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Justice Department Memos

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

This letter represents the Administration's views on H.R. 1833, a bill to ban so-called "partial-birth" abortions.[1] The bill criminalizes all performance of the procedure in question, now used in some second- and third-trimester abortions, but provides an affirmative defense when the procedure is necessary to save the life of the woman. We believe that the bill is constitutionally flawed.

First, as applied to women seeking pre-viability abortions, the bill is unconstitutional if it imposes an "undue burden" on the ability to obtain an abortion. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2819-21 (1992). Put slightly differently, the government may not place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 2820. We are concerned that the bill's prohibition on a safe and effective abortion procedure will operate as an "undue burden" with respect to a significant number of women, especially when access to alternative procedures is limited. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 77 (1976) (invalidating state ban on particular abortion procedure in part because of "severe limitations on the availability" of alternative techniques in state).

Second, the bill's failure to make an exception for preservation of the health of the woman renders it inconsistent with constitutional standards. Even in the post-viability period, when the government's interest in regulating abortion is at its weightiest, that interest must yield both to preservation of a woman's life and to preservation of a woman's health. Casey, 112 S. Ct. at 2804, 2821 (restriction or prohibition of abortion in post-viability period must except cases in which abortion is necessary to preserve life or health of woman). This means, first of all, that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy. Id. It also means that the government may not regulate access to such abortions in a manner that effectively

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[1] The procedure described in the bill appears to be a form of "dilation and extraction" abortion, sometimes abbreviated as "D&X." See Diane M. Gianelli, Shock-Tactic Ads Target Late-Term Abortion Procedure, American Medical News, July 5, 1993, at 3.

"require[s] the mother to bear an increased medical risk" in order to serve a state interest. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986) (invalidating requirement that doctor use abortion procedure most protective of fetal life "unless [that procedure] would present a significantly greater medical risk to the life or health of the pregnant woman" because would require some degree of "trade-off" between woman's health and fetal survival). That is, where the government may not prohibit abortion outright, it also may not enforce regulations that make the procedure more dangerous to the woman's health. Id.; see also Danforth, 428 U.S. at 79 (invalidating ban on abortion procedure after first trimester in part because would force "a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed").

Again, we are concerned that "in a large fraction of the cases" in which the bar in question would be relevant at all, see Casey, 112 S. Ct. at 2830 (discussing method of constitutional analysis of abortion restriction), its operation would be inconsistent with this standard. Our understanding is that the procedure at issue was developed specifically as a safer alternative to other methods of late-term abortion,[2] and that in fact it often poses fewer medical risks for women in the late stages of pregnancy.[3] It is likely, therefore, that in a high percentage of the very few cases in which the procedure actually is used, it is the technique most protective of the woman's health. Accordingly, a prohibition on the method, in the absence of an adequate exception, would require women to "bear an increased medical risk" in order to obtain an abortion. As to women to whom the government may not deny access to abortion altogether -- that is, all women seeking pre-viability abortions and women seeking post-viability abortions in order to preserve their health or lives -- this outcome is constitutionally impermissible.

We have one final concern that would implicate the bill's constitutionality as applied in all cases, even as to women seeking post-viability abortions for reasons other than preservation of life or health. The Supreme Court has recognized that the government has legitimate interests from the outset of a pregnancy both in protecting the health of the woman and in protecting "the life of the fetus that may become a child," or "potential life," and that the interest in fetal life becomes

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[2] See Shock Tactic Ads, supra.

[3] Id.; see also Karen Hosler, Rare Abortion Method Is New Weapon in Debate, Baltimore Sun, June 17, 1995, at 2A (alternative procedures may pose dangers for women); National Abortion Rights Action League, Third-Trimester Abortion: The Myth of Abortion on Demand, Issue Paper, June 14, 1995 (submitted in connection with House Hearings).

even greater in the post-viability period. Casey, 112 S. Ct. at 2804, 2821. It is not clear to us, however, that the bill represents a permissible means of advancing either of these interests.

For the reasons discussed above, the bill obviously cannot be characterized as a health measure. Nor is there a self-evident relationship to the protection of potential life: the procedure barred is no less protective of fetal life than other abortion methods, and the bill does not create a "structural mechanism" designed to persuade women to choose childbirth over abortion. Cf. Casey, 112 S. Ct. at 2821, 2818.

It is possible, we suppose, that the bill might be viewed as effectively encouraging childbirth by making abortion, at least in some cases, more dangerous and hence less attractive as an alternative. But if protecting fetal life by encouraging childbirth were invoked as the interest behind the bill, we think a serious question would be presented as to whether the means chosen are permissible. We are aware of no cases, in the abortion context or any other, in which the Court has approved the imposition of unnecessary health risks on patients as a permissible means of advancing any state end. Indeed, the cases discussed above, holding that a woman's interest in preserving her health takes precedence over the government's interest in protecting fetal life, suggest strongly that the means available to the government in pursuing its interests do not under any circumstances include requiring people to incur gratuitous medical risks or dangers.

In fact, our understanding is that the bill's supporters have not suggested that the measure is intended to protect fetal life by making abortion a more dangerous alternative for women. Rather, the bill is said to advance a governmental interest in "public morality" by banning a procedure that generates "a sense of particular moral outrage."[4] This is not, however, an interest that the Court has recognized as of sufficient magnitude to override a woman's right to obtain an abortion. Indeed, we are aware of no case in which the Court has recognized any independent governmental interest in regulating or proscribing recognized medical procedures because they are deemed offensive or immoral. Accordingly, it is not clear to us that the bill permissibly advances any governmental interest. If this is the case, of course, then the bill cannot be applied constitutionally

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[4] See Testimony of David M. Smolin, Professor of Law, Cumberland Law School, Samford University, before House Judiciary Committee, Subcommittee on the Constitution, June 15, 1995, at 4. This testimony is consistent with the statements made by sponsors of the bill (and its Senate counterpart), emphasizing the "sickening" or "disgusting" nature of the procedure. See, e.g., Statement of Senator Smith, Cong. Rec. S8541 (daily ed. June 16, 1995).

under any circumstances, even in the post-viability period as to women whose life or health are not threatened by pregnancy.

