NLWJC - Kagan
DPC - Box 069 - Folder-013

Internal Memos [2]

INTERNAL DRAFT AS OF 2/26

PRESIDENT CLINTON'S RECORD ON ABORTION

The President believes that decisions about abortion should be between a woman, her doctor and her faith, and that abortions should be safe, legal and rare. That's why he has consistently protected women's health and safety, and the right of American women to make their own reproductive choices, while he has worked to reduce the number of unwanted pregnancies.

Making Abortion Safe and Legal

As President:

Ended the Gag Rule: The Bush Administration instituted a "Gag Rule" that prevented women using federally funded clinics--primarily poor women--from getting the information they needed to make informed choices about unwanted or health-threatening pregnancies. President Clinton reversed the "Gag Rule" in his first week in office.

Ensuring Clinic Safety: Since 1992, five people have been murdered and seven others have been shot and wounded at family planning clinics where abortions are performed. President Clinton signed and the Department of Justice is implementing the Freedom of Access to Clinic Entrances Act to fight violence and intimidation by anti-choice extremists against women and their doctors.

Assured Access for Military Families Overseas: President Clinton reversed the Bush Administration ban on privately funded abortions at military medical facilities overseas for women in the military and in military families overseas. *The ban has since been reinstated by the Republican Congress in the Fiscal Year 1996 Department of Defense Appropriations and Authorizations Bills.*

Repealed the "Mexico City Policy": President Clinton reversed 12 years of attacks on reproductive choice for women around the world when he repealed the "Mexico City" policy that banned distribution of family planning funding for overseas organizations if they perform abortions or speak out about reproductive choice, even with private money.

Established Services for Victims of Rape or Incest: President Clinton supported broadening Medicaid services to permit abortion services for poor women who are the victims of rape or incest, in addition to those whose life is endangered. These services had been banned during the Reagan and Bush Administrations by the "Hyde Amendment" to the appropriations bill that funds Medicaid.

Ended the Ban on Fetal Tissue Research: The Bush Administration banned federal funding of fetal tissue transplantation research. President Clinton reversed the ban on this research, which could lead to advances in women's health and in treatment of diseases like leukemia and Parkinson's.

Ended the Mifepristone Import Ban for Testing: President Bush imposed an import ban on Mifepristone, a drug that terminates pregnancy without surgery. The President revoked the import ban, and now Mifepristone is being tested in the United States. Mifepristone would expand choices for American women--giving them options already available in France, the United Kingdom and Sweden.

Appointed Two Supreme Court Justices who support the constitutional right to privacy

Making Abortion Rare

As President

Welfare Reform: The President has fought hard for welfare reform that promotes work and responsible parenting, but that does not deny people benefits because they are underage and unmarried, which the Catholic church has argued provides an incentive for more people to have abortions and would lead to increased abortions. He has also opposed a mandatory family cap.

Funding Family Planning: To help prevent unwanted pregnancies, the President has requested budget increases for the federal Family Planning Program for each year he has been in office. Among other reproductive health and education services, this program makes family planning information and contraception available to millions of women who might not otherwise get reproductive health care.

Preventing Teenage Pregnancy: The Clinton Administration strategy is driven by two fundamental goals: instilling a greater sense of personal responsibility in young people for the consequences of their behavior, while providing increased opportunities for education, jobs and hope for the future so that they are more likely to make the right choices.

President Clinton's challenge to the private sector to address the high rates of teen pregnancy has also prompted formation of a National Campaign to Reduce Teen Pregnancy. This effort aims to marshal the resources across the country to effectively reduce teen pregnancy rates by 1/3 in ten years.

Facilitating Adoption: The President has taken important actions to encourage adoption, to recruit families, to reduce unnecessary delays in moving children from foster care to adoption, and to support families that choose to open their hearts and homes to waiting children.

We will continue to champion programs that break down barriers to adoption through aggressive recruitment of adoptive and foster care parents; support for placement of special needs children; and technical assistance to agencies committed to special needs adoption. We are shifting the Federal focus from paperwork to outcomes for children. By increasing flexibility for states and communities and by working with them, we will find better ways to guarantee safety and stability for these vulnerable children. Finally, we are developing a national strategic plan to promote the adoption of special needs children.

Record:

o The Multiethnic Placement Act, which the President signed into law in October 1994, removes barriers to adoption based on race or ethnic origin.

o During this Administration, the number of children with special needs who have been adopted with Federal adoption assistance has increased by about 30%.

o The President has stood firm during the budget debate to protect funds for adoption, foster care, child abuse and neglect, Medicaid, and SSI -- programs that are critical to many adoptive families and children.

Signed Family and Medical Leave Act: President Clinton signed the Family Medical Leave Act into law, allowing workers to take up t12 weeks of unpaid leave to care for an infant or ailing loved one without losing their jobs. American workers are no longer forced to choose between their jobs and their families in times of crisis.

As Governor

Parental Notification: Signed a parental notification law which requires minors to notify their parents with whom they are living unless they go through a judicial bypass provision and have a reason why they should not.

Late-Term Abortions: Signed a law prohibiting abortions after the 25th week of pregnancy, except for minors impregnated by rape or incest, or when the woman's life or health are endangered.

Do we know more specifically here?

President Clinton's Record on Abortion: Excerpts As Governor and President

MAKING ABORTION SAFE AND LEGAL

As Governor

"I am personally opposed to abortion except in cases of rape, incest, and to save the mother's life....However, I do not believe the law should make criminal the conduct of a woman who decides to have an abortion as long as the unborn child cannot live outside of the mother's body."

Source: Arkansas Democrat; July 14, 1989

"I am opposed to overturning Roe vs. Wade," Clinton added. "I think it's the right decision. I think we should leave it intact."

Source: The Arkansas Gazette (News, Page 1A, July 15, 1991)

A 1992 campaign issue paper stated, "Bill Clinton recognizes that personal privacy is a fundamental liberty guaranteed and protected by the Unites States Constitution; and that the government therefore has no right to interfere with the difficulty and intensely personal decisions women must sometimes make regarding abortions. As President, he will sign the Freedom of Choice Act to ensure that a woman's right to choose is not jeopardized by a Supreme Court reversal or limitation of Roe v. Wade."

Source: NARAL Document

In June 1992, Clinton stated, "We are only one justice away from returning to the painful past before Roe v. Wade, and only a president committed to maintaining the present law can maintain the constitutional right to abortion." Clinton said he would not name any judge who did not support a constitutional right to privacy and that a new leader is needed to halt "the extreme movement of the Supreme Court to the right."

Source: NARAL Document

As President:

"But let me say this: When I took office, I abolished the gag rule. I abolished the ban on fetal tissue research. I appointed Ruth Bader Ginsburg to the Supreme Court, who's made a career of fighting for the rights of women and believes in the constitutional right to choose. I have gotten the United States back into the effort to control worldwide population growth, which is an important human issue, not through abortion, but through basic contraceptives, something that the United States had walked away from before. So I think that my record on that is clear and unblemished...

I wouldn't appoint someone that I thought would just flagrantly walk away from what is clearly the law of the land, which is that a woman within the first two trimesters of pregnancy anyway has a constitutional right to choose. That's what the law is. That's what I believe in. I don't think it should be changed. And the judges that I appoint will have to be willing to uphold the law of the land if they want the job.

Source: White House Briefing; California Town Hall Meeting with President Clinton; October 3, 1993

"[Dr. Foster] has labored to reduce teen pregnancy, to reduce the number of abortions, to tell young people without other role models in a disciplined, organized way, you shouldn't have sex before you're married...This is a man our country should be proud to call our own. So, why was a group of senators determined to stop Dr. Foster? A minority of the Senate blocked a vote on him in a calculated move to showcase their desire to take away a woman's right to choose...

Unfortunately, in Washington today, pure political correctness and raw political power count a whole lot more than actually doing something to reduce the tragedies of teen pregnancy and the high number of abortions...I believe it is clear what the law of the land is. And I believe that abortion should be rare, but it should be legal and safe. The extreme right wing in our country wants to impose its views on all the rest of Americans...

Source: President Clinton's Saturday Radio Address; June 24, 1995

"There is a wholesale assault on the right to choose going on in the Congress now in all kinds of little, indirect ways," Clinton said. "And I hope we can beat it back because...I don't think that's the right thing to do."

As for his own efforts to defend women's right to abortion, Clinton said, "I think I'm doing everything I can..."

Source: Associated Press; August 12, 1995

MAKING ABORTION RARE

<u>As Governor</u>

"I believe that in the rule of Roe v. Wade which says that the states can make abortions illegal in the third trimester, when children can live independently outside their mother's wombs, and those abortions are illegal in my state. Secondly, I have signed a parental notification law which requires minors to notify their parents with whom they're living unless they go through a judicial bypass provision and have a reason why they should not."

"Those are two areas where I have supported restrictions on an absolute right to abortion. I do still believe that by and large it should be a private rather than a government decision and therefore I disagree with the position taken at the Republican convention for a constitutional amendment to ban all abortions."

Source: Dallas Town Meeting (KDFW-TV studios); August 25, 1992

78-82:Under present Arkansas law, abortion is illegal when the unborn child can live outside its mother's womb. I support that. While I have also supported restrictions on public funding and a parental notification requirement for minors, I think the government should impose no further restrictions. Until the fetus can live outside the mother's womb, I believe the decision on abortion should be the woman's not the government's.

Source: 1990 AP survey excerpt

In October 1992, Clinton stated, "I can tell you the two [abortion restrictions] that I have supported in my state, and that I think are appropriate. One is banning abortions in the third trimester....The other is a requirement of parental notice for custodial parents...[a]s long as there's some provision for bypass....Otherwise, I personally don't favor any other restrictions."

A 1992 campaign issue paper stated that Clinton and Gore "oppose any federal attempt to limit access to abortion through mandatory waiting periods or parental or spousal consent requirements."

In a letter dated July 1, 1992, Clinton wrote, "In Arkansas, I have fought against mandatory waiting periods and parental and spousal consent laws."

A 1992 campaign issue paper stated that Clinton supports "state efforts to require some form of adult counseling or consultation for underage girls who choose to have an abortion--as long as workable and effective judicial bypass provisions are attached to such laws."
Source: NARAL Document

In July 1992, Clinton stated, "We have to remind the American people once again that being pro-choice is very different from being pro-abortion...that ours is the party with the courage to reduce unwanted pregnancy and to try and to give meaning to life, to every life in this country."

In October 1992, Clinton stated, "In my state, in several of the years in which I have been governor, the number of abortions has gone down. And I have been an outspoken advocate of proper parenting and sex education in the schools, promoting abstinence among young people and also telling them how their bodies work and trying to avoid unwanted pregnancies. I also believe we ought to do more with adoptions."
Source: NARAL Document

<u>As President</u>
"These extremists want to cut off all help to children whose mothers are poor, young and unmarried, even though the Catholic Church and many Republicans have warned that this would lead to more abortions. These same people want Washington to impose mandates like a family cap, even though Republicans and Democratic governors alike agree that these decisions should be left to the states.
Source: President Clinton's Saturday Radio Address; September 16, 1995

"There's also a pretty good consensus on what we shouldn't do. I think most Americans believe that while we should promote work and we should fight premature--and certainly fight out-of-wedlock---pregnancy, it is a mistake to deny people benefits, children's benefits, because their parents are underage and unmarried, just for example. And I think most Americans are concerned that the long-term trend in America--that's now about 10 years long--toward dramatic decline in the abortion rate might turn around and go up again, at least among some classes of people, if we pass that kind of rule everywhere in the country."
Source: White House Briefing; Remarks by President Bill Clinton to the National Governors' Association Meeting; July 31, 1995

"We are deeply divided over many issues, none more than the painful and difficult issue of abortion. The law now is that the woman, not the government, makes the decision until the third trimester, when a baby can live independently of his mother, therefore the government can prohibit abortions...Many, many Americans oppose abortion. And everyone agrees it's a tragedy. I believe we should all work to reduce the number of abortions, through vigorous campaigns to promote abstinence among young people, reduce out-of-wedlock pregnancy especially among teenagers, and promote more adoptions. If people in Washington spent less time using abortion to divide the country for their own political ends, and more time following Doctor Foster's example of fighting these problems, there'd be a lot fewer abortions in America. And we'd be a lot stronger as a country."

Source: President Clinton's Saturday Radio Address; June 24, 1995

"Now, consider this: today, about 40% of all children are born into home where there was never a marriage; 27% of all pregnancies end in abortion. Now, I don't care what your position is, whether you're pro-choice or anti-, that's too many.--That's not about serious health problems or emotional problems. So, when the miracle of conception occurs, less than half of those miracles wind up being babies born into homes where there's a mother and a father and where the kid's got a better than even chance of having the life that most of us have or we wouldn't be here in our neckties and nice dresses today. Now that's just a fact."

Source: White House Briefing; Remarks by President Clinton at 114th Annual Session of the National Baptist Convention USA, Morial Convention Center; September 9, 1994

"Now, I want to be clear about this. Contrary to some assertions, we do not support abortion as a method of family planning. We respect, however, the diversity of national laws, except we do oppose coercion wherever it exists. Our own policy in the United States is that this should be a matter of personal choice, not public dictation and that --and as I have said many times, that abortion should be safe, legal and rare. In many other countries where it does exist, we believe safety is an important issue, and if you look at the mortality figures, it is hard to turn away from that issue. We also believe that providing women with the means to prevent unwanted pregnancy will do more than anything else to reduce abortion."

