

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Gene Sperling and Sarah Rosen Wartell to the President re: Bankruptcy Legislation (3 pages)	05/05/2000	P5 4203
001b. memo	Gene Sperling et al. to the President re: Decision on Bankruptcy Reform Legislation (7 pages)	06/22/2000	P5 4204
001c. fax	Ben Lawksy to Sara Rosen Wartell re: phone number (partial) (1 page)	06/23/2000	P6/b(6)
001d. memo	Betsy Cavendish to Sarah Rosen re: phone number (partial) (1 page)	06/24/2000	P6/b(6)
001e. memo	Chuck Brain to the President re: Senator Biden (partial) (1 page)	06/23/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:

Bankruptcy - Schumer Abortion Legislation Letter to Congress

Racheal Carter
2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

Personal records in file defined in accordance with 44 U.S.C. 2201(3).

RR Documents will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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*family
changes
only*

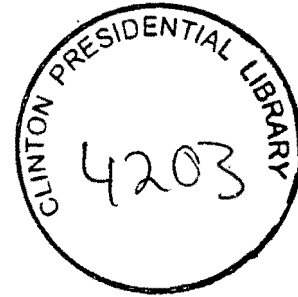
May 5, 2000

MEMORANDUM TO THE PRESIDENT

CC: JOHN PODESTA

FROM: GENE SPERLING
SARAH ROSEN WARTELL

RE: BANKRUPTCY LEGISLATION



ISSUE PRESENTED:

The NEC Bankruptcy Working Group has prepared a letter to the Congress setting forth our detailed views on the House and Senate bankruptcy reform bills. Both of these bills passed by overwhelming margins, despite our threat to veto the House bill and the important reservations we expressed about the Senate bill. Consumer groups continue to oppose these bills. Many major editorial pages have been critical of both bills, although most are more favorable toward the Senate bill. We expect some will oppose the final product. The letter to Congress would reiterate our previous statements: It again threatens to veto the House bill and says that the Senate bill better meets your principles, although we have some serious concerns. Despite the lengthy criticism of the bills' provisions, the letter effectively signals that you are likely to sign the final legislation unless it contains the most noxious House provisions or drops most of the consumer and debtor protections achieved by Senate Democrats. We seek your reaction to this strategy before the letter is sent.

VIEWS OF YOUR ADVISORS:

All of your advisors support balanced bankruptcy reform. All believe that the final bill will do some good by encouraging personal responsibility and lowering credit card interest rates that are inflated because some debtors are too ready to use and even abuse Chapter 7's bankruptcy discharge. All of your advisors also agree that, due to an expensive lobbying effort by the credit card industry, the final bill will lack the balance we sought and will not demand similar responsibility from the credit card industry.

An important issue is whether or not the new rules, determining who should be required to go into Chapter 13 (which requires repayment of what a formula says you can repay), are flexible enough to deal with specific cases of hardship in unusual circumstances. The provisions we have pushed for – ultimately allowing the bankruptcy trustees and courts greater discretion – have been largely rejected. We have made reasonable progress in the bill in other areas; for example, the bill protects child support and alimony from

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competition from credit card debt in many cases and includes a safe harbor from the means test for below-median-income debtors.

Assuming that the final bill that comes to your desk is close to the Senate bill, all of your advisors agree that you should sign it, although for somewhat different reasons. Jack Lew, Chuck Brain, and Gene Sperling believe that, while the final bill may be on the whole a net minus, it is a relatively close call, and not worth the political downside of a veto override. Larry Summers believes that a final bill relatively close to the Senate bill is a net plus and should be signed on the merits. Bankruptcy reform, Larry argues, will have an impact similar to that of open trade: a few visible cases of hardship, but a larger less visible benefit of lower interest rates for credit card borrowers.

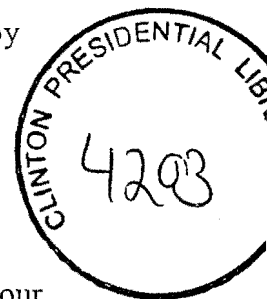
All of us feel that, while it is unfortunate that we do not have a more balanced bill, if the final bill stays relatively close to the Senate bill, it would be better to sign the bill with some reservations than to risk a veto override. For you to have any chance of sustaining a veto, or even to make a strong public statement through an override, we would need to launch a high profile battle against a "paid-for" bankruptcy bill – a battle that would indirectly put us at odds with friends like Senators Daschle and Torricelli, and allow others to say we were walking away from our individual responsibility message.

BACKGROUND:

Last May, the House bill passed by a veto-proof margin of 313 to 108. A Democratic substitute that we crafted with Congressman Nadler received only 149 votes and had no effect on our effort to give enough Democrats cover to help us achieve a veto-sustaining margin. Key House Democratic leaders, including Representatives Martin Frost, Bob Menendez, and Patrick Kennedy supported the underlying bill and opposed the Nadler substitute. Minority Leader Gephardt opposed the bill, although he announced his position well after other Members' positions in support had settled. When we talked to Senate Democrats, we found few were interested in our substantive concerns and many were eager to see a reform bill enacted. Some were willing to press for changes and modest improvements were achieved as a result. But few Senate Democrats were willing to oppose the legislation despite its imbalances. As a result, an improved but flawed bill passed the Senate by a vote of 83-14. Democrats opposing the bill on bankruptcy grounds were Senators Kennedy, Wellstone, Dodd, Feingold, Harkin, Reed, Sarbanes, Schumer, Lautenberg, and Moynihan. (A few of the 14 opposed the bill for other reasons.)

Although a formal conference committee has not been named, Congress is now working to reconcile the House and Senate bills. Republican and Democratic leadership expect to attach the bankruptcy provisions to a conference report on other legislation (perhaps Digital Signatures or Crop Insurance) in order to avoid procedural roadblocks placed by Senators Wellstone and Kennedy in trying to force another Senate vote on a two-year minimum wage increase.

The NEC working group drafted a letter to the informal conferees setting forth the Administration's detailed views on various provisions of both bills. It reiterates your senior advisors' veto threat that we issued on the House version of the legislation last May. It describes the Senate bill as more balanced and doing a better job of meeting your



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principles, although it details serious concerns we have about some of the Senate bill's provisions. In a few cases, the letter explains that the House language is actually better than the Senate approach. (The letter also reiterates the veto threat on a bill including the minimum wage, tax, and school voucher amendments that were attached to the bill by the Senate, but we expect those non-relevant provisions to be dropped.) (Copy of cover letter at Appendix A.)

Your senior advisors believe that the relatively muted tone of this letter signals that you are likely to sign the final legislation, albeit with reservations. The details in the letter provide helpful guidance to the Democratic negotiators attempting to improve the bill in conference. Unless we significantly raise the level of our rhetoric now, your advisors will likely recommend that you sign the final bill, unless it drops the most visible improvement achieved by Senate Democrats or includes the most noxious aspects of the House bill.

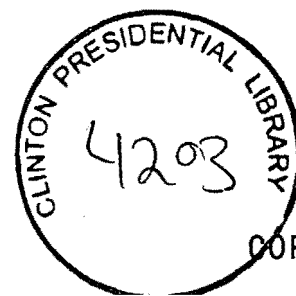
Appendix B is a more detailed summary of some of our substantive concerns with the House and Senate Bills.

DECISION:

Proceed with Letter _____

Let's Discuss _____

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June 22, 2000

MEMORANDUM TO THE PRESIDENT

FROM: GENE B. SPERLING/SARAH ROSEN WARTELL
CHARLES BRAIN/JOEL WIGINTON

SUBJECT: DECISION ON BANKRUPTCY REFORM LEGISLATION

CC: JOHN PODESTA

ISSUE PRESENTED:

Senator Lott has advised Senator Daschle that negotiations on bankruptcy reform legislation are over. The Republicans agreed to make some further concessions on a couple of the outstanding issues, but the final resolution fails to address our concerns on three key issues you noted in your recent letter to the Congressional leadership: the homestead exemption, discharge of penalties for violations of clinic access laws, and an exemption from the Fair Debt Collection Practices Act (FDCPA) for check collectors. These problems come on top of the dissatisfaction many of your advisors feel with the balance struck in the bill's other provisions. Senator Daschle has asked about your intentions and believes that a strong, clear message from you quickly could enhance the chances of obtaining a veto-sustaining margin.

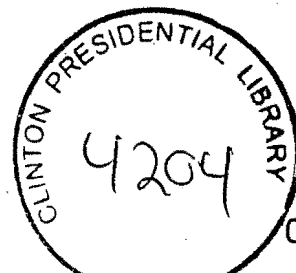
Your advisors unanimously recommend that you send another letter to the Congress that: (1) indicates that you will veto the bill that Lott described as final; (2) strongly implies that you will sign no bill without adequate clinic access provisions; (3) stresses your concerns with the current resolution of the check collector and homestead issues and the lack of balance in the remainder of the bill; but (4) urges the Congress to fix these problems and leaves you room to decide how to proceed if the clinic access issue is resolved.