THE WHITE HOUSE

WASHINGTON

COUNSEL'S OFFICE

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Testimony Before
the Committee on the Judiciary
United States Senate

on

H.R. 1833

Walter Dellinger
Assistant Attorney General

Office of Legal Counsel
United States Department of Justice

November 16, 1995

Mr. Chairman, and Members of the Committee:

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

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

This legislation is inconsistent with the constitutional standards established in Roe v. Wade[1] and recently reaffirmed in Planned Parenthood v. Casey.[2] Most significantly, the

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

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

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

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

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

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[3] Roe, 410 U.S. at 164-65; Casey, 112 S. Ct. at 2804, 2821.

[4] Casey, 112 S. Ct. at 2804, 2821.

[5] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986).

[6] Id. at 768-69.

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

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

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

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

[7] 61 F.3d 1493, 1502-04 (10th Cir. 1995) (citation omitted).

covers only cases in which partial-birth abortion is necessary to preserve a woman's life, and does not reach cases in which health is at issue. Second, the provision is not really an exception at all. Instead, the provision creates an affirmative defense, so that a doctor facing criminal charges must carry the burden of proving, by a preponderance of the evidence, both that pregnancy threatened the life of the woman and that the method in question was the only one that could save the woman's life. By exposing doctors to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute would have a chilling effect on doctors' willingness to perform even those abortions necessary to save women's lives. Providing an affirmative defense, under which doctors rather than the government bears the burden of proof, does not provide adequately for the lives and health of pregnant women.

Finally, the bill, in addition to failing to protect women's health, may otherwise impose an "undue burden" on the ability of women to obtain pre-viability abortions.[8] Under the legal analysis applied in Casey, the government may not place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[9]

By way of an example, consider the breadth of the bill's definition of the outlawed procedure. The scope of that term and the unfamiliarity of the concept of "partial-birth abortion" are such that doctors who perform second-trimester abortions by any method cannot be certain that their procedures fall outside the scope of the criminal prohibition. As a recent newspaper article reported, one group of doctors considering the legislation was

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

[9] Id. at 2820.

"unable to agree on what the law would cover -- but did agree that it posed a threat to anyone who did second-trimester abortions."[10] Given this uncertainty, and the threat of criminal prosecution, doctors might well decide to forego the performance of second-trimester abortions altogether. In that event, the practical effect of the bill would be to limit severely the availability of all second-trimester abortions, imposing an "undue burden" on women seeking late-term, previability abortions.

The procedure -- or procedures -- that would be banned by H.R. 1833 are performed primarily at or after 20 weeks in the gestational period. Late-term abortions that are performed when a woman's health or life is threatened or when a fetus is diagnosed with severe abnormalities such as anencephaly are tragically sad events, occurring under circumstances that cannot possibly benefit from the intervention of government regulators. The proposed imposition of criminal penalties in such cases would violate the Constitution and would pose a real risk to women's lives and health.

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

Testimony Before
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H.R. 1833

Walter Dellinger
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November 16, 1995

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

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

life and

OK

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

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

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preserve preserve her (or) her (other) X not grammatical

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

apparently overlooked OK

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

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

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

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

[7] 61 F.3d 1493, 1502-04 (10th Cir. 1995) (citation omitted).

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Finally, the bill ~~contains one additional constitutional flaw. Courts following current Supreme Court precedent will find the bill unconstitutional not only if it fails to protect women's health, but also if it otherwise~~ in addition to failing to protect women's health, may otherwise impose an "undue burden" on the ability of women to obtain pre-viability abortions.[5] ~~That is, even~~ As you know, under the legal analysis applied in Casey, the government may not place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[6]

alternative suggestion (need to preserve point that health problem itself creates undue burden)

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

Seems speculative to me. And, it leaves the door into treating this as an elective procedure

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

[6] Id. at 2820.

terms, would pose an impermissible "substantial obstacle" for women seeking second-trimester abortions.

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

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

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

To Elena Kagan
cc:

Memorandum

Subject	Date
Women's Medical Professional Corp. (Ohio Abortion Case)	December 28, 1995

To	From
James Castello Deputy White House Counsel	Dawn Johnsen DJ Deputy Ass't Attorney General Pam Harris PH Attorney-Advisor

On December 13, a federal district court in Ohio issued a preliminary injunction against enforcement of a state law that, inter alia, banned (a) performance of post-viability abortions generally, and (b) use of the dilation and extraction ("D&X") abortion procedure both pre- and post-viability. Women's Medical Professional Corp. v. Voinovich, No. C-3-95-414 (S.D. Ohio Dec. 13, 1995). The D&X procedure outlawed by the Ohio statute appears to be the same procedure described as "partial-birth abortion" in the pending federal legislation on which we have commented.

Our comments on the proposed federal ban on partial-birth abortion, H.R. 1833, have focused on two constitutional flaws in the bill: first, that the bill fails to provide adequately for the protection of women's life and women's health at all stages of pregnancy, as mandated by cases running from Roe v. Wade[1] through Casey;[2] and second, that the bill may impose an "undue burden" on the ability of women to obtain pre-viability abortions, contrary to the principle applied in Casey. Rather than repeating these arguments here, we are attaching a copy of Walter Dellinger's Senate testimony on H.R. 1833, submitted on November 27. This memorandum summarizes those portions of the lengthy opinion in Women's Medical Professional Corp. that are most relevant to our consideration of H.R. 1833.

1. Background

The Ohio statute at issue, known as House Bill 135 (or "H.B. 135"), banned both pre- and post-viability use of the D&X abortion procedure. The D&X procedure was defined as "termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain," and seems to be the same procedure at which H.R. 1833 is aimed. The only "exception" to the

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1 410 U.S. 113 (1973).

2 Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

ban was in the form of an affirmative defense for cases in which a doctor can produce prima facie evidence that all other abortion procedures would pose a greater risk to the health of the pregnant woman. Slip op. at 4 & n.2; id. at 41 n.27.