Source: President Clinton speaks at dinner for forum on population issues The Department of State; June 29, 1994

"My position on this I think is pretty clear. I think, at a minimum, that we should not fund abortions when the child is capable of living outside the mother's womb. That's what we permit to be criminalized in America today under Roe against Wade. And secondly, we should not in any way, shape or form fund abortions if they are enforced on citizens by the government, if they are against people's will. Those--there may be other restrictions I would favor, but I can just tell you that on the front end I think that those are the two places where I would not support our funding going in. And so I think that we ought to be very careful in how we do this. On the other hand, I don't necessarily think that we ought to write the Hyde Amendment into international law because there are a lot of countries who have a very different view of this and whose religious traditions treat it differently.

Source: White House Briefing; Remarks by President Bill Clinton to the American Society of Newspaper Editors; J.W. Marriott; April 13, 1994

"The issue is a much deeper one, and one over which people have argued for a long time, one over which Christians have argued for a long time, when does the soul enter the body so that to terminate the living organism amounts to killing a person? That is the question. It is a deep moral question over which serious Christians disagree. I have heard -- you may smile with all your self-assurance, young man, but there are many Christian ministers who disagree with you. And the question is -- and let me say, I honor your conviction. I worked very hard in my state to reduce the number of abortions. I don't like abortion. the question for policymakers on the issue of whether Roe v. Wade should be repealed is the question of whether we really are prepared to go all the way and make women and their doctors criminals because we believe we know that. Now, you are. But here's the problem. In a great democratic society, you have to be very careful what you apply the criminal law to...You have to be very careful when you know that there is a difference that splits the American people right down the middle. Very few Americans believe that all abortions all the time are all right. Almost all Americans believe that abortion should be illegal when the children can live outside the mother's womb. There is about a 50-50 split in our country of honest conviction about whether terminating a baby in the mother's womb before the bay can live outside the mother's womb amounts to what you say it does, which is first degree murder. So, the reason I support Roe v. Wade, and the reason I signed a bill to make abortion illegal in the third trimester is because I think that the government of this country should not make criminal activities over which even theologians are in serious disagreement. That's how I feel."

Source: **White House Briefing; Clinton Town Hall Meeting at Chillicothe High School Chillicothe, Ohio; February 19, 1993**

November 6, 1995

MEMORANDUM FOR DISTRIBUTION

FROM: Debbie Fine and Jeremy Ben-Ami

SUBJECT: Attached on Partial Birth Abortion Ban Bills

In addition to the e-mail that went out this evening, attached are several documents you might find helpful as a follow-up to our meeting last week:

- suggested internal talking points;
- statements/letters from American College of Obstetricians and Gynecologists, the California Medical Association, American Medical Women's Association, Planned Parenthood (American Association of Nurse Practitioners have also released a statement that we are waiting to receive);
- the SAP that went to the House (Senate SAP is likely to be virtually the same);
- a couple of news articles; and
- an ad placed by NARAL.

cc: Carol Rasco
Alexis Herman
George Stephanopoulos
Martha Foley
Nancy-Ann Min
Jennifer Klein
James Castello
Elena Kagan ✓
Mary Ellen Glynn
Kitty Higgins
John Hart
Betsy Myers
Judy Gold
Barbara Woolley
Tracy Thornton
Barbara Chow
Janet Murguia
Marilyn Yager

November 6, 1995

SUGGESTED TALKING POINTS FOR INTERNAL USE ONLY ON THE "PARTIAL BIRTH ABORTION BAN ACT"

- The President believes that the decision whether or not to have an abortion should be between a woman, her doctor and her faith; and that abortions should be safe, legal and rare. He has consistently opposed late term abortions except to protect the life or health of the mother.

- H.R. 1833 does not include consideration of the health of the mother. This is the wrong policy. The President believes it is wrong in this case to substitute political decision making for medical decision making. These decisions must be made on the basis of the woman's health.

- It is also in conflict with constitutional law, since the Supreme Court has ruled in Roe v. Wade that women's health must always be considered as a factor in such decisions.

- For these reasons, the Administration cannot support H.R. 1833.

The American College of Obstetricians and Gynecologists

November 6, 1995

The Honorable Robert Dole
Majority Leader
S-230, The Capitol
Washington, DC 20510

Dear Majority Leader Dole:

The American College of Obstetricians and Gynecologists (ACOG), an organization representing more than 35,000 physicians dedicated to improving women's health care, does not support HR 1833, the Partial-Birth Abortion Ban Act of 1995. The College finds very disturbing that Congress would take any action that would supersede the medical judgment of trained physicians and criminalize medical procedures that may be necessary to save the life of a woman. Moreover, in defining what medical procedures doctors may or may not perform, HR 1833 employs terminology that is not even recognized in the medical community -- demonstrating why Congressional opinion should never be substituted for professional medical judgment.

Thank you for considering our views on this important matter.

Sincerely,

Ralph W. Hale, MD

Ralph W. Hale, MD
Executive Director

409 12th Street, SW, Washington, DC 20024-2188 (202)638-5577

The American College of Obstetricians and Gynecologists

November 1, 1995

Statement on H.R.1833
The Partial-Birth Abortion Ban Act of 1995

The American College of Obstetricians and Gynecologists is disappointed that the U.S. House of Representatives has attempted to regulate medical decision-making today by passing a bill on so-called "partial-birth" abortion.

The College finds very disturbing any action by Congress that would supersede the medical judgment of trained physicians and that would criminalize medical procedures that may be necessary to save the life of a woman. Moreover, in defining what medical procedures doctors may or may not perform, the bill employs terminology that is not even recognized in the medical community -- demonstrating why congressional opinion should never be substituted for professional medical judgment.

The College does not support H.R.1833, or the companion Senate bill, S.939.

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409 12th Street, SW, Washington, DC 20024-2188 (202)638-5577

CMA California Medical Association
221 Main Street, P.O. Box 7690, San Francisco, CA 94120-7690 (415) 541-0900
Physicians dedicated to the health of Californians

October 24, 1995

Representative Sam Farr
1117 Longworth House Off. Bldg
Washington, DC 20515-0517

Re: H.R. 1833

Dear Representative Farr:

The California Medical Association is writing to express its strong opposition to the above-referenced bill, which would ban "partial-birth abortions." We believe that this bill would create an unwarranted intrusion into the physician-patient relationship by preventing physicians from providing necessary medical care to their patients. Furthermore, it would impose an horrendous burden on families who are already facing a crushing personal situation—the loss of a wanted pregnancy to which the woman and her spouse are deeply committed.

An abortion performed in the late second trimester or in the third trimester of pregnancy is extremely difficult for everyone involved, and CMA wishes to clarify that it is not advocating the performance of *elective* abortions in the last stage of pregnancy. However, when serious fetal anomalies are discovered late in a pregnancy, or the pregnant woman develops a life-threatening medical condition that is inconsistent with continuation of the pregnancy, abortion—however heart-wrenching—may be medically necessary. In such cases, the intact dilation and extraction procedure (IDE)—which would be outlawed by this bill—may provide substantial medical benefits. It is safer in several respects than the alternatives, maintaining uterine integrity, and reducing blood loss and other potential complications. It also permits the parents to hold and mourn the fetus as a lost child, which may assist them in reaching closure on a tragic situation. In addition, the procedure permits the performance of a careful autopsy and therefore a more accurate diagnosis of the fetal anomaly. As a result, these families, who are extremely desirous of having more children, can receive appropriate genetic counseling and more focused prenatal care and testing in future pregnancies. Thus, there are numerous reasons why the IDE procedure may be medically appropriate in a particular case, and there is virtually no *scientific* evidence supporting a ban on its use.

CMA recognizes that this type of abortion procedure performed late in a pregnancy is a very serious matter. However, political concerns and religious beliefs should not be permitted to take precedence over the health and safety of patients. CMA opposes any legislation, state or federal, that denies a pregnant woman and her physician the ability to make medically appropriate decisions about the course of her medical care. The determination of the medical need for, and effectiveness of, particular medical procedures must be left to the medical profession, to be reflected in the standard of care. It would set a very undesirable precedent if Congress were by

legislative fiat to decide such matters. The legislative process is ill-suited to evaluate complex medical procedures whose importance may vary with a particular patient's case and with the state of scientific knowledge.

CMA urges you to defeat this bill. The patients who would seek the IDE procedure are already in great personal turmoil. Their physical and emotional trauma should not be compounded by an oppressive law that is devoid of scientific justification.

Sincerely,

Eugene S Ogrod

Eugene S. Ogrod, II, M.D.
President

APM:sm

[illegible]

American Medical Women's Association, Inc.

Diane L. Dell, M.D., F.A.C.O.G., President
Elena McGrath, J.D., C.A.E., Executive Director

Lonnie R. Bristow, M.D.
President
The American Medical Association
515 North State Street
Chicago, Illinois 60610

October 17, 1995

Dear Dr. Bristow,

On behalf of the 13,000 woman physician members of The American Medical Women's Association, I write to express AMWA's concern regarding the September 23, 1995 unanimous decision of the Council on Legislation of the American Medical Association in Support of HR 1833 "the Partial-Birth Abortion Ban Act"

It is the position of the American Medical Women's Association that this legislation represents a serious impingement on the rights of physicians to determine appropriate medical management for individual patients.

AMWA urges the Board of the American Medical Association to carefully consider the implications that its support of this legislation will have for future governmental regulation of the practice of medicine. We encourage the AMA Board to actively oppose HR 1833 as legislation which unduly interferes with the physician-patient relationship.

Sincerely,

Diane L. Dell, M.D.
President

Planned Parenthood®
Federation of America, Inc.

November 2, 1995

The Honorable William Jefferson Clinton
The White House
Washington, D.C.

Dear Mr. President:

Women's fundamental reproductive rights are under siege as never before in the United States Congress. Radical right forces have attached anti-family planning and anti-abortion amendments to almost every appropriations bill and are promoting other legislation that is a direct assault on the legal right to abortion. Planned Parenthood Federation of America represents millions of American women and men who are depending on your solid support of reproductive rights. Mr. President, we urge you to veto -- and make clear publicly your commitment to veto -- the following legislative actions:

H.R. 1833, the so-called "Partial Birth Abortion Ban" Act. The approval of this legislation by the House of Representatives yesterday was deeply disturbing. It is bad policy and represents an unprecedented intrusion by Congress into the most personal and difficult of medical decisions. While late-term abortions are tragic, the fact is that the procedure is extremely rare -- fewer than 600 are performed in any given year -- and are performed only in dire situations to protect the woman's life, health and future reproductive capability. We were heartened by the statement issued by the Office of Management and Budget stating your opposition to the bill. We encourage you to continue to take the life and health of these women and their families to heart. We need you to reject this unwarranted intrusion into the practice of medicine by vetoing this bill if it is approved by the Senate.

H.R. 1868, the FY 96 Foreign Operations Appropriations bill, containing a "Mexico City Policy" (an international "gag rule") and ban on funding of the UNFPA. We are very pleased by the recommendation of the Office of Management and Budget that you veto this bill because of the population provisions. On your second day in office, you made clear your opposition to denying U.S. population assistance to organizations that -- *with private, non-U.S. funds* -- provide abortions by repealing the so-called "Mexico City Policy." Should the foreign aid spending bill include this type of restriction, an international gag rule on groups that seek to influence abortion policy in their own country, or a prohibition on funding of the United Nations Population Fund, we urge you to maintain your support by vetoing the bill. These kinds of restrictions fly in the face of the U.S. commitments to international population and reproductive health care announced at the international population and women's conferences in Cairo and Beijing.

1120 Connecticut Avenue, N.W., Suite 461, Washington, DC 20036 (202) 785-3351 FAX (202) 293-4349

The Istook/McIntosh/Ehrlich Silence America language. This provision is intended to prevent non-profit organizations from engaging in public discourse while permitting for-profit companies with views more compatible with the Congressional leadership to lobby unfettered, even if they receive millions of dollars from the government. The YWCA has noted that they might have to choose between closing down one of the nation's largest day care operations or advocating for better laws to protect abused women. The American Lung Association would be barred from advocating for restrictions on smoking while the tobacco industry would be able to run adds such as those by RJR Tobacco opposing government policies, despite receiving enormous amounts of money in Federal price supports and other government largess. This language cannot be made acceptable and should be rejected. Likewise bills that include it should be rejected if for no other reason than because of the inclusion of this provision. We urge you to stand firm and refuse to accept this undemocratic attempt to silence those that disagree with the current congressional majority.

The women of America are counting on you to preserve their fundamental right to make choices about their own reproductive lives. We all agree that unless women can make these personal decisions, they will not be fully empowered to take the best possible care of their families and communities.

We greatly appreciate your support and look forward to working with you on policies that protect women's reproductive choices.

