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Abortion - Child Custody Act [1]

Abortion - child custody act

Cynthia Dailard 09/22/98 05:08:22 PM

Record Type: Record

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

cc:

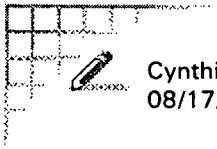
Subject: cloture vote on CCPA

The Senate failed to acheive cloture on the Child Custody Protection Act by a vote of 54-45.

Message Sent To:

Jennifer L. Klein/OPD/EOP
Neera Tanden/WHO/EOP
Nicole R. Rabner/WHO/EOP
Elena Kagan/OPD/EOP
Laura Emmett/WHO/EOP

Abortion - child custody act



Cynthia Dailard
08/17/98 10:23:50 AM

Record Type: Record

To: Ann F. Lewis/WHO/EOP

cc: Elena Kagan/OPD/EOP, Jennifer L. Klein/OPD/EOP
Subject: Child Custody Protection Act

Before Jen Klein left for vacation, she asked me to follow up on your e-mail to her regarding the Child Custody Protection Act, and stastistics regarding how many grandparents are caring for their grandchildren in this country (in order to frame CCPA as "granny goes to jail legislation.") Here is what I found. I will forward this information to the pro-choice community. Please let me know if there is anything else I can do.

According to the March 1997 Current Population Survey of the Census Bureau, 3.7 million grandparents maintain households for their grandchildren, the majority of whom are grandmothers (2.3 million). These households involve 3.9 million children (or 5.5 percent of all children). This represents a 76 percent increase since 1970, when 2.2 million American children lived in a household maintained by a grandparent. Two-thirds of grandparent-headed households have one or more parent present, which leaves 1.3 million children raised solely by their grandparents. Between 1990-1997, families with grandparents and no parents present grew by 31 percent. In contrast, families with the children's parent present increased only by 13 percent.

Several reasons account for the recent increase in grand-parent headed households, including: increased drug abuse among parents, teen pregnancy, divorce, a rise in single parent households, mental and physical illness, AIDS, crime, child abuse and neglect and incarceration. Grandparent-headed households are disproportionately low-income, and children are often at risk.

U.S. Department of Justice
Office of Legislative Affairs

Abortion - child custody act

Office of the Assistant Attorney General

Washington, D.C. 20530

June 24, 1998

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

Dear Mr. Chairman:

As was stated in the June 17, 1998 letter from White House Chief of Staff Erskine Bowles, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. The Administration appreciates the concerns of the sponsors of H.R. 3682, the "Child Custody Protection Act," about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about preventing overbearing and sometimes predatory adults from improperly influencing minors to choose an abortion.

This letter provides the views of the Department of Justice concerning H.R. 3682, as marked up by the Subcommittee on the Constitution of the Committee on the Judiciary on June 11, 1998. Although, in our view, the bill's civil and criminal provisions, as drafted, are overbroad and raise serious constitutional, legal, and law enforcement concerns, we believe that legislation could be crafted that would appropriately target non-relatives who transport minors across state lines for the purpose of avoiding parental involvement requirements.

I. OPERATION OF H.R. 3682

H.R. 3682 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a) would read as follows:

> Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent such individual obtain an abortion, if in fact the requirements of a law, requiring parental involvement in a minor's abortion decision, in the State where the individual resides, are not met before the individual obtains

the abortion, shall be fined under this title or imprisoned not more than one year, or both.[1]

The restriction on interstate transport would be triggered if the law in the state where the minor resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.[2] As we construe the provision, it appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites that would have been applicable if the abortion had been performed in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not

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[1] The referenced exception in proposed § 2401(b) would provide that "[t]he prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself."

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

> a law--
>
> (A) requiring, before an abortion is performed on a minor, either--
>
> (i) the notification to, or consent of, a parent of that minor; or
>
> (ii) proceedings in a State court; and
>
> (B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

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

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

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

seek to impose such restrictions on out-of-state abortions.[3]

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, H.R. 3682 would create a civil cause of action: proposed 18 U.S.C. § 2401(c) would provide that "[a]ny parent or guardian who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action."

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

As was stated in White House Chief of Staff Erskine Bowles's letter, H.R. 3682 must be amended to exclude close family members from civil and criminal liability. The defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(c), could well be a member of the minor's own family. Imposing criminal and civil sanctions on family members, requiring family members to testify against each other, and raising the prospect of lawsuits by one family member against another could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard of the minor's best interests. In addition, the prospect of criminal or civil action against family members would discourage a minor from seeking the advice and counsel of those closest to her. We therefore recommend that H.R. 3682 incorporate an exception for family members who transport the minor.

Chief of Staff Bowles's letter also stated that H.R. 3682 must be amended to ensure that persons who provide information, counseling, or referral or medical services to the minor are not subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interest of promoting family communication and would not deter those who inappropriately transport minors across state lines to obtain abortions. The threat of accessory liability against such persons, moreover, would likely impair the ability of physicians, clergy, counselors, and their staffs to care for and counsel both minors and adults. The bill also could provide an unintended basis for vexatious litigation against individuals and organizations, and could allow private citizens suing under the extraordinarily open-ended civil liability provision of the statute to inappropriately invade the privacy of patients.

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

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

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

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

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

> [t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

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

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he means chosen by the State to further the

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

interest in potential life must be calculated to inform the woman's free choice, not hinder it.").[5] The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

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

B. Constitutional Problems Raised by H.R. 3682

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

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases,

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

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

the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when, for example, a minor's parents in a "parental consent" state would have provided consent, or the minor would have been able to obtain a judicial bypass, had mechanisms for manifesting such consent or obtaining such a bypass for an out-of-state abortion been available. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state: The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack jurisdiction under state law to provide a legal bypass for an abortion to be performed out of state.[7]

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

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[7] In Montana, for example, the legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." Mont. Code Ann. § 50-20-212(2)(a) (1997). The "notice requirement," in turn, is imposed upon the "physician" who is to perform the abortion (who may, however, rely upon notice given by the "referring physician"). Id. § 50-20-204 (1997). And "physician," in turn, is defined to mean "a person licensed to practice medicine under [Montana law]." Id. § 50-20-203 (1997). Therefore, in the case of an out-of-state abortion, there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of the requirement.

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

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

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state of residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.[8]

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

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

C. Mens Rea

Proposed § 2401(a) should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. In other words, individuals should be subject to criminal sanction only if they know that they are acting unlawfully. Congress has used a willfulness standard in criminal statutes in a range of contexts. See, e.g., Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (sale of firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (currency transactions in violation of reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (felony and misdemeanor tax statutes).

Congress has opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. See Bryan, slip op. at 10. Many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend -- will often be people with little or no experience with abortion or knowledge of the relevant law, let alone its finer points. Seeking to aid her, they might well engage in conduct they reasonably believe to be lawful -- driving a minor who is a granddaughter, a niece, a parishioner, or a friend across state lines to a place where she can legally have an abortion. In such circumstances, they would completely unwittingly violate a federal criminal law and expose themselves to criminal and civil sanction.

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

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challenge to a congressional enactment such as H.R. 3682.

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

D. Federalism Concerns

H.R. 3682 raises novel and important federalism issues. First, H.R. 3682 would broadly undermine the ability of a state to vindicate its own policy determinations within its own borders. The thrust of the proposed bill would be to use the federal criminal and civil law to trump the policy determinations of those states that have opted not to implement a parental involvement requirement. In this respect, H.R. 3682 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular federal interest by making it a crime to engage in interstate transport or commerce for the purpose of carrying out proscribed conduct in a neighboring state. In such circumstances, the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. In contrast, the proposed bill would make unlawful travel for the purpose of engaging in conduct that is lawful in the state in which it occurs.