STATUS IN CONGRESS

Senator Daschle believes that the chances of achieving 34 Democratic votes are enhanced by your sending a clear, strong veto message as soon as possible. However, it is not certain that a veto-sustaining margin can be obtained. While Daschle would personally support the bill in its current form, if you have a strong veto message premised upon the clinic access and check collector provisions, Daschle may stand with you. Nonetheless, there is some risk, as we have never heard a credible assertion that even 25 Democrats are willing to oppose the bill.

Senator Torricelli, the lead Democratic sponsor of the legislation, also appears to be inclined to support the bill in its current form. Torricelli's staff, however, notes that if you come out with a clear and strong veto statement, the Senator may stand with you against the clinic access and check collector provisions.

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Eleven Democratic Senators were opposed to the bill on relevant grounds when it passed the Senate. Senator Durbin, who led the bipartisan effort last year and voted for the Senate bill, has determined that the final bill is unacceptable to him, regardless of the outcome of these remaining issues. Senator Leahy, who voted for the Senate bill and has worked hard to ensure a fair process, believes that the clinic access and the check collector issue swing the balance against an already flawed product; he will vote against it in this form and recommend a veto. Senator Schumer, who strongly opposes the bill, believes that the clinic access issue will mobilize others.

There are five to seven Democrats, led by Senators Biden, Johnson, Breaux, and Reid of Nevada, however, who will likely support the bill in whatever form it is presented to them. Senator Jeffords is the only Republican who has publicly noted some concerns with the measure.

There is little prospect for overcoming the strong veto-proof margin of 313 to 108 by which the House passed its bill last May. Moreover, it is likely that the Republicans will send whatever vehicle they use for the bankruptcy bill to the House first to try to gather momentum.

ADMINISTRATION APPROACH TO BANKRUPTCY REFORM

We have said repeatedly that you support balanced consumer bankruptcy legislation that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. We can eliminate abuse without hurting those forced to turn to bankruptcy, the vast majority of whom are faced with some of the hardest circumstances that life has to offer – divorce, unemployment, illness, and uninsured medical expenses. Although we should not countenance people using bankruptcy to escape bills they can afford to repay, we also should not enact punitive legislation that places insurmountable barriers before the people who file for bankruptcy as a last resort.

To guide Congress in striking the proper balance, we have set forth principles that should be met by a final bill. Many of these issues were resolved on a bipartisan basis by Congressional staff. Others were reserved as “member issues.” Just this week, Lott advised Daschle of the Republicans’ final offer on these issues and their plan to move forward attaching bankruptcy to the next available vehicle.

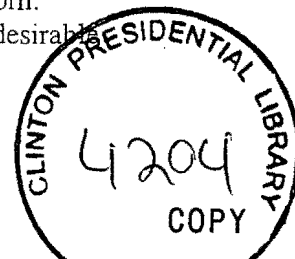
ASSESSMENT OF NON-MEMBER ISSUES

In a letter to the informal conferees on May 12, 2000, Jack Lew set forth your key principles. A detailed assessment of the resolution of these issues is in the attached appendix.

In short, the final bill’s provisions are closer to the Senate bill than the House bill, but they do not incorporate the balance that you have sought. They reflect a compromise between a House bill that we thought badly one-sided and a better Senate bill about which we still had significant concerns. While all of your advisors believed when we wrote you on May 5th that you should sign a bill close to the Senate bill, this bill is a somewhat closer call.

For example, our fundamental concern about the rigidity of the means test in the Senate bill was not addressed. Moreover, changes were made from the Senate bill to shift a few more debtors out of Chapter 7 and limit a bit further the court’s discretion to determine whether a debtor has the capacity to repay. Similarly, flawed language from the Senate bill narrowly limiting the family household goods that debtors can protect from creditor seizure was included in the final bill. While no one of these provisions alone merits your veto, cumulatively they represent undesirable changes relative to the Senate bill.

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ASSESSMENT OF RESOLUTION OF MEMBER ISSUES

You wrote to Congressional leaders on June 9th setting out your concerns about five open member issues. Our assessment of the resolution of these issues is below. In short, we believe two of those issues have been resolved to our satisfaction (pension cap and credit card disclosures, although Senator Kennedy is having trouble getting confirmation of the agreement on pension cap); one issue has been resolved to the satisfaction of key Senate Democrats but not to ours (homestead); and the Republican resolution of two issues (clinic access and check collector exemption) is unacceptable to us and the lead Democrats on those issues, although some Democrats would support the bill nonetheless.

Pensions: "The final bill may eliminate protections for reasonable retirement pensions that reflect years of contributions by workers and their employers."

The Senate bill included a noxious provision that would have allowed creditors to demand that debtors waive bankruptcy protection for pension assets as a condition of receiving credit. That was dropped in Conference, but Senator Grassley insisted on some limit on otherwise unlimited pension assets shielded from creditors. Senator Kennedy was deeply concerned that such a cap would send the wrong message about retirement savings. Moreover, seemingly large retirement accounts do not necessarily provide for extravagant lifestyles for workers with increasingly long life expectancies. A compromise was apparently reached between Kennedy and Grassley that caps only certain IRAs, excluding amounts rolled over from employer pension plans, at \$1 million. Moreover, the court has discretion to waive the cap in the interests of justice. Senator Kennedy is having difficulty getting confirmation that the Republicans will stick with this agreement. *If there is no backsliding, this resolution seems reasonable and consistent with our arguments in the homestead context.*

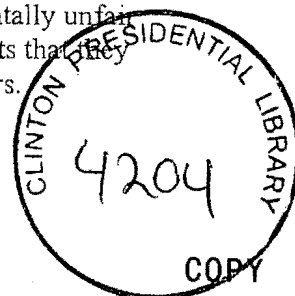
Credit Card Disclosures: "The final bill may weaken important credit card disclosure provisions that will help ensure consumers understand the implications of the debt they are incurring."

The Senate bill requires modest new credit card disclosures. Consumers would be given better information about credit card "teaser rates" and the impact of making only the minimum payment on the length of time one would be repaying debt. Your letter referred to an effort by Senator Gramm to exclude small banks from the provisions' scope. However, the provisions survived without the exclusion, although for two years the Federal Reserve Board will be asked to provide consumers with an 800 number for information about credit cards issued by smaller banks – an 800 number that larger banks will have to provide themselves. *The Senate bill's modest disclosure requirements have been effectively preserved.*

Homestead: "The final bill may not adequately address the problem of wealthy debtors who use overly broad homestead exemptions to shield assets from their creditors."

State law allows debtors to exempt from the bankruptcy estate home equity valued up to specified homestead exemption thresholds. Five states (including Texas and Florida) have unlimited homestead exemptions, effectively allowing wealthy debtors to shield millions in assets in valuable mansions, while avoid repayment of their creditors. It seems to us fundamentally unfair to ask low- and moderate-income debtors to devote future income to repay all the debts that they can, while leaving loopholes that allow the wealthy to shield assets from their creditors.

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The final bill has a modest limitation on unlimited homesteads to address abuse by those who move to states with unlimited homestead exemptions within two years of the bankruptcy filing. ***This does not address our fundamental issue.*** Moreover, wealthy debtors often can use bankruptcy planning to postpone bankruptcy for two years while they qualify for the unlimited homestead exemption.

Senator Kohl, the Democratic Senate champion of this issue, is satisfied that this resolution represents a good first step and establishes the principle that some nationwide limitation on homestead exemptions is appropriate. (Kohl is undecided whether he will support or oppose the overall bill.) Senator Leahy does not want to flank Senator Kohl on the left on this issue. Thus, if you take this issue to the public, you will have only long-time bankruptcy-bill opponents like Wellstone, Kennedy, and Nadler joining you from Congress. However, many editorial pages around the country have pressed this issue hard and would applaud your concern.

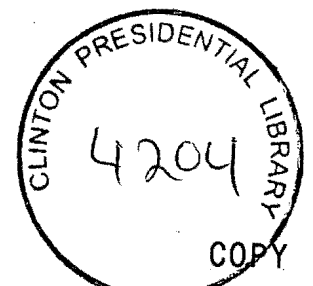
Fair Debt Collection Practices Act: "The final bill may include an anti-consumer provision eliminating existing law protections against inappropriate collection practices when collecting from people who bounce a check."

