

PARTIAL-BIRTH ABORTION BAN ACT OF 1997

MARCH 14, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 929]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 929) to amend title 18, United States Code, to ban partial-birth abortions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

| | Page |
|---|------|
| The Amendment | 2 |
| Purpose and Summary | 2 |
| Background and Need for Legislation | 2 |
| Hearings | 20 |
| Committee Consideration | 21 |
| Votes of the Committee | 21 |
| Committee Oversight Findings | 25 |
| Committee on Government Reform and Oversight | 25 |
| New Budget Authority and Tax Expenditures | 25 |
| Congressional Budget Office Estimate | 25 |
| Constitutional Authority Statement | 26 |
| Section-by-Section Analysis | 26 |
| Changes in Existing Law Made by the Bill, as Reported | 27 |
| Dissenting Views | 29 |

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Partial-Birth Abortion Ban Act of 1997”.

SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 73 the following:

“CHAPTER 74—PARTIAL-BIRTH ABORTIONS

“Sec.
“1531. Partial-birth abortions prohibited.

“§ 1531. Partial-birth abortions prohibited

“(a) Whoever, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus or infant shall be fined under this title or imprisoned not more than two years, or both.

“(b) Subsection (a) does not apply to a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, if no other medical procedure would suffice for that purpose.

“(c) As used in this section—

“(1) the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the infant and completing the delivery; and

“(2) the terms ‘fetus’ and ‘infant’ are interchangeable.

“(d)(1) Except as provided in paragraph (3), the father, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus or infant, may in a civil action obtain appropriate relief.

“(2) Such relief shall include—

“(A) money damages for all psychological injuries occasioned by the violation of this section; and

“(B) statutory damages equal to three times the cost of the partial-birth abortion;

even if the mother consented to the performance of an abortion.

“(3) A civil action may not be commenced under this section if—

“(A) the pregnancy resulted from the plaintiff’s criminal conduct;

“(B) the plaintiff consented to the abortion; or

“(C) the plaintiff is a father who abandoned or abused the mother.

“(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section for a conspiracy to violate this section, or an offense under section 2, 3, or 4 of this title based on a violation of this section.”.

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 73 the following new item:

“74. Partial-birth abortions 1531”.

PURPOSE AND SUMMARY

H.R. 929, the “Partial-Birth Abortion Ban Act of 1997,” bans the partial-birth abortion procedure. A partial-birth abortion is any abortion in which a living baby is partially vaginally delivered before killing the baby and completing the delivery. An abortionist who violates the ban would be subject to fines or a maximum of two years imprisonment, or both. The bill also establishes a civil cause of action for damages against an abortionist who violates the ban. The cause of action can be maintained by the father of the child or, if the mother is under 18, the maternal grandparents.

BACKGROUND AND NEED FOR THE LEGISLATION**THE PROCEDURE**

Thousands of partial-birth abortions are performed each year primarily in the fifth and sixth months of pregnancy on the healthy

babies of healthy mothers. The child involved in a partial-birth abortion is not unborn. His or her life is taken during a breach delivery. The breach delivery, a procedure which obstetricians use in some circumstances to bring a healthy child into the world, is perverted when a partial-birth abortion is performed to result in a dead child. The physician, traditionally trained to do everything in his power to assist and protect both mother and child during the birth process, deliberately kills the child in the birth canal. While every abortion takes a human life, the partial-birth abortion method takes that life during the fifth month of pregnancy or later as the baby emerges from the mother's womb. H.R. 929 would end this cruel practice.

One abortionist described the partial-birth abortion procedure that he uses primarily in the fifth and sixth months of pregnancy:

The surgeon introduces a large grasping forceps * * * through the vaginal and cervical canals into the corpus of the uterus. * * * When the instrument appears on the sonogram screen, the surgeon is able to open and close its jaws to firmly and reliably grasp a lower extremity [leg]. The surgeon then applies firm traction to the instrument * * * and pulls the extremity into the vagina. * * *

With a lower extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities [arms].

The skull lodges at the internal cervical os.

At this point, the right-handed surgeon slides the fingers of the left hand [sic] along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down).

While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.¹

This method is particularly brutal and inhuman. Brenda Shafer, a registered nurse who witnessed a partial-birth abortion procedure while working for an Ohio abortionist, conveyed the abhorrent nature of the procedure in a letter to Congressman Tony Hall. Nurse Shafer wrote that witnessing the procedure was "the most horrible experience of my life." She described watching one baby:

¹ Martin Haskell, M.D., "Dilation and Extraction for Late Second Trimester Abortions," Presented at the National Abortion Federation Risk Management Seminar (September 13, 1992), in *Second Trimester Abortion: From Every Angle*, 1992, [hereinafter Haskell] at 27, 30-31.

The baby's body was moving. His little fingers were clasping together. He was kicking his feet. All the while his little head was still stuck inside. Dr. Haskell took a pair of scissors and inserted them into the back of the baby's head. Then he opened the scissors up. Then he stuck the high-powered suction tube into the hole and sucked the baby's brains out.

Next, Dr. Haskell delivered the baby's head, cut the umbilical cord and delivered the placenta.²

Clearly, the only difference between the partial-birth abortion procedure and homicide is a mere three inches.

The partial-birth abortion procedure is performed from around 20 weeks to full term.³ It is well documented that a baby is highly sensitive to pain stimuli during this period and even earlier.⁴ In fact, in a study conducted on fetuses between 20 to 34 weeks of gestation at the Institute of Obstetrics and Gynaecology, Royal Postgraduate Medical School, Queen Charlotte's and Chelsea Hospital in London, researchers concluded:

Just as physicians now provide neonates with adequate analgesia, our findings suggest that those dealing with the fetus should consider making similar modifications to their practice. This applies not just to diagnostic and therapeutic procedures on the fetus, but possibly also to termination of pregnancy, especially by surgical techniques involving dismemberment.⁵

In his testimony before the Constitution Subcommittee on June 15, 1995, Professor Robert White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine, stated, "The fetus within this time frame of gestation, 20 weeks and beyond, is fully capable of experiencing pain."⁶ After specifically analyzing the partial-birth abortion procedure, Dr. White concluded, "Without question, all of this is a dreadfully painful experience for any infant subjected to such a surgical procedure."⁷

²Letter from Brenda Shafer, R.N., to Congressman Tony Hall (July 9, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

³There are several abortion techniques employed between 20 weeks and full term. The techniques fall under the general categories of partial-birth abortion, dilation and evacuation, and amnioinfusion. In the dilation and evacuation procedures the baby is dismembered and removed from the uterus in pieces. See, D.A. Grimes and W. Cates, Jr., "Dilation and Evacuation," *Second Trimester Abortion—Perspectives After a Decade of Experience* (G.S. Berger et al. eds., 1981). Amnioinfusion requires the injection of saline or other solutions into the amniotic cavity. The solution kills the baby, and labor is induced. See, Warren M. Hern, M.D., M.P.H., *Abortion Practice* (1984).

⁴See, e.g., K.J.S. Anand and P.R. Hickey, "Pain and Its Effects in the Human Neonate and Fetus," 317 *The New England Journal of Medicine*, 1321; V. Collins et al., "Fetal Pain and Abortion: The Medical Evidence," *Studies in Law and Medicine* (1984); S. Reinis and J.M. Goldman, *The Development of the Brain* (1980).

⁵Xenophon Giannakoulopoulos et al., "Fetal Plasma Cortisol and β -Endorphin Response to Intrauterine Needling," *The Lancet*, July 9, 1994, at 77, 80.

⁶Hearing on Partial-Birth Abortion Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess., (1995) [hereinafter Hearing] (testimony of Robert J. White, M.D., Ph.D.).

⁷Id.

DISINFORMATION

Abortion advocates have repeatedly denied or misrepresented the facts on partial-birth abortion. Shortly after H.R. 1833, the Partial-Birth Abortion Ban Act of 1995, was introduced in the 104th Congress, abortion advocates began to make a variety of false claims about the partial-birth abortion procedure. These claims continued into the 105th Congress.

First, while it would seem useless to argue against legislation that bans a procedure that does not exist, opponents of H.R. 929 make just such a claim. They argue that the partial-birth abortion method does not exist. Second, they claim the method is used rarely and only in cases where the mother's life is at stake or the fetus has severe abnormalities.

The first argument was based on the absence of the term partial-birth abortion in medical literature and the claim that the child aborted using the partial-birth method is already dead. However, the term partial-birth abortion is a legal term defined clearly in H.R. 929 as any "abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."⁸

This definition includes procedures that have been coined "dilation and extraction" by Dr. Martin Haskell, who performs partial-birth abortions in Ohio, and "intact dilation and evacuation" and "intrauterine cranial decompression" by Dr. James McMahan, who performed partial-birth abortions in California before his death in October of 1995. Just as the term partial-birth abortion is not found in medical literature, the terms used by Doctors McMahan and Haskell are not found in medical literature⁹ because these horrific procedures are not generally accepted by the medical community. In fact, Dr. Pamela Smith, an obstetrician at Mt. Sinai Hospital in Chicago, testified before the Subcommittee on the Constitution that when she described the procedure to other physicians, "many of them were horrified to learn that such a procedure was even legal."¹⁰ Dr. Smith also stated:

[T]here is no uniformly accepted medical terminology for the method that is the subject of this legislation. Dr. McMahan does not even use the same term as Dr. Haskell, while the National Abortion Federation implausibly argues that there is nothing to distinguish this procedure from the D & E abortions. The term you have chosen, 'partial-birth abortion,' is straightforward. Your definition is also straightforward, and in my opinion, covers this procedure and no other.¹¹

Opponents of H.R. 929 further argue that the partial-birth abortion procedure does not exist because it is only used to deliver babies who are already dead. This argument is nonsensical because

⁸H.R. 929, 105th Cong., 1st Sess. (1997).

⁹Constitution Subcommittee staff conducted a Medline search on July 11, 1995, during which no references to the terms were found.

¹⁰Hearing, supra note 6 (testimony of Pamela Smith, M.D., FACOG).