Second, by extending the reach of one state's policy choice into neighboring states, H.R. 3682 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens -- should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under H.R. 3682, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

IV. PRACTICAL ENFORCEMENT PROBLEMS

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

First, for reasons discussed in section III-C, supra, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under

the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. H.R. 3682 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of H.R. 3682 would fall entirely to the FBI -- in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources. Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

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

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

Fifth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that statute would require, of making the federal government appear overzealous and heavyhanded.[9]

Sixth, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws -- to prevent and punish the abduction or mistreatment of minors.[10] The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that H.R. 3682 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means -- for example, hitchhiking or traveling alone -- of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors' conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

* * * * *

Thank you for the opportunity to comment on this important matter. If we may be of additional assistance, please do not hesitate to contact us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

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

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

U. S. Department of Justice
Abortion-child custody act
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 27, 1998

MEMORANDUM FOR WILLIAM P. MARSHALL
ASSOCIATE COUNSEL TO THE PRESIDENT

From: Dawn E. Johnsen
Acting Assistant Attorney General

Re: S.1645, Child Custody Protection Act of 1998

You have asked for our advice with respect to proposed Senate bill S. 1645, the Child Custody Protection Act of 1998. That proposal would, inter alia, establish a new criminal law prohibiting the knowing transportation of a minor across a state line, with the intent that such individual obtain an abortion, where the minor has not "met" the "requirements" of her home state's law requiring parental involvement in her abortion decision.

This proposal constitutes a novel form of federal legislation in that it purports to restrict travel for lawful purposes in a context that implicates a constitutionally protected right. It therefore raises difficult constitutional issues for which there is little direct precedent. Nevertheless, some conclusions are possible.

Under the legal framework that governs the constitutionality of parental notification/consent laws, S. 1645 would appear to be unconstitutional as applied to minors where the law of their domicile state does not itself establish a constitutionally sufficient mechanism for satisfying the domicile state's notice or consent requirements, or for bypassing the notification or consent requirement, when an abortion is to be performed out of state. The provision also would seem to operate unconstitutionally to the extent that it would require a minor to satisfy the parental consent or notification laws of both the domicile state and the state in which the minor seeks the abortion. And S. 1645 would appear to be facially invalid if, nationwide, it would operate in "a large fraction of the cases in which [S. 1645] is relevant," Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 895 (1992), to preclude minors from obtaining adult assistance in traveling interstate for abortions because of the absence of available consent and bypass mechanisms or because of a requirement that the minor satisfy two sets of state law notification/consent provisions. Cf. id. at 895 (holding provision to be an invalid undue burden because "in a large fraction of the cases in which [the

provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."). We have not, however, undertaken the difficult task of examining the laws of all fifty states as would be necessary to determine whether the proposal would be facially invalid.

Application of S. 1645 would also raise novel and difficult questions respecting the right to travel interstate, particularly insofar as it would apply to travel for conduct that has not been made unlawful by any state law. In part because it would seem that the governmental interest in imposing restrictions on interstate travel by minors typically would be greater than it would be in restricting interstate travel by adults, it is unclear whether heightened scrutiny would apply in this context, and, if so, whether the government's interest in support of S. 1645 nonetheless would be sufficient to survive such scrutiny.

Finally, it is unclear whether a court would construe S. 1645 to require proof that the person transporting a minor across state lines knew that the home state's parental notice or consent law had not been satisfied. If S. 1645 were construed not to require the defendant's knowledge that the home state's parental notice or consent law had not been satisfied, the statute would reflect a significant departure from past practice and would appear to raise constitutional concerns under the principles set forth in Casey and Hodgson v. Minnesota, 497 U.S. 417 (1990), because of the chilling effect that it may have on the willingness of adults to provide assistance to minors who have in fact satisfied applicable notification or consent requirements.

I.

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a State may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (1990) (collecting cases). Although a State has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

> [t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (Powell, J., for a plurality of the Court) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions -- such as parental notice or consent requirements -- are impermissible if they "impose undue burdens upon a minor capable of giving an informed consent" to the procedure. Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I"). A burden is "undue," and hence impermissible, if it "will operate as a substantial

obstacle to a woman's choice to undergo an abortion." Casey, 505 U.S. at 895.[1]

States may require parental involvement in a minor's decision whether to obtain an abortion, but only where the State does so in order to advance the State's interest in ensuring that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. Accord Casey, 505 U.S. at 877 ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."). The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895. Any rule requiring parental involvement must, however, rest "entirely on the best interests of the child." Hodgson, 497 U.S. at 454 (citing Bellotti II, 443 U.S. at 651 (plurality opinion)).

At a minimum, a State that requires parental notification or consent must provide a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity. See Lambert v. Wicklund, 117 S. Ct 1169, 1171-72 (1997) (per curiam) (explaining that, under Bellotti II, 443 U.S. at 643-644 (plurality opinion), a parental-consent statute must include such a by-pass mechanism to be constitutional); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 511-13 (1990) (adopting Bellotti II's by-pass requirements); see also Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996) (holding that a parental-notification statute must include a certain by-pass mechanism to be constitutional); see also Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.) (holding a parental notification statute unconstitutional because the by-pass mechanism failed to comply with the Bellotti II requirements), cert. denied, 118 S.Ct. 357 (1997).[2]

II.

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

Except as provided in subsection (b), whoever knowingly transports an individual

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[1] All citations to Casey herein are to the controlling, joint opinion of Justices O'Connor, Kennedy and Souter.

[2] The Supreme Court has not had occasion to decide whether a bypass procedure is mandatory if the statute requires notification of one parent (rather than notification of both parents or parental consent). Lambert, 117 S. Ct. at 1171. The Supreme Court has held, however, that a by-pass mechanism is constitutionally required if the statute requires notification of both parents. See Hodgson, 497 U.S. at 451.

> who has not attained the age of 18 years across a State line, with the intent such individual obtain an abortion, if in fact the requirements of a law, requiring parental involvement in a minor's abortion decision, in the State where the individual resides, are not met before the individual obtains the abortion, shall be fined under this title or imprisoned not more than one year, or both.[3]

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

> a law--
>
> (A) requiring, before an abortion is performed on a minor, either--
>
> (i) the notification to, or consent of, a parent or guardian of that minor; or
> (ii) proceedings in a State court; and
>
> (B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.[4]

S. 1645 would not create a uniform nationwide consent or notice regime, nor prohibit altogether the interstate transport of minors for the purpose of obtaining abortions without parental notice or consent (or "bypass" of such notification or consent). Compare 18 U.S.C. § 2421 (1994) (uniformly prohibiting interstate transportation of persons with the intent that such persons engage in unlawful sexual activity). Instead, the restriction on interstate transport would be triggered only where the law in the state where the minor resides (the domicile state) would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in her home state.

S. 1645 would, inter alia, cover the following situation: Assume that the law of one state -- State A -- requires parental consent (with a constitutionally required provision for bypass) prior to a minor's abortion performed in State A (regardless of whether the minor lives in the state); but there is nothing in State A's law that attempts either to restrict its resident minors from obtaining extraterritorial abortions in State B, or to punish persons (e.g., transporters, doctors) who assist the minor in obtaining such out-of-state abortions. Under S. 1645, it would

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[3] The referenced exception in proposed § 2401(b) would provide that "[t]he prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." In addition, subsection (c) would provide that "[a]ny parent or guardian who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action."

[4] Subsection (d)(2) would define "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

be a federal crime to transport a minor outside State A for an abortion in State B if the statutory prerequisites for a hypothetical in-state abortion for that minor had not previously been satisfied. As such, S. 1645 would -- unlike the law of State A itself -- restrict the ability of resident minors of State A to obtain abortions in State B.[5]

III.