In conference, Senator Hatch has insisted on an anti-consumer provision (in neither the House or the Senate bill) which would eliminate attorneys fee awards for violations of the Fair Debt Collection Practices Act, if the defendant is collecting bounced checks rather than other defaulted debt. This is a pernicious provision because it could give check collectors de facto rein to intimidate and harass lower-income debtors, knowing that their financial position would prevent them from hiring counsel. Often, the only effective enforcement of the check collector provisions is class action litigation, financed by firms because of the potential for attorneys fee awards. Senator Torricelli suggested a minor change, which the Republicans accepted, that limits attorneys' fees to cases where the debtor can prove that he or she had no intent to defraud. Senators Leahy and Sarbanes argue that such a standard is impossible to prove. ***Our fundamental concerns have not been addressed.***

Clinic Access: "Some in Congress still object to a reasonable provision that would end demonstrated abuse of the bankruptcy system. We cannot tolerate abusive bankruptcy filings to avoid the legal consequences of violence, vandalism, and harassment used to deny access to legal health services."

The Senate bill included a Schumer amendment to address the announced strategy of anti-abortion protestors using bankruptcy to avoid penalties for violence against family planning clinics in violation of the Freedom of Access to Clinic Entrances Act (FACE) and its state counterparts. We strongly supported the amendment. The Vice President was in the Senate chamber when they voted to break a tie, if needed. To avoid embarrassment, the Republicans ensured that the amendment passed by a vote of 80-17. However, in conference, they have steadfastly refused to include it or a comparable measure. Their alternative, which they have unilaterally announced will be in the final bill, does little beyond current law. It precludes discharge of all judgements for acts of violence where behavior was shown to be willful and malicious. Advocacy groups argue that few of the actual judgements against, or settlements reached with, defendants who harassed clinic patients include a finding of willful and malicious behavior. Moreover, harassment and intimidation does not always include violence. ***Thus, the final unilateral resolution does not satisfy our concerns.***

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This is the hardest issue for the Democrats who want to support the bill. Abortion rights groups are energized. If you take a strong position, this is the issue most likely to rally Democrats in opposition to the bill. Even Senator Torricelli may join you in opposing the bill if further changes are not made to this provision, although Senator Biden does not believe this issue should bring down the entire bill.

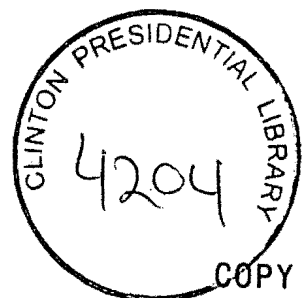
RECOMMENDATION

Your advisors unanimously recommend that you send another letter indicating that the Republicans' "final" bankruptcy bill is one that you would veto. The letter would note that there has been an acceptable resolution on pensions and credit card disclosures, but that you have continuing concerns about the check collector, homestead, and clinic access provisions. Special emphasis will be given to the clinic access issue, so that no one reading the letter would doubt you would veto any bill without its satisfactory resolution. A reader should also be concerned that you might veto a bill that does not resolve the homestead and check collection issues to your satisfaction, but the letter will give urge the Congress to fix these problems and give you sufficient latitude to make the veto decision later. There is a real risk that Congress could resolve the clinic access issue, leaving you with only a handful of Democratic Senators joining you in opposition to a bill with the other provisions.

DECISION

- ☐ 1. Send the letter as proposed
- ☐ 2. Let's discuss

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APPENDIX
ASSESSMENT OF BANKRUPTCY BILL'S OTHER PROVISIONS

In a letter to the informal conferees on May 12, 2000, Jack Lew set forth your key principles. Our assessment of the resolution of these issues is below.

Means Test: "Access to Chapter 7 should not be governed by an arbitrary means test, but by reasonable guidelines that take into account individual circumstances."

We have argued unsuccessfully that various changes are needed to build more discretion into the system to determine whether, in the debtor's individual circumstances, they really have the capacity to repay. We have also sought less stringent thresholds and various technical changes to prevent unfairness in the application of the test. We did succeed in preventing creditors from filing motions to challenge low-income debtors' bankruptcy filings, but these below-median income debtors will be subject to the burdens of new means test paperwork and trustee scrutiny even though only a tiny fraction will have any capacity to repay their debts. While some modest improvements were made in conference, *the final bill (like both House and Senate bills) does not address many of our fundamental concerns.*

Protection Against Coercive Reaffirmations and Practices: "There must be appropriate safeguards against coercive creditor practices that compel debtors to forgo their rights and that disadvantage more scrupulous creditors."

During bankruptcy, too many debtors are misled or deceived into agreeing to repay debts that they cannot afford and have a legal right to discharge. The final bill contains provisions, based on an Administration proposal, that make it significantly more difficult to mislead or deceive debtors who cannot afford to reaffirm their debts. To get our proposal included in the Senate, we had to make some significant compromises with the credit card industry that cause consumer advocates concern. We sought further improvements in conference but they were not made. However, truly offensive provisions from the House bill (that would have banned class actions as a remedy for existing law violations) were dropped. As a whole, your staff believe *these provisions are a net improvement for consumers over current law.*

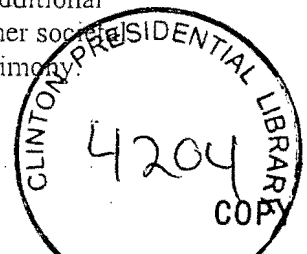
Improving Credit Card Practices: "Both debtors and creditors must be required to be responsible. Bankruptcy reform should be balanced by including provisions that address credit-card practices that may lead to bankruptcies."

As discussed in the body of the memorandum, modest new credit card disclosure requirements were included in the Senate. These largely survived in tact in the final bill. Consumers are given better information about credit card "teaser rates" and the impact of making only the minimum payment on the length of time one would be repaying debt. *Overall, while we believe more information could be provided more clearly, these provisions are an improvement over current law.*

Non-dischargeable Debts and "Cram Downs": "The goal of repaying creditors must be balanced with the need to protect social priorities, such as payment of child support, alimony, and taxes, and to preserve a meaningful opportunity for a fresh start."

In the last Congress, the First Lady wrote of her concern with provisions that make additional credit card debt nondischargeable in bankruptcy, thus leaving it to compete with higher social priorities that also are nondischargeable – especially payment of child support and alimony.

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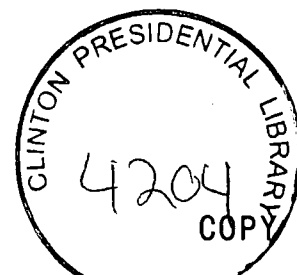
In response, the bill's proponents left the new categories of nondischargeable credit card debt, albeit somewhat narrower, but added provisions to clarify that child support and alimony are the highest priority. These provisions will work in many cases to improve the payment of child support and alimony in bankruptcy; however, in a small portion of cases after bankruptcy discharge, these new nondischargeable credit card debts could crowd out child support or alimony. Our argument is very technical, however. *Rhetorically, they have neutralized our child support and alimony criticism.*

We have a similar concern about provisions in the final bill that would give secured creditors unprecedented rights to collect amounts in excess of the value of their collateral. (Current laws "crams down" their claim to the value of the security. Thus, if a car is worth less than the amount originally borrowed, the claim is limited to the car's value.) Since secured debt must be satisfied if the collateral is to be kept, collection of other societal priorities (like child support, alimony, and taxes) might also suffer a bit. The bill also skews the distribution of scarce debtor assets toward undersecured creditors instead of unsecured creditors (like credit card companies). The latter firms support is ironic, but this was a political bargain they made with car financing firms to win Senator Abraham's support. While the final bill is better than the House provisions, *our fundamental concern was not addressed.*

Barriers to Entry or Representation in the Bankruptcy System: "Inappropriate barriers should not be created to entry into or effective representation in the bankruptcy system."

The Administration has been concerned about inflexible pre-bankruptcy filing hurdles, including paperwork and counseling requirements and fees. We were also concerned about attestation requirements and sanction provisions that could deter attorneys from representing debtors or raise the costs of representation. The final bill waives fees for low-income debtors, reduces some of the paperwork requirements, and eliminates the most chilling requirements for debtors' attorneys. *While hardly the provisions we would have written, we do not have strong objections to the remaining provisions.*

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Wm G. White to Elena Kagan re: Draft HHS Language (partial) (1 page)	07/23/1997	P6/b(6)
002. fax	Renee Landers to Elena Kagan re: phone number (partial) (1 page)	07/23/1997	P6/b(6)
003. email	Nancy Min to Barbara Chow re: Conversation with Karen Nelson on Hyde Provisions (2 pages)	06/25/1997	P5
004. memo	Charles Ruff and William Marshall to the President (4 pages)	06/10/1998	P5

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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Abortion [Binder] [1]

Racheal Carter
2012-0254-S
rc652

RESTRICTION CODES

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Personal records of gift defined in accordance with 44 U.S.C. 2201(3).
RR Documents will be reviewed upon request.