Sincerely,

Jane Johnson
Interim Co-President

Jim LeFevre
Interim Co-President

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 1, 1995
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 1833 -- Partial-Birth Abortion Ban Act of 1995
(Rep. Canady (R) FL and 115 others)

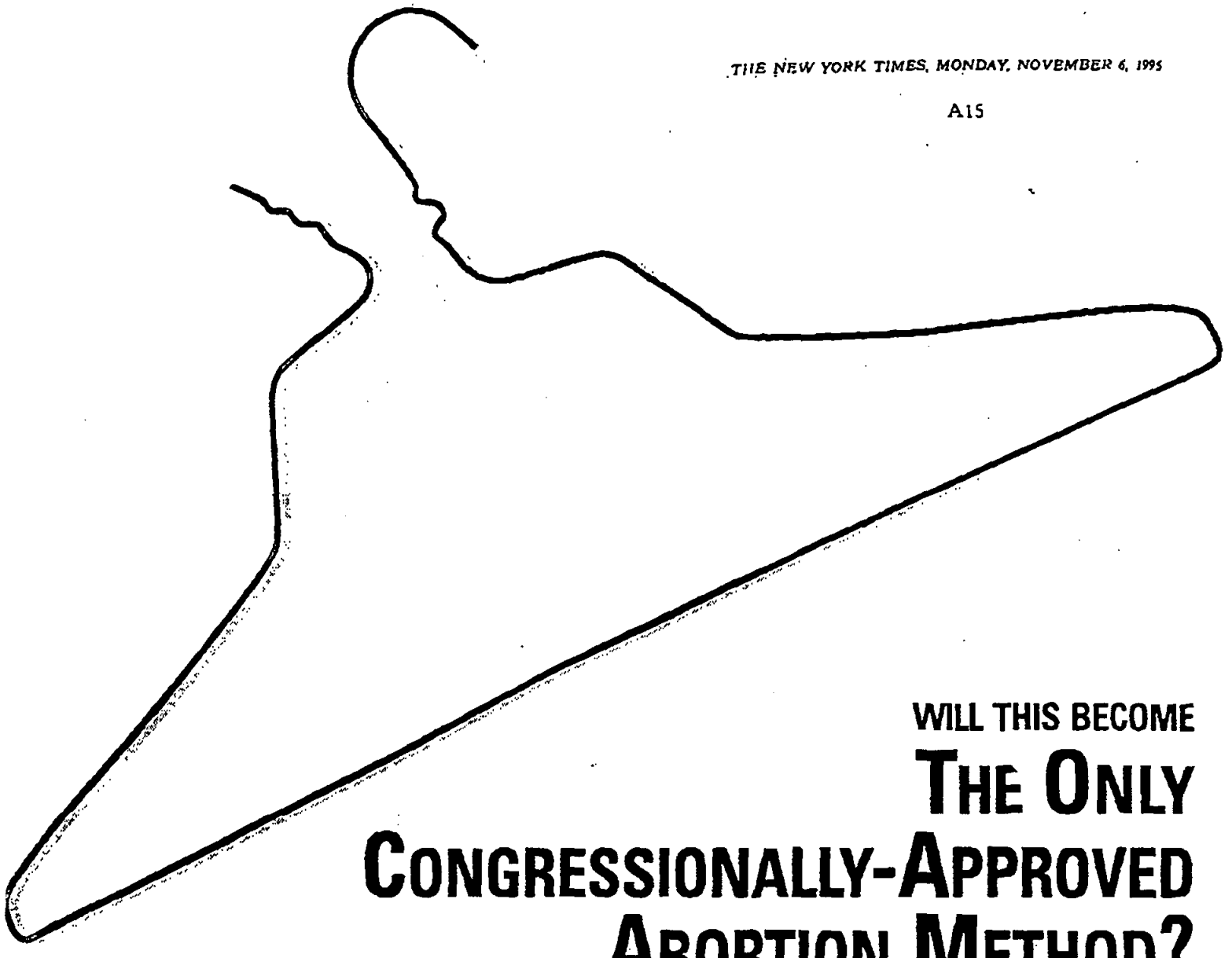
The President believes that the decision to have an abortion should be between a woman, her conscience, her doctor, and her God. He believes that legal abortions should be safe and rare. The President has long opposed late term abortions except where they are necessary to protect the life of the mother or where there is a threat to her health, consistent with the law. The Supreme Court has ruled that "Roe forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." Therefore, the Administration cannot support H.R. 1833 because it fails to provide for consideration of the need to preserve the life and health of the mother, consistent with the Supreme Court's decision in Roe v. Wade.

Pay-As-You-Go Scoring

H.R. 1833 would affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

THE NEW YORK TIMES, MONDAY, NOVEMBER 6, 1995

A15



WILL THIS BECOME THE ONLY CONGRESSIONALLY-APPROVED ABORTION METHOD?

Last Wednesday, the House of Representatives voted for the first time to criminalize some abortions and challenge *Roe v. Wade*. Even a doctor trying to save a woman's life or protect her health could be sent to jail as a common criminal. This week, Bob Dole and his anti-choice Senate are poised to do the same.

The anti-choice majority in Congress is boasting that this is the beginning of the end for abortion rights. As Rep. Chris Smith (R-NJ) said, "We will begin to focus on the methods (of abortion) and declare them to be illegal."

Since January, the House has voted to allow states to ban Medicaid abortions for rape and incest victims; interfere with the training of medical residents in abortion procedures; dictate which procedure doctors can use; prohibit federal employees

Your right to choose is in grave danger. It's time to stand up and fight back. Join NARAL's campaign to protect women, their doctors and the freedom to choose. Make sure women have a place to turn other than the back alleys. Join us, while you still have the choice.

Don't let the Senate take away your rights.
Call your Senators today at 202/224-3121.

O **Yes** I want to help NARAL keep politicians out of this private decision.

Name _____

Address _____

to abortion to servicewomen overseas; and impose a "gag" rule on international family planning programs. And they've only just begun.

The truth is that when women face obstacles to abortion, they don't stop having abortions, they just stop having safe abortions. When abortion was illegal, women died. The women of America should never again have to face those dangerous and degrading days.

City _____

I'm enclosing my donation of:

__$15 __$25 __$50 __$100 __more

Contributions or gifts to NARAL are not tax deductible as charitable contributions. NARAL cannot accept corporate contributions. Please mail to the address below.

NT115

National Abortion & Reproductive Rights Action League
1156 15th Street NW, Washington, D.C. 20005 • 202/973-3000

Promoting Reproductive Choice NARAL

THE PRESIDENT HAS SEEN
1-19-96

today
1p.

search for what
he has said.

Late Term Abortion

- State Restrictions on Late-Term Abortions
- Story of Vicki Wilson, San Jose Sunday Magazine
- Story of Coreen Costello (Pro-life Republican), *New York Times* Editorial
- Remarks: Congressman Zoe Lofgren

to
Jack Quinn

Yes, [illegible]

But args [illegible] not [illegible]
well-founded
(80%)
- factually incorrect
or
- I'm not [illegible], we're not [illegible] for elective late-term a's

BC

THE PRESIDENT HAS SEEN
1-19-96

If bill was amended to
meet yours, these wouldn't be [illegible].

[illegible] -
that's why we've insisted

THE WHITE HOUSE

WASHINGTON

January 6, 1996

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM: Debbie Fine

SUBJECT: State Restrictions on Late-Term Abortions

State Restrictions on Late-Term Abortions

Following is a list of states where post-viability (usually defined between 24 and 28 weeks) abortions are not allowed, with certain exceptions that are identified below. Please note that (1) these are not absolute bans, but limits on the availability of these services; and (2) the Attorney General has issued opinions on several of these laws stating that they are unconstitutional for varying reasons. (i.e. the restriction could apply to pre-viability cases when a specific week of pregnancy written into the law, or the law does not account adequately for health. See attached for details.) The total listed here is 41 (if you include Alabama.)

Alabama (**only applies to certain facilities**; with life and narrow health exceptions)
Arizona (with life and health exceptions)
Arkansas (with life and health exceptions, and when result of rape or incest of a minor)
California (applies to all cases after the 20th week; no exceptions)
Connecticut (with life and health exceptions)
Delaware (applies to all cases after the 20th week; life exception)
Florida (applies to all cases in the third trimester; life and health exceptions if certified in writing by two physicians)
Georgia (applies to all cases after the 2nd trimester; life and health exceptions if certified by three physicians)
Idaho (with exceptions to preserve the woman's life or if fetus would be unable to survive)
Illinois (with life and health exceptions)
Indiana (with narrow life and health exceptions)
Iowa (applies to cases after the end of the second trimester; life and health exceptions)
Kansas (with narrow life and health exceptions)
Kentucky (with life and health exceptions)
Louisiana (with life and health exceptions)
Maine (with life and health exceptions)
Maryland (with life, health and serious fetal abnormality exceptions)
Massachusetts (applies after the 24th week, with life and narrow health exceptions)
Michigan (applies 'after quickening'; life exception)

Minnesota (applies after 20 weeks; life and health exceptions)
Missouri (with life and health exceptions)
Montana (with life and health exceptions)
Nebraska (with life and health exceptions)
Nevada (applies after the 24th week; narrow life and health exceptions)
New Hampshire (applies 'after quickening'; life exception)
New York (applies after the 24th week; life exception)
North Carolina (applies after 20 weeks; narrow life and health exceptions)
North Dakota (with narrow life and health exceptions; requires concurrence from 2 physicians)
Ohio (with narrow life and health exceptions; see below for details)
Oklahoma (with life and health exceptions)
Pennsylvania (applies after 24th week; narrow life and health exceptions)
Rhode Island (life exception)
South Carolina (applies after 24th week; narrow life and health)
South Dakota (applies after 24th week; life and health exceptions)
Tennessee (with life and health exceptions)
Texas (with narrow life and health exceptions, and where severe fetal abnormality)
Utah (applies after 20 weeks; life and narrow health exceptions, and where grave fetal defect)
Virginia (applies post-second trimester; life and narrow health exceptions)
Washington (with life and health exceptions)
Wisconsin (with life and health exceptions)
Wyoming (with life and narrow health exceptions)

Note on Ohio

In August, an abortion law in Ohio was enacted with the following provisions:

- (1) bans the Dilation and Extraction (D&X) procedure for all abortions (Note: it refers to the procedure as 'D&X' unlike H.R. 1833);

- (2) bans all post-viability abortions, except when the physician is acting, "...to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function...;"

- (3) imposes a viability testing requirement and several other conditions before an abortion may be performed after the 22nd week of pregnancy; and

- (4) creates civil and criminal liability for violations of the D&X ban or the post-viability ban, and criminal liability for violations of the viability testing requirement.

On December 13, in response to a request from the Women's Professional Medical Corporation, a preliminary injunction was issued against the law. The Judge found that there is a "substantial likelihood of success" of proving that the law is unconstitutional on the following grounds:

- The definition of D&X is unconstitutionally vague. The legislation could be interpreted to include Dilation and Evacuation (D&E), the procedure commonly used in the second trimester; therefore, it lacks clear guidelines for physicians as to what will result in a liability.

- This ban on use of the D&X procedure could pose an undue burden on women seeking abortions in pre-viability stages, because D&X may be the least risky method available for some women.

- This ban on post-viability abortions could be found unconstitutional because of the threat it poses to the right of a woman to an abortion in order to preserve her life or health. (The Judge outlines several different reasons for this in his opinion, including an overly narrow definition of health.)

State-by-State Summary

Attached is a more complete summary compiled by NARAL that details all restrictions on post-viability abortions on a state-by-state basis.

cc: Carol Rasco
Jeremy Ben-Ami

NARAL *Promoting Reproductive Choices*

STATES WITH POST-VIABILITY RESTRICTIONS

ALABAMA

No abortion may be performed after viability at an abortion or reproductive health center unless immediately necessary to preserve the woman's life or physical health. Admin. Code r. 420-5-1-.03(2)(c) (Supp. 1990).

ARIZONA

No abortion may be performed after viability unless necessary to preserve the woman's life or health. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. § 36-2301.01 (1993).

ARKANSAS

No abortion may be performed after viability unless necessary to preserve the woman's life or health or the pregnancy is the result of rape or incest perpetrated on a minor. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. §§ 20-16-705, -707 (Michie 1991).

CALIFORNIA

No abortion may be performed after the 20th week of pregnancy. Health & Safety § 25953 (West 1984). The Attorney General has issued an opinion stating that this provision is unconstitutional as applied to pre-viability abortions and abortions necessary to preserve the woman's life or health. 65 Op. Att'y Gen. 261 (1982).

CONNECTICUT

No abortion may be performed after viability unless necessary to preserve the woman's life or health. § 19a-602(b) (West Supp. 1993).

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DELAWARE

No abortion may be performed after the 20th week of gestation unless continuation of the pregnancy is likely to result in the woman's death. Tit. 24, § 1790 (1987 & Supp. 1992). The Attorney General has issued an opinion stating that this provision is invalid and inconsistent with *Roe v. Wade*, 410 U.S. 113 (1973).

FLORIDA

No abortion may be performed in the last trimester of pregnancy unless two physicians certify in writing that the abortion is necessary to preserve the woman's life or health. § 390.001(2) (West 1993). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point which varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

GEORGIA

No abortion may be performed after the second trimester unless three physicians certify that an abortion is necessary to preserve the woman's life or health. § 16-12-141(c) (Michie 1992). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

IDAHO

No abortion may be performed after viability unless necessary to preserve the woman's life or unless the fetus, if born, would be unable to survive. §§ 18-608(3), 18-604(6) (1987). This law unconstitutionally prohibits post-viability abortions in cases in which an abortion is necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

ILLINOIS

No abortion may be performed after viability unless necessary to preserve the woman's life or health. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. Ch. 720, act 510, §§ 5,6 (Michie 1993).

INDIANA

No abortion may be performed after viability unless necessary to prevent a substantial permanent impairment of the life or physical health of the woman. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. §§ 16-34-2-1(3), 16-34-2-3(b) (West Supp. 1993). This law unconstitutionally prohibits some post-viability abortions that are necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 164-165 (1973).

IOWA

No abortion may be performed after the end of the second trimester unless necessary to preserve the woman's life or health. § 707.7 (West 1979). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point which varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

KANSAS

No abortion may be performed after viability unless the attending physician and another, financially independent physician determine that an abortion is necessary to preserve the woman's life or the fetus is affected by a severe or life-threatening deformity or abnormality. § 65-6703 (1992 & Supp. 1993). The Attorney General has issued an opinion stating that abortion cannot be prohibited at any time when a woman's health is at risk, and has filed a lawsuit requesting a court order stating that this law is unconstitutional and enjoining its enforcement. Op. Att'y Gen. No. 91-130 (Oct. 15, 1991); *Stephan v. Finney*, No. 93-CV-912 (Kan. D. Ct. filed Aug. 4, 1993).

