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Talking Points -- President's letter to Senators re Abortion

- The President has sent letters to Senators today asking them to close off debate and pass the anti-abortion amendment to the debt ceiling bill now pending in the Senate.

- This measure is based on the view the President himself has expressed many times in the past, that any abortion involves at least two people - the mother and her child.

- It is important to understand what this measure does and does not do:

    a. It applies to the entire federal government the principle that the government should not perform abortions or provide funding for abortions in any way, except to save the life of the mother.

    b. It will make permanent the Hyde Amendment ban on federal funding for medicaid abortions other than those to save the life of the mother.

    c. It will apply this ban consistently to all operations of the federal government.

    d. It will give the Supreme Court a speedy opportunity to reconsider its much-criticized abortion decision of Roe v. Wade.

    e. It does not overturn Roe v. Wade, as some earlier bills in the Senate would have done; it gives the Supreme Court itself the opportunity to reverse its own decision.

- The measure affirms the fundamental principle of American law that all human life has supreme value and should be protected under the law.

- This issue has been debated at great length by the Senate and it is time to come to a vote.

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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

September 14, 1982

FOR: JAMES A. BAKER

FROM: MICHAEL M. UHLMANN

SUBJECT: Senator Hatch

Following last week's report that Orrin Hatch had teed off on certain members of the staff re abortion, I asked Steve Galebach to summarize his activities. Since all of his recommendations were cleared through me before going forward, his account tracks precisely with my own knowledge of events. We made a particular point of not appearing to undercut Hatch's proposal. If you think Orrin needs further stroking, I'd be happy to talk to him.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

September 13, 1982

FOR: MICHAEL M. UHLMANN

FROM: STEPHEN H. GALEBACH

SUBJECT: Role of White House Staffers Concerning President's Posture on Senator Hatch's Anti-Abortion Amendment

In a conversation on Wednesday with Jim Baker, Senator Hatch apparently said that he suspects staffers in the White House of attempting to sabotage his anti-abortion amendment in favor of Senator Helms' measure. He apparently named me among others as those that he suspects.

Morton Blackwell, a longtime backer of Senator Hatch and his amendment, cleared the record on Friday by calling Senator Hatch to explain the truth of the matter. But the record should be set straight in-house as well.

The facts are directly contrary to what Senator Hatch suspects. I have taken great care not to recommend any actions by the President that would impede Senate consideration of the Hatch Amendment. (However, since it is unclear when the Hatch Amendment will come up for a vote in the Senate, I have held off making any recommendations for concrete Presidential action on it.)

Since I joined the White House staff, my purpose has been to make recommendations consistent with the President's opposition to abortion in general, consistent with his announced sympathy equally for the Helms, Hatch, and Hatfield measures (as he stated to the National Right-to-Life Convention and the Knights of Columbus), and consistent with avoiding a Presidential choice among competing anti-abortion measures.

As a result, I have recommended that the President support both Helms and Hatch. In fact, I drafted and recommended the language about the President's continued support of the Hatch Amendment which was included in the President's letters to Senators. I also worked closely with Jack Burgess and others to ensure that the President's action would not be offensive to the United States Catholic Conference and other supporters of the Hatch Amendment. At one point, Hatch's own staffer on this issue, Steve Markman, told me that his boss supported cloture on the Helms measure and that such action was not inconsistent with supporting the Hatch Amendment.

In all of this, I have strived to serve the interest of the President, and not that of Senator Helms, Senator Hatch, or any other of the various factions of the pro-life movement.

To the best of my knowledge, Senator Hatch's suspicions are equally unfounded with regard to all others on the White House staff with whom I have worked. No one on the White House staff has at any time encouraged me to take actions or to make recommendations adverse to Senator Hatch's amendment.

Finally, as to my personal views, I am in wholehearted agreement with the President's approach of expressing support for all anti-abortion measures without choosing one over the others.

Supreme Court Reaffirms 1973 Abortion Decision

By Fred Barbash
Washington Post Staff Writer

The Supreme Court yesterday stood firmly behind its 1973 decision legalizing abortion and ruled 6 to 3 that government cannot interfere with this "fundamental right" of women unless it is clearly justified by "accepted medical practice."