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Abortion - child custody
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THE WHITE HOUSE
WASHINGTON

June 10, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Charles F. C. Ruff, Counsel to the President
William Marshall, Associate Counsel to the President

SUBJECT: The Child Custody Protection Act

I. THE CHILD CUSTODY PROTECTION ACT

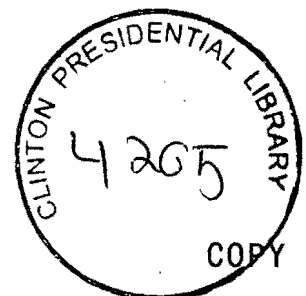
Congress is currently considering S. 1645, the Child Custody Protection Act -- a bill which would impose civil and criminal liability on any person who knowingly transports a minor across a state line to obtain an abortion in cases in which the minor has not satisfied her home state's laws regarding "parental involvement" (i.e. laws requiring parental consent or parental notification).

The bill constitutes a novel form of federal legislation in that it prohibits persons from traveling across state lines to engage in conduct that is legal in the second state.¹ It also uniquely conditions liability upon the law of the state where the person comes from rather than the law of the state in which the conduct occurs.

As described by its sponsors, the bill is designed to protect the rights of parents to participate in their minor child's abortion decision against those who would encourage her to have a "secret" abortion -- a category which, according to the sponsors, includes out-of-state

¹ The only possible exception to this is the Mann Act which may arguably be read as prohibiting transporting women across state lines for prostitution to a state where prostitution is legal.

COPY



abortion clinics who advertise the availability of abortions without parental involvement² and adult males who impregnate minors and then attempt to erase the consequences of their actions by transporting the minors out of state for the abortion procedures.

Politically, however, the bill is more easily characterized as an attempt to provoke controversy on a sensitive and divisive issue than as an effort to address a legitimate area of federal interest. Substantively, the bill raises troublesome policy, constitutional, and practical law enforcement concerns and is counterproductive to its asserted goals.

II. BACKGROUND -- PARENTAL INVOLVEMENT REQUIREMENTS

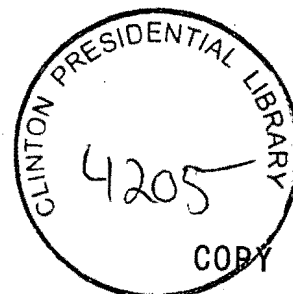
Currently twenty-two states require parental consent for a minor to terminate her pregnancy while seventeen states have opted for the lesser requirement of parental notification. Six of these states require notice to or consent from both parents, while four states would allow the notification or consent requirements to be satisfied by persons other than the minor's parents (such as a grandparent or an adult sibling.) Eleven states have no parental involvement requirements.

The constitutionality of parental involvement requirements has generally been upheld by the Supreme Court. Although holding that pregnant minors have a constitutional right to choose whether to terminate a pregnancy, the Court has determined that a state may require parental notice or consent in the interest of ensuring that the minor's decision to terminate her pregnancy is "knowing, intelligent, and deliberate." The parental involvement requirements, however, may not impose an "undue burden" upon a minor who is capable of giving an informed consent to the abortion procedure. States must also provide a judicial "bypass" mechanism which allows the minor to avoid the parental involvement requirements if she establishes either 1) that she is sufficiently mature and well-informed to make the abortion decision independently or 2) that an abortion without parental involvement would be in her best interests.³

III. ANALYSIS

² The law does not explicitly prohibit advertising. The sponsors might, however, envision extending liability to advertisers through some application of accomplice liability. See Part III, below.

³ The Supreme Court has ruled that bypass procedures are constitutionally mandated in states that require the consent or notification of both parents; but the Court has not had occasion to rule on whether bypass procedures are required in a one parent state.



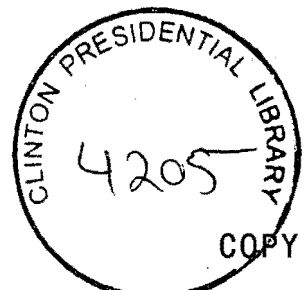
S. 1645 represents a dramatic incursion into the traditional understanding of federalism. Federalism presumes that a citizen is free to take advantage of favorable laws in other states and that states have the right to regulate matters within their own boundaries (unless the matter is directly regulated by the federal government.) S. 1645, however, is unique in that it attempts, by force of federal law, to enforce one state's laws in the territory of another. As such, it sets a dangerous precedent for federal interference with such matters as gaming, alcohol, tobacco, guns and other items whose regulation varies significantly from state to state.

Despite the seriousness of the federalism concerns, however, S. 1645 is not clearly unconstitutional on those grounds. Because the approach taken by the sponsors is so novel, there is virtually no Supreme Court precedent, on either side, from which to take direction. Accordingly, while constitutional arguments against the legislation can be made based upon general federalism principles (or upon right to travel or privilege and immunities grounds), a definitive constitutional assessment cannot be offered with any degree of certainty. The federalism objection, therefore, is best characterized as a policy, and not as a constitutional concern.

There is also no constitutional abortion rights argument that would support invalidating the bill as whole. DOJ has indicated that the bill would be unconstitutional as applied in certain circumstances (for example when the law would require the minor to satisfy the parental involvement laws of two separate states) but the constitutional concerns noted by DOJ, although serious, can be remedied by re-drafting the legislation.

The strongest objections to the legislation are based on policy, rather than on constitutional grounds. The bill's first and most glaring weakness is that it subjects family members to criminal and civil liability. Under the terms of the legislation, grandmothers, aunts, and adult siblings may be prosecuted for coming to the aid of a minor relative in distress. Even a mother or father may be criminally sanctioned if she or he resides in a state that requires the involvement of both parents. Obviously, subjecting family members to criminal and civil sanctions for helping their relatives does not further the interest of healthy family communication. Exposing family members to the possibility of criminal or civil sanction is also counterproductive in that it would further isolate the minor by discouraging her from seeking advice and counsel from those closest to her. Finally, creating a civil action which allows family members to sue each other when a minor within that family has an abortion does not serve the goal of fostering strong families.

Second, the bill could inappropriately impose liability on persons who merely provide information, advertising, counseling, referrals, or medical services to the minor. Through rules of accomplice liability, the bill could subject a telephone receptionist to criminal liability, for example, merely for informing an unnamed caller about the availability of abortion services. The bill's creation of a private cause of action is, from this perspective, even more problematic. A civil action would be a ready tool for those who wish to harass, intimidate, or bankrupt service providers.



Third, the bill imposes criminal liability on persons who may not realize they are violating the law (as when the minor falsely informs the transporter that she has parental consent.) This is because the bill predicates liability on the intent to help the minor obtain an abortion rather than on the intent to help the minor avoid the application of a state's parental notification requirements.

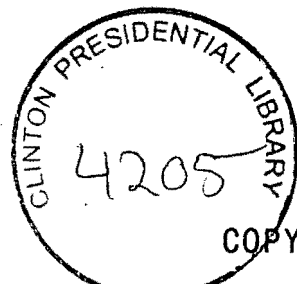
Finally, the bill raises numerous practical law enforcement concerns. These include the use of scarce FBI resources to prosecute violations, the need for federal law enforcement authorities to interrogate family members and close teenage friends in order to pursue violations, and the fact that the defendants in some cases are likely to be minors.

IV. RECOMMENDATION

There would be little advantage in opposing this bill in its entirety. The sponsors' example of the adult male impregnating the female minor and taking her across state lines for an abortion without parental involvement is likely to be politically compelling and, as noted above, there is no definitive case to be made that imposing federal civil and criminal sanctions for this activity is unconstitutional. At the same time, the bill, as written, significantly overreaches and affirmatively harms important policy and constitutional interests.

At this point, it is unclear whether the sponsors are interested in fixing the legislation to meet legitimate objections or whether they are merely interested in provoking confrontation. In either case, we believe that our best action is to announce that the Administration would support narrowly tailored legislation but, for policy and constitutional reasons, is opposed to the bill as currently drafted. The first step in this process would be to submit a letter from the EOP highlighting two specific issues -- the need to exempt family members and the need to exclude from potential liability those persons whose only connection to the abortion is the provision of information, advertising, or a medical, referral, or counseling service. This letter would also indicate that a letter containing constitutional issues would be subsequently forwarded by DOJ and that you have instructed the Department to work with the sponsors in crafting final legislation that meets Administration concerns.