¹¹Id.

partial-birth abortion by definition requires the partial delivery of a “living fetus.”¹²

Even if this argument made sense, past statements of abortionists and eyewitness accounts directly contradict claims that the babies are dead before being pulled into the birth canal. Dr. Martin Haskell and Dr. James McMahon, two abortionists who have used the partial-birth abortion method, were interviewed by the American Medical News in 1993. These doctors “told the AMNews that the majority of fetuses aborted this way are alive until the end of the procedure.”¹³

Dr. Haskell and the National Abortion Federation disputed the accuracy of the AMNews article after the “Partial-Birth Abortion Ban Act” was introduced in June of 1995, claiming that out-of-context quotes were used.¹⁴ The editor of the AMNews responded to these accusations in a letter to Constitution Subcommittee Chairman Charles T. Canady, dated July 11, 1995. The letter states, “AMNews stands behind the accuracy of the report.* * * We have full documentation of these interviews, including tape recordings and transcripts.”¹⁵ The editor also released portions of the transcript from Dr. Haskell’s interview containing the following exchange:

AMN. Let’s talk first about whether or not the fetus is dead beforehand.* * *

Haskell. No it’s not. No, it’s really not. A percentage are for various numbers of reasons. Some just because of the stress—intrauterine stress during, you know, the two days that the cervix is being dilated. Sometimes the membranes rupture and it takes a very small superficial infection to kill a fetus in utero when the membranes are broken. And so in my case, I would think probably about a third of those are definitely are [sic] dead before I actually start to remove the fetus. And probably the other two-thirds are not.¹⁶

In a Dayton News interview, Dr. Haskell referred to the scissors thrust that occurs after the baby’s entire body is delivered and only his head is still lodged within the cervix, as the act that kills the baby. He said, “When I do the instrumentation on the skull, it destroys the brain sufficiently so that even if it [the baby’s head] falls out at that point, it’s definitely not alive.”¹⁷

In a letter to the Honorable Charles T. Canady, Dr. James McMahon, an abortionist who used the partial-birth abortion meth-

¹² H.R. 929, *supra* note 8.

¹³ Diane M. Gianelli, “Shock-Tactic Ads Target Late-Term Abortion Procedure: Foes Hope Campaign Will Sink Federal Abortion Rights Legislation,” *American Medical News*, July 5, 1993, at 3, 21.

¹⁴ Letter from Martin Haskell, M.D., to Congressman Charles T. Canady (June 27, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary); Letter from Vicki Saporta, Executive Director, National Abortion Federation, to Congressman Charles T. Canady (June 27, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

¹⁵ Letter from Barbara Bolsen, Editor, *American Medical News*, to Congressman Charles T. Canady (July 11, 1995) [hereinafter Bolsen] (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

¹⁶ *Id.*

¹⁷ Dave Daley, “Late Abortion Pushes Medicine to Edge,” *Dayton Daily News*, Dec. 10, 1989 at 9A.

od, wrote that large doses of analgesia killed the baby before the doctor begins delivery. He stated:

The fetus feels no pain through the entire series of procedures. This is because the mother is given narcotic analgesia at a dose based upon her weight. The narcotic is passed, via the placenta, directly into the fetal bloodstream. Due to the enormous weight difference, a medical coma is induced in the fetus. There is a neurological fetal demise. There is never a live birth.¹⁸

Dr. Dru Carlson, director of Reproductive Genetics at Cedar-Sinai Medical Center in Los Angeles, personally observed Dr. McMahan performing a partial-birth abortion. In a letter to Chairman Henry J. Hyde, Dr. Carlson wrote:

When the cervix is open enough for a safe delivery of the fetus he uses ultrasound guidance to gently deliver the fetal body up to the shoulders and then very quickly and expertly performs what is called a cephalocentesis. Essentially this is removal of cerebrospinal fluid from the brain *causing instant brain herniation and death.*¹⁹

This statement clearly suggests that the baby is alive until the removal of fluid from the brain.

Another eyewitness, Nurse Shafer, whose observations are detailed above, has no doubt that the babies are alive during the partial-birth abortion procedure. She saw a baby moving during the procedure before the scissors were inserted into his head.

Dr. Watson Bowes, an internationally recognized authority on maternal and fetal medicine and a professor of both obstetrics/gynecology and pediatrics at the University of North Carolina at Chapel Hill School of Medicine, after reading Dr. McMahan's letter to Chairman Canady wrote:

Dr. James McMahan states that narcotic analgesic medications given to the mother induce 'a medical coma' in the fetus, and he implies that this causes 'a neurological fetal demise.' This statement suggests a lack of understanding of maternal/fetal pharmacology. It is a fact that the distribution of analgesic medications given to a pregnant woman result in blood levels of the drugs which are less than those in the mother. Having cared for pregnant women who for one reason or another required surgical procedures in the second trimester, I know that they were often heavily sedated or anesthetized for the procedures, and the fetuses did not die.

Although it is true that analgesic medications given to the mother will reach in [sic] the fetus and presumably provide some degree of pain relief, the extent to which this renders this procedure pain free would be very difficult to document. I have performed in-utero procedures on fetuses in the second trimester, and in these situations the re-

¹⁸ Letter from James T. McMahan, M.D., to Congressman Charles T. Canady (June 23, 1995) [hereinafter McMahan] (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

¹⁹ Letter from Dru Elaine Carlson, M.D., to Congressman Henry J. Hyde (June 27, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary) (italic added).

sponse of the fetuses to painful stimuli, such as needle sticks, suggest that they are capable of experiencing pain.²⁰

The claim that anesthesia given to the mother at the beginning of a partial-birth abortion kills the unborn child was disseminated by National Abortion Federation (NAF), a group representing abortion providers. Based on this myth, abortion advocates argue it is misleading to call the procedure a “partial birth” abortion, and that any concerns that the child experiences pain during the procedure are misplaced. A NAF “fact sheet” says:

Anti-abortion groups claim that the fetus is still alive until the very end of the procedure. This is absolutely untrue. Neurological fetal demise is induced, either before the procedure begins or early on [in] the procedure by steps taken to prepare the woman for surgery. (This includes narcotic analgesia, extensive cervical dilation, and rupture of membranes.) Dr. James McMahan calls statements to the contrary preposterous. Dr. Martin Haskell of Ohio agrees with Dr. McMahan’s assessment. * * * In the event that there is any possibility of pain perception in later-term fetuses prior to fetal demise, the narcotic analgesia given to the pregnant woman prevents any such sensation.²¹

Another leading proponent of the “anesthesia myth” is Kate Michelman, president of the National Abortion Rights Action League. In an interview on “Newsmakers,” in St. Louis on Nov. 2, 1995 Ms. Michelman said:

The other side grossly distorted the procedure. There is no such thing as a ‘partial-birth’. That’s a term made up by people like these anti-choice folks that you had on the radio. The fetus—I mean, it is a termination of the fetal life, there’s no question about that. And the fetus, is, before the procedure begins, the anesthesia that they give the woman already causes the demise of the fetus. That is, it is not true that they’re born partially. That is a gross distortion, and it’s really a disservice to the public to say this.²²

Dr. Mary Campbell of Planned Parenthood also circulated a “fact sheet” titled, “H.R. 1833, Medical Questions and Answers,” which includes this statement:

Q: When does the fetus die?

A: The fetus dies of an overdose of anesthesia given to the mother intravenously. A dose is calculated for the mother’s weight which is 50 to 100 times the weight of the fetus. The mother gets the anesthesia for each insertion of the dilators, twice a day. This induces brain death in a fetus in a matter of minutes. Fetal demise therefore occurs

²⁰ Letter from Watson A. Bowes Jr., M.D., to Congressman Charles T. Canady (July 11, 1995) [Hereinafter Bowes] (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

²¹ Later Abortions: Questions and Answers, National Abortion Federation, July 11, 1995.

²² Interview with Kate Michelman, President of National Abortion Rights Action League, on KMOX-AM, in St. Louis, MO (Nov. 2, 1995).

at the beginning of the procedure while the fetus is still in the womb.”²³

The press accepted abortion advocates’ claims as fact and promulgated the anesthesia myth. USA Today claimed “The fetus dies from an overdose of anesthesia given to its mother.” And the St. Louis Post-Dispatch reported “The fetus usually dies from the anesthesia administered to the mother before the procedure begins.”

The New York Daily News editorialized on December 15, 1995:

The fetus is partially removed from the womb, its head collapsed and brain suctioned out so it will fit through the birth canal. The anesthesia given to the woman kills the fetus before the full procedure takes place. But you won’t hear that from the anti-abortion extreme. It would have everybody believe the fetus is dragged alive from the womb of a woman just weeks away from birth. Not true.

Syndicated columnist Ellen Goodman wrote in November of 1995 that, if one relied on statements by supporters of the bill, “You wouldn’t even know that anesthesia ends the life of such a fetus before it comes down the birth canal.”

However, Dr. Norig Ellison, the president of the American Society of Anesthesiologists says this claim has “absolutely no basis in scientific fact.”²⁴ Dr. David Birnbach, the president-elect of the Society for Obstetric Anesthesia and Perinatology, says it is “crazy”²⁵ because “anesthesia does not kill an infant if you don’t kill the mother.”²⁶ The American Medical News reported the controversy in a January 1, 1996 article which stated, “Medical experts contend the claim is scientifically unsound and irresponsible, unnecessarily worrying pregnant women who need anesthesia. But while some are now qualifying their assertion that anesthesia induces fetal death, they are not backing away from it.”²⁷

The creation of this anesthesia myth is particularly unconscionable and could pose a threat to the health of mothers. Dr. Ellison expressed this concern, “I am deeply concerned * * * that widespread publicity * * * may cause pregnant women to delay necessary and perhaps life-saving medical procedures, totally unrelated to the birthing process, due to misinformation regarding the effect of anesthetics on the fetus.”²⁸ He also pointed out that, “Annually more than 50,000 pregnant women receive anesthesia while undergoing necessary, even lifesaving, surgical procedures. If the concept that anesthesia could produce neurologic demise of the fetus were not refuted, pregnant women might refuse to undergo necessary procedures.”²⁹

Because the creation of the anesthesia myth might endanger women’s lives and health, the House Judiciary Subcommittee on the Constitution held a hearing in the 104th Congress on March

²³ “H.R. 1833: Medical Questions and Answers,” Mary Campbell, M.D., Planned Parenthood at 3,4.

²⁴ Diane Gianelli, “Anesthesiologists Questions Claims in Abortion Debate,” American Medical News, Jan. 1, 1996 at 1.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Norig Ellison, M.D., “Testifying Before Congressional Committees,” American Society of Anesthesiologists Newsletter, Jan. 1996 at 1.