The court struck down laws, similar to those in 22 states, that require hospitals, rather than clinics, to perform abortions after the first three months of pregnancy. This should make relatively inexpensive abortions in clinics even more widely available than they are now, especially in parts of the country where hospitals, often under political pressure, have stopped performing abortions.

The court majority also invalidated an Akron, Ohio, ordinance requiring a 24-hour waiting period and elaborate "informed consent" procedures before an abortion can be performed, and special "decent burial" rules for disposal of the fetus afterward. The Akron ordinance was designed by opponents of abortion as a national model for such restrictions.

Excerpts of decision, Page A8.

The combined effect of yesterday's rulings will make it much more difficult for cities, states or even the federal government to legally defend incremental encroachments on access to abortions.

The Supreme Court acted after a decade of intense national debate, legal skirmishing and legislative struggle generated by its 1973 decision. At times, the abortion issue has dominated political campaigns, disrupted Congress and state legislatures, and sparked controversy over judicial appointments, including President Reagan's elevation of Sandra Day O'Connor to the Supreme Court.

She showed her colors yesterday by leading the dissent against the court's majority. The only woman

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Supreme Court upholds illegal abortion conviction. Page A9

Excerpts of Ruling, Dissent

Excerpts from the majority opinion, delivered by Justice Lewis F. Powell Jr. in City of Akron v. Akron Center for Reproductive Health Inc. *(Quotation marks indicate material cited from other decisions):*

These cases come to us a decade after we held in *Roe* v. *Wade* that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the court's decision have required us on several occasions, and again today, to define the limits of a state's authority to regulate the performance of abortions. And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of the law. We respect it today, and reaffirm *Roe* v. *Wade* . . . .

From approximately the end of the first trimester of pregnancy, the state "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." The state's discretion to regulate on this basis does not, however, permit it to adopt abortion regulations that depart from accepted medical practice . . . .

There can be no doubt that [a] second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion. A primary burden created by the requirement is additional cost to the woman. The Court of Appeals noted that there was testimony that a second-trimester abortion costs more than twice as much in a hospital as in a clinic. Moreover, the court indicated that second-trimester abortions were rarely performed in Akron hospitals. Thus, a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk. It therefore is apparent that a second-trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion . . . .

We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the state's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course.

The decision whether to proceed with an abortion is one as to which it is important to "afford the physician adequate discretion in the exercise of his medical judgment." In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her. But if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a state may not demand that she delay the effectuation of that decision . . . .

Excerpts from the minority opinion, written by Justice Sandra Day O'Connor and joined by Justices Byron R. White and William H. Rehnquist:

The *Roe* framework . . . is clearly on a collision course with itself . . . . [It is] inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments . . . .

Although we must be mindful of the "desirability of continuity of decision in constitutional questions . . . when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, when correction depends on amendment, not upon legislative action, this court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."

Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* and employed by the court today on the basis of *stare decisis*. For the reasons stated above, that framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated . . . .

In determining whether the state imposes an "undue burden," we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, "the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' " This does not mean that in determining whether a regulation imposes an "undue burden" on the *Roe* right that we defer to the judgments made by state legislatures. "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how other branches of government have addressed the same problem . . . ."

73 Abortion Ruling Reaffirmed

justice, joined by Justices Byron R. White and William H. Rehnquist, challenged the validity of much of the 1973 abortion decision and agreed with the Reagan administration's contention that the court was intruding on legislative authority.

Outraged opponents of abortion yesterday vowed to fight back against the decision and push even harder for a constitutional amendment that would ban abortion nationwide or allow the states to prohibit it.

All the restrictions on abortion struck down by the court yesterday had been enacted at the urging of anti-abortion forces. The court said none of them was sufficiently related to the safety and health of women. All of them, Justice Lewis F. Powell Jr. wrote for the court majority, made abortions more expensive or more risky to health and all improperly substituted the judgment of legislators for the judgment of physicians and women.

The majority rejected the Reagan administration's contention that the court should back away from its own precedent. "We respect it today, and reaffirm *Roe* v. *Wade*," Powell said, reading these words from the bench for added emphasis.

The ruling actually expanded the 1973 decision, which had appeared to allow hospitalization requirements after the first trimester (the first 12 weeks) of pregnancy. Powell said improved medical technology, allowing safe abortions outside of hospitals, justified allowing abortions in clinics.