This strategy is not without its difficulties. First, anything short of complete opposition to the bill is likely to raise objections from our allies. Second, the bill's sponsors might accept our objections and submit a bill that you would be obligated to sign. Third, and most troublesome, the sponsors might accept some of our objections and refuse others. This would place you in the position of either signing a bill with seriously objectionable provisions or continuing to oppose a bill that has had some of its more egregious provisions excised, an action that would both potentially weaken the possibility of sustaining a veto and engender the criticism that you are being overly rigid. We believe, however, that unless you would be willing to take the position that you oppose legislation that would make it illegal for adult males to transport minors they impregnate across state lines for abortions without parental consent, the best available course is that outlined in this memorandum.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Jullian Irving Grante to Heather Howard (partial) (1 page)	07/05/2000	P6/b(6)
002. note	re: meeting (2 pages)	08/24	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:

VAWA [Violence Against Women Act] [Binder] [3]

Racheal Carter
2012-0254-S
rc675

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

COPY

Patty First - 8/24

concern: Ed + Workforce - getting Dems
to recognize it's a admin
priority -- if they hold this
bill up might hurt the admin.
ask them to waive jurisdiction unless
they have concerns

Dems have said they will show
it down if comes by Senate of Migs
1 concern

Commerce - what's the problem here

McCallister
Hyde go to Goodling -

they can take care of Reports of Ind - get
Patty can help if Mem ^{mem to} talk to
other Reps.

Admin. talk to Dems (not Indic.
Dems)

COPY

bring up Senate bill in House directly
~~Senate~~

4 Reps - holds when they tried to

so ~~Biden~~ one was over better
room. 2

Biden wanted to take it out

but Kennedy working a line
that Abraham are ok with it

~~Sharon~~

Patty will see if Htch can take
care of the 4 holds.

Need a leadership strategy

talk to Gephardt's people -
Cassidy Butts

Mark + Patty to talk strategy -
maybe they can help w/ Dems too.

get Htch to do more.

PHOTOCOPY
PRESERVATION

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: VAWA meeting (3 pages)	05/23	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:

VAWA [Violence Against Women Act] [Binder] [2]

Racheal Carter

2012-0254-S

rc686

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Bonnie Campbell
Patty First

5/23

VAWA mtg w/ Biden staff

possibilities
for moving
VAWA II

- ① U.C. on sex trafficking (Wellstone + Brownback)
VAWA II as amendment - Biden objected

Del W. Smith
Mary Smith

Repubs don't care much about

Hatch has problems w/ criminal provisions in Trafficking

- ② Link to RLPA? Biden will defer to Kennedy & that
if there's a compromise, maybe it's a vehicle
Hatch wants to link it

- ③ if House moves faster - puts on an Approps bill
if then comes over
would need DOJ + WOT help - House to do this

House likely to mark up - True
meeting w/ McCollum + Congress staff

McCollum + Congress are supportive of dating relationships

- dating by now - Senate

♂ - maybe if it's amendment to Trafficking we put
back in dating relationships

COPY

5/23

VAWA ntg of Biden

Sharon of Hatch - opposed to dating relationship
worried about losing Rpt's support?
or is it just same sex

Repub
cosponsors

{ Specter, Snowe, Stevens, Roth + Jeffords

likely
pickups

Abraham, DeWine, Crapo, G. Smith, Gilliom
Hegel

→ where does this fit in WH priorities

Israel - imp to WH - we are giving sup support
ntg of G's groups, law enforcement
imp. to VPOTUS + POTUS

- we will do events, on Web, where it's effective - but
probably not
helpful at WH

if there's agreement on ADAPT also VAWA,
will people object?

④ Mack - Lantieri - fusion
another vehicle?

message:

need to ramp up law enforcement message
yet religious groups involved

Abuse - bill sequentially referred to Comm. & Judiciary
b/c HHS & (shelters, hotline) are part of
[same other act]

Hatch doesn't really
+ wants to

COPY

②

5/23

Trcl - maybe it will be one of our 3

Things - Omnibus Approps.

We have 20 priorities - so will see if it's
one of them...

message - health provider community, social workers

Barrie - get beyond 9's groups

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: VAWA meeting (4 pages)	05/19	P5
002. email	Mary Smith to Ann O'Leary and Heather Howard (partial) (1 page)	04/20/2000	P3/b(3)

FOLDER TITLE:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:

VAWA [Violence Against Women Act] [Binder] [1]

Racheal Carter
2012-0254-S
rc674

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

COPY

5/19

VAWA mtg of gr's groups

Main - issue very important to WH
WH working group
inside-outside strategy

Melanne - imp to get done - model for world
Beijing + 5

Lynn - talked to Hill, NAAC

Lin - anything we can do to react civil remedy provisions
past - Brockdale
VP feels strongly about reauthorization

Beth - Brockdale doesn't affect criminal provisions + ^{gr's} program
looking at what we can do to reinstate a form
of civil remedy

Commerce Clause + § 5 - basis for civil remedy

(unavailable)

Lopez - too attenuated effect on commerce

§ 5 of 14th A - Congress can only regulate state action

doesn't affect proposed hate crimes legislation

Pat -

① Reauthorize

② new court

③ Hate crime prevention act - incl. gender

COPY

Melanne - how do we explain that a jurisdictional
miling is important

②

5/19

VAWA mtg.

Bonnie

Key
focuses

reallocate funding
increase set aside for helpline
restore for battered immigrant &
include dating violence
set civil legal assistance program authorized

AG will go to events to ratchet up

1/4 of funding goes to police, 1/4 to prosecutors
don't just rely on 4's groups
woman infrastructure building - get law enforcement engaged

Key

Biden + Hatch close to a compromise

maybe look at appropriations as vehicles

Patty
first

- having hard time convincing Republicans
to include dating relationships

dating relationships was in Repub. 4's bill
had McCollum's ~~bill~~ support

Lyne

4's caucus - approaching leadership to model
this message for recess - visit centers, shelters, etc.

Pat

nothing on minutes, etc.

COPY

③

VAWA

Senate bill looks good except for label
language - F F + C (can be fixed)
+ dating relationships

we are going to have to say yes or no on the definition

* Should we get law enforcement to take lead on this

message - VAWA about more than the #
states asked feds to do this

* have law enforcement get to Hatch on redefinition
+ use BTS states

- it's law enforcement's problem too

there is fix in campus ~~env~~ environment -
grants to campus will be covered
I'll argue that fixes it - Clarist

Hastert - won't put on floor until Fall

October is DV awareness month

outreach

law
enforcement:

Cops, A's
Black police chiefs
Victim's groups

COPY

continuing FB groups - attached now b/c of Brockton

outside groups

(4)

business

balance - we had business at POTUS' big event
- help us get

maybe include business to mtg -
business leaders on Board

health community -

strong message - so many sectors are affected by DV

lyn - education comty too?

youth violence comty.

civil rights groups - some have immigrant rights agendas

Faith community - Jewish groups
Episcopalians, Methodist, Lutherans

labor union &

Carolyn Maloney - summit to look at fix

* focus - SC cases + new numbers

Sexual violence - look at campus sexual violence -
impact on victims - drop out rates, etc.

* practical message - violence begets violence
look at culture of violence
there also better saw it at home

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Partial Birth meeting (2 pages)	03/07	P5
002a. letter	Lisa LeRoy to Ann Lewis re: address and phone number (partial) (1 page)	05/16/2000	P6/b(6)
002b. fax	Lisa LeRoy to Heather Howard re: phone number (partial) (1 page)	06/01/2000	P6/b(6)
002c. letter	Lisa LeRoy to Heather Howard re: address, phone number, SSN, and DOB (partial) (1 page)	06/01/2000	P6/b(6)
002d. letter	Lisa LeRoy to Heather Howard re: address and phone number (partial) (1 page)	01/18/2000	P6/b(6)
002e. envelope	re: address (partial) (1 page)	06/10/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

Racheal Carter
2012-0254-S
rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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COPY

3/7

Partial Births

brief - focus on Q's health - that's our legislative strategy
- not invading 2nd trimester

Should we sign bill saying won't sign bill that goes into 2nd trimester

ct. decisions focus on vagueness -
improper definition that encompasses other procedures

we have it focused on this before - it wasn't in
our veto statement - he said he'd sign if it
had a health exception

Beth - brief could focus on: ① health exception
② definition vague
don't change in 2nd trimester issue

OLC asked to comment on the Bill -
they could start to set the table by raising vagueness problem

8th Cir. opinion - focuses on health, vagueness - not health

when Clinton used veto threats, all the Ct. 1 appeals
had it yet found the statutes to be overbroad -
he was operating on an assumption
that wasn't the case

would brief we write help the case?

if we file a brief not focusing on pre-viability
problem - the most obvious basis for 8th Cir -
isn't that troublesome?

that might weaken case.