A. Parental Notice/Consent. S. 1645 would appear to be unconstitutional as applied to minors where the law of their domicile state does not itself establish a constitutionally sufficient mechanism for satisfying the domicile state's notice or consent requirements, or for bypassing the notification or consent requirement, when an abortion is to be performed out of state. For example, in some states the state-law duty to notify a parent is imposed, not on the minor herself, but on the in-state abortion provider. See, e.g., Lambert, 117 S. Ct. at 1170 n.1 (quoting requirement of Montana law that physician give notice to parents). In such a state, there would appear to be no one with the legal authority or obligation to satisfy the state's "notice" requirement in the case of a minor who sought an abortion out of state. Under these circumstances, it would be impossible for the "requirements" of state law to be "met," in which case S. 1645 effectively would prohibit persons from transporting minors out-of-state for abortions, because the statutory prerequisites for transport in accord with federal law could not be satisfied. Alternatively, the domicile state's law might not provide any means, in the case of an abortion to be performed out of state, of providing a constitutionally mandated bypass procedure. State A's bypass mechanism, for example, might expressly (or in legal operation) require state judges to provide bypasses under constitutionally required circumstances, but only with respect to in-state abortions. In such cases, state judges might simply lack legal jurisdiction under state law to provide a legal "bypass" for an abortion to be performed out of state.

Nothing in S. 1645 itself would provide the constitutionally necessary procedures in cases

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[5] There is some ambiguity as to exactly how the notice and consent prerequisites of S. 1645 would be intended to work. By its terms, S. 1645 would impose a limitation on the person transporting a minor across states lines only if, "in fact," the requirements of the domicile State's parental notice or consent "are not met before the individual obtains the abortion." Read literally, then, S. 1645 could be triggered only if there were some "requirements" in the law of the domicile State that must be "met" before a resident of that State obtains an out-of-state abortion -- i.e., where the domicile State's notice or consent law applies to extraterritorial abortions obtained by the State's own residents. If the scope of S. 1645 were so narrow, however, it would have little, if any, effect, because few, if any, states impose such extraterritorial restrictions on their resident minors' out-of-state abortions. See generally Seth F. Kreimer, "But Whoever Treasures Freedom . . . ": The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 910-11 & nn.16-18 (1993). Moreover, there is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992). Accordingly, we are assuming that S. 1645 would be construed so that the prohibition in § 2401(a) would apply with respect to abortions outside the domicile state even where the law of that state does not itself impose consent or notice requirements on its residents' extraterritorial abortions. As indicated in the text, we will assume that the statute is intended to apply to out-of-state abortions whenever the domicile state's prerequisites to an in-state abortion have not been met.

such as these. S. 1645 does not, for instance, provide any constitutionally acceptable bypass mechanism for non-domicile-state abortions. To be sure, a state could, in response to S. 1645, provide for constitutionally sufficient notice and bypass mechanisms even for abortions that would not be performed in state. Absent such supplementary action, however, minors whose home states' procedures would be applicable to out-of-state abortions would, in effect, be unable to invoke the assistance of others in travel to another state for an abortion. For many minors, abortion outside of the domicile state might be significantly safer, less expensive, or otherwise more convenient. Yet S. 1645 could have the effect of deterring or preventing such minors -- particularly those who cannot drive -- from obtaining safe and convenient out-of-state abortions even when their parents would have consented to their being assisted in interstate travel for the purpose of obtaining such abortions (or they would have been able to obtain a bypass had a bypass mechanism been available.)

In light of these problems, where the relevant state requirements could not be met for an out-of-state abortion, it would appear that S. 1645 could not be justified, as have constitutionally permissible parental consent or notification laws, as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. Indeed, the Hodgson Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a one-parent with bypass requirement. Id. at 450.[6] The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision." Id. It would appear to follow that S. 1645 would not appear to serve "any [governmental] interest with respect to functioning families" within the meaning of Hodgson insofar as it would preclude minors from traveling with the assistance of an adult for the purpose of obtaining an abortion to which their parents would have consented but for the absence of a legal mechanism that would have permitted them to manifest such consent. A similar concern would arise in cases in which a minor would have been able to have satisfied a bypass mechanism but for the fact that no such mechanism was available under state or federal law. And S. 1645 would appear to be facially invalid as well if, nationwide, it would operate in "a large fraction of the cases in which [S. 1645] is relevant," Casey, 505 U.S. at 895, to preclude minors from obtaining adult assistance in traveling interstate for abortions because of the absence of available consent and bypass mechanisms. Cf. id. (holding provision to be an invalid undue burden because "in a large fraction of the cases in which [the provision] is relevant, it will operate as

[6] The Court did not address whether a one-parent notification provision without a by-pass mechanism would itself be constitutionally permissible. In addition, a different majority of the Court held that a two-parent notification requirement that did include a by-pass mechanism was constitutionally valid.

a substantial obstacle to a woman's choice to undergo an abortion.").[7]

The provision also would seem to operate unconstitutionally where both State A and State B -- the domicile state and the state in which the minor seeks the abortion -- have parental consent or notification laws. By law of State B, the minor already will be required to satisfy certain parental notice/consent prerequisites in order to obtain an abortion there. If S. 1645 were construed to require satisfaction of State A's requirements, as well, it would impose two separate parental notification procedures, or bypass procedures, for any minor who would need or want assistance in crossing state lines. In most cases, such duplication would serve little or no legitimate governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.

The combined effect of these two distinct ways in which S. 1645 might operate unconstitutionally would be to increase the risk of its facial invalidation. This risk could be alleviated (1) by providing for (a) a constitutionally sufficient, federal consent/notice and bypass mechanism or (b) an exemption for travel from states that do not have a constitutionally sufficient consent/notice bypass mechanism for out-of-state abortions and (2) by making clear that the prohibition effected by S. 1645 would not apply so long as a minor had complied with at least one constitutionally sufficient consent/notice bypass mechanism, whether that mechanism had been established by state or federal law.

B. Right to Travel Interstate. Application of S. 1645 also would raise questions respecting the right to travel interstate, particularly insofar as it would apply to travel for conduct that has not been made unlawful by any state law. The Supreme Court repeatedly has recognized the existence of a constitutional right to travel. See, e.g., Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 & n.7 (1993); Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 757-58 (1966). In Bray, the Court explained that the "federal guarantee of interstate travel . . . protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." 506 U.S. at 276-77. And in Shapiro, the Court held that state action that imposes a significant deterrent to the exercise of the right to travel interstate is unconstitutional "unless shown to be necessary to promote a compelling governmental interest." 394 U.S. at 634.

This right to interstate travel is based, at least in part, on "constitutional concepts of personal liberty," Shapiro, 394 U.S. at 629, and is a "basic right under the Constitution," Guest, 383 U.S. at 758. See also Dunn, 405 U.S. at 338 (right to travel is a "fundamental personal right"). Accordingly, the Supreme Court has suggested that the right imposes some constraint on the federal government, as well as on the states. See Bray, 506 U.S. at 277 n.7. See also Shapiro, 394 U.S. at 641 (applying heightened equal protection scrutiny to an act of Congress

[7] See also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., joined by Souter, J., concurring); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (Opinion of Stevens, J., respecting the denial of cert.).

that discriminated between long-term and short-term residents of the District of Columbia); id. at 669-71 (Harlan, J., dissenting) (concluding that the Due Process Clause of the Fifth Amendment limits Congress's power to impinge on certain forms of interstate travel).[8]

If the right to travel constrains the federal government, Congress nonetheless as a general matter plainly has the authority pursuant to its commerce power to regulate the interstate movement of people and goods. Congress clearly does not impermissibly infringe upon the right to travel when it bars a person from traveling interstate for the purpose of committing a crime – even if state law alone defines that crime. See, e.g., 18 U.S.C. § 1952 (1994) (making it an offense to travel in interstate commerce with the "intent to distribute the proceeds of any unlawful activity; or commit any crime of violence to further any unlawful activity; or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity").[9] It is unclear whether and to what extent Congress is similarly free to burden interstate travel for lawful purposes. Indeed, in upholding 18 U.S.C. § 1952 against a right to travel challenge, a federal district court emphasized that the statute "interferes only with travel . . . in aid of unlawful activities and not at all with travel and speech for legitimate purposes." See United States v. Corallo, 281 F. Supp. 24, 28 (S.D.N.Y. 1968) (emphasis in Corallo).