21, 1996 to examine the effect of anesthesia administered to a mother during a partial-birth abortion. At the hearing, Planned Parenthood staff distributed a letter from Dr. Mitchell Creinin, an obstetrician-gynecologist, that stated: “As a physician, I can assure you that there is no such thing as pain to a fetus; plain and simple, pain does not exist to a fetus. Any doctor who states otherwise is flat out lying and twisting medical data.”³⁰

Judiciary Committee Chairman Henry Hyde read this statement to four anesthesiologists, experts in pain management, who were testifying at the hearing. Dr. Norig Ellison, the president of the American Society of Anesthesiologists, responded, “I read that letter over there, and I find it inconceivable that any physician would make a—would attach his name to a letter like that.”³¹ Dr. David Birnbach, the president of the Society for Obstetric Anesthesia and Perinatology, responded:

Having administered anesthesia for fetal surgery, I know that on occasion we need to administer anesthesia directly to the fetus because even at these early ages the fetus moves away from the pain of the stimulation. So I cannot agree at all.³²

Dr. David Chestnut, chairman of the Department of Anesthesiology at the University of Alabama School of Medicine and the author of a book on Obstetric Anesthesiology, also responded:

I agree with my colleagues and would also note that at the University of California at San Francisco, which is the leading center in the world for performance of fetal surgery, that even though the mother is receiving heavy, deep doses of general anesthesia, those physicians give additional anesthetic drugs directly to the fetus during surgery in order to make certain that the fetus does not experience pain during the procedure.³³

Dr. Wright, the medical director of Egleston Children’s Hospital at Emory University, was the last expert to respond to the letter. She said:

There is no science to substantiate that letter. I believe all of us submitted to you journal articles that have been reviewed by our peers—and I make particular reference to a landmark article in 1987 in *The New England Journal*, and their phrase was, “there is no doubt about cortical function and the perception of pain in children of this age.”³⁴

Clearly, anesthesia administered during a partial-birth abortion neither kills the unborn child nor alleviates his or her pain. But despite the widespread circulation and the egregious nature of the falsehood that anesthesia harms unborn children, the National Abortion Federation, the National Abortion Rights Action League

³⁰ Letter from Mitchell Creinin, M.D., to Congressman Charles T. Canady (March 20, 1996) (on file with the Subcomm. on the Const. of the House Comm. on the Judiciary).

³¹ Hearing on the Effects of Anesthesia During a Partial-Birth Abortion before the Subcomm. on the Const. of the House Comm. on the Judiciary, 104th Congress, 2nd Session (1996), at 288.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

and Planned Parenthood, an organization which purports to care for women's health, have taken no steps to correct their information or inform women that anesthesia administered to a mother does not kill her unborn child.

Abortion advocates' statements that the child involved in a partial-birth abortion dies before partial-delivery are clearly inconsistent with prior statements by abortionists who perform the procedure, eyewitness accounts, and the professional judgment of medical specialists. Such claims betray the desperation of abortion advocates who know that partially delivering a live baby and then killing him cannot be justified to the American public. Instead of defending partial-birth abortion, they attempt to convince the public that it does not exist.

Abortion advocates also attacked medical illustrations of the partial-birth abortion procedure. On June 12, 1995 the National Abortion Federation sent a letter to Members of Congress in which NAF stated that it relied on "complete and accurate information from the physicians involved"³⁵ in performing partial-birth abortions. The letter claimed that medical illustrations depicting partial-birth abortion distributed by the sponsors of the Partial-Birth Abortion Ban Act were "highly imaginative" and "misleading."³⁶ However, Dr. Martin Haskell, one of the physicians on which NAF relied, told the American Medical News that the diagrams of the procedure were accurate "from a technical point of view."³⁷

Furthermore, Professor Watson Bowes, a distinguished physician and prominent authority on fetal and maternal medicine, reviewed Dr. Haskell's paper describing the partial-birth abortion procedure and confirmed that the illustrations are "an accurate representation of the procedure described in the article by Dr. Haskell."³⁸ Even Dr. Courtland Robinson, testifying on behalf of NAF, admitted that the illustrations were accurate during a 1995 House Judiciary Constitution Subcommittee hearing on partial-birth abortion. When Dr. Robinson was asked if he thought the illustrations were technically correct, he stated, "That is exactly probably what is occurring at the hands of the two physicians involved."³⁹

After the 1995 hearing on partial-birth abortion, NAF sent a letter to Constitution Subcommittee Chairman Charles T. Canady with testimony attached. In the testimony, NAF again stated that it relied on "complete and accurate information from the physicians involved"⁴⁰ in performing partial-birth abortions. One of these physicians was Dr. Martin Haskell. In their testimony, NAF decried the use of the medical illustrations of the partial-birth abortion procedure because "the drawings depict a perfectly formed, healthy fetus when, in reality, the majority of these procedures are performed in cases of severe fetal abnormality."⁴¹

³⁵ Letter from Vicki Saporta, Executive Director, National Abortion Federation, to Members of the U.S. House of Representatives (June 12, 1995) (on file with the Subcom. on the Const. of the House Comm. on the Judiciary).

³⁶ *Id.*

³⁷ Gianelli, *supra* note 13.

³⁸ Bowes, *supra* note 20.

³⁹ Hearing, *supra* note 6 at 89.

⁴⁰ Letter from Vicki Saporta, Executive Director, National Abortion Federation, to Chairman Charles T. Canady (June 27, 1995) (on file with the Subcom. on the Const. of the House Comm. on the Judiciary).

⁴¹ *Id.*

However, the illustrations were drawn based on Dr. Haskell's paper, "Second Trimester D&X, 20 Weeks and Beyond," that was delivered at the National Abortion Federation's own Fall Risk Management Seminar. In fact, the illustrations were drawn to scale to depict a 20 to 24 week old child—the same age at which Dr. Haskell performs the partial-birth abortion procedure on healthy children of healthy mothers. Dr. Haskell told the American Medical News: "And I'll be quite frank: most of my abortions are elective in that 20–24 week range. * * * In my particular case, probably 20% are for genetic reasons. And the other 80% are purely elective."⁴²

Clearly, the medical illustrations, while discomfoting, are accurate.

In the event they cannot convince the public that the partial-birth abortion procedure does not exist, abortion advocates claim that the procedure does exist, but it is rare and only used in limited circumstances. In fact, the National Abortion Federation, the National Abortion Rights Action League and Planned Parenthood have falsely claimed—from the beginning of the debate over partial-birth abortion—that it is a rare procedure performed only in extreme cases involving severely handicapped children, serious threats to the life of the mother, or the potential destruction of her future fertility.

Once again, this claim is contradicted by the evidence. The writings of both Dr. Haskell and Dr. McMahon advocate partial-birth abortion as the method they prefer for all late-term— fifth month of pregnancy or later—abortions.⁴³ Dr. Haskell told the AMNews that the vast majority of the partial-birth abortions he performs are elective. He stated, "And I'll be quite frank: most of my abortions are elective in that 20-24 week range. * * * In my particular case, probably 20% are for genetic reasons. And the other 80% are purely elective. * * *"⁴⁴

Dr. McMahon used the partial-birth abortion method through the entire 40 weeks of pregnancy. He claimed that most of the abortions he performed were "non-elective," but his definition of "non-elective" was extremely broad. Dr. McMahon sent a letter to the Constitution Subcommittee in which he described abortions performed because of the mother's youth or depression as "non-elective."⁴⁵

Dr. McMahon also sent the subcommittee a graph which showed the percentage of "flawed fetuses" that he aborted using the partial-birth abortion method. The graph shows that even at 26 weeks of gestation half the babies that Dr. McMahon aborted were perfectly healthy and many of the babies he described as "flawed" had conditions that were compatible with long life, either with or without a disability. For example, Dr. McMahon listed nine partial-birth abortions performed because the baby had a cleft lip.⁴⁶

⁴² Bolsen, supra note 15.

⁴³ Haskell, supra note 4 at 27; Letter from James T. McMahon, M.D., to the Subcomm. on the Constitution of the House Comm. on the Judiciary (June 6, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

⁴⁴ Bolsen, supra note 17.

⁴⁵ McMahon, supra note 18.

⁴⁶ Id.

The National Abortion Federation in the past recognized that partial-birth abortions are performed for many reasons other than to save the life of the mother or for fetal abnormalities. In a 1993 memorandum to its members, the group counseled members not to apologize for this “legal procedure” and stated, “There are many reasons why women have late abortions: life endangerment, fetal indications, lack of money or health insurance, social-psychological crises, lack of knowledge about human reproduction, etc.”⁴⁷

On September 15, 1996 *The Sunday Record*, a newspaper in New Jersey, reported that “in New Jersey alone, at least 1,500 partial-birth abortions are performed each year—three times the supposed national rate. Moreover, doctors say only a “minuscule amount” are for medical reasons.”⁴⁸ This article refuted the abortion advocates claims that partial-birth abortion was both rare and only performed in extreme medical circumstances. The article quotes an abortionist at the New Jersey clinic that performs the 1,500 partial-birth abortions every year as describing their patients who come in during the fifth and sixth months of pregnancy: “Most are Medicaid patients, black and white, and most are for elective, not medical reasons: people who didn’t realize, or didn’t care, how far along they were. Most are teenagers.”⁴⁹

However, abortion advocates have continued to disseminate false information to Congress, the press and the public. As recently as February 25, 1997 the home page of the National Abortion Federation informed journalists and other web visitors, “This procedure is used only in about 500 cases per year, generally after 20 weeks of pregnancy, and most often when there is a severe fetal anomaly or maternal health problem detected late in pregnancy.”⁵⁰

But, the same week the NAF web page misinformed the public, *The New York Times* reported that an abortion rights advocate admitted that he lied about partial-birth abortion. Ron Fitzsimmons, the executive director of the second largest “trade association” of abortion providers in the country, said that he intentionally, “lied through [his] teeth,” when he repeated these claims to a “Nightline” camera in 1995.⁵¹

The New York Times reported that Mr. Fitzsimmons “says the procedure is performed far more often than his colleagues have acknowledged, and on healthy women bearing healthy fetuses.”⁵² “The abortion rights folks know it,”⁵³ he said. *The Times* took some of its information from an *American Medical News* article in which Mr. Fitzsimmons was interviewed. Fitzsimmons told the *American Medical News* that pro-abortion spokespersons should drop their “spins” and “half-truths.”⁵⁴ He explained that the disinformation

⁴⁷ Letter from Barbara Radford, Executive Director, National Abortion Federation, to National Abortion Federation members (June 18, 1993) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary) (emphasis added).

⁴⁸ Ruth Padower, “The Facts on Partial-Birth Abortion,” *The Sunday Record*, Sept. 15, 1996, section RO at 1.

⁴⁹ *Id.*

⁵⁰ National Abortion Federation: “The Voice of Abortion Providers Web Site”, <http://www.prochoice.org/naf>, Feb. 25, 1997.

⁵¹ David Stout, “An Abortion Rights Advocate Says He Lied About Procedure”, *The New York Times*, Feb. 26, 1997 at A11.

⁵² *Id.*

⁵³ Diane Gianelli, “Medicine Adds to Debate on Late Term Abortion”, *American Medical News*, March 3, 1997 at 54.

⁵⁴ *Id.*

has hurt the abortionists he represents, and said, “When you’re a doctor who does these abortions and the leaders of your movement appear before Congress and go on network news and say these procedures are done in only the most tragic of circumstances, how do you think it makes you feel? You know they’re primarily done on healthy women and healthy fetuses, and it makes you feel like a dirty little abortionist with a dirty little secret.”⁵⁵

Ron Fitzsimmons’ admissions make clear that the pro-abortion lobby has engaged in a concerted and ongoing effort to deceive the Congress and the American people about partial-birth abortion. They attempted to hide the truth about partial-birth abortion because they know the American people would be outraged by the facts.