H.B. 135 also banned all post-viability abortions, with an exception for abortions necessary to save a woman's life or to avoid a serious risk of substantial and irreversible impairment to a major bodily function. The district court read the health exception as limited to physical, rather than emotional, health. For those abortions falling within the life or health exceptions, additional restrictions attached; the one most relevant here was a "choice of method" restriction requiring use of the method most protective of fetal life unless it would pose a significantly greater risk to the life or physical health of the pregnant woman. Slip op. at 4-5 & n.5.

health exception

2. D&X Ban

The district court enjoined the ban on D&X abortions after finding that the plaintiffs had demonstrated a substantial likelihood of success on two alternative claims: first, that the ban was impermissibly vague, and second, that the ban imposed an undue burden on the right of women to obtain pre-viability abortions.[3] Because both holdings might bear on H.R. 1833, they are discussed separately below.

a. Vagueness

The district court found the potential for vagueness with respect to the D&X ban especially problematic for two reasons: because any vagueness might have a chilling effect on the exercise of constitutionally protected rights, and because the statute provided for criminal penalties. Slip op. at 19-20. Examining H.B. 135 in light of these considerations, the district court held that the definition of the proscribed D&X procedure was impermissibly vague because it failed to provide doctors with fair warning as to what conduct would expose them to liability. In particular, the court was concerned that the statute failed to distinguish the D&X procedure from dilation and evacuation ("D&E") procedures that also involved compression of the fetal skull. The court emphasized that doctors performing second-trimester abortions might not know which procedure they would use until encountering particular surgical variables after beginning to terminate a pregnancy. Slip op. at 28-30.

[3] Because of the procedural posture of the case, the court applied the "substantial likelihood of success" standard to all of the constitutional claims discussed in this memorandum. See slip op. at 9-10 (discussing preliminary injunction standard). For the sake of brevity, we will not refer again to this standard.

vagueness issue

Similar vagueness concerns have been raised with respect to H.R. 1833. The definition of "partial-birth abortion" provided by the federal statute differs from that in H.B. 135,[4] and accordingly might not suffer from identical defects. Nevertheless, the broader problems are the same. There appears to be no medical consensus as to what the term "partial-birth abortion," even as defined by H.R. 1833, would cover, and no confidence among doctors that any second-trimester abortion, once begun, might not end with a procedure that would fall within the statutory bar.[5] The special concerns that animated the district court's decision -- the potential for a chilling effect and the harshness of criminal sanctions -- are implicated to the same degree at the federal level. In short, though we have not before treated the vagueness issue as a separate constitutional concern,[6] the Ohio decision may provide strong precedent for doing so now.

b. Undue Burden

The district court also enjoined the D&X ban on the ground that it imposed an undue burden on the ability of women to obtain pre-viability abortions. Relying on Danforth[7] and Casey, the court held that banning a particular method of abortion imposes an impermissible undue burden if safe alternatives are not available to women seeking abortions prior to fetal viability. Slip op. at 31.

The Ohio D&X ban was unconstitutional under that standard for two reasons. First, the district court found that the D&X procedure, typically performed late in the second trimester of pregnancy, "appears to pose less of a risk to maternal health" than other procedures available at that stage of pregnancy. Slip op. at 38-39.

If this abortion procedure, which appears to pose less of a risk to maternal health than any other alternative,

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[4] H.R. 1833 defines "partial-birth abortion" as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

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

[6] We have discussed the vagueness problem in connection with the undue burden issue, arguing that the chilling effect generated by H.R. 1833's imprecision will reduce significantly the availability of all second-trimester abortions.

[7] Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

> were banned, and women were forced to use riskier and more deleterious abortion procedures, the ban could have the effect of placing a substantial obstacle in the path of women seeking pre-viability abortions, which would be an undue burden and thus unconstitutional under Casey.

Slip op. at 39-40. In the alternative, the district court found that even assuming that another method, induction, were as safe as the D&X procedure, the fact that induction required hospitalization could have a "negative impact on the practical availability" of abortion, itself "amounting to an undue burden." Slip op. at 40-41. For these reasons, the court enjoined the D&X ban on its face -- most likely, though this is not made explicit, on the theory that it would operate unconstitutionally in a "large fraction" of the cases in which it was relevant. Slip op. at 13-18 (deciding that Casey standard for facial challenges applies). The district court did not address separately the potential post-viability application of the D&X ban.

We have raised similar concerns with respect to H.R. 1833, arguing both that the government may not ban abortion procedures that are the most protective of women's health and, specifically with respect to the pre-viability period, that the government may not ban a given abortion procedure when doing so would impose an "undue burden" on the ability of women to obtain abortions. The district court opinion provides strong support for this approach.

c. Affirmative Defense

The district court rejected an argument that the constitutional defects it had identified were cured by H.B. 135's affirmative defense provision. Under that provision, a doctor prosecuted for performing a D&X abortion could present prima facie evidence that all other procedures would have posed greater risks to the woman's health. If the doctor could make that showing, then the burden would shift to the state to prove that at least one other abortion procedure would have been equally protective of the woman's health. Slip op. at 41 n.27.

According to the district court, the provision was inadequate for two reasons. First, because it was in the form of an affirmative defense rather than a true exception, it would deter doctors from performing even those D&X procedures that fell within the provision's scope as the safest method available. Second, the provision would cover only those D&X procedures that were "obviously and irrefutably" the method most protective of health; criminal sanctions could still attach when D&X procedures were arguably safer or evidently more available than other methods. Id.

The version of H.R. 1833 enacted by the House also contains an

affirmative defense provision in lieu of an exception,[8] but the House provision is even more problematic than that considered by the district court. First, the procedural burden imposed on doctors (and the concomitant chilling potential) is higher under H.R. 1833: under the federal statute, unlike the Ohio statute, doctors would bear the burden of proving the applicability of the affirmative defense. Second, and most obviously, the scope of the federal defense would be far narrower than that provided by H.B. 135, reaching only those partial-birth abortions necessary to save the life of a pregnant woman. If a reviewing court were to follow the lead of the Ohio district court, then it would follow a fortiori that the federal provision would be inadequate.

d. State Interest

The district court gave substantial attention to the nature of the state's asserted interest in banning D&X abortions. Though the court's analysis of the issue was not critical to its holding, its reasoning on this point may be relevant to our consideration of H.R. 1833.

According to Ohio, its D&X ban was intended to prevent "unnecessary cruelty to the human fetus." Slip op. at 42. The plaintiffs argued that this did not represent a legitimate interest, on the theory that the government's interests in regulating abortion are limited to those approved in Casey: protecting potential life by persuading women to choose childbirth over abortion, and furthering the health or safety of women seeking abortions. Id. at 42. The district court came close to rejecting this argument, and assumed arguendo that there was an additional legitimate state interest in preventing unnecessary cruelty to fetuses. Id. at 43. At the same time, however, the court found itself unable to conclude that the D&X ban served the purported state interest, because there was "no reliable evidence that the D&X method is more cruel than other methods of abortion." Id. at 49-50.

