?

Health is danger
this public
life excep-
tion is
(as per
written)

Post-Viability Fetal Deformity: Severe fetal deformities are sometimes detected only after viability. Obviously, a pre-viability exception would do nothing to authorize D & X abortions in such cases. Even if a health exception were added to the Canady bill, it is doubtful whether doctors would rely on that exception to perform fetal deformity abortions since they would probably interpret a criminal statute conservatively, to avoid the risk of imprisonment. Rep. Schroeder tried but failed (in committee) to add a "health" exception to the Canady bill that expressly defined health to include "threats from severe fetal abnormality." This may have been intended to help doctors who perform fetal deformity abortions by underscoring that deformities *can* implicate maternal health. But the Schroeder language seems unlikely to help by much, since the doctor must still decide that a given fetal deformity threatens maternal health, and that decision remains subject to criminal challenge.

Recommendation

(1) We believe you should take a position on the Canady bill. Many members of the Judiciary Committee (including pro-choice members) have asked for a statement, and the bill in some form probably will pass the House and may well succeed in the Senate.

(2) We also believe you should oppose the bill by emphasizing the strongest constitutional objection: the bill's failure to contain a health exception. Probably, the statement should also refer to the bill's problematic application to pre-viability abortions. One way to combine both concepts would be to define the "health" exception so that it would permit D & X abortions not only when a pregnancy threatens maternal health but also when (in the pre-viability context) the doctor determines that the D & X procedure is *safest* for the mother. By framing the issue as one of maternal health and safety, you should be able to keep the debate at the proper level of principle -- especially the principle that medical judgments should be left to doctors. On the other hand, you will be relying on a factual predicate -- the medical superiority of the D & X method -- for which we have little evidence.

(3) In defending D & X abortions in the pre-viability period (when most such abortions are by other methods), you may be placed in the position of defending a particular *procedure* that is publicly controversial. If, however, you initially decide not to defend pre-viability D & X abortions, you may encounter greater difficulties later on. The bill may well be amended to protect the woman's health. You would then face the question whether to object to the pre-viability bar or, if you did not object, whether to sign a bill that might well be unconstitutional. It would be more difficult to raise the pre-viability objection at this later point if you have not even mentioned it in an initial statement.

(4) We think it is not advisable to address separately the issue of fetal deformity abortions. Adding a health exception to the Canady bill should permit *some* abortions where fetal deformities clearly jeopardize maternal health. While the bill's criminal penalties will doubtless have a chilling effect on doctors' medical judgments in such cases, that is unlikely to be alleviated by the Schroeder amendment (or other similar language). The chilling effect probably can only be eliminated by adding a further exception to the bill that would

expressly permit abortions for certain fetal deformities. Such a proposal would cloud the bill with a further controversy and, if adopted, could even authorize abortions in circumstances that you would find unacceptable.

Given all of these considerations, we recommend issuing a statement along the lines indicated in the second paragraph immediately above (option #3, below).

1. Take no position on the bill
2. Oppose bill solely because it lacks a health exception
3. Oppose bill because it lacks both a health exception *and* an exception for pre-viability abortions when the D & X method is the safest.
4. Let's discuss

~~66732~~

~~George Adams - phg in lobby~~

~~66732~~

Susan Liss ^{no need}
~~514-4016 / alt what?~~

Barry Fox ~~61785~~

John
Handley

Ben Nye 622-2735

THE WHITE HOUSE
WASHINGTON

October 27, 1995

MEMORANDUM FOR CAROL RASCO AND ALICE RIVLIN

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

SUBJECT: The Partial Birth Abortion Bill

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

I. Background

Description of the bill

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

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

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

Current Status on the Hill

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

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

Profile of the Medical Community Views

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

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

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

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

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

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

This is largely for several reasons:

- 'Partial birth abortion' is not a medical term so there is not unanimity about what precise procedure this language describes. This seems to cause some to feel stronger about the need to oppose the bill because it could be interpreted to ban much more commonly used medical procedures, while it causes others to hesitate.
- The D&X procedure that is ostensibly described is extremely rare, and only 2 or 3 doctors in the country perform it. As a result, there is not necessarily a large natural base of doctors to respond to this ban.
- Some in and out of the medical community identify this as the safest method for the mother under certain circumstances for several reasons; however, there does not seem to be consensus about this because there are so few doctors who perform it and so few women who undergo it.
- The bill is not yet widely known about around the country to those who do not normally follow choice issues closely.
- People are afraid of the politics of this issue.

Profile of Women and Pro-Choice Group Views

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

II. OPTIONS

1. Express No Opinion: The administration can remain silent during the coming House floor debate. There is no requirement that we send up a SAP, and we could wait to see how the debate plays out in the Senate.
2. Express Opposition: The administration could express its opposition to the bill in a SAP to the House. If this option is chosen, we recommend basing opposition on the following: (1) It is unconstitutional because of it fails to include an exception for situations when certain procedures are necessary in order to protect the health or life of the woman, and because it poses an undue burden on women seeking an abortion by criminalizing the use of abortion methods that may best protect them and their child bearing capacity; and (2) It is not the business of Congress to regulate medical procedures.
3. Veto Threat: The President could choose to make it clear from the start that he would veto this bill. This would be an unusually strong statement, but it has been used more in recent times than earlier in the administration.

III. ANALYSIS

- This is a bad bill, the passage of which would be a setback for women's right to choose in this country and potentially creating a situation where women are forced to make decisions that are not the safest or healthiest for them.
- The politics are incredibly tough: on the one hand, this is a critical issue for the women's community and those who believe in choice, yet, on the other, no one is comfortable with affirmatively supporting a procedure that can be so graphically misrepresented by pro-lifers. It is important to note here that the right-to-lifers are already engaging in a campaign that effectively depicts this procedure in an extremely graphic and gruesome way -- and it is safe to assume that they will intensify this effort when the bill comes up.

- If we were to remain neutral, the women's groups would be extremely disappointed. They would likely see neutrality as a signal that we are willing to compromise on choice despite our otherwise strong record. We would also be allowing a clear victory for the right-to-lifers without a fight.
- If we oppose, with or without a veto threat, we will have the strong and active support of the women's community. At the same time, there is no guarantee that we will be able to mobilize opposition and or even find strong support in the medical community.
- If we take a strong position on this issue, it will be critical -- yet very difficult -- to define this debate on our terms; i.e. challenging its constitutionality and its inappropriate intervention in medical practice. It is clear that we cannot win if we argue this in terms of the credibility or safety of the procedure itself.

IV. RECOMMENDATION

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

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

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