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THE PRESIDENT HAS SEEN

2/4/96

THE WHITE HOUSE
WASHINGTON

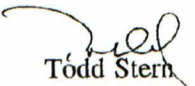
February 5, 1996

MR. PRESIDENT:

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

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

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


Todd Stern

COPY
from ORM

2/14/96

Todd -

Already sent copy of xerox -
Should I also send copy
of original? Yes

no ✓

Carol

rec'd 7:25pm
2/2/96

THE WHITE HOUSE

WASHINGTON
February 2, 1996

THE PRESIDENT HAS SEEN

2/14/96

MEMORANDUM FOR THE PRESIDENT

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

SUBJECT: PARTIAL BIRTH ABORTION ACT

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

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

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

* * * * *

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

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

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

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

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

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

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

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

DRAFT

Dear Senator Hatch:

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

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

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

DRAFT

woman's pregnancy in which, in a doctor's medical judgment, this

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

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

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

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

DRAFT

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

Sincerely,

THE PRESIDENT HAS SEEN

THE WHITE HOUSE
WASHINGTON

2-13-96

February 5, 1996

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Todd Stern

THE WHITE HOUSE
WASHINGTON
February 2, 1996

2/2/96
7:25 pm

Wright

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DRAFT

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Sincerely,

COPY

any one

of these

also

yes -

all

done
cu
2/14/96

ASAP

February 5, 1996

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Todd Stern

Notes on Partial Birth Memo
(2/14/96)

- Option 1 says that you can only use this procedure in a previability situation if it's a health-related abortion (i.e., serious adverse consequences unless an abortion is done), not an elective abortion. So if it's an elective abortion -- **but you need to use this particular procedure and if you don't you risk causing serious adverse health consequences to the woman -- you *still* can't use the procedure.** This is not a defensible position vis-a-vis women, and both White House Counsel and DOJ believe it is unconstitutional under Roe v. Wade.
- Option 2 says you can't use this procedure in a pre-viability situation unless you have to in order to avoid serious adverse health consequences. Meaning that you can use it in either an elective or a health-related abortion, so long as use of this particular procedure, rather than some other procedure, is necessary to avoid a risk to life or health.
- Option 1 -- which is conceded to be unconstitutional -- should never have gone to President. Option 2 gives him all the protection he needs -- i.e. a woman can never use the procedure unless it's medically necessary -- without being unconstitutional and untenable vis-a-vis women.

Partial Birth -- How the Options Work

Post-viability

- Option 1 and 2 are identical -- this procedure can be used only if an abortion is required because the pregnancy itself would risk life or serious adverse health consequences.

Pre-viability

- **Option 1** -- procedure can be used *only* if an abortion is required because the pregnancy itself would risk life or serious adverse health consequences -- i.e., it can never be used in an elective abortion.
- **Option 2** -- procedure can be used in an elective abortion, but only if the procedure, as distinguished from other procedures, is necessary to avoid risk to life or serious adverse health consequences.
- **Illustration** -- Suppose a woman in her first or second month of pregnancy chooses to have an abortion in circumstances where the pregnancy itself does not threaten her life or health. Now suppose further that her doctor tells her that the use of *this procedure* (rather than some other procedure) is necessary to avoid risking life or serious adverse health consequences.

Under Option 1, the procedure *still cannot be used*. Under Option 2 the procedure *can be used*.

Conclusion

- Option 1 is not defensible for us because both White House Counsel and DOJ believe it is unconstitutional under Roe v. Wade, and because women's groups will see this as a major undercutting of Roe. (In addition, it is not tenable for us to veto a bill because the prohibition on the partial birth procedure fails to meet requirements of Roe and then turn around in same veto message and say that we would endorse restrictions that violate Roe.)
- Option 2 allows us to take position that this procedure can never be used unless it is necessary to avoid risk to life or serious adverse health consequences; without running into the major constitutional and political problems raised by Option 1.