After Mr. Fitzsimmons admitted that he had lied, he offered some advice to his pro-abortion colleagues. He said, “The pro-choice movement has lost a lot of credibility during this debate, not just with the general public, but with our pro-choice friends in Congress. * * * I think we should tell them the truth, let them vote and move on.”⁵⁶

The statements of the abortionists themselves and the admissions of Ron Fitzsimmons, make it clear that partial-birth abortions are performed primarily in the fifth and sixth month of pregnancy on thousands of healthy children with healthy mothers every year.

Based on the false claims of abortion advocates, President Clinton has offered to “compromise” on the Partial-Birth Abortion Ban Act of 1997 by signing a ban on abortion after “viability” unless the abortionist determines that the procedure is needed for the life or “health” of the mother. This so-called “compromise” proposal is irrelevant to partial-birth abortion.

First, the proposal would do nothing to stop abortionists from partially delivering and then killing the healthy children of healthy mothers in the fifth and sixth months of pregnancy which is when the vast majority of the thousands of partial-birth abortions occur. While some babies who are born prematurely in the fifth and sixth months of pregnancy live, the President’s proposal leaves the determination of viability up to the abortionist himself. Under the proposal, a prosecutor would have to show that the particular child who was aborted was viable. It would be extremely difficult to show beyond a reasonable doubt that a child during the fifth or sixth month of pregnancy—that is before the third trimester—would have lived. Therefore, the proposal would allow partial-birth abortion during the fifth and sixth months of pregnancy on the healthy children of healthy mothers.

With regard to third trimester or post-viability abortions, the proposal’s “health” exception would effectively permit all abortions. In *Doe v. Bolton*, the companion case to *Roe v. Wade*, the Supreme Court defined the word “health” in the context of abortion as, “all factors—physical, emotional, psychological, familial and the woman’s age—relevant to the well-being of the patient.”⁵⁷ Under the President’s proposal, if a woman was depressed or underage, she

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ *Doe v. Bolton*, 410 U.S. 179 at 192 (1973).

would be entitled to a partial-birth abortion even when her child could survive outside the womb.

When President Clinton vetoed H.R. 1833, the Partial-Birth Abortion Ban Act of 1995, he claimed that unless partial-birth abortion was performed in some situations women would be “eviscerated” or “ripped to shreds” so they “could never have another baby.”⁵⁸ That claim has been proven to be completely false. When he was interviewed in the American Medical News, former Surgeon General C. Everett Koop said, “in no way can I twist my mind to see that the late-term abortion as described—you know, partial birth, and then destruction of the unborn child before the head is born—is a medical necessity for the mother. It certainly can’t be a necessity for the baby. So I am opposed to * * * partial birth abortions.”⁵⁹ In addition, a group of over 400 obstetrician-gynecologists and maternal-fetal specialists have unequivocally stated, “partial-birth abortion is never medically indicated to protect a woman’s health or her fertility. In fact, the opposite is true: The procedure can pose a significant and immediate threat to both the pregnant woman’s health and her fertility.”⁶⁰

Not only are obstetrician-gynecologists and maternal-fetal specialists concerned that women may be harmed by partial-birth abortion, but a late-term abortionist has also expressed concern about the safety of the procedure. Warren Hern, M.D., an abortionist who wrote the nation’s most widely used book on abortion procedures, said, “I have very serious reservations about this procedure.* * * You really can’t defend it. I’m not going to tell somebody else that they should not do this procedure. But I’m not going to do it.”⁶¹ He continued, “I would dispute any statement that this is the safest procedure to use.”⁶²

There is no evidence that partial-birth abortion would ever be necessary to save the life of a mother. Nevertheless, out of an abundance of caution, H.R. 929 provides for such a situation.

CONSTITUTIONAL ANALYSIS

Although the Supreme Court in *Roe v. Wade* held that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,”⁶³ the Court has never addressed the constitutional status of those who are in the process of being born. However, *Roe* did distinguish between a child who is “unborn” and “being born” when it noted that a Texas statute prohibiting killing a child during the birth process had not been challenged. The statute, which was recodified in 1993, stated:

“Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been

⁵⁸ News Conference, William J. Clinton in Milwaukee, WI, May 23, 1996.

⁵⁹ Diane Gianelli and Christina Kent, “The View from Mount Koop”, American Medical News Interview with C. Everett Koop, M.D. August 19, 1996 at 3.

⁶⁰ Nancy Romer, M.D.; Pamela Smith, M.D.; Curtis Cook, M.D.; Joseph DeCook, M.D., “Partial Birth Abortion is Bad Medicine”, Wall Street Journal, Sept. 19, 1996.

⁶¹ Diane Gianelli, “Outlawing Abortion Method”, American Medical News, Nov. 20, 1995 at 3.

⁶² Id.

⁶³ 410 U.S. at 158.

born alive, shall be confined in the penitentiary for life or for not less than five years.”⁶⁴

“Parturition” is defined in Webster’s Dictionary as “the act or process of giving birth to offspring.”

The child involved in a partial-birth abortion is in the process of being born. In fact, in the “D & X,” “Intact D & E,” and “Intra-uterine Cranial Decompression” methods of abortion which are covered by the “Partial-Birth Abortion Ban Act” the child’s entire body, except the head, is delivered before the child is killed. While the “unborn” child is not considered by the Supreme Court to be a constitutional person, the constitutional status of the child in the process of being born has not been considered by the Court.

In sum, there is no substantive difference between a child in the process of being born and that same child when he or she is born. The only distinguishing characteristic is locale. Clearly, the child is as much a “person” when in the process of being born as that child is when the process is complete.

However, even if the Court somehow concluded that a partially-born child is not a person under the Fourteenth Amendment, the “Partial-Birth Abortion Ban Act” satisfies the requirements of *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶⁵

The Supreme Court in *Roe* created a fundamental right for a woman to choose to have an abortion. The Court established a trimester framework during which the State’s interests in maternal health and potential life became increasingly compelling, and therefore, the State’s ability to regulate abortion increased each trimester of pregnancy.⁶⁶ The Court explicitly rejected the argument that the right to an abortion is absolute and that a woman “is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.”⁶⁷ While *Roe* is popularly regarded as having established a woman’s “Right” to have an abortion, it also recognized the State’s obligation to observe both the interest in preserving the mother’s health and “still another important and legitimate interest in protecting the potentiality of human life.”⁶⁸

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed in a plurality opinion the essential holding of *Roe* but rejected the trimester framework. The Court stated that, “The woman’s liberty is not so unlimited * * * that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”⁶⁹

The *Casey* Court established a bifurcated approach to determine whether an abortion statute is constitutional, drawing a line at fetal viability.⁷⁰ Subsequent to viability of the fetus, the govern-

⁶⁴ 410 U.S. at 117 n.1, citing Art. 1195 of Chapter 9 of Title 15 in the Texas Penal Code.

⁶⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁶⁶ 410 U.S. at 162-163.

⁶⁷ 410 U.S. at 153.

⁶⁸ 410 U.S. at 162.

⁶⁹ 505 U.S. at 869.

⁷⁰ 505 U.S. at 872.

ment can prohibit abortion except in cases where the abortion is needed to protect the life or health of the mother.⁷¹

Before viability, the *Casey* Court established the “undue burden” test. The threshold question of that test is whether the abortion statute imposes an “undue burden” on a mother’s right to choose to have an abortion.⁷² An “undue burden” is placed on the mother if the purpose or effect of the statute “is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁷³

If the statute does not impose an “undue burden” on the mother, rational basis scrutiny is applied.⁷⁴ The statute is constitutional if it reasonably relates to a legitimate governmental purpose.

Applying the bifurcated approach of the *Casey* decision, H.R. 929, the “Partial-Birth Abortion Ban Act of 1997,” would be constitutional both before and after viability. H.R. 929 is a regulation on abortion. The Act would prohibit only abortions “in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.”⁷⁵

After viability, the government under both *Roe* and *Casey* may prohibit all abortions, except those that are necessary to save the life or health of the mother. *Casey* reemphasized a point which had been neglected by some of the Court’s post-*Roe* abortion jurisprudence; namely, that *Roe* compelled the State, post-viability, to consider the “important and legitimate interest in protecting the potentiality of human life.”⁷⁶ That element of the *Roe* decision, according to *Casey*, had “been given too little acknowledgment and implementation by the Court in its subsequent cases.”⁷⁷ *Casey* further observed that “the independent existence of the second life can in reason and all fairness be the object of state protection that overrides the rights of the woman.”⁷⁸ Moreover, “in some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”⁷⁹

Therefore, after viability the State certainly may, and arguably has a duty to, prohibit partial-birth abortion, a method of abortion preferred by only a handful of abortionists⁸⁰ that is particularly painful and offensive to humanity. H.R. 929 leaves alternative procedures, including other methods of abortion, available for a physician to use in a case where a mother’s life or health is threatened by bringing her child to term. Of course, it also provides an exception for instances where the mother’s life is endangered.

Before viability, *Casey* allows regulation of abortion that is reasonably related to a legitimate state interest, unless the regulation

⁷¹ 410 U.S. at 164–165 and 505 U.S. at 872.

⁷² 505 U.S. at 874. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 463 (1983) (O’Connor, J., dissenting).

⁷³ 505 U.S. at 877.

⁷⁴ *id.* See also 462 U.S. at 463.

⁷⁵ H.R. 929, *supra* note 11.

⁷⁶ 410 U.S. at 162.

⁷⁷ 505 U.S. at 871.

⁷⁸ 505 U.S. at 870.

⁷⁹ *Id.*

⁸⁰ Diane M. Gianelli, “Shock-tactic Ads Target Late-term Abortion Procedure,” *American Medical News*, July 5, 1993, at p.3.

places an “undue burden” on a woman’s right to choose to have an abortion.⁸¹

The “Partial-Birth Abortion Ban Act” does not place a “substantial obstacle” in the path of a mother seeking to abort her child. The Act prohibits only abortions in which the child is partially delivered alive and then killed. It does not prohibit alternative and, in fact, more frequently used late-term abortion techniques. Partial-birth abortions are not performed due to any special circumstances of a mother or her pregnancy. The procedure is used by a handful of abortionists who “routinely” perform the procedure late in pregnancy.⁸²

Proponents of the partial-birth abortion procedure wrongly assert that (1) the procedure is necessary in some cases to protect the life and “health” of the mother, and (2) therefore the procedure cannot constitutionally be banned. There is, in fact, no credible evidence that partial-birth abortion is ever necessary to protect the life or health of the mother. Moreover, there is no evidence that the procedure is safer than alternative procedures, including delivery of the child alive. The Supreme Court in *Casey* required that, post-viability, a law adequately provide accommodation for “the preservation of the life or health of the mother.”⁸³ However, *Casey* did not preclude the banning of merely one cruel procedure, so long as there were other procedures available to protect the life and health of the mother.