3. Post-Viability Ban

As noted above, the district court enjoined the D&X ban on its face, without giving express consideration to its possible application post-viability. However, the district court's analysis of H.B. 135's general ban on post-viability abortions bears directly on that question, and makes clear that the D&X ban would

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be unconstitutional even as applied in the post-viability period, at least in a large number of cases.

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The district court found the post-viability ban unacceptable under this standard, relying on a number of independent grounds. Two appear especially relevant to consideration of H.R. 1833. First, the court held that the exception was insufficiently protective of women's health because it covered only physical and not mental or emotional health risks. Relying on Doe v. Bolton,[9] the court held that post-viability abortion regulations may not deprive physicians of the discretion to consider mental as well as physical health in determining what measures are necessary to preserve a woman's health. Slip op. at 57-65. Second, the court invalidated a "choice of method" restriction that required doctors performing excepted post-viability abortions to use the method most protective of fetal life except when it would pose a "significantly greater risk" to a woman's life or health. In a straightforward application of Thornburgh,[10] which involved a very similar restriction, the court held that the provision "traded off" women's health for fetal health, and hence impermissibly required women to bear increased medical risks. Slip op. at 83-85.

mental health

Again, because the district court had invalidated the D&X ban on its face, it did not have occasion to analyze it separately in connection with the post-viability abortion ban. Nevertheless, it is clear from the district court's reasoning that the government generally could not enforce the D&X ban even in the post-viability period. Under the district court analysis, protection of women's health in the post-viability period means at least two things: first, that women whose health, broadly construed, is threatened by pregnancy cannot be denied access to abortion; and second, that post-viability abortion cannot be regulated in a way that requires

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those women to bear increased medical risks. Given the district court finding that the D&X procedure appears to pose the fewest medical risks for women seeking late-term abortions, the D&X ban, as applied post-viability, is likely to generate precisely the increased medical risk the district court deemed impermissible.

We emphasize the district court's discussion of post-viability abortion because it bears directly on the status of H.R. 1833. Both the district court's general premise -- that the government may not "impinge" at all on women's health interests in the post-viability period -- and its specific analysis of the H.B. 135 health exception are in accord with our own analysis of H.R. 1833's post-viability application. In this respect, the district court opinion provides substantial support for our view that H.R. 1833 is unconstitutional even as applied post-viability.

THE WHITE HOUSE

WASHINGTON

January 6, 1996

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM: Debbie Fine

SUBJECT: State Restrictions on Late-Term Abortions

State Restrictions on Late-Term Abortions

Following is a list of states where post-viability (usually defined between 24 and 28 weeks) abortions are not allowed, with certain exceptions that are identified below. Please note that (1) these are not absolute bans, but limits on the availability of these services; and (2) the Attorney General has issued opinions on several of these laws stating that they are unconstitutional for varying reasons. (i.e. the restriction could apply to pre-viability cases when a specific week of pregnancy written into the law, or the law does not account adequately for health. See attached for details.) The total listed here is 41 (if you include Alabama.)

Alabama (**only applies to certain facilities**; with life and narrow health exceptions)
Arizona (with life and health exceptions)
Arkansas (with life and health exceptions, and when result of rape or incest of a minor)
California (applies to all cases after the 20th week; no exceptions)
Connecticut (with life and health exceptions)
Delaware (applies to all cases after the 20th week; life exception)
Florida (applies to all cases in the third trimester; life and health exceptions if certified in writing by two physicians)
Georgia (applies to all cases after the 2nd trimester; life and health exceptions if certified by three physicians)
Idaho (with exceptions to preserve the woman's life or if fetus would be unable to survive)
Illinois (with life and health exceptions)
Indiana (with narrow life and health exceptions)
Iowa (applies to cases after the end of the second trimester; life and health exceptions)
Kansas (with narrow life and health exceptions)
Kentucky (with life and health exceptions)
Louisiana (with life and health exceptions)
Maine (with life and health exceptions)
Maryland (with life, health and serious fetal abnormality exceptions)
Massachusetts (applies after the 24th week, with life and narrow health exceptions)
Michigan (applies 'after quickening'; life exception)

Minnesota (applies after 20 weeks; life and health exceptions)
Missouri (with life and health exceptions)
Montana (with life and health exceptions)
Nebraska (with life and health exceptions)
Nevada (applies after the 24th week; narrow life and health exceptions)
New Hampshire (applies 'after quickening'; life exception)
New York (applies after the 24th week; life exception)
North Carolina (applies after 20 weeks; narrow life and health exceptions)
North Dakota (with narrow life and health exceptions; requires concurrence from 2 physicians)
Ohio (with narrow life and health exceptions; see below for details)
Oklahoma (with life and health exceptions)
Pennsylvania (applies after 24th week; narrow life and health exceptions)
Rhode Island (life exception)
South Carolina (applies after 24th week; narrow life and health)
South Dakota (applies after 24th week; life and health exceptions)
Tennessee (with life and health exceptions)
Texas (with narrow life and health exceptions, and where severe fetal abnormality)
Utah (applies after 20 weeks; life and narrow health exceptions, and where grave fetal defect)
Virginia (applies post-second trimester; life and narrow health exceptions)
Washington (with life and health exceptions)
Wisconsin (with life and health exceptions)
Wyoming (with life and narrow health exceptions)

Note on Ohio
In August, an abortion law in Ohio was enacted with the following provisions:

- (1) bans the Dilation and Extraction (D&X) procedure for all abortions (Note: it refers to the procedure as 'D&X' unlike H.R. 1833);

- (2) bans all post-viability abortions, except when the physician is acting, "...to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function...;"

- (3) imposes a viability testing requirement and several other conditions before an abortion may be performed after the 22nd week of pregnancy; and

- (4) creates civil and criminal liability for violations of the D&X ban or the post-viability ban, and criminal liability for violations of the viability testing requirement.

On December 13, in response to a request from the Women's Professional Medical Corporation, a preliminary injunction was issued against the law. The Judge found that there is a "substantial likelihood of success" of proving that the law is unconstitutional on the following grounds:

- The definition of D&X is unconstitutionally vague. The legislation could be interpreted to include Dilation and Evacuation (D&E), the procedure commonly used in the second trimester; therefore, it lacks clear guidelines for physicians as to what will result in a liability.

- This ban on use of the D&X procedure could pose an undue burden on women seeking abortions in pre-viability stages, because D&X may be the least risky method available for some women.

