

NLWJC - KAGAN

WHORM - BOX 004 - FOLDER 009

WE003 218945SS

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records
Subgroup/Office of Origin: Records Management - SUBJECT FILE
Series/Staff Member:
Subseries:

OA/ID Number: 14117
Scan ID: 218945SS
Document Number:

Folder Title:
WE003

Stack:	Row:	Section:	Shelf:	Position:
S	88	5	10	3

218945 SS

'97 MAY 12 PM8:09

WE 003

THE WHITE HOUSE
WASHINGTON

May 12, 1997

THE PRESIDENT HAS SEEN

5/13/97

MEMORANDUM FOR THE PRESIDENT

FROM:

ELENA KAGAN *EK*

SUBJECT:

DASCHLE AMENDMENT

The First Lady asked Sylvia for a copy of the amendment that Senator Daschle plans to offer tomorrow during the debate on the Partial Birth Abortion Act. Sylvia suggested that I send it to you too. Attached is the most recent draft. As you will see, the amendment prohibits all post-viability abortions, with an exception for life or "grievous injury." I am sorry I could not find a cleaner copy of the amendment. Please let me know if you have any questions.

Abortion - partial birth -
legislative

05/08/97 18:49

003

DRAFT -- NOT FOR DISTRIBUTION

Findings

- (1) As the Supreme Court recognized in Roe v. Wade, the government has an "important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grow in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling";
- (2) In delineating at what point the government's interest in fetal life becomes "compelling," Roe v. Wade held that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," a conclusion reaffirmed in Planned Parenthood of Southeastern Pennsylvania v. Casey;
- (3) Planned Parenthood v. Casey also reiterated Roe's holding that the government's interest in potential life becomes compelling with fetal viability, stating that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother";
- (4) According to the Supreme Court, viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman";
- (5) The Supreme Court has thus indicated that it is constitutional for Congress to ban abortions occurring after viability so long as the ban does not apply when a woman's life or health faces a serious threat;
- (6) Even when it is necessary to terminate a pregnancy to save the life or health of the mother, every medically appropriate measure should be taken to protect a viable fetus as long as the mother's health is not put at greater risk;
- (7) It is well established that women may suffer serious health conditions during pregnancy, such as breast cancer, preeclampsia, uterine rupture or non-Hodgkin's lymphoma, among others, that may require the pregnancy to be terminated;
- (8) While such situations are rare, not only would it be unconstitutional but it would be unconscionable for Congress to ban abortions in such cases, forcing women to endure severe damage to their health and, in some cases, risk early death;
- (9) In cases where the mother's health is not at such high risk, however, it is appropriate for Congress to assert its "compelling interest" in fetal life by prohibiting abortions after fetal viability;
- (10) While many States have banned abortions of viable fetuses, in some States it continues to be legal for a healthy woman to abort a viable fetus;
- (11) As a result, women seeking abortions may travel between the States to take advantage of differing State laws;
- (12) To prevent abortions of viable fetuses not necessitated by severe medical complications, Congress must act to make such abortions illegal in all States;

(more)

05/08/97 18:48

DRAFT -- NOT FOR DISTRIBUTION

(13) Congress finds that abortion of a viable fetus should be prohibited throughout the United States, unless a woman's life or health is threatened and that, even when it is necessary to terminate the pregnancy, every measure should be taken, consistent with the goals of protecting the mother's life and health, to preserve the life and health of the fetus.

Prohibition of Post-Viability Abortions

(a) In General. It shall be unlawful to abort a viable fetus unless the physician certifies that continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health.

"Grievous injury" shall be defined as:

- (a) a severely debilitating disease or impairment specifically caused by the pregnancy; or
- (b) an inability to provide necessary treatment for a life-threatening condition.

(b) "Grievous injury" does not include any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated.

Penalties

(a) Action by Attorney General: the Attorney General may commence a civil action under this Act in any appropriate United States District Court.

(b) Relief.

(1) First offense: In any action under subparagraph (.), the court shall order the suspension or revocation of respondent's medical license, certificate, or permit, or shall assess a civil penalty against the respondent in an amount not exceeding \$100,000, or both.