Partial-birth abortion proponents misread two pre-*Casey* decisions in support of their argument that no “health-saving” procedure may be banned, even though alternatives exist. The first misapplied decision is *Planned Parenthood of Missouri v. Danforth*,⁸⁴ where the Court struck down a ban on “saline or other solution” abortions, concluding that such a ban “forces a woman and her physician to terminate the pregnancy by methods more dangerous to her health than the method outlawed.”⁸⁵ The Court found the ban on saline abortions to be “an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks.”⁸⁶

Danforth is, of course, factually distinguishable. There, Missouri proposed to ban the most prevalent form of abortion. Further, evidence was produced in *Danforth* that there were no commonly used alternative procedures available. H.R. 929, on the other hand, seeks to prohibit only abortions where the child is partially delivered alive and then killed, a procedure which is employed by very few abortionists, leaving open a number of other procedures.

Furthermore, *Danforth*’s holding has been substantially superseded by *Casey*, which held that reasonable regulations can be applied in the interest of the unborn child throughout the pregnancy. *Danforth* stated that in the first trimester the decision to abort a child rested solely with the woman and her physician, “without interference from the State.”⁸⁷ *Casey* discredited that element of

⁸¹ 505 U.S. at 877.

⁸² Giannelli, *supra* note 46 and Haskell, *supra* note 4 at 28.

⁸³ 505 U.S. at 879.

⁸⁴ 428 U.S. 52 (1976).

⁸⁵ 428 U.S. at 79.

⁸⁶ 428 U.S. at 79.

⁸⁷ 428 U.S. at 61.

Danforth, labeling such a view an “overstatement” and observing that “[n]ot all governmental intrusion is of necessity unwarranted.”⁸⁸

The second decision on which proponents of partial-birth abortion incorrectly rely is *Thornburg v. American College of Obstetricians & Gynecologists*.⁸⁹ In *Thornburg*, Pennsylvania sought to require abortionists to employ the post-viability abortion technique that would provide the best opportunity for the unborn child to be aborted alive, unless that technique presented a “significantly greater medical risk” to the life or health of a woman.⁹⁰ The Court held that Pennsylvania could not compel the mother to “bear an increased medical risk in order to save her viable fetus.”⁹¹

The Pennsylvania statute invalidated in *Thornburg* sought to impose a limiting standard of care applicable to all post-viability abortions. It was, accordingly, far more restrictive upon a doctor and a patient than H.R. 929, which bans merely one particularly gruesome procedure.

Furthermore, to the extent that *Thornburg* overlooked *Roe*’s holding that a State has a legitimate interest in promoting the potential life of the unborn, it was overruled by *Casey*.⁹² *Thornburg*’s holding survives *Casey* only insofar as it stands for the proposition that prior to viability the State may not place an “undue burden” on a woman’s decision to have an abortion.

Partial-birth abortion proponents incorrectly hold up *Danforth* and *Thornburg* as controlling Supreme Court precedent when, in fact, the prevailing abortion regulation standard is set by *Casey*. The proponents also ignore a central holding of *Casey*, that there are two lives in the balance throughout pregnancy. Their claim that a woman has an unfettered choice of any abortion technique, at any time, for any reason is simply not grounded in the Constitution.

Banning this particularly heinous procedure does not place an “undue burden” on a mother’s right to choose to have an abortion. Since H.R. 929 does not impose an “undue burden,” rational basis scrutiny is applied to determine whether H.R. 929 is constitutional.

Rational basis scrutiny requires H.R. 929 to be reasonably related to a legitimate government interest. The Supreme Court has recognized many legitimate interests on which abortion statutes have been based. In *Roe*, the Court recognized that the government has legitimate interests in “safeguarding health, maintaining medical standards, and in protecting potential life.”⁹³ The Court has also expressly recognized as legitimate interests: protecting immature minors,⁹⁴ promoting general health,⁹⁵ promoting family integrity,⁹⁶ and encouraging childbirth over abortion.⁹⁷

⁸⁸ 505 U.S. at 875.

⁸⁹ 476 U.S. 747 (1986).

⁹⁰ 476 U.S. at 768.

⁹¹ 476 U.S. at 769.

⁹² 505 U.S. at 870.

⁹³ 410 U.S. at 154.

⁹⁴ 462 U.S. at 427, n. 10 and *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 489 (1983).

⁹⁵ 462 U.S. at 430, n. 13 and 462 U.S. at 489.

⁹⁶ 462 U.S. at 443, n. 32.

⁹⁷ 462 U.S. at 444, n. 33.

H.R. 929 serves several legitimate governmental interests, some of which are mentioned above. Among the important interests served by banning partial-birth abortion is the government's interest in protecting human life. During a partial-birth abortion a child is killed after he is partially delivered from his mother's womb. The difference between partial-birth abortion and infanticide is a mere three inches. The "Partial-Birth Abortion Ban Act" would protect children from being killed during the delivery process.

The Act also serves the interest of protecting the dignity of human life. During a partial-birth abortion, the abortionist holds a helpless child's body in his hands and forces blunt scissors through the back of the child's skull. The abortionist's actions completely disregard the humanity of the child and strip that child of the dignity normally accorded members of the human race. Allowing an abortionist to kill a child in this manner reduces society's respect for human life.

An additional legitimate interest is the prevention of both moral and legal confusion about the role of physicians in our society. During childbirth, the physician has two patients. The physician works to protect both mother and child and is responsible morally and legally for both of his patients. In a partial-birth abortion, the child's life is taken during a breach delivery. A procedure which obstetricians use in some circumstances to bring a healthy child into the world is perverted to result in a dead child. The physician, traditionally trained to do everything in his power to assist and protect both mother and child during the birth process deliberately kills the child in the birth canal. A doctor holding a child in the palm of his hand and deliberately killing that child offends society's concept of the role of a physician. The "Partial-Birth Abortion Ban Act" would put an end to this heinous act.

The prevention of cruel and inhumane treatment is another interest furthered by the "Partial-Birth Abortion Ban Act." As discussed above, a child feels excruciating pain during a partial-birth abortion. Just as the government has an interest in protecting animals from cruel treatment, the government has an even greater interest in protecting children from cruel treatment.

In conclusion, H.R. 929 is reasonably related to these and other legitimate government interests. The Partial-Birth Abortion Ban Act, which prohibits merely one gruesome abortion procedure, is constitutionally permissible in that it does not impose an undue burden upon a woman seeking a pre-viability abortion; it leaves open alternative procedures to protect the "health" of the mother; and it includes an exception to allow the procedure in the unlikely event it is necessary to save the life of the mother. H.R. 929 is both constitutionally permissible, and it is morally imperative.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of joint hearings on H.R. 929 with the Senate Judiciary Committee on March 11, 1997. Testimony was received from the following witnesses: Renee Chelian, President, National Coalition of Abortion Providers; Kate Michelman, National Abortion and Reproductive Rights Action League; Doug Johnson, Legislative Director, National Right to Life Committee; Helen Alvare, Director of Planning and

Information, Secretariat for Pro-Life Activities, National Conference of Catholic Bishops; Vicki Saporta, Executive Director, National Abortion Federation; Gloria Feldt, President, Planned Parenthood Federation of America; Curtis Cook, M.D., Maternal Fetal Medicine, Butterworth Hospital, Michigan State College of Human Medicine; Maureen Britell; Eileen Sullivan; and Whitney Goin.

COMMITTEE CONSIDERATION

On March 12, 1997, the Committee met in open session and ordered reported the bill H.R. 929 with amendments by a rollcall vote of 20 to 11, a quorum being present. The Committee adopted three amendments by voice votes.

VOTES OF THE COMMITTEE

The Committee considered the following amendments.

1. An amendment in the nature of a substitute that would ban post-viability abortions unless the abortionist determines the mother's life or "health" is at risk was offered by Mr. Scott. The amendment was defeated by a 13-18 rollcall vote.

| YEAS | NAYS |
|-----------------|-------------------|
| Mr. Conyers | Mr. Hyde |
| Mr. Frank | Mr. Sensenbrenner |
| Mr. Schumer – | Mr. McCollum |
| Mr. Boucher | Mr. Gekas |
| Mr. Nadler | Mr. Smith (TX) |
| Mr. Scott | Mr. Schiff |
| Mr. Watt | Mr. Gallegly |
| Ms. Lofgren | Mr. Canady |
| Ms. Jackson-Lee | Mr. Inglis |
| Mr. Meehan | Mr. Buyer |
| Mr. Delahunt | Mr. Bono |
| Mr. Wexler | Mr. Bryant (TN) |
| Mr. Rothman | Mr. Chabot |
| | Mr. Barr |
| | Mr. Jenkins |
| | Mr. Hutchinson |
| | Mr. Pease |
| | Mr. Cannon |

2. An amendment was offered by Mr. Frank concerning the interstate commerce provision. The amendment was defeated by a 11-16 rollcall vote.

| YEAS | NAYS |
|-----------------|----------------|
| Mr. Conyers | Mr. Hyde |
| Mr. Frank | Mr. McCollum |
| Mr. Nadler | Mr. Gekas |
| Mr. Scott | Mr. Smith (TX) |
| Mr. Watt | Mr. Schiff |
| Ms. Lofgren | Mr. Canady |
| Ms. Jackson-Lee | Mr. Inglis |
| Mr. Meehan | Mr. Goodlatte |
| Mr. Delahunt | Mr. Buyer |
| Mr. Wexler | Mr. Bono |

| | |
|-------------|-----------------|
| Mr. Rothman | Mr. Bryant (TN) |
| | Mr. Chabot |
| | Mr. Barr |
| | Mr. Jenkins |
| | Mr. Pease |
| | Mr. Cannon |

3. An amendment was offered by Ms. Jackson Lee to allow all pre-viability partial-birth abortions and to add an exception to the general prohibition of partial-birth abortions to allow the procedure if the abortionist determines that a mother's life or "health" is at risk. The amendment was defeated by a 13–16 rollcall vote.

| YEAS | NAYS |
|-----------------|-------------------|
| Mr. Conyers | Mr. Hyde |
| Mr. Frank | Mr. Sensenbrenner |
| Mr. Schumer | Mr. McCollum |
| Mr. Nadler | Mr. Gekas |
| Mr. Scott | Mr. Gallegly |
| Mr. Watt | Mr. Canady |
| Ms. Lofgren | Mr. Inglis |
| Ms. Jackson-Lee | Mr. Goodlatte |
| Ms. Waters | Mr. Bono |
| Mr. Meehan | Mr. Bryant |
| Mr. Delahunt | Mr. Chabot |
| Mr. Wexler | Mr. Barr |
| Mr. Rothman | Mr. Jenkins |
| | Mr. Hutchinson |
| | Mr. Pease |
| | Mr. Cannon |

4. An amendment was offered by Mr. Frank to add an exception to the general prohibition against partial-birth abortion for the "physical health" of the mother. The amendment was defeated by a rollcall vote of 12–16.

| YEAS | NAYS |
|-----------------|-------------------|
| Mr. Conyers | Mr. Hyde |
| Mr. Frank | Mr. Sensenbrenner |
| Mr. Schumer | Mr. McCollum |
| Mr. Nadler | Mr. Gekas |
| Mr. Scott | Mr. Gallegly |
| Mr. Watt | Mr. Canady |
| Ms. Lofgren | Mr. Inglis |
| Ms. Jackson-Lee | Mr. Goodlatte |
| Ms. Waters | Mr. Bono |
| Mr. Delahunt | Mr. Bryant (TN) |
| Mr. Wexler | Mr. Chabot |
| Mr. Rothman | Mr. Barr |
| | Mr. Jenkins |
| | Mr. Hutchinson |
| | Mr. Pease |
| | Mr. Cannon |

5. An amendment was offered by Mr. Nadler to remove the civil cause of action from the Act. The amendment was defeated by a rollcall vote of 11–16.