KENTUCKY

No abortion may be performed after viability unless necessary to preserve the woman's life or health. § 311.780 (Michie/Bobbs-Merrill 1990).

LOUISIANA

No abortion may be performed after viability unless necessary to preserve the woman's life or health. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. § 40:1299.35.4 (West 1992).

MAINE

No abortion may be performed after viability unless necessary to preserve the woman's life or health. Tit. 22, § 1598 (West 1992 & Supp. 1993).

MARYLAND

Abortion may be prohibited after viability unless necessary to preserve the woman's life or health or unless the fetus is affected by genetic defect or serious deformity or abnormality. Health-Gen. § 20-209 (Supp. 1993).

MASSACHUSETTS

No abortion may be performed after the 24th week of pregnancy unless necessary to preserve the woman's life or to prevent a substantial risk of grave impairment to her physical or mental health. Ch. 112, § 12M (West 1983). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law also unconstitutionally prohibits some post-viability abortions that are necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

MICHIGAN

Any person who intentionally causes an abortion that is not necessary to preserve the woman's life is guilty of manslaughter if the abortion occurs after quickening. § 750.323 (West 1991) (enacted 1931). A court has ruled that this law is not unconstitutional as applied to viable fetuses. *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973). This law is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortions prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *See Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law is also unconstitutional as applied to post-viability abortions necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

MINNESOTA

No abortion may be performed after the second half of the gestation period (20 weeks) unless necessary to preserve the woman's life or health. A second physician must be immediately accessible at a post-viability abortion to take all reasonable measures to preserve the life and health of the fetus. §§ 145.412(sub. 3), 145.411(sub. 2), 145.423(sub. 2) (West 1989). A court has ruled that the provision restricting abortion after 20 weeks is unconstitutional. *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976).

MISSOURI

No abortion may be performed after viability unless necessary to preserve the woman's life or health. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. § 188.030 (Vernon 1983).

MONTANA

No abortion may be performed after viability unless necessary to preserve the woman's life or health. § 50-20-109(1)(c) (1993).

NEBRASKA

No abortion may be performed after viability unless necessary to preserve the woman's life or health. § 28-329 (1989).

NEVADA

No abortion may be performed after the 24th week of pregnancy unless there is a substantial risk that continuance of the pregnancy would endanger the woman's life or gravely impair her physical or mental health. § 442.250 (1991). This law is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortions prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *See Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law is also unconstitutional as applied to some post-viability abortions necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

NEW HAMPSHIRE

No abortion may be performed after quickening, unless necessary to preserve the woman's life. § 585:13 (1986). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and which may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law also unconstitutionally prohibits post-viability abortions that are necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

NEW YORK

No abortion may be performed after the 24th week of pregnancy unless necessary to preserve the woman's life. When an abortion is performed after the 20th week of pregnancy, a second physician must be in attendance to provide medical attention to the fetus. Penal Law § 125.05(3) (McKinney 1987); Pub. Health § 4164 (McKinney 1985). These provisions are unconstitutional to the extent they prohibit pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and which may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law also unconstitutionally prohibits post-viability abortions that are necessary to preserve the woman's health. See *Roe v. Wade*, 410 U.S. 113, 165 (1973).

NORTH CAROLINA

No abortion may be performed after 20 weeks of pregnancy unless there is a substantial risk that continuance of the pregnancy would threaten the woman's life or gravely impair her health. § 14-45.1(b) (1986). These provisions are unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law also unconstitutionally prohibits some post-viability abortions that are necessary to preserve a woman's health. See *Roe v. Wade*, 410 U.S. 113, 165 (1973).

NORTH DAKOTA

No abortion may be performed after viability unless the attending physician and two other licensed physicians who have examined the woman concur that the procedure is necessary to preserve the woman's life or continuation of the pregnancy would impose on her a substantial risk of grave impairment to her physical or mental health. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. §§ 14-02.1-04, 14-02.1-05 (1991). This law unconstitutionally prohibits some post-viability abortions that are necessary to preserve the woman's health. See *Roe v. Wade*, 410 U.S. 113, 165 (1973).

OHIO

No abortion may be performed after viability unless two physicians certify in writing that it is necessary to preserve a woman's life or to prevent a serious risk of substantial and irreversible impairment of a major bodily function. The physician must use the abortion method most likely to result in fetal survival, a second physician must be in attendance to provide medical attention to the fetus, and the abortion must be performed in a health care facility with access to neonatal services for premature infants. This law is scheduled to become effective on November 15, 1995. A lawsuit has been filed challenging the constitutionality of these provisions. *Women's Medical Professional Corp. v. Voinovich*, (S.D. Ohio filed Oct. 27, 1995).

OKLAHOMA

No abortion may be performed after viability unless necessary to preserve the woman's life or health. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. Tit. 63, § 1-732 (West 1984).

PENNSYLVANIA

No abortion may be performed after the 24th week of pregnancy unless the attending physician and another physician who has examined the woman concur that the procedure is necessary to preserve the woman's life or to prevent a substantial and irreversible impairment of a major bodily function. A second physician must be in attendance at a post-viability abortion to provide medical attention to the fetus. Tit. 18, § 3211 (Supp. 1994). This law is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law also unconstitutionally prohibits some post-viability abortions that are necessary to preserve the woman's health. See *Roe v. Wade*, 410 U.S. 113, 165 (1973).

RHODE ISLAND

No abortion may be performed after viability unless necessary to preserve the woman's life. § 11-23-5 (1981). This law unconstitutionally prohibits post-viability abortions that are necessary to preserve the woman's health. See *Roe v. Wade*, 410 U.S. 113, 165 (1973).

SOUTH CAROLINA

No abortion may be performed after the 24th week unless the attending physician and another independent physician certify that the abortion is necessary to preserve the woman's life or health. §§ 44-41-20(c), -10(k), (l) (Law. Co-op. 1985 & Supp. 1990). A court has ruled that this provision is unconstitutional as applied to pre-viability abortions. *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977), *vacated without opinion on other grounds*, 440 U.S. 445 (1979).

SOUTH DAKOTA

No abortion may be performed after the 24th week of pregnancy unless necessary to preserve the woman's life or health. § 34-23A-5 (1986). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

TENNESSEE

No abortion may be performed after viability unless necessary to preserve the woman's life or health. § 39-15-201(c)(3) (1991).

TEXAS

No abortion may be performed after viability unless necessary to prevent the death or a substantial risk of serious impairment to the physical or mental health of the woman or if the fetus has a severe and irreversible abnormality. Art. 4495b, § 4.011(b), (d) (West Supp. 1994). This law unconstitutionally prohibits some post-viability abortions that are necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

UTAH

No abortion may be performed after 20 weeks unless necessary to preserve the woman's life, to prevent grave damage to the woman's medical health, or to prevent the birth of a child that would be born with grave defects. §§ 76-7-302(3) (1990 & Supp. 1993). A court has ruled that this provision is unconstitutional. *Jane L. v. Bangerter*, 61 F. 3d 1493 (10th Cir. 1995).

VIRGINIA

No abortion may be performed subsequent to the second trimester unless the attending physician and two other physicians certify that continuation of the pregnancy is likely to result in the woman's death or substantially and irremediably impair the woman's physical or mental health. § 18.2-74 (Michie 1988). This provision is unconstitutional as applied to pre-viability abortions. A state may not prohibit abortion prior to viability, a point that varies with each pregnancy and may not be declared to occur at a particular gestational age. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). This law also unconstitutionally prohibits some post-viability abortions that are necessary to preserve the pregnant woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

WASHINGTON

No abortion may be performed after viability unless necessary to protect the woman's life or health. §§ 9.02.110, 9.02.120 (Supp. 1994).

WISCONSIN

No abortion may be performed after viability unless necessary to preserve the woman's life or health. § 940.15 (West Supp. 1993).

WYOMING

No abortion may be performed after viability unless necessary to protect the woman from imminent peril that substantially endangers her life or health. § 35-6-102 (1988). This law unconstitutionally prohibits some post-viability abortions that are necessary to preserve the woman's health. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

State Restrictions on Late-Term Abortions

San Jose Sunday Magazine Article

Story of Vicki Wilson's partial birth abortion

Viki Wilson made a choice that saved her health and perhaps

The Death of

In one set of photographs Baby Abigail is adorable.

A sweet newborn, swaddled in pink and blue flannel, she has a flume of black hair peeking from under a white cap, tiny interlocking fingers, serene face, eyes gently closed. Her grandma, sister brother and parents are taking turns holding the 3-pound, 8-ounce, 17-inch-long bundle.

"She looks like a perfect little baby," says her mother, Viki Wilson. "She looks like my father, like my son, Jon, when he was born."

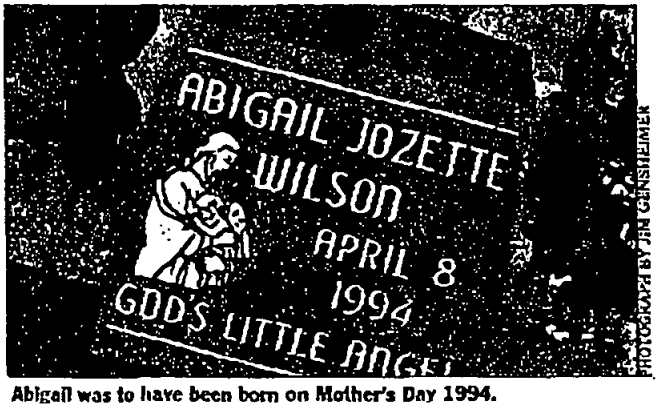
In another set of photographs, Baby Abigail is disturbing.

Floating over an inky backdrop, the nude newborn is the color of concrete, with skin tightly wrapping her miniature rib cage. The closed eyelids are puffy and the pursed mouth hints dubiously at a smile. Abigail's skull is bare and from its rear hangs a large dark sac of rubbery flesh. It contains her brain.

"Sometimes I get tangled up in the rhetoric," her mother says. " 'She was born? She was born dead?' I guess I prefer to say she was born and then died because she definitely had a life inside my belly. I never had an aversion to hands and faces touching my belly to feel her kick. In that way she was connected to this family."

A little more than a year ago, Viki and her husband, Bill, a physician, were parents to two children—Jon, 10, and Kaitlyn, 8—and planning for a third. Early tests revealed a healthy girl was due May 8, Mother's Day 1994.

But in the eighth month of pregnancy, an ultrasound showed that the fetus had a fatal condition called encephalocoele with microcephaly: Her brain was growing outside her skull. On April 8, 1994, a doctor induced labor and aborted Abigail.



PHOTOGRAPH BY JEN GLENSHEIMER

Abigail was to have been born on Mother's Day 1994.

For more than a year afterward, Viki and her family endured a hell of guilt and depression, wondering, "Why Abigail? Why us? What did we do wrong?"

Viki couldn't release her grief, partiall because she had trouble talking about i And one haunting question rocked he center and shook her faith: "What was all for?"

Then, in early June 1995, the Wilson were contacted by James McMahon, th doctor who performed the abortion. H told them that Republican conservative in Congress—a majority for the first tim since Roe vs. Wade became law in 1973- were making aggressive legislativ assaults against abortion.

They were intending to limit funds fc family planning, have outlawed abortion for military personnel overseas, elimina ed the service from federal employee healt plans. And they were proposing to outlaw th medical procedure used in late-term abortion

BY DAVID E. EARLY

r life. Is it right to deprive someone of that choice?

Baby Abigail

rdyn, Viki and Bill Wilson were able to spend two hours with Baby Abigail, who was born dead.

PHOTOGRAPH COURTESY OF THE WILSON FAMILY

"I look at death as part of life," Viki Wilson says, here holding Abigail for the first and last time. "We needed that tangibility that she did exist."

like the one Viki Wilson had.

The bill was introduced by Rep. Charles T. Canady, a Republican from Lakeland, Fla., and chairman of the subcommittee on the Constitution. Canady was quickly pulling together a June 15 hearing on the procedure he had tactically dubbed "partial-birth abortion."

The doctor asked if he could pass Viki's name to the National Abortion Federation in Washington, D.C. Would she be willing to talk publicly about Baby Abigail? Although Wilson, a homemaker and part-time nurse, says she was a "non-political know-nothing" who barely watched television news and read the newspaper only casually, she agreed.

"I didn't know much but I knew this doctor was a hero," Wilson says. "If there was going to be legislation trying to make the procedure illegal then I wanted to fight it. It gave my daughter death with dignity instead of subjecting her to a process that would have taken away all her dignity."

And so Viki Wilson, a practicing Catholic, agreed to enter the violent legal, ethical and medical fray where politicians challenge physicians and where organizations from the National Right to Life Committee, to Planned Parenthood, from the Christian Coalition to the Center for Reproductive Law and Policy continuously clash. At that moment, she found the answer to the question—"What was it all for?"—that had haunted her.

"I hate that Abigail had to die," says Wilson, 39, who lives in Fresno, in a warm, sprawling house that used to be a convent. "God put me through this because he knew I would be strong enough to be an an advocate against this bill. This has given me whole new justification for why I went through what I did."

REP. CANADY'S voice drips with disdain when he recalls how he first heard about the late-term procedure. It was during "that *last* Congress," he says.

Today when he talks about his controversial bill, H.R. 1833, which would charge physicians who perform a specific abortion technique with a felony, he says, "In *this* Congress we knew we could move it forward."

Canady's bill (and S. 939, the Senate version) marks the first time that Congress has attempted to outlaw a particular medical technique. It is no surprise that the legislation involves the most discomforting of all abortions—late term or after approximately 20 weeks.