(2) Second offense: If the respondent has been convicted on a prior occasion for a violation of this Act, the court shall order the revocation of respondent's medical license, certificate, or permit, or shall assess a civil penalty against the respondent in an amount not exceeding \$250,000, or both.

(c) Certification Requirements. At the time of the commencement of an action under this section, the Attorney General shall certify to the court that at least 30 calendar days previously --

(1) he or she has notified in writing to the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision of the alleged violation of this section, and

(2) he or she believes that such an action by the United States is in the public interest and necessary to secure substantial justice.

No woman who has had an abortion after fetal viability may be prosecuted under this section for a conspiracy to violate this section or for an offense under section 2, 3, 4, or 1512 of this title.

(more)

Penalties

(a) Action by Attorney General. The Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General or United States Attorney specifically designated by the Attorney General may commence a civil action under this Act in any appropriate United States District Court.

(b) Relief.

(1) First offense: In any action under subparagraph (), the court shall notify the State medical licensing authority in order to effect the suspension or revocation of respondent's medical license, or shall assess a civil penalty against the respondent in an amount not exceeding \$100,000, or both.

(2) Second offense: If the respondent has been convicted on a prior occasion for a violation of this Act, the court shall shall notify the State medical licensing authority in order to effect the revocation of respondent's medical license, or shall assess a civil penalty against the respondent in an amount not exceeding \$250,000, or both.

(3) Hearing on penalties: The State medical licensing authority shall be given notification of and an opportunity to be heard at a hearing to determine penalties under this Title.

(c) Certification Requirements. At the time of the commencement of an action under this section, the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General or United States Attorney specifically designated by the Attorney General shall certify to the court that at least 30 calendar days previously --

(1) he or she has notified in writing to the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision of the alleged violation of this section, as well as the State medical licensing board or other appropriate State agency, and

(2) he or she believes that such an action by the United States is in the public interest and necessary to secure substantial justice.

No woman who has had an abortion after fetal viability may be prosecuted under this section for a conspiracy to violate this section or for an offense under section 2, 3, 4, or 1512 of this title.

Regulations

In the certification to be submitted under subsection (), the physician shall certify that, in his or her best medical judgment, an abortion was medically necessary pursuant to subsection (), and describe the medical indications supporting his or her judgment.

The Department of Health and Human Services shall establish regulations for certification by the physician under subsection (), unless the State has its own certification procedure for abortions after fetal viability.

In addition, Department of Health and Human Services shall establish regulations to ensure the confidentiality of all information submitted pursuant to certification by the physician, as required by subsection ().

Each State shall ensure that the State medical licensing authority develops regulations to effect the revocation or suspension of respondent's medical license under subsection (), or the State shall be subject to loss of funding under title XVIII.

Rule of Construction

Nothing in this chapter shall be construed to prohibit State or local governments from regulating, restricting, or prohibiting post-viability abortions to the extent permitted by the Constitution of the United States.

THE WHITE HOUSE
WASHINGTON
ORM OPTICAL DISK NETWORK

ID# 218945 2 2

Hardcopy pages are in poor condition (too light or too dark).

Remainder of case not scanned.

Oversize attachment not scanned.

Report not scanned.

Enclosure(s) not scanned.

Proclamation not scanned.

Incoming letter(s) not scanned.

Proposal not scanned.

Statement not scanned.

Duplicate letters attached - not scanned.

Only table of contents scanned.

No incoming letter attached.

Only tracking sheet scanned.

Photo(s) not scanned.

Bill not scanned.

Resolution not scanned.

Comments:

218138

'97 MAY 12 PM8:09

THE WHITE HOUSE
WASHINGTON

May 12, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: ELENA KAGAN *EK*
SUBJECT: DASCHLE AMENDMENT

The First Lady asked Sylvia for a copy of the amendment that Senator Daschle plans to offer tomorrow during the debate on the Partial Birth Abortion Act. Sylvia suggested that I send it to you too. Attached is the most recent draft. As you will see, the amendment prohibits all post-viability abortions, with an exception for life or "grievous injury." I am sorry I could not find a cleaner copy of the amendment. Please let me know if you have any questions.