YEAS

Mr. Conyers
 Mr. Frank
 Mr. Schumer
 Mr. Nadler
 Mr. Scott
 Mr. Watt
 Ms. Lofgren
 Ms. Waters
 Mr. Delahunt
 Mr. Wexler
 Mr. Rothman

NAYS

Mr. Hyde
 Mr. Sensenbrenner
 Mr. McCollum
 Mr. Gekas
 Mr. Gallegly
 Mr. Canady
 Mr. Inglis
 Mr. Goodlatte
 Mr. Bono
 Mr. Bryant (TN)
 Mr. Chabot
 Mr. Barr
 Mr. Jenkins
 Mr. Hutchinson
 Mr. Pease
 Mr. Cannon

6. An amendment was offered by Mr. Frank deleting the criminal penalties provision from the Act. The amendment was defeated by a rollcall vote of 11–17.

AYES

Mr. Conyers
 Mr. Frank
 Mr. Schumer
 Mr. Nadler
 Mr. Scott
 Mr. Watt
 Ms. Lofgren
 Ms. Waters
 Mr. Delahunt
 Mr. Wexler
 Mr. Rothman

NAYS

Mr. Hyde
 Mr. Sensenbrenner
 Mr. McCollum
 Mr. Gekas
 Mr. Schiff
 Mr. Canady
 Mr. Inglis
 Mr. Goodlatte
 Mr. Buyer
 Mr. Bono
 Mr. Bryant
 Mr. Chabot
 Mr. Barr
 Mr. Jenkins
 Mr. Hutchinson
 Mr. Pease
 Mr. Cannon

7. An amendment was offered by Mr. Scott to expand the exception for life of the mother in the Act. The amendment was defeated by a 11–20 rollcall vote.

YEAS

Mr. Conyers
 Mr. Frank
 Mr. Schumer
 Mr. Boucher
 Mr. Nadler
 Mr. Scott
 Mr. Watt
 Ms. Jackson-Lee
 Mr. Delahunt
 Mr. Wexler

NAYS

Mr. Hyde
 Mr. Sensenbrenner
 Mr. McCollum
 Mr. Gekas
 Mr. Coble
 Mr. Smith (TX)
 Mr. Schiff
 Mr. Gallegly
 Mr. Canady
 Mr. Inglis

| | |
|-------------|-----------------|
| Mr. Rothman | Mr. Goodlatte |
| | Mr. Buyer |
| | Mr. Bono |
| | Mr. Bryant (TN) |
| | Mr. Chabot |
| | Mr. Barr |
| | Mr. Jenkins |
| | Mr. Hutchinson |
| | Mr. Pease |
| | Mr. Cannon |

8. An amendment was offered by Ms. Jackson Lee to add a rule of construction that nothing in the Act would allow a woman upon whom a partial-birth abortion has been performed to be sued. The amendment was defeated by a 6–14 rollcall vote.

| YEAS | NAYS |
|-----------------|-------------------|
| Mr. Frank | Mr. Hyde |
| Mr. Boucher | Mr. Sensenbrenner |
| Mr. Nadler | Mr. McCollum |
| Mr. Scott | Mr. Gekas |
| Mr. Watt | Mr. Coble |
| Ms. Jackson-Lee | Mr. Smith (TX) |
| | Mr. Schiff |
| | Mr. Gallegly |
| | Mr. Canady |
| | Mr. Buyer |
| | Mr. Bono |
| | Mr. Chabot |
| | Mr. Jenkins |
| | Mr. Cannon |

9. Final Passage. Mr. Hyde moved to report H.R. 929, as amended, favorably to the whole House. The resolution was ordered favorably reported by a rollcall vote of 20–11.

| YEAS | NAYS |
|-------------------|-----------------|
| Mr. Hyde | Mr. Conyers |
| Mr. Sensenbrenner | Mr. Frank |
| Mr. McCollum | Mr. Schumer |
| Mr. Gekas | Mr. Boucher |
| Mr. Coble | Mr. Nadler |
| Mr. Smith (TX) | Mr. Scott |
| Mr. Schiff | Mr. Watt |
| Mr. Gallegly | Ms. Jackson-Lee |
| Mr. Canady | Mr. Delahunt |
| Mr. Inglis | Mr. Wexler |
| Mr. Goodlatte | Mr. Rothman |
| Mr. Buyer | |
| Mr. Bono | |
| Mr. Bryant (TN) | |
| Mr. Chabot | |
| Mr. Barr | |
| Mr. Jenkins | |
| Mr. Hutchinson | |

Mr. Pease
Mr. Cannon

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 929, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 14, 1997.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 929, the Partial-Birth Abortion Ban Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

H.R. 929—Partial-Birth Abortion Ban Act of 1997

CBO estimates that enacting this legislation would have no significant impact on the federal budget. While the bill could lead to increases in both direct spending and receipts, the amounts involved would be less than \$500,000 a year. Because H.R. 929 could affect direct spending and receipts, pay-as-you-go procedures would apply.

H.R. 929 would ban most instances of a late-term abortion procedure known as "partial-birth abortion." Violators of the bill's provisions would be subject to a criminal fine or imprisonment.

Enacting H.R. 929 could increase governmental receipts from fines, but we estimate that any such increase would be less than \$500,000 annually. Criminal fines would be deposited in the Crime Victims Fund and would be spent in the following year. Thus, direct spending from the fund would match the increase in revenues with a one-year lag.

H.R. 929 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA), and would impose no costs on state, local, or tribal governments. This bill would impose a new private-sector mandate by prohibiting individuals from performing partial-birth abortions. CBO estimates that the direct cost of this mandate would not exceed the statutory threshold specified in UMRA.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS

H.R. 929 amends title 18 of the United States Code by adding sec. 1531 to ban partial-birth abortions.

Section 1. Short Title

This section states that the short title of the bill is the “Partial-Birth Abortion Ban Act of 1997.”

Section 2. Prohibition on Partial-Birth Abortions

Subsection (a) of this section imposes a maximum of two years imprisonment or fine, or both, on whoever performs a partial-birth abortion in or affecting interstate or foreign commerce.

Subsection (b) specifies that paragraph (a) does not apply if the partial-birth abortion is necessary to save the life of the mother.

Subsection (c) defines “partial-birth abortion” as “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the infant and completing the delivery.”

The definition includes any abortion in which an infant is partially delivered alive before killing him or her. The definition distinguishes partial-birth abortion from other methods of abortion where the infant is killed before removal or the infant is dismembered and removed in pieces.

Subsection (d), paragraph (1) establishes a civil cause of action against the abortionist for the father, and if the mother is a minor at the time of the abortion, the maternal grandparents of the infant, to obtain damages from the abortionist who performs the partial-birth abortion. Of course, this section in no way authorizes a civil suit against the mother as she does not perform the partial-birth abortion.

Paragraph (2) provides that relief in a civil suit shall include compensation for all injuries caused by the partial-birth abortion and statutory damages equal to three times the cost of the partial-birth abortion.

Paragraph (3) bars recovery under the section if the pregnancy resulted from the plaintiff's criminal conduct; the plaintiff consented to the abortion; or the plaintiff is a father who has abandoned the mother or where there is evidence of physical or severe psychological abuse of the mother so that relief is not justified.

Subsection (e) ensures that a woman who undergoes a partial-birth abortion cannot be prosecuted for any offense based on a violation of this section.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART I—CRIMES

| Chap. | Sec. |
|--|-------------|
| 1. General provisions | 1 |
| * * * * * | |
| 74. Partial-birth abortions | 1531 |
| * * * * * | |

CHAPTER 74—PARTIAL-BIRTH ABORTIONS

Sec.
1531. *Partial-birth abortions prohibited.*

§ 1531. Partial-birth abortions prohibited

(a) *Whoever, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus or infant shall be fined under this title or imprisoned not more than two years, or both.*

(b) *Subsection (a) does not apply to a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, if no other medical procedure would suffice for that purpose.*

(c) *As used in this section—*

(1) *the term “partial-birth abortion” means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the infant and completing the delivery; and*

(2) *the terms “fetus” and “infant” are interchangeable.*

(d)(1) *Except as provided in paragraph (3), the father, and if the mother has not attained the age of 18 years at the time of the abor-*

tion, the maternal grandparents of the fetus or infant, may in a civil action obtain appropriate relief.

(2) Such relief shall include—

(A) money damages for all psychological injuries occasioned by the violation of this section; and

(B) statutory damages equal to three times the cost of the partial-birth abortion;

even if the mother consented to the performance of an abortion.

(3) A civil action may not be commenced under this section if—

(A) the pregnancy resulted from the plaintiff's criminal conduct;

(B) the plaintiff consented to the abortion; or

(C) the plaintiff is a father who abandoned or abused the mother.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section for a conspiracy to violate this section, or an offense under section 2, 3, or 4 of this title based on a violation of this section.

* * * * *

DISSENTING VIEWS

We dissent from H.R. 929. In our view the legislation represents an effort to politicize a sensitive and personal issue that is best left to a woman and her doctor, rather than the politicians.

H.R. 929 places women's health, if not their lives at severe risk; is unconstitutional on its face; and is part of a coordinated effort to not only ban an abortion procedure, but to ban all abortions.

We believe it is time to take the politics out of this issue and work together to develop policies which will make abortion safe, legal and rare. We urge the Members to think twice before voting for this dangerous and divisive legislation.

1. H.R. 929 IS HARMFUL TO WOMEN

The legislation is disastrous for women. Not only does H.R. 929 fail to provide any protection for women's health, it does not even fully protect their lives.

Failing to include a "health" exception in the legislation is more than an academic constitutional concern; it will prevent some women from being able to terminate their pregnancies in the manner determined to be safest and most appropriate by their physician, using the intact dilation and evacuation (intact D & E) or dilation and extraction method. These concerns are highlighted by the real life cases of Coreen Costello, Vicki Stella and Maureen Britell.