In a different context from the one presented here, a federal court of appeals has interpreted the Mann Act, which forbids the interstate transportation of persons for the purpose of prostitution or any sexual activity "for which any person can be charged with a criminal offense," see 18 U.S.C. § 2421 (1994), as not being "keyed to the legality or illegality of prostitution under the law of the state where the transportation ends." United States v. Pelton, 578 F.2d 701, 712 (8th Cir.), cert. denied, 439 U.S. 964 (1978). Pelton did not, however,

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[8] Justice Harlan relied upon Court decisions, e.g., Kent v. Dulles, 357 U.S. 116, 125-26 (1958), holding that the Due Process Clause constrains Congress's ability to impede international travel, as support for his conclusion that the same clause impose some constraints upon Congress's power to burden interstate travel. The Court has on occasion indicated that another source of the right to travel is the Privileges and Immunities Clause found in Article IV, § 2. See Shapiro, 394 U.S. at 630 n.8, and cases cited therein; Zobel v. Williams, 457 U.S. 55, 71-81 (1982) (O'Connor, J., concurring in the judgment); see also Doe v. Bolton, 410 U.S. 179, 200 (1973) (using Privileges and Immunities doctrine to resolve "right to travel" claim alleging impermissible discrimination in abortion services between in-state and out-of-state residents). That clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948). It is unclear whether, or to what extent, that Clause imposes limitations on Congress. Compare White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 215 n.1 (1983) (Blackmun, J., concurring) (in dicta, expressing doubt that congressional authorization could render constitutional a state's privileges and immunities violation) with Shapiro, 394 U.S. at 666 (Harlan, J., dissenting) ("it appears settled" that the Privileges and Immunities Clause does not "limit[] federal power").

[9] For this reason, the Webb-Kenyon Act, 27 U.S.C. § 122 (1994), which prohibits the shipment or transportation of liquor interstate for the purpose of selling, possessing, receiving or using it in any manner that would be unlawful would appear to raise no concerns regarding the right to interstate travel.

confront a right to travel claim.[10] In Cleveland v. United States, 329 U.S. 14, 19 (1946), the Supreme Court used broad language in upholding the constitutionality of the Mann Act against a federalism-based challenge, explaining that "[t]he power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices") (emphasis added). However, Cleveland, like Pelton, did not confront a right to travel claim; in addition, it considered interstate travel for conduct that was itself unlawful. Finally, the broad dicta in Cleveland is consistent with the holding in Hoke v. United States, 227 U.S. 308 (1913), which rejected a right to travel challenge to a prosecution under the "white slave act," in which the federal government brought criminal charges against a woman for aiding and assisting in an effort to induce women to travel in interstate commerce for the purpose of prostitution. Id. at 317. Although Hoke employed broad language regarding Congress's commerce power to regulate interstate commerce, see id. at 321 (explaining that Congress could regulate interstate travel for "baneful" activity), it did not address whether interstate travel for a concededly lawful purpose would be constitutional. There is no suggestion in the opinion that the defendants claimed that prostitution was legal in the state to which they were travelling.

The application of these principles to S. 1645 would raise novel and difficult constitutional questions concerning the right to travel as a limitation on congressional power. In particular, it is unclear how the right-to-travel doctrine would be applied to a case involving a congressionally imposed restriction on the assistance that a minor can receive to travel interstate for important, lawful purposes. We are unaware of any relevant precedent discussing the rights of minors to travel interstate. At a minimum, it would seem that the governmental interest in imposing such restrictions on interstate travel typically would be greater than it would be in restricting interstate travel by adults.[11] It therefore is unclear whether heightened scrutiny would apply in this context, and, if so, whether the government's interest in support of S. 1645 nonetheless would be sufficient to survive such scrutiny.

C. Mens Rea. It is unclear whether a court would construe S. 1645 to require proof that the person transporting a minor across state lines knew that the home state's parental notice or consent law had not been satisfied. S. 1645 provides that the criminal prohibition applies if "in fact" the minor did not meet the requirements of her home state's parental notice or consent law (emphasis added). A court might interpret the phrase "in fact" as an indication of congressional

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[10] In Pelton, the woman was transported voluntarily to Nevada for prostitution, and the transporter was convicted despite the fact that the prostitution was legal in Nevada. One defendant did raise a constitutional defense to this application of the Mann Act; but instead of arguing that there was an imposition on his own or the woman's right to interstate travel, the transporter argued that the Act "unconstitutionally violates and derogates 'the rights of females to seek legal employment as guaranteed by the constitution of this country.'" Id. at 710. The court held that the transporter lacked standing to challenge the statute on this basis, id., and added in dicta that "[i]t is difficult to conceive of prostitution as being constitutionally guaranteed and protected." Id.

[11] Cf. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will.").

intent to relieve the government of the burden of proving the defendant's knowledge that the minor had not satisfied her home state's parental notice or consent law.

If S. 1645 were construed not to require the defendant's knowledge that the home state's parental notice or consent law had not been satisfied, the statute would reflect a significant departure from past practice. Inclusion in a criminal statute of a "conventional mens rea element" requiring that a defendant "know the facts that make his conduct illegal" is "'the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" Staples v. United States, 511 U.S. 600, 605 (1994) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978)). Because offenses requiring no mens rea have a "generally disfavored status," Liparota v. United States, 471 U.S. 419, 426 (1985) (internal quotation marks omitted), courts construing a criminal statute will not assume that Congress intended to dispense with a mens rea requirement absent "some indication of congressional intent, express or implied," Staples, 511 U.S. at 606. See also United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) ("[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct.").

Moreover, the Supreme Court has recognized that Congress has dispensed with the conventional mens rea requirement in connection with a limited class of "public welfare" or "regulatory" offenses. In such instances, "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." Liparota, 471 U.S. at 433; accord Staples, 511 U.S. at 607; Morissette v. United States, 342 U.S. 246, 255-56 (1952); see United States v. Freed, 401 U.S. 601 (1971) (statute criminalizing receipt of unregistered firearm did not require proof that recipient of unregistered hand grenades knew that they were unregistered); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (statute criminalizing shipment of adulterated or misbranded drugs did not require knowledge that items were misbranded or adulterated) (dictum); United States v. Balint, 258 U.S. 250, 251-53 (1922); United States v. Behrman, 258 U.S. 280 (1922). S. 1645 would not, however, create a public welfare or regulatory offense. Rather, the conduct prohibited is akin to that reached by common law offenses against the "state, person, the property, or public morals" -- offenses as to which, as a matter of policy, mens rea is ordinarily required. X-Citement Video, 513 U.S. at 71-72 (internal quotation marks omitted); Morissette, 342 U.S. at 255-56.

In addition, if S. 1645 were construed not to require proof that a defendant knew that the minor had not met her home state's parental notice or consent law, then a reasonable belief that a minor had satisfied her home state's notice or consent law would not be a defense to criminal liability under S. 1645. Such a construction could make adults reluctant to assist a minor in interstate transport even when the domicile state's notice or consent law has been met, if the adult cannot easily confirm that this is so. To the extent that S. 1645 operated to prevent adults from assisting minors who have met their home states' notice or consent laws, it would appear to raise constitutional concerns under the principles set forth in Hodgson and Casey.

Abortion – child custody act

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

September 9, 1998
(Senate)

STATEMENT OF ADMINISTRATION POLICY

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

S. 1645 - Child Custody Protection Act
(Sen. Abraham (R) MI and 24 cosponsors)

The Administration strongly opposes enactment of S. 1645 in its current form. If the bill presented to the President fails to address the concerns that are described below, the President's senior advisers will recommend that he veto it.

As stated in recent letters from White House Chief of Staff Erskine Bowles to the House and Senate Committees on the Judiciary, the Administration would support properly crafted legislation that would make it illegal to transport minors across State lines for the purpose of avoiding parental involvement requirements. Unfortunately, S. 1645, as reported by the Senate Committee on the Judiciary, fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

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

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

- Address constitutional infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to Congress on June 24, 1998.

The Administration is concerned that S. 1645 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement requirements, would mitigate the federalism concerns.

Pay-As-You-Go Scoring

S. 1645 could affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is that it would have a net effect of less than $500,000.