- This ban on post-viability abortions could be found unconstitutional because of the threat it poses to the right of a woman to an abortion in order to preserve her life or health. (The Judge outlines several different reasons for this in his opinion, including an overly narrow definition of health.)

State-by-State Summary
Attached is a more complete summary compiled by NARAL that details all restrictions on post-viability abortions on a state-by-state basis.

cc: Carol Rasco
Jeremy Ben-Ami

THE WHITE HOUSE

WASHINGTON

COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: November 7, 1995

TOTAL PAGES (INCLUDING COVER PAGE): 3

TO: Office of Chief of Staff

ATTN: Martha Foley

FACSIMILE NUMBER: 6-2271

TELEPHONE NUMBER: 6-6799

FROM: James E. Castello
(202) 456-6611

Final Version

COMMENTS:

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James' version of draft to be sent to Senate

H.R. 1833, the bill that would ban what it calls "partial birth abortions," fails to make an exception for preservation of the health of the woman. This omission violates constitutional standards recently reaffirmed by the Supreme Court. Even in the post-viability period, when the government's interest in regulating abortion is at its weightiest, that interest must yield both to preservation of a woman's life and to preservation of a woman's health. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 & 2821 (restriction or prohibition of abortion in post-viability period must except cases in which abortion is necessary to preserve life or health of woman). This means, first of all, that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy. Id. It also means that the government may not regulate access to such abortions in a manner that effectively "require[s] the mother to bear an increased medical risk" in order to serve a state interest. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986) (invalidating requirement that doctor use abortion procedure most protective of fetal life "unless [that procedure] would present a significantly greater medical risk to the life or health of the pregnant woman" because this would require some degree of "trade-off" between woman's health and fetal survival). That is, where the government may not prohibit abortion outright, it also may not enforce regulations that make the procedure more dangerous to the woman's health. Id.; see also Danforth, 428 U.S. at 79 (invalidating ban on abortion procedure after first trimester in part because it would force "a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed").

If Congress were to ban so-called partial-birth abortions, "in a large fraction of the cases" in which the bar in question would be relevant at all, see Casey, 112 S. Ct. at 2830 (discussing method of constitutional analysis of abortion restriction), its operation would be inconsistent with this constitutional standard. It appears that the procedure at issue was developed specifically as a safer alternative to other methods of late-term abortion,[1] and that in fact doctors performing this method believe it often poses fewer medical risks for women in the late stages of pregnancy.[2] It is likely,

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1 See Diane M. Gianelli, Shock-Tactic Ads Target Late-Term Abortion Procedure, American Medical News, July 5, 1993, at 3.

2 Id.; see also Karen Hosler, Rare Abortion Method Is New Weapon in Debate, Baltimore Sun, June 17, 1995, at 2A (alternative procedures may pose dangers for women); National Abortion Rights Action League, Third-Trimester Abortion: The Myth of Abortion on Demand, Issue Paper, June 14, 1995 (submitted

therefore, that in a high percentage of the very few cases in which the procedure actually is used, it is the technique believed most protective of the woman's health. Accordingly, a prohibition on the method, in the absence of an adequate exception, would require women to "bear an increased medical risk in the view of their doctor," in order to obtain an abortion. As to women to whom the government may not deny access to abortion altogether -- that is, all women seeking pre-viability abortions and women seeking post-viability abortions in order to preserve their health or lives -- this outcome is constitutionally impermissible.

g:\data\hr1833.mem

This is terrible.
And it is much broader than the argument we want to be making (simple health exception necessary)

Key of this analysis -
All you need is a dr certifying "this procedure is safer"

don't even need him to certify that woman is choosing to have an abortion for health reasons.

in connection with House Hearings.).

H.R. 1833, a bill that would ban "partial-birth abortions," violates constitutional standards recently reaffirmed by the Supreme Court. Most significantly, the bill fails to make an adequate exception for preservation of a woman's life and health. The Supreme Court has made clear that the government's interest in regulating abortion must yield to both the preservation of a woman's life and the preservation of a women's health. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804, 2821 (1992). This means that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy, id., and that the government may not regulate access to abortion in a manner that effectively "require[s] the mother to bear an increased medical risk" in order to serve a state interest. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986) (invalidating restriction on doctor's choice of abortion procedure because it could result in increased risk to woman's health); see also Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 79 (1976).

H.R. 1833 would provide for an affirmative defense to criminal prosecution or civil claims when a partial-birth abortion is both (a) necessary to save the life of the woman, and (b) the only method of abortion that would serve that purpose. This provision will not cure the bill's constitutional defects. First, as discussed above, the provision is too narrow in scope, as it fails to reach cases in which a woman's health is a risk. Second, the provision does not actually except even life-threatening pregnancies from the statutory bar. Cf. Casey, 112 S. Ct. at 2804 (even in post-viability period, abortion restrictions must "contain[] exceptions for pregnancies which endanger a woman's life or health"). Instead, the provision would require a physician already facing criminal charges to carry the burden of proving, by a preponderance of the evidence, both that pregnancy threatened the life of the woman and that the method in question was the only one that could save the woman's life. By exposing physicians to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute undoubtedly would have a chilling effect on physicians' willingness to perform even those abortions necessary to save women's lives.

To Elena Kagan
cc:

Memorandum

Subject	Date
Women's Medical Professional Corp. (Ohio Abortion Case)	December 28, 1995

To	From
James Castello Deputy White House Counsel	Dawn Johnsen DJ Deputy Ass't Attorney General Pam Harris PH Attorney-Advisor

On December 13, a federal district court in Ohio issued a preliminary injunction against enforcement of a state law that, inter alia, banned (a) performance of post-viability abortions generally, and (b) use of the dilation and extraction ("D&X") abortion procedure both pre- and post-viability. Women's Medical Professional Corp. v. Voinovich, No. C-3-95-414 (S.D. Ohio Dec. 13, 1995). The D&X procedure outlawed by the Ohio statute appears to be the same procedure described as "partial-birth abortion" in the pending federal legislation on which we have commented.

Our comments on the proposed federal ban on partial-birth abortion, H.R. 1833, have focused on two constitutional flaws in the bill: first, that the bill fails to provide adequately for the protection of women's life and women's health at all stages of pregnancy, as mandated by cases running from Roe v. Wade[1] through Casey;[2] and second, that the bill may impose an "undue burden" on the ability of women to obtain pre-viability abortions, contrary to the principle applied in Casey. Rather than repeating these arguments here, we are attaching a copy of Walter Dellinger's Senate testimony on H.R. 1833, submitted on November 27. This memorandum summarizes those portions of the lengthy opinion in Women's Medical Professional Corp. that are most relevant to our consideration of H.R. 1833.