Coreen Costello, a self-described conservative, pro-life Republican, was seven months pregnant when she learned that her daughter was dying inside of the womb. Because the fetus had polyhydramnia, amniotic fluid was puddling in the uterus, posing severe health risks to Ms. Costello. Eventually, Ms. Costello had over nine pounds of excess amniotic fluid, her daughter's body was rigidly stuck in such a position that she was undeliverable and Ms. Costello was unable to sit or lie down for more than about ten minutes because of the pressure on her lungs. As a result, an intact D & E was considered the safest way possible to remove the dying fetus without further risking Ms. Costello's health. Ms. Costello has since given birth to a healthy baby body.¹

Vicki Stella's health was similarly at risk when she underwent an intact D & E. When she was 32 weeks pregnant, Ms. Stella discovered that her baby had severe problems that were incompatible with life, including no brain. As a diabetic, a Cæsarian section and

¹"Partial-Birth Abortion: The Truth," Joint Hearing, Subcommittee on the Constitution, House Comm. on Judiciary and Sen. Judiciary Comm., 105th Cong., 1st Sess (1997) [hereinafter, 1997 Joint Hearings] (statement of Coreen Costello).

induced labor were considered more dangerous for Ms. Stella than the intact D & E. Ms. Stella has since borne a healthy baby boy.²

Most recently, at the joint hearing of the House and Senate Judiciary Committees, Maureen Britell testified about discovering in her sixth month of pregnancy that their daughter had anencephaly. Ms. Britell's priest supported her decision to induce labor and terminate the pregnancy, but during the delivery, a complication arose and the placenta would not drop. The umbilical cord had to be cut in order to prevent serious health risks to Ms. Britell. Ms. Britell's baby's life was ended while the delivery was still taking place, and therefore, constituted a "partial birth abortion" as defined under H.R. 929. Although during the markup Constitution Subcommittee Chairman Canady denied that Ms. Britell even underwent an abortion, Ms. Britell's insurance company found that she did, going so far as to deny her claim for benefits on the grounds that the procedure was an abortion and therefore was not covered by the insurance policy.³

At the Committee markup, the Majority repeatedly failed to recognize a woman's health interests. Ms. Jackson-Lee offered an amendment exempting abortion procedures necessary to preserve the "health of the mother" and Mr. Frank offered an even more narrowly drafted amendment which would have allowed partial birth abortions where necessary to "avert serious adverse physical health consequences to the mother." Both were rejected on party line votes.

The Majority claims that any health exception, no matter how narrowly written, would be unacceptable because they do not believe any situation exists where the health exception could apply. Yet, the American College of Obstetricians and Gynecologists has written, the intact D & E procedure "may be the best or most appropriate procedure in a particular circumstances to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision."⁴

The majority's contention is also flatly contradicted by the real life examples noted above and by the fact that H.R. 929 provides for a life of the mother exception. If the procedure is in some cases necessary to preserve a woman's life, it is absurd to argue that no situation could ever exist where health is threatened. Of course, the real reason the Majority won't allow a health exception is their belief that under no possible condition is a mother's health problem—no matter how serious—to be equated with the potential life of a fetus. Chairman Hyde acknowledged this at the markup.⁵

It is also important to note that even the bill's exception for the mother's life is written in the narrowest possible fashion. Rather than providing a straightforward exemption from the bill's coverage for "partial birth" abortions necessary to protect a woman's life, the

²H.R. 1833, Partial-Birth Abortion Ban of 1995, Hearing Before the Senate Comm. on Judiciary, 104th Cong., 1st Sess. (1995) (statement of Vicki Stella) [hereinafter, 1995 Senate Judiciary Hearings].

³1997 Joint Hearings, supra n. 1 (statement of Maureen Britell).

⁴Statement of Policy of the American College of Obstetricians and Gynecologists, Approved by the Executive Board, Jan. 12, 1997 [hereinafter, ACOG Statement].

⁵Transcript at 99 ("Yes, the woman's health is critical; it is important, it is significant, but no more so—and I would submit slightly less so—than the very life of the unborn child.")

bill only exempts such procedures “if no other medical procedure would suffice for that purpose.”⁶ This means that even where the use of an alternative procedure would cause a woman to lose her fertility or face serious injury, the physician would be compelled to forego use of the intact D & E procedure. And even where an abortion is required as a life or death matter, the physician would have to show that the risk to life is necessitated by a particular set of circumstances (in this case that the woman’s life “is endangered by physical disorder, physical injury, or physical illness * * *”⁷

The Majority also rejected on a party-line vote an amendment by Ms. Jackson-Lee which would have exempted women who undergo abortion procedures from the heavy-handed monetary damages provisions of the bill.⁸ As a result, any woman who undergoes an abortion risks losing her life savings if the ambiguous damages language in the bill is found to be applicable. This seemingly applies whether or not the woman is even aware of the law or the fact that her physician used a procedure covered by the law.⁹

2. H.R. 929 IS UNCONSTITUTIONAL

Failure to Include “health” Exception

H.R. 929 contains a number of constitutional defects. First, the legislation fails to provide any health exception as required by *Roe v. Wade* (1973)¹⁰ and reaffirmed in *Planned Parenthood v. Casey* (1992).¹¹ In *Roe*, the Supreme Court found that women had a constitutional privacy interest in deciding whether or not to have an abortion.¹² Although the Court found the right to be qualified, it explicitly held that even after the point of viability of the fetus (which generally occurs between the 23rd and 28th weeks of pregnancy), the state may not prohibit abortion when necessary to preserve the woman’s life or health. The Court’s holding on this point is abundantly clear:

For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*¹³

Even the dissenters in *Roe* (and its companion case *Doe v. Bolton*) suggested that abortion procedures required to avoid “substantial hazards to either life or health” could not constitutionally be forbidden.¹⁴ Professor Laurence Tribe, perhaps the nation’s pre-eminent constitutional scholar, has written that “the proposed stat-

⁶See proposed sec. 1531(b) of sec. 2 of H.R. 929.

⁷*Id.* The Majority rejected an amendment offered by Mr. Scott to delete this language.

⁸See proposed sec. 1531(d)(2) of sec. 2 of H.R. 929.

⁹See n. 3 and accompanying text. It seems evident that H.R. 929 would indeed apply to women who undergo abortions. The legislation exempts women from criminal sanctions, but not civil damages. See proposed sec. 1531(e) of sec. 2 of H.R. 929. And the Majority accepted several amendments offered by Mr. Nadler which limited liability where fathers had been abusive or had abandoned the mother.

¹⁰410 U.S. 113 (1973).

¹¹505 U.S. 833 (1992).

¹²*Roe* was part of a long line of decisions protecting personal decisions relating to marriage, procreation, contraceptions, family relationships, child rearing, and education.

¹³410 U.S., at 164–5 (italic added).

¹⁴*Doe*, 410 U.S. at 223 (White J., dissenting); *Roe*, 410 U.S. 173 (Rehnquist, now C.J., dissenting).

ute * * * in exempting from prohibition only those abortions necessary to save the life of the pregnant woman, is undeniably inconsistent with the core holding of *Roe*.”¹⁵ Similarly, last Congress, Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel, testified that the legislation was “inconsistent with the constitutional standards established in *Roe v. Wade* and recently reaffirmed in *Planned Parenthood v. Casey*.”¹⁶

The Majority’s contention that H.R. 929 falls outside of the restriction of *Roe* because the fetus is “almost” born is fallacious on its face. The intact D & E procedure targeted by the bill falls within the general understanding of abortion. The definitions used in the bill and even the title of the bill repeatedly utilize the term “abortion.”¹⁷ To attempt to assert that the abortion procedures covered by the bill are somehow exempt from the constitutional protections of *Roe* is to abandon legal credibility. Indeed any arguments to such effect have already been implicitly rejected by the federal court in Ohio which has found unconstitutional a state law ban on intact D & E procedures, absent an adequate health exception.¹⁸

Places “Undue Burden” on Abortion Rights During Pre-Viability Phase

By banning a particular procedure during the pre-viability phase of a pregnancy, the legislation also places an “undue burden” on the woman’s right to choose in violation of the principles set forth by *Roe* and reaffirmed in *Casey*. In *Casey* the Supreme Court allowed the State to require a waiting period based on its interest in protecting potential human life and maternal health. But neither of these factors are present in H.R. 929, which simply forces a woman to choose a more risky procedure over a less risky one. Instead of a reasonable measure to protect the women’s health, H.R. 929 deliberately endangers her health. In this respect the proposed law is directly analogous to *Planned Parenthood of Central Missouri v. Danforth* (1976),¹⁹ where the Court found that a prohibition on the use of saline amniocentesis to perform an abortion after the first 12 weeks of pregnancy was an unconstitutional prohibition of an abortion procedure under *Roe*.²⁰

Vagueness

H.R. 929 is likely to be declared unconstitutionally vague in a number of respects, most notably the uncertainty concerning the scope of the ban on “partial birth abortions.” Although the legislation appears to target the intact D & E abortion technique, it is not clear the term “partial birth abortion” would be limited to one particular or identifiable practice. For example, the American College of Obstetrics and Gynecologists has stated that the definitions in the bill “are vague and do not delineate a specified procedure recog-

¹⁵ 1997 Joint Hearings, supra n. 1 (statement of Professor Laurence H. Tribe, Harvard Law School).

¹⁶ 1995 Senate Judiciary Hearings, supra n. 2 (statement of Walter Dellinger).

¹⁷ See H.R. 929, 105th Cong., 1st Sess. (1997).

¹⁸ *Women’s Medical Professional Corp. v. Voinovich*, No. C-3-95-414 (S.D. Ohio, Jan. 12, 1996).

¹⁹ 428 U.S. 52 (1976).

²⁰ In striking down the saline ban, the Court found that “as a practical matter [the ban] forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.” 428 U.S. 78-79.

nized in the medical literature. Moreover the definitions could be interpreted to include elements of many recognized abortion and operative obstetric techniques.”²¹

Dr. Courtland J. Robinson, Professor of Gynecology and Obstetrics at Johns Hopkins University, has similarly testified:

To say “partially vaginally delivers” [as the bill does] is vague, not medically substantiated, and not medically correct. In a 2d-trimester abortion procedure done by any method, you may have a point at which a part of the fetus passes out of the cervical os, for example the hand protrudes an inch, before fetal demise has occurred. That doesn’t mean you’re performing a “partial-birth.”²²

Such vagueness is constitutionally impermissible with regard to laws imposing criminal sanctions. In *Colautti v. Franklin*,²³ the Supreme Court invalidated a statute that imposed criminal penalties on doctors who failed to exercise care to preserve the health and life of the fetus in circumstances where there was sufficient reason to believe that the fetus might be viable. The Court found the law “conditions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.”²⁴

Even beyond the issue of the ambiguity inherent in the definition of “partial birth abortion” is the difficulty in ascertaining the applicability of the other terms of the legislation. For example, the bill’s exception allowing abortions to save the life of the mother²⁵ is exceedingly difficult to ascertain in real world situations. As Professor Louis Seidman has pointed out, “[s]uppose, for example, that if the abortion is not performed, there is a 10% chance that the woman will die. Physicians are forced to guess on the pain of criminal penalty whether this risk is large enough to come within the statutory exception.”²⁶

Moreover there is no obvious or clear meaning of the bill’s requirement that the abortion be performed “in or affecting interstate or foreign commerce.”²⁷ During the markup, the sponsor of H.R. 929, Mr. Canady stated that the question of whether or not a particular abortion was performed in interstate commerce was “a question of fact that has to be determined on an individual case by case basis.”²⁸ How such a standard would apply to purely in-state abortions, or abortions performed at free clinics remains entirely unanswered.