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Abortion - child custody

Cynthia Dailard 09/10/98 10:34:12 AM

Record Type: Record

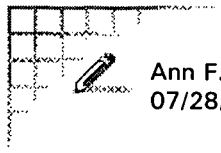
To: Jennifer L. Klein/OPD/EOP, Neera Tanden/WHO/EOP, Elena Kagan/OPD/EOP

cc:
Subject: CCPA

There will be a Senate vote tomorrow on the motion to proceed on cloture on the Child Custody Protection Act. The D's are expected to support the motion. Once it passes, the D's will try to offer a number of very hard-hitting amendments (ie. miminum wage), hopefully forcing the R's to drop consideration of the bill.

That is the strategy for now....

Abortion - Child Custody bill



Ann F. Lewis
07/28/98 06:01:12 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Jennifer L. Klein/OPD/EOP, Maureen T. Shea/WHO/EOP

cc:
Subject: Grandmothers

According to todays NYTimes: "About 4 million children ...live in households headed by a grandparent, a 41 percent increase since 1992 ...Research by AARP attributes this rise mainly to high rates of substance abuse by parents; child abuse neglect, or abandonment...."

I think I remember that we were trying to get more information about custodial grandparents to explain problems with the Child Custoday/Locking Up Granny bill.

Abortion - child custody act

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

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

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

I. OPERATION OF S. 1645

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

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

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

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

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

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

a law--

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

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

(ii) proceedings in a State court; and

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

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

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

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

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

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

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

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

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

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

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

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

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

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

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

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

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

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

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

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

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

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

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

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

B. Constitutional Problems Raised by S. 1645

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

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

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

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

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

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

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

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

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

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

C. Mens Rea

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

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

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

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

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

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

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

D. Federalism Concerns

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

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

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

IV. PRACTICAL ENFORCEMENT PROBLEMS

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

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

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

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

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

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

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

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

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

federal government appear overzealous and heavyhanded.[9]

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

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

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

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

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

Abortion-child custody

William P. Marshall
07/07/98 12:26:10 PM

Record Type: Record

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

cc: Nelson Reyneri/WHO/EOP, Laura Emmett/WHO/EOP
Subject: New child custody letter

OLA has indicated we need to get a letter to the Senate by tomorrow expressing our views on the newest version of the Child Custody Protection Act. (The latest version exempts parents but otherwise does not meet our objections.)

Attached is a draft letter for your review.

I will be also asking DOJ to redraft their letter to reflect the changes in the legislation.

CCPALET5.W

Message Sent To:

Maria Echaveste/WHO/EOP
Charles F. Ruff/WHO/EOP
Sylvia M. Mathews/OMB/EOP
Ann F. Lewis/WHO/EOP
Audrey T. Haynes/WHO/EOP
Elena Kagan/OPD/EOP
Cynthia Dailard/OPD/EOP
Lawrence J. Stein/WHO/EOP
Tracey E. Thornton/WHO/EOP
Peter G. Jacoby/WHO/EOP
Katharine Button/WHO/EOP
Jill M. Blickstein/OMB/EOP
Janet R. Forsgren/OMB/EOP
Kate P. Donovan/OMB/EOP
Robin Leeds/WHO/EOP

Dear

The Administration has made clear that changes must be made in S. 1645 in order to ensure that the legislation is appropriately tailored to achieve its stated goals. Unfortunately, although S. 1645 has been revised to exclude parents from potential liability, the bill has not been amended to meet the other critical concerns raised by the Administration. Accordingly, the Administration strongly opposes S. 1645 as drafted.

Specifically, S. 1645 must first be amended to exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress. Imposing criminal and civil sanctions on family members for helping their relatives, however, would not promote healthy family communications. Subjecting family members to criminal or civil sanction, moreover, would further isolate the minor by discouraging her from seeking advice and counsel from those closest to her. Finally, creating a civil action that permits family members to sue each other when a minor within that family has an abortion would not foster strong families.

Second, S. 1645 must be amended to ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interests of promoting family communication, would not deter those who would inappropriately transport minors across state lines to obtain abortions, and would provide an unintended basis for vexatious litigation against individuals and organizations.

Finally, S. 1645 must be amended to address constitutional infirmities that the Department of Justice has identified in particular provisions of the legislation. The Department will forward these and practical law enforcement concerns in a separate letter.

The Administration is concerned that S. 1645, as written, raises novel and important federalism issues, including the rights of states to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across state lines for the purposes of avoiding parental involvement requirements, would mitigate the federalism concerns.

S/

Abortion - child custody

DRAFT -- NOT FOR RELEASE

July 13, 1998
(House)

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

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

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

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

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

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

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

Pay-As-You-Go Scoring

H.R. 3682 could affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

Abortion - child custody

Maria Echaveste 07/14/98 06:11:46 PM

Record Type: Record

To: Kate P. Donovan/OMB/EOP
cc: Sylvia M. Mathews/OMB/EOP, Elena Kagan/OPD/EOP, William P. Marshall/WHO/EOP
bcc:
Subject: Re: URGENT: Child Custody Protection Act SAP

?Looks fine to me.
Kate P. Donovan

Kate P. Donovan
07/14/98 05:14:27 PM

Record Type: Record

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

Below is the draft SAP on H.R. 3682 - Child Custody Protection Act. The bill is scheduled for House floor action tomorrow (7/15); therefore, please provide comments/clearance c.o.b. today. **Position: Senior Advisors veto recommendation.** Thank you.

July 14, 1998
(House)

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

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

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

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

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

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

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

Pay-As-You-Go Scoring

H.R. 3682 could affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

* * * * * * * * * *

(Do Not Distribute Outside Executive Office of the President)

This Statement of Administration Policy was developed by the Legislative Reference Division (Pellicci) in consultation with Associate Director Mendelson, HD (Clendenin/Miller), TCJS (Haun), HR (Smalligan), and the White House Offices of Legislative Affairs (Jacoby), the General Counsel (Marshall), and Intergovernmental Affairs (Ibarra). The Department of Justice (Greg Jones) concurs in the proposed position. The Departments of the Interior (Schwartz) and Health and Human Services (Wallace) have no comments.

OMB/LA Clearance:_____

The proposed position is consistent with that taken in letters from Chief-of-Staff Bowles to the House and Senate Committees on the Judiciary on June 17th and July 18th, respectively. It is also consistent with the views taken by the Justice Department in letters to the two committees transmitted on June 24th and July 8th, respectively.

H.R. 3682 was ordered reported by the House Committee on the Judiciary by a vote of 17-10, along party lines, on June 23, 1998.

Summary of H.R. 3682

As ordered reported, H.R. 3682 would make it illegal for anyone -- other than the girl's parent or guardian -- to knowingly transport a minor across a State line to obtain an abortion in cases in which the minor has not satisfied her home State's laws regarding "parental involvement" (i.e., laws requiring parental consent or notification). H.R. 3682 would subject individuals violating the bill's provisions to civil and criminal penalties, including the possibility of imprisonment for up to one year. The bill would allow an out-of-State abortion without parental notification if the abortion was necessary to save the minor's life.

Currently, 22 States require parental consent for a minor to terminate her pregnancy while 17 States have opted for the lesser requirement of parental notification. Eleven States have no parental involvement requirements.

Pay-As-You-Go Scoring

According to HD (Miller), H.R. 3682 could affect direct spending and receipts; therefore, the bill is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. Individuals prosecuted and convicted under H.R. 3682 could be subject to criminal fines. Collections of such fines are governmental receipts, which are deposited in the Crime Victims Fund and spent in the following year. OMB estimates that the scoring estimate of this bill is zero. CBO estimates that H.R. 3682 would not result in any significant cost.

LEGISLATIVE REFERENCE DIVISION DRAFT
07/14/98 - 4:30 p.m.