The anti-abortion forces contend that thousands of late-term abortions are done each year, many on healthy fetuses. They say the fetuses feel pain and are usually alive until the abortionist kills them using the "partial birth" technique: The lower body of the fetus is pulled from the birth canal, then the doctor suctions the contents of its head to complete the removal.

"This procedure should not be allowed to take place in this country," Canady says. "It is barbaric and offends the conscience of people who understand what is happening."

According to pro-choice backers, fewer than 600 such late-term abortions are done annually in this country and most are to protect the health of the mother or because the fetuses have severe, often fatal abnormalities.

Intact dilation and extraction is the medical term for what conservatives are calling "partial birth" abortion, and reducing the size of the head is often necessary to complete removal of an intact fetus from the birth canal. Pro-choice lawyers say that if the doctor believes that is the most efficient medical technique to protect the health of the woman, it is within the law as established by the Roe decision and reaffirmed in 1992 by Planned Parenthood vs. Casey.

"I had hoped that members who took an oath of office would respect Supreme Court case law," says Kathryn Kolbert, vice president of the Center for Reproductive Law and Policy in New York. "But what is going on is politics and not responsible lawmaking. Therefore the zeal to keep this issue in the news has not only resulted in an unprecedented intervention into medical decision-making but bad law as well. Never in history has Congress ever told a doctor what he or she can do within their examining room."

Freshman Rep. Zoe Lofgren, who like Canady is a member of the House Judiciary Committee, sees the bill as a frightening first maneuver with a broader goal.

"What is really going on is that the majority in Congress opposes all abortion under all circumstances and they are making it illegal where there will be the least public uproar or outrage," says the San Jose Democrat, whose interest is also personal. Bill Wilson's mother is Susanne Wilson, a former Santa Clara County supervisor who served in local government with Lofgren for a dozen years.

"They are portraying it as if women in their ninth month are saying, 'Oops, maybe I don't want this kid after all,'" Lofgren says. "In most all these kind of cases they are wanted children and the families have gone from one doctor to another desperately looking for something to save the baby. These are women who are facing that nothing can be done to help their very sick babies."

But Doug Johnson, federal legislative director of the National Right to Life Committee, says such decisions are not valid just because

"This procedure should not be allowed to take place in this country," says Canady. "It is barbaric and offends the conscience of people who know what is happening."

the fetuses are flawed.

"Usually they involve women who are carrying babies with genetic disorders, babies who are going to be born alive with poor long-term prognosis," Johnson says. "The purpose then is not to save the mom but to terminate the life of a baby with profound disabilities. To get it over with. That is infanticide. That is prenatal euthanasia."

Lofgren calls that view ridiculous.

"It's not even an issue of whether to have a child," she says. "It's how is the child going to die?"

Canady's bill passed the Judiciary Committee July 18, and any day now will come up for consideration by the full House.

"As I heard that super-heated, ugly rhetoric being aimed at good people like Viki and Bill Wilson I realized that all these politicians have is a policy position against abortion," Lofgren says. "They don't have real stories like these people do."

VIKI AND BILL Wilson's real story began in August 1993 when they decided to get pregnant.

"I wanted a lot of kids," Viki says. "We have this convent with all these rooms to fill. When I found myself 37 years old I figured I better get on the ball."

As a nurse since 1977, she knew that after the age of 35 the risks—of Down's syndrome, for example—increase. But her main concern was about her energy level. "A new baby means you are up around the clock," she says.

Nevertheless, Viki wanted as much early information as possible about the health of the fetus. She had worked as a nurse in a child rehabilitation ward, and knew as well anyone what can go wrong.

"I've seen kids born with congenital anomalies, with things like spina bifida and encephalitis," Viki says. "I had seen babies with defects so severe that they would never get off a respirator. The quality of life for this kind of child is not very pretty. And I also saw the strain between the parents of such children."

In her eighth week of pregnancy, Viki had a chorionic villus study. It showed that a healthy baby girl was on the way. In her 18th week, Viki had the alpha-fetoprotein test, a blood test, which looks for neural tube defects such as encephalocoeles. An initial reading came back high, but a retest was normal.

While medical science has developed a vast, sophisticated prenatal technology, even massive abnormalities are sometimes not detected until the latter stages of pregnancy.

At 36 weeks, when Viki was "as big as a house," she went for a routine checkup. Dr. Alfred Peters found she had lost a little weight and that a previous measurement, from her belly button to her pubic bone, was off. He figured nothing was wrong but he wanted her to take an ultrasound a few days later.

Every year Viki's side of the family has a traditional Easter party at her house with about 50 guests. That she was due to have a baby the following month created heightened excitement at the party.

"Lots of people were coming up and touching my belly and laughing because the baby was moving around really strong and they could feel her," Viki recalls. "She was a big baby and everybody was putting in their two cents on what I should name her."

Viki's sister was in town from Santa Maria for the party and the following Tuesday the two women and their mom went for "the good time" of seeing the baby on a digital screen.

They laughed and talked as the bubbly technician rubbed transducer gel on Viki's stomach. When the image of the fetus came on the screen, the technician began pointing out each clear feature—beginning with perfect toes and feet and legs. She gave a good-natured hoot when she noted that it was *definitely* a girl.

"She said there is her heart and her liver and then, at the head, she went dead silent," Viki recalls. "Nothing."

The technician asked Viki's mom and sister

to move into a waiting room. A few minutes later Viki entered Peters' office. "How bad is it?," she asked.

"Bad," he said. He pointed at the pictures: "Here is her brain. But this is her head."

"It looked like she had two heads," Viki recalls. "I fell over."

Two-thirds of the brain was in a separate sac and the tissue remaining inside her head was improperly formed. "You could not discern a cerebrum from a medulla," Viki says. "You could not do a proper anatomy lesson with Abigail's brain."

Viki phoned Bill. "Tears were flooding out of every orifice of my face," she says. Bill, an emergency room physician, responded to the news with utter silence.

"I knew my child was going to die and I realized my biggest fear was coming to life," Viki says. "I was having one of those children like the ones I saw in the rehab-neonatal unit. I thought, 'Oh my God, it has happened to me.'"

In the waiting room Viki told her mother, "She is not going to make it."

Her mother fainted and Viki lost her footing. "My sister, the smallest of all of us, was trying to hold both of us up," Viki recalls. "It's a funny sight in retrospect, but that day it wasn't funny at all."

Peters sent Viki to a perinatologist. On the way over, in her brother-in-law's car, anger and sadness collided and filled Viki's head with questions: Can't we just get all of that brain and put it back in her head? Why did I have to go so long? Why can't I be pregnant for the rest of my life with her? Why did all those tests come back negative?

The perinatologist told the Wilsons it was the biggest encephalocoele he had seen. When Bill saw the screen he wept, gripped Viki's hand and caressed her belly with his face.

"I kept telling myself this was in God's hands," says Bill, 45. "That was the only way I could go on. It was the toughest thing I ever went through. I thought I was going to break apart from sadness."

Later that day they met with Jamie Fisher, a genetic counselor who was seven months pregnant. "I kept praying that somebody would tell me, 'Oh, that was the wrong belly. That was the lady next to you,'" Viki says. "Though I wouldn't wish what I was going through on anybody."

The couple got an intensive lesson about the 400 fetal anomalies, about encephalocoeles, about grieving when, as one pamphlet put it, "Hello Means Goodbye." They were also told about the dire percentages of mortality even if some of the pregnancies make it to term. They were told that massive abnormalities increase the chances of something going wrong before or during birth that could cause hemorrhaging or a ruptured uterus. Bill asked medical questions. The answers clarified their options.

The Wilsons had held two baby showers and had finished a nursery for a girl. Now they cried. For hours, they talked about what they should do "as if we knew what the other was thinking and feeling," Bill says.

Finally, they agreed to end the pregnancy, finding it unbearable to go another month knowing their baby had no chance of surviv

"I'd seen the devastation from the death o child, and I was thinking of my two older cl dren and how it would affect them," Viki sa "Bill delivered both our kids, and Katie a Jon were going to help deliver this baby. So our dreams of a healthy, happy family in t delivery room came crashing in on us becat our child was going to die."

"I wanted to stand on a cliff and scream to the world, I am Viki Wilson. My daughter died."

Baby Abigail's encephalocoele is shown in clinical photograph McMahon took at autopsy.

THE GENETIC COUNSELOR told t Wilsons about Dr. James McMahon Los Angeles, one of only three doctors the United States who specialize in late-te abortions. McMahon, who has been doi abortions since 1972, primarily treats patie referred by other doctors.

That night Viki and Bill headed down Hig way 5 with Viki at the wheel. "I needec focus, some distance from being with myse she says. They talked about the aunt at t Easter party who said her mom had alwa wanted a grandchild named Abigail. At t time Bill and Viki had said no.

But now they decided if the baby w named Abigail, her grandmother would rec nize her in heaven. They also gave her t middle name, Jozette, of the godmother to t Wilson children.

In the passenger seat Bill wrestled l demons by sketching out poems. One beg "The possibilities are gone, the dreat undreamed...."

In Los Angeles they checked into a Rad son hotel and called home to ask Bill's moth if she would drive their children down fr Fresno by Friday morning. The couple spen sleepless night worrying about going to " abortion clinic," where they might have pass through a posse of angry protesters.

"Here I am 36 weeks along," Viki said. "H will I make them listen to and understand?"

The West Los Angeles cl ic turned out to be an oa with high, ivy-covered wa surrounding an atrium tropical plants. There w no protesters.

"From the first I felt t blanket of warmth over n Viki says. "I had an inn feeling that everything w going to be OK somehov was no longer a nurse bu scared, vulnerable moth coming to terms with t reality that her child w going to die."

As soon as Viki and I met McMahon, 57, that se of relief deepened. He w confident and unhurri with a beard and gentle b eyes. Almost all the patie who come to Eve Surgi

Centers are married women who want a child but have passed the 22-week point when severe genetic damage is discovered, he says. While Bill and McMahon discussed the clinical details Viki was soothed by McMahon's wife, Gail, a nurse at the clinic.

Viki recalls the doctor telling her: "This was nothing wrong you did. This is just a pregnancy gone terribly wrong and I am here to help you. I don't mean to sound harsh but the baby is not the issue. My concern is you. You are my only patient here. I am going to do everything in my medical expertise and knowledge to get you through this physically and emotionally. If you decide to have a subsequent pregnancy you will be able to do it because this is the safest method known to medicine today."

McMahon explained that the movements by Abigail, celebrated by family and friends, had been seizures. He said that because of the anomaly, her head was stuck in Viki's pelvis. If she had gone into spontaneous labor, with the uterus contracting, the size and position of the anomaly could have ruptured Viki's uterus or caused a massive infection that could have left her unable to have more children.

The movements by Abigail, celebrated by family and friends, had been seizures. Her condition could have ruptured Viki's uterus.

IN LATE-TERM abortions, McMahon writes, "the risk is based on geometry. Something large must pass through something small. Specifically, the fetus must be brought out through a small, very vascular canal. Also in late pregnancy, the tissue integrity of the fetus is quite substantial compared to that of the cervix. This poses an increasing threat to the cervix as the gestation gets larger."

In simple terms McMahon floods the cervix with a laminaria, a seaweed fluid that gently enlarges the canal while shrinking the fetus. This process takes several days until the fetus can be slipped out of the lower uterus intact.

Usually the head of a late fetus is too large to fit through the cervix so he uses a needle to extract just enough fluid from the head to slip it out.

"The fetus feels no pain through the entire series of procedures," McMahon has written. "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."

At 9 a.m. Wednesday, April 6, 1994, McMahon began the intact dilation and extraction. He repeated it that afternoon. He did it twice more Thursday and again Friday morning. McMahon told Viki on Friday afternoon she would be ready to deliver.

On the afternoon of April 8 Abigail was cleaned up, dressed in pajamas and wrapped in blankets with yellow and pink cartoons. A white cap was placed over her head before she was presented to the couple, Susanne Wilson, Katie and Jon.

"There were 12 to 14 people in the room when Jon was born," Viki says. "Just a few days before we had been thinking of that same happy scene. Instead here are our kids coming in to see their dead sister."

The doctor hugged Viki and cried with her family. A Catholic, McMahon used holy water to perform a baptism before leaving the Wilsons to hold their child for the first and last time.

"People thought we were nuts to take pictures of us with Abigail," Viki says. "They thought it was sort of sick, asking, 'Why would you want to take pictures of a dead child?' I look at death as part of life. I know as my kids get older and I get older we'll want to remember. We need that tangibility that she did exist."

After two hours Gail McMahon came into the room to retrieve Abigail.

"When she reached out for the baby I suddenly thought, 'I'm going to bolt. I'm going to run out the door and take her and just run away from here. I've got her in my arms. I know she's dead but I want to take her and keep her,' " Viki says. "There is a picture of me holding her and when you look at that picture you can feel how much I didn't want to give her back. I knew that was it."

WHEN THE WILSONS returned to Fresno the following day, Viki's arms ached from being empty.

"I didn't sleep for three days. I went into the nursery room and sat there, not sobbing, but with so many tears flooding out I thought I would dehydrate. I wasn't eating or drinking anything. When the pictures came I held them against me. I pressed my nose in the clothes she had been dressed in and when that smell hit me, I felt total devastation and grief, like a pain in my chest. I couldn't breathe. I'd sit there staring at the crib thinking, she is never going to see this stuff everybody got for her."

When Viki tried to sleep she'd drift off for only a few minutes and dream about how she never heard the sound of a baby crying. She was in pain because her breasts continued to be engorged with milk. A cousin brewing herbal teas helped some, but mostly she lay down with bags of frozen peas on her chest.

continued from page 22

A playground fund raised thousands of dollars in Abigail's memory and named it after her.