²¹ ACOG Statement, supra n. 4.

²² Partial-Birth Abortion, Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) [hereinafter, 1995 House Judiciary Hearings]. See also 1997 Joint Hearings (colloquy between Rep. Nadler and Douglas Johnson, Transcript at 160).

²³ 439 U.S. 379 (1979).

²⁴ 439 U.S., at 394.

²⁵ See proposed sec. 1531(b) of sec. 2 of H.R. 929.

²⁶ 1997 Judiciary Hearings (statement of Professor Louis Michael Seidman, Professor of Law, Georgetown Law School).

²⁷ See proposed sec. 1531(a) of sec. 2 of H.R. 929.

²⁸ Transcript at 75. The debate occurred while debating an amendment offered by Mr. Frank which would have limited the scope of covered abortions to those pregnant women who “travel across state lines or national borders” or physicians who “travel across state lines or national borders to perform an abortion.” The Frank amendment was rejected along a party line vote.

3. H.R. 929 IS MOTIVATED BY POLITICS, NOT POLICY

H.R. 929 is not a serious effort to deal with the problems of unintended pregnancies in this country or the Majority's professed concerns relating to post-viability abortions. If the Majority were serious about limiting so-called "partial birth abortions," they would have accepted suggestions to amend the legislation to protect the health of the mother. But they not only refused to discuss such a compromise, they would not even make such an amendment providing for a health exception in order under the Rule when this legislation was considered by the House last Congress.²⁹

And if the Majority were serious about limiting late term abortions, they would have considered proposals such as H.R. 1032, bipartisan legislation introduced by Representatives Hoyer (D-MD) and Greenwood (R-PA), banning all post-viability abortions except those necessary to preserve the woman's life or avert serious health consequences.³⁰

The reality is, of course, that the Majority has little interest in developing a credible and constitutional proposal that could be signed into law. The Majority knows the President cannot sign any bill that fails to protect a woman's health and is inconsistent with *Roe*. Bills such as H.R. 929 are being considered by the House for the very reason that they will not become law.

4. H.R. 929 IS PART OF AN EFFORT TO BAN ALL ABORTIONS

The stark reality of the movement behind the partial birth abortion legislation is that it is part of a broader strategy to ban virtually all abortions. The Majority itself makes no secret of this fact—their longstanding party platform contains a promise to pass a Constitutional amendment banning all abortions.³¹ During the markup Chairman Hyde frankly acknowledged that his views favored the rights of the unborn and unviable fetus over all of the woman's rights, other than her life.³² And Subcommittee Chairman Canady admitted his view that these legal rights go all the way to the very point of conception.³³

The legislation is therefore a stalking horse for an anti-choice movement with an agenda of preventing any woman from choosing to have an abortion. The very idea of demonizing partial birth abortion was derived from a 1992 cover story published in the anti-abortion magazine "Life Advocate."

And it should come as no surprise that supporters of H.R. 929 frequently refer to medical professionals as "assassins," "exterminators" and "murderers."³⁴ Inflamed rhetoric such as this can only encourage those who would prevent women from seeking an abortion by threatening and stalking them at abortion clinics.

²⁹ See H.Res. 251, 104th Cong., 1st Sess. (1995); H.Res. 389, 104th Cong., 2d Sess. (1996).

³⁰ An amendment incorporating the Hoyer-Greenwood bill was offered by Constitution Subcommittee Ranking Member Scott at markup and rejected on a party line vote.

³¹ See, e.g., Republican National Committee, *The Republican Platform 1996: Restoring the American Dream* 34.

³² See *Supra* n. 5.

³³ Transcript at 165.

³⁴ H. Rep. No. 267, 104th Cong., 1st Sess. 22 (1995) (dissenting views).

5. STATISTICAL INFORMATION CONCERNING LATE TERM ABORTIONS

The debate over partial birth abortions has been subject to a variety of statistical confusions and misunderstandings. The reality is that there are no national figures on the number of intact D&E procedures performed each year. The Center for Disease Control and Prevention (CDC) has written:

Because the term “partial birth abortions” is not a medical term, it is not used in reports submitted by physicians or providers to State health departments. Therefore, abortion data compiled by CDC does not have data specific to that term. Dilation and extraction (also known as D&K and intact D&E) is one of several abortion methods included under the general category of curettage, however the data submitted by States and providers do not subdivide the category further into specific abortion methods. In fact, the current lack of standardization in the definition of the procedures is a barrier to the collection of such data.³⁵

However, we do know that according to the Alan Guttmacher Institute, which is recognized by the CDC as collecting the most comprehensive data available concerning abortion, in the most recent year for which data is available—1992—there were over 1.5 million abortions. Of these, 89% took place within 12 weeks of pregnancy, and 99% occurred within 20 weeks.³⁶ The intact D&E procedure targeted by H.R. 929 is generally performed after this time period; it is therefore essentially a subset of this 1% figure.³⁷

Nonetheless, anti-abortion advocates attempted to make much of a supposed “admission” several weeks ago by Ron Fitzsimmons³⁸ that he “lied” in 1995 when he claimed the procedure was used very rarely and only in cases where the mother’s life was in danger or in cases of fetal anomalies.³⁹ Less reported is the fact that these supposed “lies” were never actually reported on the “Nightline” show for which Fitzsimmons was interviewed—they were edited out of the program.⁴⁰

To the extent groups in the pro-choice community focused on late term abortions, it appears to have been due, in part, to legislative proponents who chose to focus on intact D&E procedures performed in the 8th and 9th months of pregnancy.⁴¹ The legislation itself has commonly been referred to as the “late term abortion bill.”

³⁵ 1997 Joint Hearings, *surpa n. 1* (statement of Edward J. Sondik, Ph.D., Senior Advisor to the Secretary of Health Statistics, and Director, National Center for Health Statistics, CDC).

³⁶ Letter from The Alan Guttmacher Institute entitled “When do Abortions Take Place,” Sept. 25, 1996.

³⁷ See 1997 Joint Hearings (statement of Kate Michelman, President, National Abortion and Reproductive Rights League).

³⁸ Executive Director of the National Coalition of Abortion Providers.

³⁹ David Stout, An Abortion Rights Advocate Says He Lied About Procedure, *N.Y. Times*, Feb. 26, 1997, at A1.

⁴⁰ Nightline (ABC television broadcast, Feb. 26, 1997).

⁴¹ For example, in describing the legislation on “Meet the Press,” (Sept. 1996) Speaker Gingrich stated “[v]irtually every pro-choice American and every pro-life American agrees that aborting a child in the eighth month or ninth month the way a partial birth abortion does is wrong.” And during the December 4, 1995 Senate floor debate in the Senate, Senator Bob Smith (R-NH) stated, “[t]here we have it, Mr. President, 8½ months, bring the child 80% into the world, making sure that you bring it out feet first so that it cannot breathe first and kill it. That is exactly what we are doing [in the procedure covered by this bill]. That is what an elec-

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At the same time it is important to note that there are a number of mistaken impressions which have been left by the supporters of H.R. 929. Proponents frequently depict fully developed fetuses as being subject to elective partial birth abortions. For example, they claim that many partial birth abortions are performed late in pregnancy by high school girls who complain they “won’t fit into a prom dress, hate being ‘fat,’ [and] can’t afford a baby and a new car.”⁴² These characterizations completely ignore the fact that 40 states and the District of Columbia have already passed bans on late term abortions, except where life or health is involved. And anti-choice groups frequently cite an article appearing in the Bergen County Record⁴³ stating that a single clinic in New Jersey performs 1,500 intact D & E abortions per year, even though the clinic in question has denied the veracity of the article.⁴⁴

CONCLUSION

By ordering H.R. 929 reported in its present form, the Majority makes it abundantly clear that when it comes to so-called “partial birth” abortions, they prefer a political issue to a bill which can be signed into law. The perceived political value of promoting such a bill has proved so important to the Majority that in many respects it goes against the very principles for which they ordinarily stand.

How else can we explain a bill that would for the very first time federalize the regulation of abortion, a matter historically left to the discretion of the states? How else can we explain a bill that labels a procedure as “infanticide” but subjects the perpetrator to a maximum prison term of two years? And how else can the supposed party of “tort reform” justify creating a brand new federal tort action, with no dollar caps on damages whatsoever?⁴⁵

It is ironic that those who profess to be so concerned about late term abortions would show so little interest in working on a legislative compromise which could limit the use of so-called “partial birth” and other abortion procedures during the third trimester, when it is most troubling to many Americans.

And those who support this legislation appear to be even less interested in responding to the real causes of late term abortions which may necessitate use of the intact D & E procedure. The reality is that such abortions are often delayed because there are a dearth of physicians in many poor and rural areas; because Medicaid funding for abortions is restricted; because funding has been cut for contraceptive research and development; because many pregnant women fear violence at local clinics; because teen-agers are fearful of notifying their parents and women are subject to delays caused by mandatory notice and biased counseling require-

tive abortion is * * *. Similar statements have been made by Senator Phil Gramm (R-TX) and Republican National Committee Chairman Haley Barbour, among other. See, e.g., 1997 Joint Hearings (statement of Gloria Feldt, President, Planned Parenthood of America).

⁴²Advertisement of the National Council of Catholic Bishops, The Washington Post, March 25, 1996.

⁴³Ruth Padawer, The Facts on Partial-Birth Abortion, Bergen Country Record, Sept. 15, 1996, at Review & Outlook 1.

⁴⁴The Management of Metropolitan Medical Associates, Abortion Numbers Questioned (Letter to the Editor), Bergen County Record, Oct. 2, 1996.

⁴⁵The Majority rejected, along party line votes, amendments offered by Mr. Frank that would have struck the criminal penalties and Mr. Nadler that would have struck the civil penalties.

ments; and because many women only learn of severe anomalies as a result of late term ultrasound and amniocentesis tests.

This bill takes no account of any of these factors, and paints those who choose to have an abortion with a uniformly unfair and distorted brush. We cannot accept such an approach, and we dissent from this legislation.

JOHN CONYERS, JR.
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JERROLD NADLER
ROBERT C. SCOTT
MELVIN L. WATT
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