Message Sent To: _____

Abortion - child custody

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216

THOMAS E. MOONEY, SR.
CHIEF OF STAFF — GENERAL COUNSEL

JON DUDAS
STAFF DIRECTOR — DEPUTY GENERAL COUNSEL

(202) 225–3951
http://www.house.gov/judiciary

JULIAN EPSTEIN
MINORITY STAFF DIRECTOR

June 26, 1998

The President
The White House
Washington, D.C. 20502

Dear Mr. President:

As Democratic Members of the House Judiciary Committee we are writing to urge you to veto H.R. 3682, the so-called "Child Custody Protection Act," if it reaches your desk.

This legislation will dramatically increase the dangers young women face in their decisions to terminate unwanted pregnancies. Since H.R. 3682 contains no prohibition against young women traveling across state lines to avoid a consent requirement, it will merely lead to more women traveling alone to obtain abortions or seeking illegal "back alley" abortions locally. To the extent young women continue to seek the involvement of close family members when they cannot confide in their parents – for example where the parent has committed incest or there is a history of child abuse – the legislation would result in the criminalization of grandparents and other relatives. Indeed at our hearings we learned of several tragic circumstances where young women who would not confide in their parents or trust the confidentiality of the judicial bypass process died as a result of illegal abortions. The number of these incidents can only be expected to multiply under H.R. 3682.

We can also inform you that none of the principal objections set forth in letters from your Chief of Staff and the Justice Department have been addressed during the Committee markup. Despite your Administration's objection to H.R. 3682's applying to close family members and persons providing counseling, referral or medical services, the legislation was not altered to respond to these concerns (other than to provide an exemption for parents). Indeed the Republican majority rejected several Democratic amendments to exempt relatives such as grandparents and siblings, and clinics from the scope of the bill. As a result, the bill continues to provide "an unintended basis for vexatious litigation against [these] individuals and organizations" as Mr. Bowles complained of in his letter.

In addition, the Majority refused to make any changes to provide exemptions for travel from states that have not established a constitutionally sufficient judicial bypass mechanism or to make clear that the bill does not mandate minors complying with the consent requirements of two separate states. As a result, H.R. 3682 would appear to be unconstitutional by the very terms laid out the by Justice Department and relevant Supreme Court precedent. Finally, we would note that the other serious problems laid out by the Justice Department, concerning the bill's overly broad strict liability requirements, federalism concerns, and enforcement difficulties, were are also not resolved in the Committee passed bill.

H.R. 3682 does nothing to prevent teen pregnancies, but it does make abortion far more dangerous. We appreciate the consistent and principled positions you have taken in the past on matters involving a woman's right to choose, and we therefore strongly urge you to veto this bill should it reach your desk.

Sincerely,

John Conyers, Jr.

Barney Frank

Charles E. Schumer

Howard L. Berman

Jerrold Nadler

Robert C. Scott

Melvin L. Watt

Zoe Lofgren

Sheila Jackson Lee

Maxine Waters

Martin T. Meehan

William D. Delahunt

Robert Wexler

Steven R. Rothman

cc: The Honorable Erskine Bowles
Chief of Staff to the President

The Honorable Larry Stein
Assistant to the President for Legislative Affairs

Abortion - child custody

Laura Emmett 07/16/98 11:32:32 AM

Record Type: Record

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

cc: See the distribution list at the bottom of this message
Subject: 5:00 Mtg. TODAY to discuss attached POTUS Choice letter

ABOR.J1 Attached please find the draft choice letter from the President. Please note that we did not comment on the Istook and Porter Title X amendments to Labor, HHS, and Education Appropriations because Bruce and Elena felt that it would undermine the purpose of the letter.

Please come to a brief meeting at 5:00 TODAY in the Roosevelt Room to discuss the letter or feel free to call Jennifer Klein (6-2599) with any comments or questions in the interim.

Message Sent To:

Jennifer L. Klein/OPD/EOP
Cynthia Dailard/OPD/EOP
Sylvia M. Mathews/OMB/EOP
Maria Echaveste/WHO/EOP
Ann F. Lewis/WHO/EOP
Peter G. Jacoby/WHO/EOP
Martha Foley/WHO/EOP
Audrey T. Haynes/OVP @ OVP
Sean P. Maloney/WHO/EOP
Phillip Caplan/WHO/EOP
Tracey E. Thornton/WHO/EOP
William P. Marshall/WHO/EOP
Linda Ricci/OMB/EOP

Message Copied To:

Janet L. Graves/OMB/EOP
Marjorie Tarmey/WHO/EOP
Leslie Bernstein/WHO/EOP
Ruby Shamir/WHO/EOP
Tania I. Lopez/WHO/EOP
Jessica L. Gibson/WHO/EOP
Janelle E. Erickson/WHO/EOP
Carolyn E. Cleveland/WHO/EOP

I am writing to express my concern over the Congress's unprecedented effort in recent weeks to restrict safe reproductive choices for women. It is regrettable that some Members of Congress have chosen to pursue a series of initiatives designed to create a political issue at the risk of increasing unintended pregnancies and abortions and of compromising women's health and safety.

I have long said that I believe abortion should be safe, legal, and rare. All of the proposals being offered would restrict safe medical choices. Some would actually restrict access to family planning information and services and could have the perverse effect of increasing the number of unintended pregnancies and abortions. I urge the Congress to put partisan politics aside and instead put women's health and safety first.

First, I oppose efforts to strike or scale back Congresswoman Lowey's proposal to require health plans participating in the Federal Employees Health Benefits Program to cover all FDA approved prescription contraceptives. The Lowey proposal would improve basic health care coverage for many women and help reduce unwanted pregnancies and the need for abortion. The current attempts to strike or scale back this amendment would undermine these important goals.

Second, I strongly object to the amendment to impose restrictions on international family planning programs. By prohibiting foreign non-governmental organizations from receiving United States funds if the organization uses any non-US government funds for abortion-related services, the amendment jeopardizes funding to health care providers who are working to meet the growing demand for family planning and other critical health services in developing countries. The result of this amendment's provisions could also be an increase in unintended pregnancies, abortions, and maternal and infant death.

Third, I find it deeply disturbing that Congress would take the unprecedented step of intervening in the Food and Drug Administration's drug approval process by banning funding for the approval or testing of drugs such as RU-486. For years, the FDA has used vigorous testing and the highest scientific standards to protect public health. This amendment substitutes political ideology for sound science. It would restrict scientific research that can protect women's lives and offer them safe medical choices.

Fourth, I am disappointed that the House chose to reject the changes that I proposed to the Child Custody Protection Act. As my Administration conveyed to Congress, I would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. I have repeatedly stated that I would sign a bill if it were amended to exclude close family members from criminal and civil liability and to ensure that individuals who provide only information, counseling, referral, or medical services to the minor cannot be subject to liability. As amended in this way, the legislation would prevent the circumvention of state parental involvement laws, while ensuring healthy family communications. Unfortunately, the Congress has ignored these proposed changes, as well as those designed to address constitutional infirmities in particular provisions identified by the Department of Justice. In doing so, this Congress has demonstrated that it is not truly interested in passing legislation, but only in creating another partisan political issue.

Finally, Congress is again indicating that it will turn the difficult debate over so-called partial birth abortions into an opportunity to score political points, rather than to pass legislation restricting this procedure. I have long opposed late term abortions, and I believe that we generally should prohibit the use of this procedure. I have insisted, however, on exempting those few but tragic cases in which this procedure is necessary to save a woman's life or to protect her against serious injury to her health. I again call upon Congress to add such a narrow, tightly drawn exception to this bill, so that I can sign it and put an end to all other uses of this procedure.

I urge Congress to move beyond ideology and political maneuvering, to abandon extremism, and to protect women's lives and health, while reducing the need for abortion. Congress's current course would remove appropriate reproductive choices for women, seriously jeopardize their health, and very possibly increase the frequency of abortions. I will strongly oppose these efforts.

Abortion - child custody act

Cynthia Dailard
07/15/98 07:03:47 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

cc: Jennifer L. Klein/OPD/EOP, Neera Tanden/WHO/EOP
Subject: Child Custody Protection Act

Q&A0715.W The CCPA passed in the House by a vote of 276-150. I prepared a draft q&a, in case we need it.