For four months she sat on her living room couch and fingered things she had collected that were part of Abigail. "That is how I got through the day." Sometimes she felt as if she was failing as a mother to her two children because it was so hard for her to be strong and loving, to give them the hugs and kisses they needed to get through their pain.

And though she and Bill are very close, she had trouble talking to him. He was open with his grief, but able to push through it.

"As an emergency room doctor I see, all the time, how easy it is to be here one day and gone the next," Bill says. "Most of the time it's due to pure circumstance and you can't do anything about it. You just have to say this is terrible but we will have good days again."

Viki, on the other hand, couldn't shake the feeling of doom. "So many times I wanted to stand on a cliff and scream to the world. I am Viki Wilson. My daughter died. See me. Hear me. Feel me."

But looking back, Viki says Bill's way of being both emotional and strong gave her something solid to hold on to. Finally, she got back on her feet knowing, "I am forever a changed individual."

Some good things have come from the loss. A local school playground fund raised thousands of dollars in Abigail's memory and named it after her. And the Wilsons deeply value the friendships forged in sadness with many other families who have been trekking up Capitol Hill, fighting lawmakers trying to block a woman's right to choose.

"It has really been a life-affirming experience," Viki says, "a huge catharsis to meet women who have been through this and who truly know what I'm talking about."

Viki has flown to Washington twice. She walked the hallways of Congress, chasing down anyone willing to listen to her story. She says she has been transformed from "some little woman in Fresno" into a pro-choice warrior.

For a time she thought something else good had happened. Viki got pregnant while they were in Washington.

"We want this baby just as much as we wanted Abigail," Viki said in early summer. "God forbid anything should happen. But if it does I want to have the right to make whatever choices are best for all of us."

No one knows better than the Wilsons that stories don't always end happily. In late August Viki had a miscarriage.

"I feel like I've been in a constant two-year battle with fate," she says. "Bill and I talked about it long and hard and and we are going to try again."

DAVID E. EARLY is a staff writer for West.

New York Times Editorial 11/29/95, Coreen Costello

(Pro-Life Republican)

1ST STORY of Level 1 printed in FULL format.

The New York Times

November 29, 1995, Wednesday, Late Edition - Final

SECTION: Section A; Page 23; Column 1; Editorial Desk

LENGTH: 615 words

HEADLINE: Giving Up My Baby

BYLINE: By Coreen Costello; Coreen Costello testified at the Senate Judiciary Committee's hearing on late-term abortions on Nov. 17.

DATELINE: AGOURA, Calif.

BODY:

Those who want Congress to ban a controversial late-term abortion technique might think I would be an ally. I was raised in a conservative, religious family. My parents are Rush Limbaugh fans. I'm a Republican who always believed that abortion was wrong.

Then I had one.

It wasn't supposed to be that way. My little girl, Katherine Grace, was supposed to have been born in the summer. The births of my two other children had been easy, and my husband and I planned a home delivery.

But disaster struck in my seventh month. Ultrasound testing showed that something was terribly wrong with my baby. Because of a lethal neuromuscular disease, her body had stiffened up inside my uterus. She hadn't been able to move any part of her tiny self for at least two months. Her lungs had been unable to stretch to prepare them for air.

Our doctors told us that Katherine Grace could not survive, and that her condition made giving birth dangerous for me -- possibly even life-threatening. Because she could not absorb amniotic fluid, it had gathered in my uterus to such dangerous levels that I weighed as much as if I were at full term.

I carried my daughter for two more agonizing weeks. If I couldn't save her life, how could I spare her pain? How could I make her passing peaceful and dignified? At first I wanted the doctors to induce labor, but they told me that Katherine was wedged so tightly in my pelvis that there was a good chance my uterus would rupture. We talked about a Caesarean section. But they said that this, too, would have been too dangerous for me.

Finally we confronted the painful reality: our only real option was to terminate the pregnancy. Geneticists at Cedars-Sinai Medical Center in Los Angeles referred us to a doctor who specialized in cases like ours. He knew how much pain we were going through, and said he would help us end Katherine's pain in the way that would be safest for me and allow me to have more children.

That's just what happened. For two days, my cervix was dilated until the doctor could bring Katherine out without injuring me. Her heart was barely beating. As I was placed under anesthesia, it stopped. She simply went to

sleep and did not wake up. The doctor then used a needle to remove fluid from the baby's head so she could fit through the cervix.

When it was over, they brought Katherine in to us. She was wrapped in a blanket. My husband and I held her and sobbed. She was absolutely beautiful. Giving her back was the hardest thing I've ever done.

After Katherine, I didn't think I would have more children. I couldn't imagine living with the worry for nine months, imagining all the things that could go wrong. But my doctor changed that. "You're a great mother," he told me. "If you want more kids, you should have them." I'm pregnant again, due in June.

I still have mixed feelings about abortion. But I have no mixed feelings about the bill, already passed by the House and being considered in the Senate, that would ban the surgical procedure I had, called intact dilation and evacuation. As I watched the Senate debate on C-Span this month, I was sick at heart. Senator after senator talked about the procedure I underwent as if they had seen one, and senator after senator got it wrong. Katherine was not cavalierly pulled halfway out and stabbed with scissors, as some senators described the process.

I had one of the safest, gentlest, most compassionate ways of ending a pregnancy that had no hope. I will probably never have to go through such an ordeal again. But other women, other families, will receive devastating news and have to make decisions like mine. Congress has no place in our tragedies.

LANGUAGE: ENGLISH

LOAD-DATE: November 29, 1995

Remarks regarding late term abortion:

Congresswoman Zoe Lofgren

Tomorrow morning the Judiciary Committee will mark up a bill to outlaw late term abortions. There has been a lot of loud rhetoric about this issue. Some view it symbolically. But to me it's about my friend Susie Wilson and her family.

Susie and I served together in local government for 12 years. She is a wonderful person whose background is all-American.She grew up in Texas. She married her high school beau, Bob, and after World War II they moved to San Jose. She taught sewing for her Methodist Church and was a volunteer youth counselor there. She got involved in local government as a neighborhood leader. She and Bob have been married 47 years and have three grown sons. She is now retired and a proud and doting grandmother.

Last year Susie was so pleased when she told me that her son Bill and daughter-in-law Vicky were expecting a third child. She wanted another granddaughter and was going to get one!

It was with a lot of tears and sorrow that we learned, late in Vicky's pregnancy, that the little girl Abigail could not live. She had a rare condition that caused most of her brain tissue to form outside of her cranial cavity, and all of the tissue was abnormal. Vicky had been experiencing strong contractions - which as a proud mother-to-be she felt might indicate a truly strong child. It was devastating to learn that these contractions were because of seizures that Abigail was having in utero. Abigail would not survive the birth process. Further, it was possible that Vicky might not survive child birth.

Susie had made plans to help out with the new baby. Instead, she helped her son, daughter-in-law and two grandchildren to cope with their loss. After a lot of prayer and discussion, Vicky and Bill had a late term abortion that our Congress is now being asked to outlaw.

Bill is a doctor in Fresno, California. As a physician, he knew about the risks to the mother of his two children. He also knew that his new daughter could not survive the birth process. Given the situation, these parents wanted a death that was the least painful for baby and mother. They wanted a chance to properly grieve for their daughter and a chance for their other two children to come to terms with the loss. Susie was there. She also needed a chance to grieve and say good-bye. This they were able to do because of the late term abortion available to them: to hold and bury a whole deceased child and to know that the pain of death was less for her than would have been childbirth.

Abigail's memorial service was held on April 23, 1994. Susie and I talked about the whole tragedy with a lot of tears and love. I was so proud that my friend, Susie, was strong for her family at this terrible time and grateful that Vicky and Bill and their children had had the chance to hold Abigail, grieve and say good-bye. Vicky and Bill are secure knowing that Abigail is in heaven with God.

The loss of Abigail was sad and very personal for the Wilson family and for their friends, like me. It's not the sort of thing I thought I would ever talk about publicly. But the mark-up in Judiciary Committee tomorrow means that this private, personal tragedy cannot be kept private any longer. Susie along with Bill and Vicky have told me to share their family story because they believe that another family who faces the same terrible situation should have the chance to do their best to cope with dignity, love and safety without the intrusion of the Federal government.

This issue isn't about anonymous people. It's about real people facing real tragedies. It's about my friend, Susie Wilson, and her son, daughter-in-law and granddaughter. I promised her that I would do my very best to let people know that her family -- and other families faced with similar circumstances - do not need the Congress of the United States intruding into this most personal situation.

The Wilson family had their memorial service a year ago April. I've enclosed a copy of the memorial program and the autopsy photograph so you can see, as I already know, how real, personal and tragic this situation is. This family tragedy is not one which will be improved with the intervention of the Federal government.

When we meet tomorrow morning, I hope you will remember the Wilson family and vote with me to keep the long arm of the Federal government out of family situations such as these.

Warm regards.

Testimony before the Rules Committee on H.R. 1833
Congresswoman Zoe Lofgren
October 31, 1995

Ms. Lofgren. Mr. Chairman , Mr. Farr and I appear before the Rules Committee today to ask that we be allowed to offer an amendment to H.R. 1833, the Partial Birth Abortion Ban Act of 1995. This amendment will create an exception to the bill which will allow doctors to perform this procedure when it is necessary to preserve the life or health of the mother.

There has been a lot of loud rhetoric about this issue. Some view it symbolically. But to me it's about my friend Susie Wilson and her family.

Susie and I served together in local government for 12 years. She is a wonderful person whose background is all-American.She grew up in Texas. She married her high school beau, Bob, and after World War II they moved to San Jose. She taught sewing for her Methodist Church and was a volunteer youth counselor there. She got involved in local government as a neighborhood leader. She and Bob have been married 47 years and have three grown sons. She is now retired and a proud and doting grandmother.

Last year Susie was so pleased when she told me that her son Bill and daughter-in-law Viki were expecting a third child. She wanted another granddaughter and was going to get one!

It was with a lot of tears and sorrow that we learned, late in Viki's pregnancy, that the little girl Abigail could not live. She had a rare condition that caused most of her brain tissue to form outside of her cranial cavity, and all of the tissue was abnormal. Viki had been experiencing strong contractions - which as a proud mother-to-be she felt might indicate a truly strong child. It was devastating to learn that these contractions were because of seizures that Abigail was having in utero. Abigail would not survive the birth process. Further, it was possible that Viki might not survive child birth.

Susie had made plans to help out with the new baby. Instead, she helped her son, daughter-in-law and two grandchildren to cope with their loss. After a lot of prayer and discussion, Viki and Bill had a late term abortion that our Congress is now being asked to outlaw.

Bill is a doctor in Fresno, California. As a physician, he knew about the risks to the mother of his two children. He also knew that his new daughter could not survive the birth process. Given the situation, these parents wanted a death that was the least painful for baby and mother. They wanted a chance to properly grieve for their daughter and a chance for their other two children to come to terms with the loss. Susie was there. She also needed a chance to grieve and say good-bye. This they were able to do because of the late term abortion available to them: to hold and bury a whole deceased child and to know that the pain of death was less for her than would have been childbirth.

Abigail's memorial service was held on April 23, 1994. Susie and I talked about the whole tragedy with a lot of tears and love. I was so proud that my friend, Susie, was strong for her family at this terrible time and grateful that Viki and Bill and their children had had the chance to hold Abigail, grieve and say good-bye. Viki and Bill are secure knowing that Abigail is in heaven with God.

The loss of Abigail was sad and very personal for the Wilson family and for their friends, like me. It's not the sort of thing I thought I would ever talk about publicly. But the mark-up in Judiciary Committee tomorrow means that this private, personal tragedy cannot be kept private any longer. Susie along with Bill and Viki have told me to share their family

story because they believe that another family who faces the same terrible situation should have the chance to do their best to cope with dignity, love and safety without the intrusion of the Federal government.

This issue isn't about anonymous people. It's about real people facing real tragedies. It's about my friend, Susie Wilson, and her son, daughter-in-law and granddaughter. I promised her that I would do my very best to let people know that her family -- and other families faced with similar circumstances - do not need the Congress of the United States intruding into this most personal situation.

On behalf of Viki Wilson and other mothers like her, please allow us to offer this amendment to H.R. 1833.

Congress of the United States

Washington, DC 20515

DON'T TURN DOCTORS INTO CRIMINALS
Oppose H.R. 1833

November 1, 1995

Dear Colleague:

This week we had planned to offer an amendment on the Floor to H.R. 1833, the Partial Birth Abortion Ban Act of 1995, which would have allowed this procedure if it was medically necessary to preserve the life or health of the mother. This amendment is critical because it would have made sure that H.R. 1833 didn't risk the life or health of the pregnant woman by outlawing the safest late-term abortion procedure available.

The Rules Committee has just reported out a closed rule on this bill which will prevent us from offering this amendment.

Opponents of our amendment will tell you that the bill already provides the doctor with an affirmative defense if the procedure was necessary to preserve the life of the mother. But, that argument allows doctors to defend themselves after they are dragged into court by prosecutors.

The Partial Birth Abortion Ban Act of 1995 is troubling to us for constitutional reasons, medical reasons, but most importantly, for personal reasons. We know what this bill will do to real-life families who face real-life problems: it will allow the federal government to intrude on the most deeply personal decision that a woman and her family will ever face.

Most of you have heard about our friends Viki Wilson and Tammy Watts who have had this procedure. Last year Viki and Tammy became pregnant to the great joy of their family and friends. It was with a lot of tears and sorrow that they both learned, late in their pregnancy, that their babies could not live.