COPY

Partial ②
Birth

normal procedure is for SG to ask for argument -
he might be asked about 2nd trimester -

~~that~~
also - Nebraska will exploit if we leave out the argument
sit 9's health an undue burden argument - yes

2. It's possible that Pres would sign a narrowly constructed 2nd trimester bill

how do we unite w/o leaving exposed that we're leaving out
a critical issue?

~~problem~~ if don't file - looks like we're silent on first
app to weaken Roe - ~~was~~ sends bad message to Ct

group firmly believe we can craft a brief that will be helpful

if going to file amicus broaden OLC letter
to signal shift - that leg. st. Pres. had
said he'd sign he now wouldn't - b/c many
judges have mixed questions about vagueness

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Meeting (13 pages)	03/20	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:

[Meetings on Ritalin] [Loose]

Racheal Carter
2012-0254-S
rc685

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

COPY

3/20

Strategy Mtg.

Shalala: introductions

Frame the discussions:

growing concern about the use of psychotropic drugs
look at children individually + therapy + careful evaluation

concerned about developing stereotypes -
medicine is good or bad

focus on child's needs

mobilize federal health + education issues

recognize Mrs Clinton + Mrs Gore

Satcher - SG Report on Mental Health

look at in context of family, school, community
team approach - families, schools, teachers

Report ^{was} comprehensive - assessed where we are
some children who need medication aren't getting
some who are being medicated w/o
proper diagnosis

must involve PCP's

Hyman -

press this into referendum - is medication good or bad
Q: what is best for indiv. child

COPY

②

Strategy Mtg.

Hyman - we need to know more about children
need to overcome guild barriers - pediatricians & ^{with} providers

need to develop interventions that are implementable
gap btwn what we know + practice

we do know a lot about kids > 7 w/ ADHD
but still not enough
have to think together about implementing new guidelines

educate teachers on best behavioral interventions

New large scale study - initial < 6

Henry - was a teacher - introed emotionally disturbed teacher
FDA has 2 helpful tools

① ^{congress} _{gave} exclusivity provision - modernization act - drugs still on patent -
get 6 extra months exclusivity
have issued — letters asking companies
to study children from 6 ~ 7
making of Pediatric Advisory Committee
looking at clinical trials

②

POTUS + HRC rule - allows FDA to go to companies of drugs
off patent + ask them to do more studies

COPY

Strategy mtg.

⑤

as they figure out how best to do studies,
they'll know what to ask for

Heumann - glad to see cooperation - good example
b/c parents have to deal first

Kids w/ these problems don't just have problems
at school - have problems later in life -
more likely to end up in criminal justice system

provide info to teachers - "effective positive behavioral
interventions"

IDEA - greater responsibility to train teachers

need to ensure that children get appropriate plans

Chris Jennings - teachers are resources but need help - info

no? - kids are diagnosed by people w/o expertise
need to give equal emphasis to behavioral treatment

Faenza - needs 7 kids - 7/3 of kids who need help get nothing

CHIP covers mental health care

? but kids don't get the services

COPY

much more can be done for MH

④

Strategy Mtg.

Shelala - we are reviewing all coverage issues
particularly Medicaid
(as offshoot of SB's report)

- AACAP -
Kestenbaum - has guidelines on ADHD +
evaluation of children
Chapter 3 was unclear

Managed care is problem - (her doctor says) - 2 tiered system
child in private practice gets 3 or 4 visits
of family - gets careful assessment

HRC enters -
Shelala recaps -

HRC - thanks everyone for joining
diverse group
work collegial + cooperative way

Shelala - focused on what we don't know; also, coverage
how the system works - lack of coordination

Kestenbaum - 2 tiered system -

now give drugs w/o other treatments
but 30 minutes

COPY

(5)

Strategy mtg.

Copeland - access issue - esp. rural
guidelines
look at outcomes - appropriate use

Pediatricians - don't fragment the issue
don't get into the disease of the month
PDAMA is working
drugs are ~~not~~ used by relatively untrained people
b/c they are useful

Daniel - families need to be educated - need to understand side effects
nurses should be educated
closely watch for side effects

Tasman - problems - reimbursement
research - understanding children
MC, access

preschool years of child development are critical in
determining behavior
need to pay more attn to exposure parents, teachers
need to nurture healthy development
community based programs
deal w/ problems early in life -
when kids are in formative areas of life

COPY

(u)

Strategy mtg.

Hynan - heavy mental stress has terrible impact on
brain development -
So don't just worry about effect of drugs on brain

HRC - debate issue is ripe -
debate on medication lets us look at broader issues
way to get more into other issues
maybe this will be a "door opener" - not to a small closet

Hynan - limited understanding of how drugs work - pros & cons -
how they are metabolized, excreted

How should research trials be designed?

have the tools now - Modernization Act
New Rules
to get companies engaged in research

Hynan - + getting diagnosis in kids < 6 -

Dwyer - partnerships that HRC, POTUS + ^{developed} now have
enabled us to work together -
~~we~~ (practitioners, etc.) need to work together
get up to teachers + pain w/ teachers
get rid of the guidelines

COPY

⑦

Strategy Intg.

McGrady - need educators on team
need more teachers of specialized skill
need to invest in training

Fisher - social workers are a resource
can work w/ parents, etc.

AFT - school, doctor, family working together
teachers need to deal w/ parents - some parents
aren't available

Halala - not just the kid - it's the whole class

Kaplanek - using multi-model approach - it works w/ her son
MC not set up to support multi-model approach
parents & can't get the help they need - they need support

* ANA - half of schools don't have full time nurse
medications are administered & monitored by
non-professional

Proctor - parents don't understand - don't get info -
they look for other treatments - look at
homeopathic, nutrition

COPY

Satcher - over + under medicating
kids - inner city aren't getting treated

⑧

Strategy Mtg.

Sadler - team heartnet - teachers, school nurse
esp. time in inner city + rural communities

CDF - 72 million kids w/ grandparents } focus on
child care, head start } these kids
protective service } need

juvenile justice system -
kids being put in facilities that need treatment

Henney -

Pla. -

Heumann - look at collaboration
look at whole school; comprehensive service
~~kids need~~ teachers need to be trained - positive
behavioral

Project Achieve

another document - [couldn't get the name]

~~the~~ public health model in schools

Sadler - Safe Schools, Healthy Children - HHS, DOS

have funded SE ~~low~~ communities

all groups have to work together - schools, faith based,
etc.

COPY

NY?

(9)

Strategy Mtg.

9

empower teachers + parents

Kestenbaum

88000 schools

1000 have health centers on site

500-600 have MHT service

AACAP - they have a film on treatment at schools

Shalala - this is an ongoing discussion
than

HRC

Think of ways we can follow up
will expand to include people not at Retake -
insurance companies

both encouraged + discouraged

30 years
go

worked at Yale Child [Health] Center

hope to get commitment to build a SB's report,
PDA's work

she's learned from working on these issues.

4D's

denial, defiance, dehumanization, deletion

COPY

3/20

Press Q+A

Hyman - recap: response to recent press reports
focus on individual child's needs
medication may be appropriate
don't neglect behavioral therapies
imp role for teachers, etc.

Need for new knowledge - NIMH will
begin study on use of Risperidone ≤ 6
② better ability to diagnose

Even when we do have some understanding (eg ADHD > 6)
we often don't practice what we know -
involve parents & teachers - evidence &
follow up

SG will convene conference this Fall
hope to disseminate info - fact sheet for
parents, educators & FPs

Hennery - need to know more about medications we have
use the Rule announced by POTUS + HRC
to request studies be done on drugs
wound 7 letters to companies - depression + OCD

ethical issues

Don ask companies to do studies

COPY

②

Heumann - tip to include educators
teachers need training + need to work collaboratively
w/ health providers
DOE has issued paper ~~for~~ on ADHD (2/)

Pediatricians - proper diagnosis
Appreciate fr risks & benefits
Medication can be most effective + cost-effective ^{way} to treat

Faenza - need more research
but not kids who need mH get ϕ (2/3)
Medicaid - only 19 states implement program
screening kids for mH
only 80 million goes to mH

APA (Tasne) - applauded Mrs. Chilton
found more who'd been helped by medication
+ those who don't have access
Need multi-modal interventions
break down guild barriers - increase cooperation ^{between} profess.

APA (Tasne) kids get drugs after initial evaluation (often 7 min)
w/ little follow-up

McFadyen - educator must be part of team

COPY

②

Q
from press

do you believe these medications are over prescribed?
is ADHD over diagnosed?

Hyman - both over + under - mismatch b/w kids + their needs
enormous variation ~~group~~ in communities

Q: is reason they're not getting behavioral treatment
b/c of MC + admin budget

A: can't comment on budget
frontline physicians have too little time
educators aren't gaining instruction

Q: also b/c insurers + employers not cover?

