Abortion

THE WHITE HOUSE

WASHINGTON

May 13, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED
ELENA KAGAN

SUBJECT: DASCHLE AND FEINSTEIN AMENDMENTS

As you know, the Senate is taking up the Partial Birth Abortion Act (HR 1122) this afternoon. We expect Senator Daschle and Senator Feinstein to offer substitute amendments during the course of the debate. We recommend that you send a letter to Congress indicating that you would accept either of these substitute proposals. John Hilley and Rahm strongly agree, believing that a letter of this kind will help prevent a veto override on this issue. The proposed letter is attached; if you agree to send it, we will put it into final form for your signature.

Background

Both the Feinstein and the Daschle amendments prohibit post-viability abortions generally. They thus differ in two crucial ways from HR 1122: (1) they apply to all procedures, including but not limited to the "partial birth" procedure, and (2) they apply only to abortions performed after the fetus has become viable.

Both amendments impose civil, rather than criminal, penalties. Feinstein's would fine the physician up to $10,000 for a violation. Daschle's would result in a fine of up to $100,000, or suspension or revocation of the doctor's medical license (and in the case of a second or subsequent offense, $250,000 or revocation of the license).

Most critically, both amendments contain a health exception, though of different kinds. The Feinstein legislation would exempt an abortion if, "in the medical judgment of the attending physician, the abortion is necessary to . . . avert serious adverse health consequences to the woman." This language is essentially identical to the language you have used in calling for a health exception to the Partial Birth Act. The Daschle language is more stringent. It exempts an abortion when the physician "certifies that continuation of the pregnancy would . . . risk grievous injury to [the mother's] physical health." "Grievous injury" is then defined as "a severely debilitating disease or impairment specifically caused by the pregnancy, or an inability to provide necessary treatment for a life-threatening condition."

The five women you spoke with before your last year's veto would fall within even the Daschle exception, assuming the truth of their accounts. Each said that her doctor advised her that an abortion was necessary to prevent a risk of grave physical harm -- for example, of serious

damage to her reproductive system. Daschle himself believes that his bill protects such women, and is willing to refer to these women when he offers his amendment. You should be aware, however, of a slight chance that one of the choice groups will persuade one or more of these women to oppose the Daschle bill on the ground that it would not protect women in her situation.

The American College of Obstetricians and Gynecologists today endorsed the Daschle amendment, stating that it "provides a meaningful ban [on post-viability abortions] while assuring women's health is protected." (ACOG took no position on the Feinstein amendment, which the group rightly views as a less serious proposal.) The AMA has refused to take a position on any of the pending legislative proposals, but yesterday issued a study (1) expressing skepticism about the need to use the "partial birth" procedure, but stating that doctors must retain discretion to use medical judgment in selecting procedures, and (2) stating that post-viability abortions are almost never necessary to save a woman's life or prevent serious harm to her health, given the alternative at this stage of delivering the fetus.

The choice groups (somewhat reluctantly) support the Feinstein language, but oppose the Daschle proposal. They argue that the stringency of Daschle's health exception -- including its limitation to cases of physical harm -- undermines the comprehensive protections announced in Roe regarding the health of the woman. The Office of Legal Counsel of the Justice Department similarly believes that both the Daschle and the Feinstein amendments, properly read, violate Roe because they countenance tradeoffs involving women's health. (OLC thinks, however, that a court might be able to interpret the Feinstein amendment so narrowly as to avoid this problem.)

John Hilley believes that a letter from you supporting the Daschle amendment is of crucial importance in sustaining a veto. He worries that if the Daschle amendment goes down to a decisive defeat, many Senators who previously supported you will switch and vote for HR 1122. He thinks a letter of endorsement from you will strengthen the prospects for the Daschle amendment.

Recommendation

We recommend that you endorse the Daschle amendment in order to sustain your credibility on HR 1122 and prevent Congress from overriding your veto. You have spent many months calling on Congress to pass a bill that contains a sufficiently protective, but also appropriately confined, health exception -- as you said in a letter to the Cardinals, not a health exception that "could be stretched to cover most anything," but a health exception that "takes effect only where a woman faces real, serious adverse health consequences." Especially given ACOG's endorsement of the Daschle amendment, it will be difficult for you to make the case that Daschle's language does not adequately safeguard women's health. In these circumstances, declining to support the amendment will weaken your position and increase the chance that Congress will override your veto.

DRAFT

Dear Senators Daschle and Feinstein:

I am writing to express support for your amendments prohibiting late-term abortions. If Congress were to substitute either of these amendments for the current H.R. 1122, I would sign the legislation.

As you know, I have long opposed late-term abortions, and I continue to do so except where necessary to save the life of a woman or prevent serious harm to her health. When I was Governor of Arkansas, I signed into law a bill that barred third-trimester abortions, with an appropriate exception for life or health. And last year, I made clear that I would sign such a bill at the federal level.

Your amendments, though differing in detail, both meet the standards I have set for such legislation. The amendments contain exceptions that will adequately protect the lives and health of the small group of women in tragic circumstances who need an abortion at a late stage of pregnancy to avert death or great injury. At the same time, the amendments prohibit any late-term abortions performed for elective reasons. This balance is an appropriate one, which I -- and, I believe, most Americans -- would gladly make the nation's law.

Sincerely,