1. Background

The Ohio statute at issue, known as House Bill 135 (or "H.B. 135"), banned both pre- and post-viability use of the D&X abortion procedure. The D&X procedure was defined as "termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain," and seems to be the same procedure at which H.R. 1833 is aimed. The only "exception" to the

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1 410 U.S. 113 (1973).

2 Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

ban was in the form of an affirmative defense for cases in which a doctor can produce prima facie evidence that all other abortion procedures would pose a greater risk to the health of the pregnant woman. Slip op. at 4 & n.2; id. at 41 n.27.

H.B. 135 also banned all post-viability abortions, with an exception for abortions necessary to save a woman's life or to avoid a serious risk of substantial and irreversible impairment to a major bodily function. The district court read the health exception as limited to physical, rather than emotional, health. For those abortions falling within the life or health exceptions, additional restrictions attached; the one most relevant here was a "choice of method" restriction requiring use of the method most protective of fetal life unless it would pose a significantly greater risk to the life or physical health of the pregnant woman. Slip op. at 4-5 & n.5.

health exception

2. D&X Ban

The district court enjoined the ban on D&X abortions after finding that the plaintiffs had demonstrated a substantial likelihood of success on two alternative claims: first, that the ban was impermissibly vague, and second, that the ban imposed an undue burden on the right of women to obtain pre-viability abortions.[3] Because both holdings might bear on H.R. 1833, they are discussed separately below.

a. Vagueness

The district court found the potential for vagueness with respect to the D&X ban especially problematic for two reasons: because any vagueness might have a chilling effect on the exercise of constitutionally protected rights, and because the statute provided for criminal penalties. Slip op. at 19-20. Examining H.B. 135 in light of these considerations, the district court held that the definition of the proscribed D&X procedure was impermissibly vague because it failed to provide doctors with fair warning as to what conduct would expose them to liability. In particular, the court was concerned that the statute failed to distinguish the D&X procedure from dilation and evacuation ("D&E") procedures that also involved compression of the fetal skull. The court emphasized that doctors performing second-trimester abortions might not know which procedure they would use until encountering particular surgical variables after beginning to terminate a pregnancy. Slip op. at 28-30.

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[3] Because of the procedural posture of the case, the court applied the "substantial likelihood of success" standard to all of the constitutional claims discussed in this memorandum. See slip op. at 9-10 (discussing preliminary injunction standard). For the sake of brevity, we will not refer again to this standard.

vagueness issue

Similar vagueness concerns have been raised with respect to H.R. 1833. The definition of "partial-birth abortion" provided by the federal statute differs from that in H.B. 135,[4] and accordingly might not suffer from identical defects. Nevertheless, the broader problems are the same. There appears to be no medical consensus as to what the term "partial-birth abortion," even as defined by H.R. 1833, would cover, and no confidence among doctors that any second-trimester abortion, once begun, might not end with a procedure that would fall within the statutory bar.[5] The special concerns that animated the district court's decision -- the potential for a chilling effect and the harshness of criminal sanctions -- are implicated to the same degree at the federal level. In short, though we have not before treated the vagueness issue as a separate constitutional concern,[6] the Ohio decision may provide strong precedent for doing so now.

b. Undue Burden

The district court also enjoined the D&X ban on the ground that it imposed an undue burden on the ability of women to obtain pre-viability abortions. Relying on Danforth[7] and Casey, the court held that banning a particular method of abortion imposes an impermissible undue burden if safe alternatives are not available to women seeking abortions prior to fetal viability. Slip op. at 31.

The Ohio D&X ban was unconstitutional under that standard for two reasons. First, the district court found that the D&X procedure, typically performed late in the second trimester of pregnancy, "appears to pose less of a risk to maternal health" than other procedures available at that stage of pregnancy. Slip op. at 38-39.

If this abortion procedure, which appears to pose less of a risk to maternal health than any other alternative,

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[4] H.R. 1833 defines "partial-birth abortion" as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

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

[6] We have discussed the vagueness problem in connection with the undue burden issue, arguing that the chilling effect generated by H.R. 1833's imprecision will reduce significantly the availability of all second-trimester abortions.

[7] Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

were banned, and women were forced to use riskier and more deleterious abortion procedures, the ban could have the effect of placing a substantial obstacle in the path of women seeking pre-viability abortions, which would be an undue burden and thus unconstitutional under Casey.

Slip op. at 39-40. In the alternative, the district court found that even assuming that another method, induction, were as safe as the D&X procedure, the fact that induction required hospitalization could have a "negative impact on the practical availability" of abortion, itself "amounting to an undue burden." Slip op. at 40-41. For these reasons, the court enjoined the D&X ban on its face -- most likely, though this is not made explicit, on the theory that it would operate unconstitutionally in a "large fraction" of the cases in which it was relevant. Slip op. at 13-18 (deciding that Casey standard for facial challenges applies). The district court did not address separately the potential post-viability application of the D&X ban.

We have raised similar concerns with respect to H.R. 1833, arguing both that the government may not ban abortion procedures that are the most protective of women's health and, specifically with respect to the pre-viability period, that the government may not ban a given abortion procedure when doing so would impose an "undue burden" on the ability of women to obtain abortions. The district court opinion provides strong support for this approach.

c. Affirmative Defense

The district court rejected an argument that the constitutional defects it had identified were cured by H.B. 135's affirmative defense provision. Under that provision, a doctor prosecuted for performing a D&X abortion could present prima facie evidence that all other procedures would have posed greater risks to the woman's health. If the doctor could make that showing, then the burden would shift to the state to prove that at least one other abortion procedure would have been equally protective of the woman's health. Slip op. at 41 n.27.

According to the district court, the provision was inadequate for two reasons. First, because it was in the form of an affirmative defense rather than a true exception, it would deter doctors from performing even those D&X procedures that fell within the provision's scope as the safest method available. Second, the provision would cover only those D&X procedures that were "obviously and irrefutably" the method most protective of health; criminal sanctions could still attach when D&X procedures were arguably safer or evidently more available than other methods. Id.