"We did not persuade a majority," Solicitor General Rex E. Lee, who represented the Reagan administration in the case, said yesterday. But "we got three solid votes. We may yet live to fight another day."

O'Connor wrote that the court can and should correct "errors" of constitutional judgment in past decisions. This was a victory for Reagan. He had nominated her in the face of angry criticism from anti-abortion conservatives who doubted her loyalty to their cause.

But her dissent yesterday drew bitter denunciations from some women's rights advocates, who earlier had been pleasantly surprised by her votes on other women's issues. It "was unprincipled," charged Janet Benshoof, the American Civil Liberties Union lawyer who argued in favor of yesterday's ruling.

"I'm personally disappointed," said Jane Gruenebaum, spokesman for the National Abortion Federation. "It would have been nice to

minor victories by upholding, as it has in the past, laws requiring parental consent to an abortion for a woman under 18, as long as she can freely appeal to a local court if she is unable to obtain such permission.

It also upheld Virginia's law requiring that abortions in the second trimester of pregnancy be performed in hospitals and upheld the conviction of a Northern Virginia physician, Dr. Chris Simopoulos, for performing an abortion in his office. The Virginia law is valid, the justices ruled, only because the state includes licensed outpatient clinics in its definition of hospitals and does not ban abortions in them.

Roe v. *Wade*, which struck down abortion bans across the country, remains one of the most controversial decisions ever made by the Supreme Court. It said no interference with abortion is permissible during the first three months of pregnancy (the first trimester), but that in the second three months, regulations can be imposed to protect the health of the mother. Abortions in the final stage in some circumstances may be "proscribed," the court said in 1973.

Yesterday's ruling in the Akron case guided the outcome of the Virginia case and another from Missouri.

Powell said the second trimester hospitalization requirement in the Akron ordinance "places a significant obstacle in the path of women seeking an abortion." Powell said an abortion may cost twice as much in a hospital as in a clinic. Because Akron hospitals rarely perform such abortions, he added, the requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk."

He acknowledged that the 1973 *Roe* v. *Wade* ruling gave legislators more leeway to regulate second-trimester abortions because of the increased risk to the women. Since then, however, Powell said the development of safer abortion techniques—particularly the dilation and evacuation (D&E) procedure—has reduced that risk. He cited studies by the American Public Health Association and the American College of Obstetricians and Gynecologists.

"By preventing the performance of D&E abortions in an appropriate non-hospital setting, Akron has imposed a heavy, and unncessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure," Powell wrote.

Akron's 24-hour waiting period also is unnecessary, unless prescribed by a doctor, Powell said, concluding

pared to give her written informed consent and proceed with the abortion, a state may not demand that she delay the effectuation of that decision," he said.

The "informed consent" provision of the Akron ordinance required physicians to tell a woman about the "development of her fetus," the physical and emotional complications that may result from an abortion, and the availability of agencies to assist her with birth control, adoption and childbirth.

That provision, Powell said, appeared designed not to inform her of her choice but to "persuade her to withhold it altogether." Governments, he said, do not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion . . . . It remains primarily the responsibility of the physician . . . ."

O'Connor's dissent stopped short of saying she would overrule *Roe* v. *Wade*, though Powell, in a footnote, suggested she would, in effect, do that.

Saying the court has been too strictly scrutinizing abortion regulations, she attacked the trimester scheme of *Roe* v. *Wade* as "unworkable."

She said government should be free to impose some regulation at all stages of pregnancy, both to protect maternal health and the "potential life" of the fetus. "The state's interest in protecting potential human life exists throughout the pregnancy," she said.

Citing language in previous opinions, she said "we must always be mindful that 'the Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate government objective of protecting potential life.' "

The dissent particularly criticized Powell's conclusion that second trimester abortions are now safer. She said new medical advances also have made it easier for fetuses to survive earlier outside the womb. The majority opinions in the Akron case and in the 1973 ruling forces courts, she said, to "pretend to act as science review boards and examine . . . legislative judgments."