Abortion -- child custody act

DRAFT -- NOT FOR RELEASE

July 13, 1998
(House)

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

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

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

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

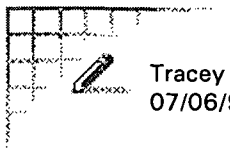
-- Address constitutional infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998.

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

Pay-As-You-Go Scoring

H.R. 3682 could affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

Abortion--child custody



Tracey E. Thornton
07/06/98 06:23:54 PM

Record Type: Record

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

cc: Jessica L. Gibson/WHO/EOP, Janelle E. Erickson/WHO/EOP
Subject: Abortion

I talked to Leahy's staff and we need to update the EBB letter on child custody to take the tone up a notch since Abraham put out a substitute that does not address any of our concerns but picks up changes made by House Republicans. The markup is in Senate Judiciary on Thursday and we won't have the votes to make any improvements. Bill and I talked about a new draft which he is working on. We need it to committee by wed.

Message Sent To:

Lawrence J. Stein/WHO/EOP
Sylvia M. Mathews/OMB/EOP
Maria Echaveste/WHO/EOP
Elena Kagan/OPD/EOP
Peter G. Jacoby/WHO/EOP

Abortion - child custody

DRAFT

You have asked for a policy analysis of S. 1645, particularly for a review of the impact of S. 1645 on federalism values and on federal law enforcement resources. We previously have provided some analysis on certain federalism and law enforcement problems with S. 1645. This memorandum addresses additional enforcement problems and significant policy issues raised by S. 1645 relating to abortion services providers and the scope of persons who may be subject to prosecution if this legislation becomes law.

I. Practical Problems With Enforcement

Some of the practical problems that investigators and prosecutors would face in trying to enforce S. 1645, should it become law, have already been identified. We now have had discussions with a member of the Executive Office for United States Attorneys, who identified a number of additional serious concerns.

The crime created by S. 1645 appears to have five elements: (1) knowingly transporting across a state line; (2) an individual under the age of 18; (3) with the intent such individual obtain an abortion; (4) where the individual's home state parental involvement requirements have not been met; and (5) the individual has an abortion.

There are a number of significant law enforcement problems with this formulation, particularly as compared with other federal criminal prohibitions.

First, as written the statute could be construed to impose criminal liability even if the accused had no intention to violate the state law. The statute should incorporate a "willful" requirement, as do analogous criminal laws, to make clear that the transporter has to know of the domicile state's requirements for a minor to have an abortion and know that they are not met.

Second, it is not clear what constitutes "transport" under the statute. Often such a requirement can be satisfied by a showing that the defendant caused the act to happen. This creates a number of problematic scenarios. What about providing the fare for public transportation across a state line? How would you ever prove this with willing participants and small amount cash transfers?

Third, a high percentage of the putative defendants under this statute will be minors. Federal prosecution of juveniles raises a host of practical problems. Federal prosecutors rarely take such cases. And the prosecution of minors as adults is sharply limited by strict Department of Justice guidelines.

Fourth, and perhaps most worrisome, the proof of the critical elements in these cases generally will have to come

through either the defendant or the minor, both of whom will be extraordinarily problematic witnesses. Thus, to prove that the defendant had the requisite intent, the government in most cases would have to rely on information and testimony from either the defendant (who would have a Fifth Amendment right not to testify), the minor, or, in some cases, spectators, some of whom may be anti-abortion activists staking out abortion services providers. Given that the minor will, in most cases, have chosen to have the abortion and enlisted the aid of the defendant, who may be her boyfriend, aunt, grandmother, best friend, etc., she is likely to be a hostile and uncooperative witness. This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution. Thus, investigators and prosecutors will be left to rely on the off-chance that the defendant or minor talked at length to a cooperative third party about their plans and their intent. Moreover, unlike in other crimes, there is no likely presumption that could be adopted in this context. For example, in a theft crime, the possession of stolen property might give rise to a presumption regarding the theft. Here, the mere fact of abortion (which is legal in the state in which it took place) is not a reliable guide to the intent of the defendant.

Fifth, the detection and investigation here will be left entirely to the FBI -- in stark contrast to other federal criminal cases, where local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is a federal element. Here, the act will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. This will place an enormous and difficult burden on the FBI.

Sixth, another practical concern is timing. By the time a case is investigated, indicted, and goes to trial, the minor will be older (likely no longer a minor), and will look, act and be quite mature. Getting a jury to convict the defendant under those circumstances may be difficult, especially if the woman testifies that she chose to have the abortion and is glad that she did.

Seventh, laws shielding hospital records and various communication privileges that may be applicable will further slow down the investigation of these crimes. Enforcing subpoenas against such state laws can take tremendous time and effort, involving rulings by state courts and significant bureaucratic snags. It also runs the risk, as do many of the investigative and prosecutorial steps that the statute would require, of making the federal government appear overzealous, highhanded, and mean-spirited.

All of this effort will be expended to prosecute defendants who may well be minors themselves, in all likelihood will have no prior criminal record (after all, driving a friend to another state to get an abortion is hardly an indicator of criminal

propensity) and will end up with no or little jail time.

Finally, in view of the many and substantial obstacles to enforcement of S. 1645 were it to become law, it is extremely likely that there would be few cases brought and even fewer convictions. Experience indicates that there would be much criticism of such a record in Congress and pressure to bring more cases, particularly given the likely vigilance of abortion opponents with respect to prosecution under the statute. If law enforcement says that it cannot make cases because of problems with the statute, the statute might well be revised in draconian ways. If law enforcement says it does not have the resources to investigate and prosecute these cases, Congress may provide such resources exclusively for these cases. Neither of these is an appealing scenario.

II. Impact of S. 1645 on Abortion Services Providers

While S. 1645 explicitly targets for both criminal and civil liability persons who knowingly transport minors across state lines to obtain abortions, both liability provisions, as a practical matter, could be used to intimidate and harass abortion services providers. Accordingly, an express limiting provision to the criminal liability provision, as suggested below, seems appropriate, if not necessary. Concerning the civil action provision, we first would urge that the Administration insist that it be dropped; the provision is unnecessary, a potential drain of federal court resources, inconsistent with basic federalism principles, and susceptible to abusive exploitation by anti-abortion activists against abortion services providers and their officers, employees, and contract personnel. Should eliminating the civil action provision not be feasible, then we urge that it be reformulated to limit civil liability to the individual convicted of the knowing transportation under the criminal provision.

A. Potential Criminal Liability for Provision of Abortion Services and Related Information

S. 1645 creates a federal offense for knowingly transporting a minor across a state line to obtain an abortion without complying with the domicile state's parental involvement requirements. Although the proposed statute expressly singles out the person(s) who knowingly transports, the additional criminal law theories of conspiracy and standard principles of accomplice liability would operate to expand its reach beyond just the transporter. The usual and lawful activities of abortion services providers, independent doctors, and others who provide counseling and referrals could become subject to investigation and possible prosecution under the statute and related theories, particularly if anti-abortion activists press federal law enforcement to focus on such persons and entities. Any such focus would not only have a materially chilling effect

on the ability of adults and minors alike to obtain an abortion, but also would provide an easy and effective method to tax the financial resources of abortion and related service providers and even eventually drive them out of business.

The legitimate activities of abortion services providers that S. 1645 might be used to target include: (1) providing abortion services; (2) advertising or making other statements about the availability of abortion services and any terms or conditions under applicable state law; (3) counseling and referring patients or clients to abortion services providers; and (4) making routine communications, such as answering telephones, providing information, or making appointments. In so doing, providers may gain information concerning a patient or prospective patient's circumstances that might give rise to the claim that the staff member knew or should have known that the patient was being brought to the facility in violation of federal law.