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Again, because the district court had invalidated the D&X ban on its face, it did not have occasion to analyze it separately in connection with the post-viability abortion ban. Nevertheless, it is clear from the district court's reasoning that the government generally could not enforce the D&X ban even in the post-viability period. Under the district court analysis, protection of women's health in the post-viability period means at least two things: first, that women whose health, broadly construed, is threatened by pregnancy cannot be denied access to abortion; and second, that post-viability abortion cannot be regulated in a way that requires

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We emphasize the district court's discussion of post-viability abortion because it bears directly on the status of H.R. 1833. Both the district court's general premise -- that the government may not "impinge" at all on women's health interests in the post-viability period -- and its specific analysis of the H.B. 135 health exception are in accord with our own analysis of H.R. 1833's post-viability application. In this respect, the district court opinion provides substantial support for our view that H.R. 1833 is unconstitutional even as applied post-viability.

THE WHITE HOUSE

WASHINGTON

January 6, 1996

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM: Debbie Fine

SUBJECT: State Restrictions on Late-Term Abortions

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Arkansas (with life and health exceptions, and when result of rape or incest of a minor)
California (applies to all cases after the 20th week; no exceptions)
Connecticut (with life and health exceptions)
Delaware (applies to all cases after the 20th week; life exception)
Florida (applies to all cases in the third trimester; life and health exceptions if certified in writing by two physicians)
Georgia (applies to all cases after the 2nd trimester; life and health exceptions if certified by three physicians)
Idaho (with exceptions to preserve the woman's life or if fetus would be unable to survive)
Illinois (with life and health exceptions)
Indiana (with narrow life and health exceptions)
Iowa (applies to cases after the end of the second trimester; life and health exceptions)
Kansas (with narrow life and health exceptions)
Kentucky (with life and health exceptions)
Louisiana (with life and health exceptions)
Maine (with life and health exceptions)
Maryland (with life, health and serious fetal abnormality exceptions)
Massachusetts (applies after the 24th week, with life and narrow health exceptions)
Michigan (applies 'after quickening'; life exception)

Minnesota (applies after 20 weeks; life and health exceptions)
Missouri (with life and health exceptions)
Montana (with life and health exceptions)
Nebraska (with life and health exceptions)
Nevada (applies after the 24th week; narrow life and health exceptions)
New Hampshire (applies 'after quickening'; life exception)
New York (applies after the 24th week; life exception)
North Carolina (applies after 20 weeks; narrow life and health exceptions)
North Dakota (with narrow life and health exceptions; requires concurrence from 2 physicians)
Ohio (with narrow life and health exceptions; see below for details)
Oklahoma (with life and health exceptions)
Pennsylvania (applies after 24th week; narrow life and health exceptions)
Rhode Island (life exception)
South Carolina (applies after 24th week; narrow life and health)
South Dakota (applies after 24th week; life and health exceptions)
Tennessee (with life and health exceptions)
Texas (with narrow life and health exceptions, and where severe fetal abnormality)
Utah (applies after 20 weeks; life and narrow health exceptions, and where grave fetal defect)
Virginia (applies post-second trimester; life and narrow health exceptions)
Washington (with life and health exceptions)
Wisconsin (with life and health exceptions)
Wyoming (with life and narrow health exceptions)

Note on Ohio
In August, an abortion law in Ohio was enacted with the following provisions:

- (1) bans the Dilation and Extraction (D&X) procedure for all abortions (Note: it refers to the procedure as 'D&X' unlike H.R. 1833);

- (2) bans all post-viability abortions, except when the physician is acting, "...to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function...;"

- (3) imposes a viability testing requirement and several other conditions before an abortion may be performed after the 22nd week of pregnancy; and

- (4) creates civil and criminal liability for violations of the D&X ban or the post-viability ban, and criminal liability for violations of the viability testing requirement.

On December 13, in response to a request from the Women's Professional Medical Corporation, a preliminary injunction was issued against the law. The Judge found that there is a "substantial likelihood of success" of proving that the law is unconstitutional on the following grounds:

- The definition of D&X is unconstitutionally vague. The legislation could be interpreted to include Dilation and Evacuation (D&E), the procedure commonly used in the second trimester; therefore, it lacks clear guidelines for physicians as to what will result in a liability.

- This ban on use of the D&X procedure could pose an undue burden on women seeking abortions in pre-viability stages, because D&X may be the least risky method available for some women.

- This ban on post-viability abortions could be found unconstitutional because of the threat it poses to the right of a woman to an abortion in order to preserve her life or health. (The Judge outlines several different reasons for this in his opinion, including an overly narrow definition of health.)

<u>State-by-State Summary</u>
Attached is a more complete summary compiled by NARAL that details all restrictions on post-viability abortions on a state-by-state basis.

cc: Carol Rasco
Jeremy Ben-Ami

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 7, 1995

H.R. 1833, a bill that would ban what it calls "partial-birth abortions," violates constitutional standards recently reaffirmed by the Supreme Court. Most significantly, the bill fails to make an adequate exception for preservation of a woman's health. Even in the post-viability period, when the government's interest in regulating abortion is at its weightiest, that interest must yield both to preservation of a woman's life and to preservation of a woman's health. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804, 2821 (1992). This means, first of all, that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy. Id. It also means that the government may not regulate access to abortion in a manner that effectively "require[s] the mother to bear an increased medical risk" in order to serve a state interest. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986) (invalidating restriction on doctor's choice of abortion procedure because could result in increased risk to woman's health). That is, the government may not enforce regulations that make the abortion procedure more dangerous to the woman's health. Id.; see also Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 79 (1976) (invalidating ban on abortion procedure after first trimester in part because would force "a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed").

If Congress were to ban this method of abortion, it appears that "in a large fraction of the cases" in which the ban would be relevant at all, see Casey, 112 S. Ct. at 2830 (discussing method of constitutional analysis of abortion restrictions), its operation would be inconsistent with this constitutional standard. It has been reported that doctors performing this procedure believe it often poses fewer medical risks for women in the late stages of pregnancy.[1] If this is true, then it is likely that in a "large fraction" of the very few cases in which the procedure actually is used, it is the technique most protective of the woman's health. Accordingly, a prohibition on the method, in the absence of an adequate exception

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1 See Hearings on H.R. 1833 Before the Subcomm. on the Constitution of the House Judiciary Comm. (June 23, 1995) (statement of James T. McMahon, M.D., Medical Director, Eve Surgical Centers) (procedure shown to be safest surgical alternative late in pregnancy); id. (June 15, 1995) (statement of J. Cortland Robinson, M.D., M.P.H.) (same); see also Tamar Lewin, Wider Impact is Foreseen for Bill to Ban Type of Abortion, The New York Times, November 6, 1995, at B7; Diane M. Gianelli, Shock-Tactic Ads Target Late-Term Abortion Procedure, American Medical News, July 5, 1993, at 3; Karen Hosler, Rare Abortion Method Is New Weapon in Debate, Baltimore Sun, June 17, 1995, at 2A.

covering such cases, impermissibly would require women to "bear an increased medical risk" in order to obtain an abortion.