The Missouri decision *(Planned Parenthood Association of Kansas City* v. *Ashcroft)* also struck down a hospitalization requirement. But it upheld laws requiring special pathology reports on the aborted fetus and

Court Ruling Will Spur Campaign To Prohibit Abortions, Critics Say

By Mary Thornton
Washington Post Staff Writer

Opponents of abortion bitterly attacked the Supreme Court yesterday, accusing it of legalizing "abortion on demand" in its latest ruling and vowing to push through Congress a constitutional amendment to ban the practice.

Sen. Roger W. Jepsen (R-Iowa) predicted that the 6-to-3 ruling will backfire and help him and other abortion critics gain anti-abortion legislation. Jepsen and Rep. Henry J. Hyde (R-Ill.) are co-sponsors of the "unborn human life" bill to ban federal abortion funding and extend legal rights to the unborn. President Reagan has endorsed the bill.

"There's absolutely no question about that [backlash]," Jepsen said. "The fever pitch emotion that this has generated will help us. The Supreme Court is complete[ly] out of their jurisdiction. Maybe it will be the straw that broke the camel's back."

Sen. Bob Packwood (R-Ore.), a leading Senate defender of the right to abortion, said he was "delighted" by the court's decision. "The court said . . . that this is a constitutional right that state legislatures cannot nibble away at . . . If 'Right-to-Life' forces want to upset it, they have to do it with a constitutional amendment . . ."

At least an yesterday's ruling were upheld from Minnesota, Virginia, and Akron, Ohio. The cases had raised hopes among abortion opponents that the court would reverse its landmark 1973 decision in Roe v. Wade legalizing abortions in certain circumstances.

Instead, a majority of the justices affirmed that a woman's right to privacy includes her decision on abortion and overturned local laws that tried to limit that right.

Supporters of the right to abortion were ecstatic at the decision, despite the fact that Sandra Day O'Connor, the first woman to serve on the court, wrote the dissent.

Janet Benshoof, director of the American Civil Liberties Union's reproductive rights project, which brought the Akron case, called the decision "a total victory for a woman's right to chose abortion."

But the enthusiasm for the decision was overshadowed by fear of a new push for a constitutional amendment banning abortion.

Nanette Falkenberg, executive director of the 150,000-member National Abortion Rights Action League, said, "The decision will simply reinforce anti-choice groups to intensify their efforts to restrict abortion . . . We will see new strategies to prevent abortions and increased harassment of women seeking them."

Judy Lichtman, executive director of the Women's Legal Defense Fund, said abortion-rights groups are prepared to fight those efforts. "We've fought them. We've won, and we'll fight them again," she said.

Abortion opponents made it clear that they, too, are ready to fight for a ban on abortion and for legislation to take the issue out of the jurisdiction of the federal courts.

Sen. Orrin G. Hatch (R-Utah) called the Supreme Court decision an "abomination." Hatch has proposed an amendment saying that the Constitution does not guarantee women the right to abortions. Hatch said his proposal will reach the Senate floor before July 4, but he conceded that it has little chance of passage.

Gary Curran, speaking for the 120,000-member American Life Lobby, said, "We are very disappointed with the Supreme Court decision. It is clear that a majority of the justices . . . care little or nothing for the humanity of the unborn . . . This is proof positive that via judge-made law, we have abortion on demand in America.

"The Supreme Court thinks they are a super legislature for every city, town, county and state in America. This will spur us to enact a constitutional amendment to ban abortion . . . and other human-life bills which would remove the question of abortion from the federal courts entirely."

Richard A. Viguerie of Conservative Digest said the ruling "displays an intolerable insensitivity to the health needs of women. This ruling will delight those abortionists who are only interested in ripping as many women as possible through their clinics so as to maximize their profits. The court has, in effect, put its stamp of approval on assembly-line abortion clinics.

"In nearly abortion, at least one person dies, but there is no need to risk the life of the mother as well . . . She deserves more protection from the people who might take advantage of her while she is distraught."

Douglas Johnson of the National Right to Life Committee said the ruling "demonstrates the paternalism of the court on abortion . . . It underscores the need for congressional action . . . and for the appointment of judges who will not impose their pro-abortion extremism on the nation. The court has defended the constitutional rights of women bent on the unrestricted abortion industry . . . This issue is not down very quickly."

SEN. ROGER W. JEPSEN
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