Abortion - partial birth -
legislative

05/08/97 18:48

DRAFT -- NOT FOR DISTRIBUTION

Findings

- (1) As the Supreme Court recognized in Roe v. Wade, the government has an "important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling";
- (2) In delineating at what point the government's interest in fetal life becomes "compelling," Roe v. Wade held that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," a conclusion reaffirmed in Planned Parenthood of Southeastern Pennsylvania v. Casey;
- (3) Planned Parenthood v. Casey also reiterated Roe's holding that the government's interest in potential life becomes compelling with fetal viability, stating that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother";
- (4) According to the Supreme Court, viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman";
- (5) The Supreme Court has thus indicated that it is constitutional for Congress to ban abortions occurring after viability so long as the ban does not apply when a woman's life or health faces a serious threat;
- (6) Even when it is necessary to terminate a pregnancy to save the life or health of the mother, every medically appropriate measure should be taken to protect a viable fetus so long as the mother's health is not put at greater risk;
- (7) It is well established that women may suffer serious health conditions during pregnancy, such as breast cancer, preeclampsia, uterine rupture or non-Hodgkin's lymphoma, among others, that may require the pregnancy to be terminated;
- (8) While such situations are rare, not only would it be unconstitutional but it would be unconscionable for Congress to ban abortions in such cases, forcing women to endure severe damage to their health and, in some cases, risk early death;
- (9) In cases where the mother's health is not at such high risk, however, it is appropriate for Congress to assert its "compelling interest" in fetal life by prohibiting abortions after fetal viability;
- (10) While many States have banned abortions of viable fetuses, in some States it continues to be legal for a healthy woman to abort a viable fetus;
- (11) As a result, women seeking abortions may travel between the States to take advantage of differing State laws;
- (12) To prevent abortions of viable fetuses not necessitated by severe medical complications, Congress must act to make such abortions illegal in all States;

(more)

Penalties

(a) Action by Attorney General. The Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General or United States Attorney specifically designated by the Attorney General may commence a civil action under this Act in any appropriate United States District Court.

(b) Relief.

(1) First offense: In any action under subparagraph (), the court shall notify the State medical licensing authority in order to effect the suspension or revocation of respondent's medical license, or shall assess a civil penalty against the respondent in an amount not exceeding \$100,000, or both.

(2) Second offense: If the respondent has been convicted on a prior occasion for a violation of this Act, the court shall shall notify the State medical licensing authority in order to effect the revocation of respondent's medical license, or shall assess a civil penalty against the respondent in an amount not exceeding \$250,000, or both.

(3) Hearing on penalties: The State medical licensing authority shall be given notification of and an opportunity to be heard at a hearing to determine penalties under this Title.

(c) Certification Requirements. At the time of the commencement of an action under this section, the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General or United States Attorney specifically designated by the Attorney General shall certify to the court that at least 30 calendar days previously --

(1) he or she has notified in writing to the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision of the alleged violation of this section, as well as the State medical licensing board or other appropriate State agency, and

(2) he or she believes that such an action by the United States is in the public interest and necessary to secure substantial justice.

No woman who has had an abortion after fetal viability may be prosecuted under this section for a conspiracy to violate this section or for an offense under section 2, 3, 4, or 1512 of this title.

Regulations

In the certification to be submitted under subsection (), the physician shall certify that, in his or her best medical judgment, an abortion was medically necessary pursuant to subsection (), and describe the medical indications supporting his or her judgment.

The Department of Health and Human Services shall establish regulations for certification by the physician under subsection (), unless the State has its own certification procedure for abortions after fetal viability.

In addition, Department of Health and Human Services shall establish regulations to ensure the confidentiality of all information submitted pursuant to certification by the physician, as required by subsection ().

Each State shall ensure that the State medical licensing authority develops regulations to effect the revocation or suspension of respondent's medical license under subsection (), or the State shall be subject to loss of funding under title XVIII.

Rule of Construction

Nothing in this chapter shall be construed to prohibit State or local governments from regulating, restricting, or prohibiting post-viability abortions to the extent permitted by the Constitution of the United States.