H.R. 1833 would provide for an affirmative defense to criminal prosecution or civil claims when a partial-birth abortion is both (a) necessary to save the life of the woman, and (b) the only method of abortion that would serve that purpose. This provision will not cure the bill's constitutional defects. First, as discussed above, the provision is too narrow in scope, as it fails to reach cases in which a woman's health is at issue. Second, the provision does not actually except even life-threatening pregnancies from the statutory bar. Cf. Casey, 112 S. Ct. at 2804 (even in post-viability period, abortion restrictions must "contain[] exceptions for pregnancies which endanger a woman's life or health"). Instead, the provision would require a physician facing criminal charges to carry the burden of proving, by a preponderance of the evidence, both that pregnancy threatened the life of the woman and that the method in question was the only one that could save the woman's life. By exposing physicians to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute undoubtedly would have a chilling effect on physicians' willingness to perform even those abortions necessary to save women's lives.

cc: Dellinger Ret. (HarrisP) Abortion.CC2
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U. S. Department of Justice

Office of Legal Counsel

Office of the
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Washington, D.C. 20530

January 25, 1996

**MEMORANDUM FOR JACK QUINN
COUNSEL TO THE PRESIDENT**

From: Walter Dellinger

Re: Partial-Birth Abortion Ban Act

I have reviewed the memorandum of the General Counsel of the United States Catholic Conference on the proposed Partial-Birth Abortion Ban Act, arguing that the Act would be constitutional. Because my Senate testimony (a copy of which is attached) lays out the basis for our disagreement with this conclusion, I will not revisit the issue at length here. However, I would like to respond very briefly to some of the arguments advanced by the Catholic Conference memorandum ("Memorandum").

As my testimony indicates, one of the most significant constitutional flaws in the proposed Act is that it fails to provide adequately for the protection of women's health. Our argument here consists of two distinct claims, one legal and one factual: first, that the Constitution does not permit the government to regulate access to abortion in a manner that makes the procedure more dangerous for women; and second, that the proposed ban violates this standard because the procedure in question may pose the fewest medical risks for women in the late stages of pregnancy.

The Memorandum's analysis consists almost entirely of an attack on the factual predicate for our argument. That is, the Memorandum argues that the legal standard outlined above is not implicated here because the procedure at issue is never the safest method of abortion, and indeed poses greater risks to women's health than other types of abortion. Memorandum at 2-5. To a significant degree, then, the debate here boils down to a factual dispute about the relative safety of the procedure in question.

This dispute recently has been addressed by a federal district court in Ohio. At issue in Women's Medical Professional Corporation v. Voinovich, No. C-3-95-414 (S.D. Ohio Dec. 13, 1995) was an Ohio statute banning the same "dilation and extraction" abortion procedure described by the proposed federal statute. After analyzing the evidence presented over the course of six days of hearings, during which several medical experts testified on each side of the issue, the district court concluded that the procedure in question "appears to

pose less of a risk to maternal health" than do other procedures available late in pregnancy. Slip op. at 38-39; see also id. at 31-38 (reviewing evidence). On that basis, the district court issued a preliminary injunction against enforcement of the ban; four weeks later, relying on its original opinion, the district court entered a permanent injunction.[1]

The Catholic Conference Memorandum does not mention Voinovich, despite the case's obvious relevance and the fact that it was decided several weeks before the Memorandum was issued. I am attaching a copy of an earlier memorandum provided by our office to James Castello assessing the Voinovich decision, and will not describe the case in any greater detail here. For present purposes, it should be sufficient that the only court to consider the question -- and to consider it at great length -- has rejected the factual claims made by the Memorandum and adopted instead the factual premise that underlies our constitutional analysis.

Quite apart from Voinovich, I should add, the Memorandum's factual argument is intrinsically weak. Obviously, of course, the Memorandum's citations are selective; there are no references to the doctors who testified before the House Judiciary Committee that the procedure at issue is in fact the safest surgical alternative for women late in pregnancy.[2] Moreover, the Memorandum's absolutist position -- that the procedure is never the method that poses fewest medical risks for women, and actually poses increased risks to health -- is almost facially implausible: if that were indeed the case, it would be difficult to explain why the American College of Obstetricians and Gynecologists has made clear that it will not support the proposed ban,[3] or why individual doctors continue to perform the procedure. At a bare minimum, some doctors clearly find that the procedure at issue is the safest for certain of their patients, making precisely the kind of "best medical judgment" that the Court has recognized is critical to the protection of women's health.[4]

Though the Memorandum relies almost exclusively on its factual claims to advance its argument, it also makes a legal claim that deserves mention. The Memorandum states on page 5 that Casey signals a move by the Supreme Court "away from earlier and more restrictive pronouncements, giving legislatures today greater latitude to regulate abortion." Without engaging in an exhaustive analysis of Casey's import, I do want to emphasize that as to the priority given women's health, Casey in no way retreats from prior case law, but

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[1] Women's Medical Professional Corp. v. Voinovich, No. C-3-95-414 (S.D. Ohio Jan. 12, 1996).

[2] See Hearings On H.R. 1833 Before the Subcomm. on the Constitution of the House Judiciary Comm. (June 23, 1995) (statement of James T. McMahon, M.D., Medical Director, Eve Surgical Centers); id. (June 15, 1995) (statement of J. Cortland Robinson, M.D., M.P.H.).

[3] Letter from Ralph W. Hale, MD, Executive Director, ACOG, to Herbert C. Jones, MD (Oct. 24, 1995).

[4] See Doe v. Bolton, 410 U.S. 179, 192 (1973).

rather reaffirms that the government's interest in regulating abortion must yield at all times to preservation of women's health.[5]

[5] This point, with references to supporting case law, is discussed in my testimony at pages 2-3.