Viki's baby had a rare condition that caused most of her brain tissue to form outside of her cranial cavity, and all of the tissue was abnormal. Viki's baby would not survive the birth process. Further, it was possible that Viki might not survive it either.

Tammy's fetus was afflicted with a deadly fetal anomaly -- Trisomy 13. There was no surgical or genetic therapies to help her child, which was already suffering and would not live, even if carried to full term. Further, if Tammy and her husband decided to continue the pregnancy, dangerous toxins would have been released into Tammy's body as her baby died in utero, causing great risk to her health.

The bill we will vote on this week will criminalize doctors who perform the very procedure that probably saved Viki and Tammy's life and certainly preserved their ability to have a child in the future.

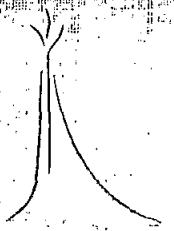
We urge you to vote no on the Rule and oppose H.R. 1833 because there is

circumstances like theirs. Don't add to the trauma that already faces mothers and fathers who are forced to terminate a wanted pregnancy.

Sincerely,

Zoe Lofgren
Member of Congress

Sam Farr
Member of Congress



WillowCreek Community Church

January 3, 1996

President Clinton
c/o Nancy Hernreich
The White House
1600 Pennsylvania Avenue
Washington DC 20500-2000

Dear Bill:

Happy New Year! I trust that you and your family got some rest and "together time" over the holidays.

Enclosed are two items. The first is an approach to the end of the State of the Union Address. I'll do further work on it, if you request. The second is some reading for you on the partial birth abortion legislation. I can't stress enough what being on the wrong side of this issue will do to your support base in the Christian community. Although less that 600 of these procedures are done each year, the moral outrage over it has captured the hearts of tens of millions of Americans. In my opinion, signing the bill will cost you very little. Vetoing it will come to haunt you, not only in the near term, but all throughout the upcoming campaign. And if you ask me what I think Jesus would do if He were in your shoes. . . well, enough said.

You're a good man, Bill. And you are not only going to win re-election, but in your second term you are going to leave a legacy that will be honored for centuries! Really!

Here to help. . .

Your friend in Christ,

Bill

Bill Hybels

67 East Algonquin Road • South Barrington, IL 60010-6143 • 708/765-5000

Memo to Bill Hybels
from Lee Strobel
date: January 3, 1996
re: *Partial-Birth Abortion Bill*

At your request, I have thoroughly reviewed medical documentation, testimony before House and Senate subcommittees, and other relevant data concerning "partial-birth abortions," or the "dilation and extraction" procedure, used on late-term fetuses. I am firmly convinced that the bill outlawing such practices is (1) morally and ethically correct; (2) medically appropriate; and (3) Constitutionally defensible. The following summarizes my reasoning; I can provide documentation of any point as necessary.

I start with this uncontested description of the procedure from *The Los Angeles Times*: "The procedure requires a physician to extract a fetus, feet first, from the womb and through the birth canal until all but its head is exposed. Then the tips of surgical scissors are thrust into the base of the fetus' skull, and a suction catheter is inserted through the opening and the brain is removed."

Physicians employ this procedure in abortions of fetuses of 4 1/2+ months.

Despite rhetoric to the contrary, there is convincing evidence that:

1. This procedure is frequently performed on infants who are healthy or have defects that are consistent with long life.

-- In a taped interview with the *American Medical News*, the official newspaper of the American Medical Association, Dr. Martin Haskell, a leading practitioner of the procedure, said 80% of the partial-birth abortions he performs are "purely elective." For example, Dr. Nancy Romer, an obstetrician/gynecologist, said she referred three patients to Dr. Haskell's clinics for abortions "well beyond" the half-way point of pregnancy and "none of these women had any medical illness, and all three had normal fetuses."

-- James McMahon gave the House Judiciary Constitution Subcommittee a self-selected sample of 175 such abortions he personally performed. An analysis by an expert shows that 39 of the abortions -- or 22% -- were performed because of "maternal depression," while another 16% were "for conditions consistent with the birth of a normal child (e.g., sickle cell trait, prolapsed uterus, small pelvis)." At 26 weeks of gestation, half the aborted babies were perfectly healthy and many of those that Dr.

McMahon defined as "flawed" had conditions compatible with long life, with or without disability (nine, for example, had cleft palates).

2. The fetus is alive, in most cases, until the end of the procedure and is not killed by anesthesia given to the mother.

-- Dr. Haskell said: "And so in my case, I would think probably about a third of those are definitely dead [from the early part of the abortion procedure] before I actually start to remove the fetus. And probably the other two-thirds are not." (When Dr. Haskell recently tried to back away from this assertion he made to the *American Medical News*, the editors produced a transcript of the taped interview containing this quote and others.)

-- Responding to Dr. McMahon's suggestion that the mother's anesthesia causes "fetal demise," Dr. Watson Bowes, Professor of Obstetrics and Gynecology and Pediatrics at the University of North Carolina at Chapel Hill School of Medicine, wrote: "This statement suggests a lack of understanding of maternal/fetal pharmacology. . . . 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 for the procedures, and the fetuses did not die."

-- The president of the American Society of Anesthesiologists added that there is "absolutely no basis in scientific fact" for the claim that the mother's anesthetic results in the fetus' death. Dr. David Birnbach, Director of Obstetric Anesthesiology at St. Luke's-Roosevelt Hospital Center, and numerous other experts back that up.

-- Dr. Dru Elaine Carlson, a Perinatologist and Director of Reproductive Genetics at Cedars-Sinai Medical Center, has observed Dr. McMahon actually perform this procedure and said that it's not until the point of "removal of cerebrospinal fluid from the brain" that "instant brain herniation and death" occur.

3. It's likely that many of these fetuses feel pain.

-- "The fetus within this time frame of gestation, 20 weeks and beyond, is fully capable of experiencing pain . . . . Without question, all of this is a dreadfully painful experience for any infant subjected to such a surgical procedure." -- Dr. Robert J. White, Professor of Neurosurgery at Case Western University, testifying before the House Judiciary Constitution Subcommittee.

-- "It may be concluded with reasonable medical certainty that the fetus can sense pain at least by 13 1/2 weeks." -- Dr. Vincent J. Collins, Professor of Anesthesiology at Northwestern University and author of *Principles of Anesthesiology*, a leading medical text on pain control.

-- Dr. Haskell said in 1992 that he performs partial-birth abortions under "local anesthesia," which would provide no pain-deadening for the fetus. The American Society of Anesthesiologists told the Senate Judiciary Committee that the regional anesthesia used in some partial-birth abortions wouldn't affect the fetus; general anesthesia may sedate the fetus to some degree, but less than the mother, and pain relief for the fetus would be doubtful.

I. Signing the bill is morally and ethically correct.

1. Babies subjected to this procedure are two-thirds delivered before being killed, making this barely distinguishable from infanticide. Indeed, one expert told the House subcommittee that the doctor has to work hard to keep the baby's head inside of the mother, because "if by chance the cervix is floppy or loose and the head slips through, the surgeon will encounter the dreadful complication of delivering a live baby. The surgeon must therefore act quickly to ensure that the baby does not manage to move the inches that are legally required to transform its status from one of an abortus to that of a living human child."

2. Even numerous abortionists and pro-choice advocates believe that this procedure is barbarous and shocks the conscience.

-- "In my own personal opinion, particularly when there are other techniques available, the introduction of a sharp instrument into the brain and sucking out the brain constitutes cruel and unusual fetal punishment." -- Dr. Harlan R. Giles, Professor of High-Risk Obstetrics at the Medical College of Pennsylvania, who performs abortions.

-- "I'm not going to vote in such a way that I have to put my conscience on the shelf." -- U.S. Rep. Jim Moran of Virginia, one of a dozen abortion-rights supporters in the House who voted for the bill to outlaw partial-birth abortions.

-- Although the American Medical Association has not taken an official position, the AMA's Council on Legislation unanimously recommended support of the House bill, with one member calling the partial-birth abortion procedure "basically repulsive."

3. From a Biblical perspective, those who are subjected to partial-birth abortions are fully human and deserving of complete legal protection. See the attached analysis by Dr. Francis J. Beckwith (Ph.D., philosophy, Fordham University; currently a lecturer in philosophy at the University of Nevada), who convincingly dismantles attempts by pro-choice advocates to reconcile abortion with Scripture.

4. Outlawing "partial-birth abortions" is not impermissibly imposing personal morality on others. We would not allow a segment of the population to kill members of a minority group because they consider them "subhuman." Similarly, we should not allow some to terminate the lives of these babies because of their belief that they are less than human, when the evidence strongly supports the conclusion that they are human beings deserving complete legal protection.

5. We should have sympathy for women who carry gravely deformed children, as is the case in some instances in which this procedure is used. These babies would have died a natural death if allowed, and sometimes there are medical grounds for early delivery. But even a brief life can contribute positively to others. For example, a couple in our church decided against abortion and instead gave birth to a son named Joshua, who was born with the absence of the brain cortex, resulting in total retardation. The couple wrote this: "As time went by, as a family, our faith began to grow. And we loved our son Joshua so much that the handicap didn't matter anymore. God taught us to give love rather than just receive it, and there was a great peace within us. Joshua went to be with the Lord at age 21 months. The beautiful experience of his life impacted not just our family, but our community and acquaintances as well."

6. Permitting something as grotesque as partial birth abortions is a form of extremism. "Those who defend it reflexively because it may lead to other legislation are in the exact position of gun lobbyists who shoot down bans on assault weapons because those bans may one day lead to a roundup of everybody's handguns. They refuse, on tactical grounds, to confront the moral issue involved." -- John Leo, *U.S. News & World Report.*

II. Signing the bill is medically appropriate.

1. Even doctors who routinely perform late abortions say the partial-birth abortion technique is unneeded and unnecessary. Dr. Warren Hern, author of the standard textbook *Abortion Practice*, said: "I have very serious reservations about this procedure . . . You really can't defend it. . . . I would dispute any statement that this is the safest procedure to use."

Dr. Nancy G. Romer, Assistant Clinical Professor of Obstetrics and Gynecology at Wright State University School of Medicine, told the Senate Judiciary Committee: "If this procedure were absolutely necessary, then I would ask you why does no one that I work with do it? We have two high-risk obstetricians, a medical department of about 40 obstetricians, and nobody does it. And we care for and do second trimester abortions."

2. Partial-birth abortions can present special risks to the mother. Dr. Pamela Smith, Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital, told the Senate Judiciary Committee: "You should have grave concerns about the health of the mother if you're going to do a delivery like this in the office." She said this procedure, because it takes three days to complete, can heighten emotional harm to the mother. She also testified that "the damage that could possibly be done to the bottom of a woman's womb by doing this procedure should not be underestimated or glossed over."

3. The law *does* permit partial-birth abortions in the unlikely case that it would be necessary to save the life of the mother. But as Dr. Pamela Smith, Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital, noted: "There is absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life of the mother." Even so, Rep. Charles T. Canady (R-Fla.), who introduced the House legislation, said: "No physician is going to be prosecuted and convicted under this law if he or she reasonably believes the procedure is necessary to save the life of the mother."

III. Signing the bill is Constitutionally defensible.

1. The official report of the House Judiciary Committee makes the argument that the partial-birth abortion ban could be upheld by the Supreme Court without overturning *Roe v. Wade*. The Supreme Court's current doctrine suggests that a human being becomes a legal "person" upon emerging from the mother; the Court has not dealt with the question of a human being who is two-thirds across the line of "personhood." So the Court could retain its *Roe v. Wade* doctrine while at the same time declaring that partial-birth abortions are not Constitutionally protected.

2. David M. Smolin, Professor of Law at Cumberland Law School at Samford University, testified before the House Judiciary Committee that the banning of partial-birth abortions would be Constitutional for several reasons. These are set forth in the attached brief, which I urge you to read.

Note Professor Smolin's assertion that the partial-birth abortion ban can be upheld as Constitutional despite the *Planned Parenthood of Missouri v. Danforth* decision: ". . . It is clear that a prohibition of partial-birth abortions would leave in place the currently standard and dominant methods of abortion during the second half of pregnancy. Thus, the current [proposed] law cannot be viewed, as was the law in *Danforth*, as having the purpose or effect of inhibiting the majority of abortions during a certain

period. *The proposed ban on partial-birth abortions is a true regulation, and not in any way a prohibition of abortion.*" (emphasis added)

There are other Constitutional Law scholars, including Professor Douglas W. Kmiec of the University of Notre Dame, who concur that this law can pass Constitutional scrutiny. (See attached brief)

3. U.S. District Court Judge Walter Rice in Ohio recently struck down an Ohio law banning partial-birth abortions. However, this state law is fundamentally different from the proposed federal legislation, and its definition of the relevant abortion procedure is much more inclusive and vague. Thus, the Ohio decision is basically irrelevant to the federal issue.

Conclusion

At its core, this is a moral and ethical issue. Even those who believe in the legality of abortion should recoil at the violent ugliness of this procedure. And anyone who opposes this legislation must live with this description by Brenda Pratt Shafer, a registered nurse who assisted in three of these abortions -- two performed on normal babies and one on an infant with Down's syndrome. In testimony before the House Judiciary Committee, she recalled the first procedure, a partial-birth abortion of a baby boy at 26 1/2 weeks (or about 6 months):

"[The doctor] delivered the baby's body and the arms -- everything but the head. The doctor kept the baby's head just inside the uterus. The baby's little fingers were clasping and unclasping, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp."

"The radical, violent, inhumane nature of this procedure demands prompt enactment of this legislation." -- Constitutional Law scholar Douglas W. Kmiec.