The use of S. 1645 against abortion services providers in such a manner would be likely to chill speech about abortion and to render providers less capable of treating both minor and adult patients. To address these concerns, a provision such as the following should be added to S. 1645:

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

B. Potential Civil Liability for Provision of Abortion Services and Related Activities

S. 1645 contains an extraordinarily open-ended civil liability provision that states: "any parent or guardian who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action." Unlike the criminal action, the operation of this provision would not be constrained by prosecutorial discretion and policy. The provision would therefore be a ready tool for harassment and intimidation of abortion services providers and others providing information, counseling and referrals. Litigation under this provision would almost certainly be used in an attempt to shut down providers of abortion and related services. There are other problems with this provision of S. 1645 as well.

First, the civil action provision of S. 1645 would impose an unnecessary burden on the federal courts. Federal courts are a forum of limited resources as well as limited jurisdiction. The proposal presents all the concerns the Chief Justice and others have raised about other legislation that would add unduly to the business of the federal courts.

Second, the civil action provision of S. 1645 undermines federalism interests and values. In essence, the provision constitutes a license to push extraterritorial enforcement of parental involvement laws in states that have chosen not to adopt such measures. Moreover, the minor's home state has the ability through its own tort laws to protect the relationship between parent and child.

Third, a civil action brought against an abortion services provider would likely involve discovery requests for medical information. Such requests would likely conflict with state privacy and privilege laws concerning doctor/patient or counselor/client communications and medical records. The consequence will be either an unwelcome standoff between state and federal interests or an effective preemption (and the strain of federalism interests that entails) of state privacy law. It is preferable for a state court to be deciding the primacy of the various competing interests of that state.

Finally, the open-endedness of the civil action provision of S. 1645 makes it a certain tool to harass and attempt to drive abortion services providers out of business. The provision does not define the "legal harm" it seeks to redress, does not limit the class of persons or entities against whom a civil action may be brought or tie such an action to a finding of criminal liability, and does not indicate what relief might be appropriate. To take just one likely example, abortion opponents may use S. 1645's civil liability provision to orchestrate individual and class action lawsuits that involve harassing discovery requests and potentially sizeable monetary judgments. Even an unsuccessful action would be a source of huge expense and aggravation for the abortion services provider.

Because of these problems, the civil liability provision should be eliminated from S. 1645. If it is not, it should at least be re-drafted to limit its great potential for abuse. There are at least three options for limitation: (1) to allow civil suits only against individuals who have been convicted under the bill's criminal provisions; (2) to allow suits against persons who knowingly transport a minor in violation of the criminal provisions of the bill, but preclude suits against persons who do not personally carry out the transportation; and (3) to foreclose suits based on the provision of abortion services, advertising, etc., by adding "civil" to the limitation proposed for the criminal provision. We would suggest something like the following formulation, which combines options (1) and (2):

> Any parent or guardian who suffers legal harm from a violation of subsection (a) may bring a civil action to obtain appropriate relief from any person who has been convicted of committing the violation by knowingly transporting a minor under the circumstances and with the intent described in subsection (a).

III. Persons Covered by Statute

We appreciate the concerns the sponsors of S. 1645 have about shoring up legitimate parental involvement in a minor's decision to obtain an abortion and about overbearing and sometimes predatory adults who improperly influence minors to choose an abortion. However, we believe that S. 1645 as drafted reaches unreasonably beyond the group of minors in need of protection.

A. Informed Decision by the Minor

S. 1645 aims to effectuate state laws requiring parental involvement in a minor's decision whether to terminate her pregnancy. However, parental consent statutes also include, as a constitutional requirement, judicial bypass mechanisms to effectuate the minor's rights and interests where the minor's decision to terminate her pregnancy is "knowing, intelligent, and deliberate."[1] Thus, when the constitutional responsibility to respect a minor's fully informed decision is taken into account, the state's legitimate policy interest is not to require parental consent in every instance but rather to require it in circumstances where the minor's decision is not knowing, intelligent and deliberate. A federal criminal statute that does not adequately or realistically accommodate the minor's interests in effectuating informed decisions does not seem reasonable policy, particularly when the point of the federal law is to bolster the state policy. Some proponents of S. 1645 say that the interest preserved in the judicial bypass mechanism is served as part of the state's requirements and that only if those requirements are not met would criminal liability obtain. This is insufficient as a matter of policy, particularly when the reality in many cases is that the judges hearing these matters decline to find any minor's decision "knowing, intelligent and deliberate" and thus never permit an abortion procedure to go forward.

Moreover, as currently drafted, S. 1645 reaches far beyond the chief targets of the bill's sponsors -- predators who improperly influence minors to have an abortion and transport

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[1] The proponents of the federal legislation aver that the bills incorporate this principle. See, e.g. Statement of Chairman Charles T. Canady at Constitution Subcommittee 5/21/98 Hearing on H.R. 3692 ("Abortion activists say taking girls out of state is the only option when the girls are afraid to tell their parents about their pregnancy, but this ignores the judicial bypass option that is available for just this type of situation.") Indeed, the statements of the bills' sponsors indicate that the bill seeks more narrowly to target predators who improperly influence minors to have abortions, not just anyone who transports a minor where the minor has not made a knowing, intelligent, and deliberate choice.

them to obtain it. Another scenario is equally, if not more, likely to occur -- the sophisticated and determined teenager who is very clear that she wants an abortion and is asking friends, parents of friends, religious figures and others of good will to drive her into the state with the more permissive abortion laws. She may tell those she asks the truth or partial truth. It seems harsh to impose even potential federal criminal liability on the individual transporting the minor in such circumstances.

For these reasons, the legislation should incorporate, either in the exceptions section or in the definition of the substantive offense in subsection (a), a provision precluding liability where the minor's decision to be transported across state lines was knowing, intelligent, and deliberate. Such a provision would be consistent with the state interests present. It also would be the most legally effective way to single out those persons that the bill seeks to target -- persons who take advantage of and overbear the will of minors who are not able to make their own informed decisions.

The determination that the minor's choice had been knowing, intelligent, and deliberate would be made by the federal district court in the criminal prosecution. Thus, it would take place in all likelihood after an abortion had been carried out, in contrast with a judicial bypass mechanism, in which the same determination is made in advance of the abortion. This is simply a feature of the law's being a criminal provision that punishes past behavior. Moreover, there is nothing distinctive in this regard about a provision excepting situations where the minor has made an informed decision: even in the absence of such a provision, S. 1645's criminal provision can be invoked only after an abortion has taken place. To the extent the statute is designed to deter future violations, it would not be good policy to deter abortion decisions that would be permissible under the constitutional standard a state parental consent statute necessarily must adopt. The vital point is that in those instances in which the abortion in fact was the product of a knowing, intelligent, and informed decision, the creation of this exception would not undermine the federal government's interest in supporting the legitimate policy that underlies constitutionally permissible parental notification and consent laws.

B. **Family Members Exemption**

In addition to this proposed limitation, S. 1645 should also contain an exception for family members who transport the minor. Family members are the identifiable category of persons that are least likely to conform to the bills' sponsors' paradigm scenario of overbearing associates acting with disregard for the minor's best interests. Family members as a category also would generally be difficult to successfully investigate and convict because of problems with gathering evidence and jury sympathy.

C. **Incest, Rape, and Health**

An abortion of any pregnancy caused by incest or rape should be included within the exceptions provision of S. 1645. In the case of incest, none of the family-friendly interests said to be served by parental involvement laws is or should be presumed to be present. Moreover, all of the practical investigative and prosecutorial problems outlined in section I would be magnified. The abortion of a pregnancy resulting from a rape presents a somewhat different but equally unappealing basis for a prosecution. Certainly family friendly interests seem a great deal weaker, if not wholly subordinated, to the concerns of the minor. And, as with an abortion of a pregnancy resulting from incest, the idea of a federal criminal prosecution of anyone (except perhaps the rapist) on top of everything else the minor has undergone seems horrific.

In addition, while S. 1645 contains an exception for cases in which the minor's life is jeopardized, it is too restrictive. Laws that restrict abortion generally must include an exception for cases in which the "health" -- whether physical or mental -- of the mother is threatened. Although such an exception would not be constitutionally required here, there would appear to be no policy justification for not including one.