A: hard to get coverage for diagnosis, treatment + follow up
need to educate employers + insurers
if cover, families are better off

Heumann - IDEA - admin. working for better collab.
getting medication used better

Fanza - so little \$ in children's MH services
admin. he does a good job of increases

Q: to Heumann about Risperidone

COPY

③

Pass Q+A

Q: why no more research on Ritalin

A: ethical concerns

Q: are drug-like ^{Ritalin} Prozac used as throw away solutions?

A: for ^{appropriately} diagnosed kids - Ritalin works
need appropriate diagnostic workup
follow-up, etc.

Drugs - need more resources
intervene early

NRA - Eddie Davis

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Gag Rule meeting (2 pages)	05/15	P5
002. note	re: Gag Rule meeting (3 pages)	03/03	P5
003. note	re: Gag Rule meeting (4 pages)	03/08	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:

Gag Rule

Racheal Carter
2012-0254-S
rc684

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

COPY

5/15

Gag Rule

Spotlan - ~~the~~ groups called the meeting...

Judy & Susan - groups agree -- both nondirective counseling + referrals
should be in rule

promote or encourage - prefer guidance but
understand

Corey - fiscal separation - mere bookkeeping is not enough
need the guidance explaining - can live w/ it
- but need that explanation

Nancy - we agree ok to put promote or encourage in rule

Marcia - put promote or encourage in preamble, not rule

Corey - promote or encourage was hook for Rega Admin. i
need to have liberty log - make clear it does not
apply to nondirective counseling

Marcia - counseling + referral have to be together
otherwise, gives power to their arguments
that one is more important

Corey - principle of integration - don't step back

Marcia - Nancy misspoke - don't put promote or encourage in rule
- it's never been in the rule

COPY

②

~~Corey~~

"promote or encourage"

Corey - Subj. Admin. could interpret - it used by
justification for anti-gay rule

giving examples is helpful - pro choice litigation & lobbying

Judy D. Have out by July 4th

Better to have fight on floor - then ^{full} comte
- easier to fight something being added
than to fight to take something out
(comte votes are bad)

Alison - shouldn't be moved out Rule b/c Gay Bureaucracy -
- practically

Marcia - way to undermine non-directive council, informal

Corey - or way to harass programs

COPY

3/3

Gag Rule

4 groups

OMB Review - Rule making

can anything be done to strengthen the rule

Internal discussions -

better to have a general rule - deal w/ details in administrative guidance -

2-part admin guidance - the rule

Judy DeSanto - how long would it take if you wanted a more detailed rule.
or is it easier to go w/ the pre-Reagan rule
- Patients Bill of Rights, Labor-H

A - re-proposing rule would add to the fact
but rule published in 1983 + have comments -
can use comments - have some leeway

long talking about non-directive counseling
ethical referral language (so that it doesn't have a
back)

worried about timelines - to suddenly talk about redrafting
want to get it done

worried about re-proposing + having to get into notice + comment

no intent of putting out for comment - it has been out for comment
so it is speed + specificity

Concern about Riders - legislative process

Bliley - Adoption promotion Bill

redefine non-directive counseling - everything but abortion
attaches to 3 programs - not just Title X

COPY

(2)

Gag Rule

Bliley likes to call something adoption + go after Title X

Tim (Ks) later H problem last year - going after separation of funds

do you wait until after appropriations?
or do it soon?

Groups - do it soon - b/c if there's mischief
There'll be time to react, public pressure

Istook - angry "Shirangta didn't get his Adolescent + Family life
may make mischief + go after Title X

Care over from HHS in late Dec - 90 day review - can be extended

Re: same? Title X ^{guidelines} Regs - not updated since 1980

How much of guidelines to put in Rule? does it make it - target?
What's marginal benefit?
want a rule that holds

More quickly - if anything, Stryker by a no direction counseling
publish guidance in FR

if Δ too much - open to legal challenge? (see Rust - we challenged under APA)

We have Final Rule + Guidance now

COPY

by rule:

"separation is not merely book-keeping" - counsel omb aware of this

guidelines?
guidance?

Sylvia
Mann

Gag Rule ③

clinics confused about what kind of referrals to give

Just saying "non-directive counseling" is not enough -
b/c ant's can define badly -

~~must to~~ ^{Robins} "all medical options" have to be given +

? have discussion of referral?

? will be given a referral

in Reg. itself?

opens to attack - is it worth it? No -

stick to right to non-directive counseling - (but beyond
that phrase)

Sharon - let it look like it's part of normal process -
not something pushed through at last minute

it - Not a "significant rule" subject to Cong. approval - want trigger
(not a major economic impact rule)

HHS inclined to publish no guidance of Rule

COPY

3/8

Gag Rule

3.7.1 Marshall → WHC

Sarah Wilson

Alia-

Marcy W. Linder HTS

Nerdy Taylor

en

-OMB
counsel

HTS

Rule log needs log on nondirective counseling

but not referral

-this is what groups want

Marcy - more imp. is revocation of gag rule

strongest legal position is keeping revocation separate

Alia - rule published - 1993 was pre-1988 rule - general
how does it change our legal position to move guidance log into rule

HTS not opposed substantively to moving the guidance log into rule.

Marcy - there's rational basis for keeping log in guidance

- if rulemaking is challenged - it's stronger position

to say there's no APA challenge to rule

- more open to challenge on guidance - not legislative rulemaking
but it's not make-or-break

then
if succeed in striking the guidance, at least they have the rule

? - is it any less binding if it's in the guidance only? yes -

but if you move into the rule you help protect ^{from} ~~by~~ ^{legis} rulemaking arguments

? if it's only in guidance, but it more open to D from new Admin.

big downside for RTR to challenge - if they strike the guidance, they lose all the circumstances log.

COPY

Bag Rule ②

Sarah - isn't last outcome to put it all in Rule
but → Not's assuming it all stays
but better outcome might be to protect the rule.

Can you separate counseling from referral?

What would legislation look like?

Bliley legislation - non-directive counseling -
& categories (but not pregnancy termination)

Alisa - thinking about defining non-directive counseling
(ii) is more than she wanted

Not mention appropriate referral or request or physical separation

If you say non-directive counseling - have to define to
include pregnancy termination

Otherwise - better not to mention non-directive in rule

Marcy - got most comments on ^{physical} separation of fund -
how can we move non-directive counseling into rule &
not physical separation
~~- what does that say about significance of issue?~~

? Stu

Maybe argue the physical separation is more practical -
need guidance as to need flexibility

? Marcy - by keeping guidance separate, ^{minimizing risk} **COPY**?

Sarah - if don't put in Rule - riskier if new administration?
HHS - then can always do that

Gag Rule ③

assessing litigated risks -

Steve - they'll challenge however we do it

Marcy - if Rule challenged, better chance of protecting the revocation of the gag rule

Steve - can't we argue it's severable -
does it make that much of a difference -
argue we're doing 2 things:

(1) existing

(2) newly stuff that's been in the guidance to rule - good govt, etc.

Bill - to greater risk is legislative -
what's going to be greater motivation for them

Alison/Sarah - groups seem to think it's worth the risk a no directive - but
referral too risky

Alison - basically - (i) minus referral, but restricted &
put non-directive first and default as (A)(B)+(C) later

Bill - maybe keep (5) in - helpful of legislative strategy

Alison - if include, hard Saturday to turn over the
Title X prohibition

COPY

Marcy - you're losing something by putting it in (community)
what are you gaining?
do business with?

Bag Rule ④

Bill - do you danger opposition
- do you help w/ moderates

HAS "promote ~~and~~ or encourage" is from legislative history

Alison - we can continue to include - Regardance -
do we set in stone in Rule?

Preamble -

① self-referral - alison - need to be sensitive - heavily
negotiate self-referral - moderate contrast
Sarah - why talk about it if don't talk about
referrals - rule
- it's already law

② One's Payment

③ Family Executive Order - RLC groups complain
the Rule is inconsistent w/ this order -
need to address

direct ⑤ it read "Not provide abortion as a
method of family planning."

Oppn ① - not provide abortion - This was
in original
rule
② not provide or promote or encourage
- both options drop referral r(ii)

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Betsy Cavendish and Allison Herwitt to Bruce Reed et al. re: Executive Order Regarding Emergency Contraception for Rape Victims (partial) (1 page)	11/20/2000	P6/b(6)
002. note	re: phone number (partial) (1 page)	11/27	P6/b(6)
003. memo	Heather Howard to Bruce Reed re: Ideas for Executive Actions to Promote Reproductive Rights (2 pages)	11/27/2000	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:

E.O. [Executive Order] on Emergency Contraception

Racheal Carter
2012-0254-S
rc663

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or
financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President
and his advisors, or between such advisors [(a)(5) of the PRA]
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personal privacy [(a)(6) of the PRA]

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purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of
financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information
concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed
of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C.
2201(3).

RR. Document will be reviewed upon request.

COPY

November 27, 2000

MEMORANDUM FOR BRUCE REED

FROM: HEATHER HOWARD ^{HH}
CC: BARBARA CHOW
ANN O'LEARY
SUBJECT: IDEAS FOR EXECUTIVE ACTIONS TO PROMOTE
REPRODUCTIVE RIGHTS

As you know, NARAL has approached us to suggest two ideas for executive actions to promote reproductive rights.

Executive Order Regarding Emergency Contraception for Rape Victims

NARAL proposes an executive order requiring hospitals receiving federal funds to provide emergency contraception to rape victims. Attached is a memo from NARAL that provides background information on emergency contraception, as well as citations to recent studies that have found that many hospitals do not provide emergency contraception to women requesting it, including women who have been sexually assaulted.

Ann and I have reviewed the materials and recommend we pursue the idea, with one caveat: we will have to address the need for an appropriate conscience clause. This is a complicated issue because so many Catholic hospitals do not provide emergency contraception to rape victims (82% in one study), and therefore, a broad conscience clause that allowed religious hospitals to opt out would render the E.O. meaningless. In addition, the current federal conscience clause allows institutions, such as hospitals, to opt out of providing only abortion and sterilization procedures; extending the conscience clause to any form of contraception would be a significant expansion of the conscience clause and a dangerous precedent.

At a minimum, we should include a more narrow **provider conscience clause**. Such a conscience clause would respect the rights of those with religious beliefs in opposition to providing contraception, while ensuring that women who have been the victim of sexual assault receive appropriate health care to prevent unwanted pregnancy. Providing only a narrow conscience clause, however, may well provoke a Congressional reaction next year. As you know, Congress is already energized about the provision of emergency contraception at school-based health clinics, and could react by imposing a very broad conscience clause, allowing more than hospitals (health plans, for example) to opt out of providing emergency contraception, or contraception altogether. This would clearly be a step backwards. I discussed the issue of conscience clauses with NARAL and they believe that 1) no conscience clause is necessary (not even for providers), and 2) even if it provokes a Congressional backlash next year, this is a good fight to wage, since the focus would be on rape victims. Given the risks of Congress reacting and imposing a religious exemption for the provision of contraception, I am not sure I am a fan of this is a battle we want to fight. Still, this is an intriguing idea, and if you are interested in pursuing it I can do more research and talk to HHS and Counsel's office.

COPY

DOJ Report on the Accomplishments of FACE

NARAL also suggested that DOJ prepare a report on the accomplishments of the Freedom of Access to Clinic Entrances (FACE) law. Such a report could 1) provide a status report on how FACE has been used to protect access to reproductive health clinics; 2) discuss pending cases (perhaps cases in which indictments have been filed or grand juries impaneled); 3) address whether bankruptcy has been used to avoid court-imposed fines resulting from clinic violence; and 4) provide a roadmap for the future use of FACE to ensure safe access to reproductive health services. Such a report would lay an important predicate for maintaining prosecutions under FACE, making it harder for the next Administration to shift course and drop pending cases. NARAL has already talked to Eldie Acheson at DOJ, who seemed interested in the idea.

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. note	re: CPSC meeting (1 page)	07/11	P5
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:

CPSC [Consumer Product Safety Commission] Kids in Danger

Racheal Carter

2012-0254-S

rc683

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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COPY

7/11

Mike Solender

(301) 504-0980 x2299

-- CPSC

Ann Brown - worried about reputation of CPSC
be careful about responding to external families

Education E.O. not a good example - b/c
it seemed to be saying there's a lot to fix
- "need to do this..."

don't like impetus -- emphasis on something new way
as long as key is involved
can't see an E.O. that doesn't take them to task

worried about how people perceive them

she has a call in to Bruce Reed

code of conduct
recall registry / warranty card

he will take another shot at Ann Brown

7/11

conveyed this to Barbara Chou

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Wm.G. White to Elena Kagan re: Draft HHS Language (partial) (1 page)	07/23/1997	P6/b(6)
002. fax	Renee Landers to Elena Kagan re: phone number (partial) (1 page)	07/23/1997	P6/b(6)
003. email	Nancy Min to Barbara Chow re: Conversation with Karen Nelson on Hyde Provisions (2 pages)	06/25/1997	P5
004. memo	Charles Ruff and William Marshall to the President (4 pages)	06/10/1998	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: - 21196

FOLDER TITLE:

Abortion [Binder] [1]

Racheal Carter

2012-0254-S

rc652

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

COPY

Alaska - budget
provisions

From: Nancy A. Min@EOP@LNGTWY@EOPMRX@LNGTWY
*To: FOLEY_M@A1@CD@LNGTWY
*To: Barbara Chow@EOP@LNGTWY@EOPMRX@LNGTWY
Date: 6/25/97 1:15pm
Subject: Conversation with Karen Nelson on Hyde Provisions
Message Creation Date was at 25-JUN-1997 13:15:00

This may interest you.

----- Forwarded by Nancy A. Min/OMB/EOP on 06/25/97 01:15 PM

Barbara E. Washington
06/25/97 01:11:31 PM
Record Type: Record

To: Nancy A. Min/OMB/EOP
cc: Barry T. Clendenin/OMB/EOP, Mark E. Miller/OMB/EOP, Nani A.
Coloretti/OMB/EOP
Subject: Conversation with Karen Nelson on Hyde Provisions

I spoke with Karen Nelson regarding the letter to the President that you faxed to us last night. You had a question about the following statement in the letter: "The Senate Finance Committee attached the same restriction (Hyde Amendment) to the entire Medicaid program in addition to the Children's Health Initiative." This statement was not consistent with our understanding of what was in the language. The following explanation is pretty long, but Karen's points were complicated.

Senate Medicaid Language

Karen said that the statement refers to the provision in the Senate Finance Medicaid language that appears on page 55 of the legislation, in the "sanctions for noncompliance by managed care entities" section. States may impose sanctions on managed care organizations that fail to substantially "provide medically necessary items and services." However, for the purposes of this sanction authority, the term "medically necessary" shall not be construed as requiring an abortion be performed for any individual except in the cases of rape, incest or life of the mother."

She acknowledged that the provision in the SFC Medicaid language does not really prohibit all Medicaid payments for abortion, it only means that if this bill language passed, and Hyde language was no longer in the L/HHS appropriations bill, a State would not be able to sanction a managed care organization for refusing to provide abortion services (unless that abortion was necessary because of rape, incest or to save the life of the mother).

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However, she said that the more important point was that the Majority had changed the definition of "medical necessity" in the Medicaid statute. Historically, Medicaid coverage of abortion services has ridden on the interpretation of the term "medically necessary services" to include abortion

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services. The term "medically necessary" is not currently defined anywhere in the Social Security Act, only in regulation.

Karen said that by changing the definition of "medically necessary" to exclude abortion services in the law (even though it is only for the purposes of managed care sanctions and is not a blanket prohibition), the Majority is chipping away at the current regulations which define "medically necessary" services to include abortion services. Karen thought that because there is no statutory definition of what is "medically necessary", courts could point to this definition in the managed care sanctions section to overturn the regulation.

She also said that she had heard "fifth hand" that someone was planning to move to strike this provision on the Senate floor because it violates the Byrd rule.

House and Senate Children's Health Language

I asked her what she thought about the effect of the Hyde Amendment provisions in the children's health titles of the House and Senate bills. I indicated to her that after a preliminary review, staff thought that the Hyde Amendment language in the children's health titles prohibits the use of the funds allotted under the new Title XXI for abortion (with exceptions for rape, incest, and life of the mother). Under this interpretation, the Hyde Amendment language would affect the child health funds allotted under this new title, whether the States choose to use it for Medicaid or for the other purposes.

She said that she thought the construction of the amendments in the children's health titles was not clear. She said that, if it passed, it would probably be left up to the discretion of lawyers in the Administration whether or not the prohibition would apply to Medicaid spending under the new title, or just the new children's grant program.

She said that some could argue that the prohibition applied to all of the funds allotted under the children's health title, whether the State chooses to use the funds for Medicaid or a new grant. She said, on the other hand, though, one could also argue that the title allows states to spend Medicaid funds (from the Medicaid appropriation) equivalent to the amount of funds allotted under the new title. Under this scenario, the funds would come from the Medicaid appropriation, and a State's allotment under the new title would be decreased by an equal amount. Theoretically under this scenario, if there was no Hyde Amendment on the Medicaid appropriation, Medicaid funds spent on children's health would not be subject to the Hyde Amendment language in Title XXI.

She said that regardless of which interpretation is correct (which she said is academic at this point), they will urge the leadership to remove the restrictions.

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