TESTIMONY OF DAVID M. SMOLIN, PROFESSOR OF LAW,
CUMBERLAND LAW SCHOOL, SAMFORD UNIVERSITY
BEFORE THE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON THE CONSTITUTION,
UNITED STATES HOUSE OF REPRESENTATIVES
CONCERNING CONSTITUTIONALITY OF PROHIBITING
PARTIAL-BIRTH ABORTIONS

June 15, 1995

Mr. Chairman and members of the Committee, I am honored to have been invited to testify regarding the proposed prohibition of partial-birth abortions. The following testimony represents my own views as a law professor, teaching and writing in the area of constitutional law, and is not intended to represent the views of my employer, Cumberland Law School of Samford University.

My testimony will concentrate on two constitutional questions: First, is the prohibition of this abortion method constitutional under Planned Parenthood v. Casey and other binding precedent?; and second, does Congress possess the authority, under the Commerce Clause of the Constitution, to enact this law?

I. CONSTITUTIONALITY OF PROHIBITING PARTIAL-BIRTH ABORTIONS UNDER PLANNED PARENTHOOD V. CASEY AND OTHER BINDING PRECEDENTS

My conclusion is that a prohibition of partial-birth abortions, such as the one proposed by Chairman Canady, is constitutional under current United States Supreme Court precedent, including in particular Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992).

The proposed prohibition of this particular method of abortion constitutes, in constitutional terms, a regulation of abortion. The proposed law would merely alter the manner in which a minority of the small minority of abortions occurring in the second half of pregnancy are performed. See, e.g., Centers for Disease Control, Abortion Surveillance--United States, 1990, 42 Morbidity and Mortality Weekly Report 29, 31 (December 17, 1993)(approximately one percent of abortions performed at or after 21 weeks; four percent performed at 16 to 20 weeks); see Martin Haskell, Second Trimester D & X, 20 Weeks and Beyond, Presentation to National Abortion Federation (Sept. 13, 1992)(partial-abortion method designed for abortions at twenty weeks and beyond). Thus, the law would potentially alter the method of abortion used in less than twenty thousand abortions per year, out of the more than 1.5 million annual abortions; as a practical matter, given current preferences for other methods, the law would probably have some influence in the choice of method in less than five thousand abortions annually. Thus, although the proposed law is in statutory terms a prohibition of certain conduct, in constitutional terms it is a regulation of abortion.

This conclusion is supported by a comparison of the proposed law with the Supreme Court's 1976 invalidation of a ban on saline abortions after twelve weeks, in Planned Parenthood of Missouri v.

Danforth, 428 U.S. 52, 75-79. The Supreme Court concluded in Danforth that 68% to 80% of all post-first-trimester abortions employed the saline method. 428 U.S. at 77. Thus, the ban in Danforth prohibited the dominant abortion method for this period of pregnancy. Further, the primary alternative method relied on by Missouri, that of prostaglandin instillation, was at that time a new method, and was not proven to be available in Missouri; further, the Court interpreted the saline abortion prohibition as possibly also prohibiting prostaglandin abortions, as well as potentially safe future methods. Id. at 77-78. Thus, the Court concluded that the post-twelve week saline abortion prohibition "was designed to inhibit, and ha[d] the effect of inhibiting, the vast majority of abortions after the first 12 weeks." Id. at 79. Under these circumstances, the Missouri law was held unconstitutional.

By contrast, Dr. Martin Haskell's September 13, 1992 presentation to the National Abortion Federation introduced partial-birth abortions as a new alternative to the standard techniques employed in post nineteen week abortions. Dr. Haskell's paper notes that current methods at this stage include induction methods, classic D & E abortion, and two modified methods of D & E abortion; Dr. Haskell specifically states that "most late second trimester abortions are performed by an induction method." Martin Haskell, supra, at 28. Further, Dr. Warren Hern, author of the much-cited text, Abortion Practice, has clearly outlined a modified D & E procedure, employing "adjunctive urea amnioinfusion," as an effective method for these late term abortions. See Warren Hern, Abortion Practice 127, 144-46 (1990)(cited in Martin Haskell, supra, at 28). Thus, it is clear that a prohibition of partial-birth abortions would leave in place the currently standard and dominant methods of abortion during the second half of pregnancy. Thus, the current law cannot be viewed, as was the law in Danforth, as having the purpose or effect of inhibiting the majority of abortions during a certain period. The proposed ban on partial-birth abortions is a true regulation, and not in any way a prohibition, of abortion.

The present proscription appears constitutional even under the standards applied by Justice Blackmun in Danforth; it is even clearer that the law is constitutional under the less stringent constitutional standards decreed in Casey. Danforth applied Roe's trimester approach, which forbade any regulation of second-trimester abortion in the interests of the fetus. See Danforth, 428 U.S. at 61 (citing Roe v. Wade, 410 U.S. 113 (1973)). Casey, by contrast, overruled Roe's trimester system, and held that it was permissible to regulate abortion throughout pregnancy in the interests of the fetus, or unborn child, so long as any previability regulations did not constitute an "undue burden" on the abortion liberty. See 112 S.Ct. at 2818-20 (joint opinion); see, e.g., Planned Parenthood v. Casey, 114 S.Ct. 909, 910 fn 2 (1994) (Souter, J.) (joint opinion sets constitutional standard under Marks v. United States, 430 U.S. 188 (1977)). Thus, the prohibition on partial-birth abortions could be constitutional even

if such prohibition did not specifically serve the interests of maternal health.

The proposed prohibition on its face applies throughout pregnancy; however, Dr. Haskell claims to have developed the method for use at twenty weeks and beyond, and has noted that a colleague uses "a conceptually similar technique" "up to 32 weeks or more." Martin Haskell, supra, at 27-28, 33. Thus, the method apparently is only applicable to the period shortly before, and the period after, viability. Constitutional analysis of the prohibition under Casey therefore requires a bifurcated approach.

Under Planned Parenthood v. Casey, previability regulations of abortions are constitutional so long as they do not constitute an undue burden on the abortion liberty. See 112 S.Ct. at 2819-21. The essence of the undue burden test is the question of whether the law, on its face, places a "substantial obstacle" on the woman's liberty that effectively deprives her of the right to make the "ultimate decision" of whether or not to abort. See id. Given the existence of several standard abortion techniques for previability abortions, other than partial-birth abortions, it is clear that this prohibition would not constitute an undue burden. There is no indication in the case law that women possess a constitutional right to demand that the fetus they carry be killed in the birth canal. If women lack such a constitutional right to demand that the unborn child they carry be killed in the birth canal, then physicians lack any corollary right to kill fetuses in the birth canal. The abortion liberty exists for the woman, and physicians are constitutionally protected from regulation only to the degree necessary to protect the constitutional liberties of the woman.

The primary application of this regulation of abortion to the second half of pregnancy further suggests a lenient constitutional standard of review. The Supreme Court in Webster v. Reproductive Health Serv., 492 U.S. 490, 513-20 (1989), upheld a viability testing requirement at twenty weeks, based on the common tendency to miscalculate gestational age by as much as four weeks; Justice O'Connor's concurring opinion stressed the permissibility of a presumption of viability at twenty weeks, and the permissibility of regulating abortion during the period when "viability is possible." See 492 U.S. at 525-31. It appears that regulations of abortion operating at the periphery of viability (which can occur as early as 23 to 24 weeks according to Casey, 112 S.Ct. at 2811,) benefit in some ways from the more lenient standards applicable to postviability abortions.

Further, it should be underscored that any claims that partial-birth abortions are superior to the standard existing techniques must be evaluated separately for previability, and postviability, abortions. The undue burden standard is only relevant to previability abortions; after viability, the state may actually proscribe some abortions. See Casey, 112 S.Ct. at 2816-17, 2821. Thus, for example, Dr. Haskell's concern regarding the "toughness of fetal tissues" at "twenty weeks and beyond," making dismemberment (and hence classic D & E abortion) difficult, at some

point becomes less significant, for within several weeks the toughening fetal tissues comprises a viable fetus, or, as the Casey joint opinion described it, an " independent ... second life," or "developing child." 112 S.Ct. at 2817. To gain the burden of the undue burden standard, a physician would have to demonstrate that there was no medically-viable alternative method of abortion, during this short period from twenty weeks to viability at twenty-three to twenty-four weeks. Yet, even Dr. Haskell's paper documents the alternatives of induction methods, and of Dr. Hern's technique for softening the fetal tissues prior to D & E abortion.

Upon viability, the state can proscribe some abortions, because "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." Casey, 112 S.Ct. at 2817; see also Roe v. Wade, 410 U.S. 113, 163-64 (1973). The proposed ban on partial-birth abortions is merely a regulation of abortion, and therefore is, in its application to the abortion of viable fetuses, well within constitutional limits. The Supreme Court has never given women the right to demand that the viable "developing child," Casey, 112 S.Ct. at 2817, be killed in the birth canal.

Both before and after viability, the statute would, in the broad sense, be subject to lenient rational basis review, which would require that the prohibition of partial-birth abortions be rationally related to some legitimate governmental interest. This is the same lenient review applied in the modern era to economic regulatory review, and laws are almost always found constitutional under this standard of review. Public morality, for example, is a legitimate governmental interest. Thus, a sense of particular moral outrage at partial-birth abortions would be a sufficient reason to sustain the law. The spectre of partially delivering a fetus, and then suctioning her brains, may mix the physician's disparate roles at childbirth and abortion in such a way as to particularly shock the conscience. In childbirth the physician considers the fetus her "second patient," and thus works to guard and protect the life and health of the fetus; by contrast in abortion the physician often acts directly to kill the fetus as a part of the abortion procedure. Proscribing a procedure that seems, even momentarily, to evoke simultaneously these disparate roles is itself a "legitimate governmental purpose."

Further legitimate purposes for the law would include protecting respect for human life, and for constitutional persons, by not permitting a fetus present in the birth canal to be deliberately assaulted and killed. The birth canal represents, in constitutional terms, the passage from constitutional non-personhood to recognition and protection as a constitutional person; even a viable fetus is not a constitutional person within the womb, while even a nonviable fetus aborted or born alive apparently is a constitutional person upon birth, particularly if the fetus is of substantial size and development. See, e.g., Showery v. State, 690 S.W.2d 689 (Tex.App. 8 Dist. 1985)(upholding murder conviction when physician, subsequent to abortion, killed infant; noting that viability is irrelevant upon birth). A

physician deliberately killing a fetus whom the physician has moved partway on the journey from nonpersonhood to personhood, and who is physically literally on the verge of constitutional personhood, undermines respect for human life and for constitutional personhood, because such a fetus appears indistinguishable from a constitutional person. Requiring that the fetus be killed within the womb, rather than within the birth canal, in a small way widens the line between permissible and impermissible conduct. It undermines respect for constitutional persons, and for human life, to deliberately bring a fetus within proximity of constitutional personhood, and then, as such fetus lies literally within inches of constitutional personhood, assault and kill her.

It is possible that at least some of the fetuses killed by partial-birth abortions are constitutional persons. The Supreme Court in Roe v. Wade held that "the world 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. The Court, however, has never addressed the constitutional status of those who are "partially born." Indeed, in Roe the Court noted that the following Texas statute had not been constitutionally challenged:

> Art. 1195. Destroying unborn child.
>
> 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 born alive, shall be confined in the penitentiary for life or for not less than five years.

410 U.S. at 118 n. 1.

"Parturition" means "the act or process of giving birth to offspring," Webster's Seventh New Collegiate Dictionary 615 (1967). Typical legal definitions of "live birth" require complete expulsion or extraction, whether or not the umbilical cord has been cut or the placenta is attached; the neonate must, after such expulsion, evidence signs of life such as breathing, heartbeat, pulse, or voluntary movement. Significantly, "duration of pregnancy" (and hence viability) are explicitly stated as irrelevant to the definition of live birth. See, e.g., Ill. Rev. Stat., ch. 111 1/2 para. 73-1(5); Fla. Stat. Ann. §382.002(10).

It seems reasonable to suppose that an infant who has been only partially extracted from the mother, and hence not yet legally born, might be considered a constitutional person, even though (for example) only the head and shoulders have been extracted from the mother. It would certainly seem wrong to remove all legal protection from such a partially-born neonate, and thereby subject her to being killed, assaulted, or the subject of medical experimentation, upon the direction of another. In the same way, it would not be unreasonable to find that a fetus delivered into the birth canal has already become a constitutional person. A fetus delivered into the birth canal has commenced the journey toward legal personhood and hence legal protection; indeed, where such a fetus is or may be viable, she or he is literally inches

away from maintaining a sustainable, developing, independent life completely apart from her mother. It seems odd to demand that such a journey be completed before legal recognition and protection are assumed.

However, it is important to underscore that the partial-birth abortion prohibition is fully constitutional, under current standards, even if the Court were to hold that all of the fetuses protected were NOT constitutional persons. Even if the infant in the birth canal (or partially extracted from the mother) is NOT a constitutional person, the government nonetheless may be concerned with her fate, and with the wider implications of permitting killing within the birth canal or during the process of birth. The decision of abortion rights litigants not to challenge the Texas prohibition of killing the unborn during the process of birth suggests a broad agreement that there is no constitutional right to kill during the process of birth; the proposed prohibition on partial-birth abortion extends this reasoning only slightly, by preventing physicians from delivering the unborn into the birth canal, and then killing them.

Indeed, one notable feature of the proposed legislation is that it is supportable by a variety of legitimate state interests, which in turn reflect a variety of views of the status of the fetus. Animal cruelty laws can regulate the manner in which cattle and other sources of meat are cared for and slaughtered; thus, one who believes the human fetus to be morally equivalent to a cow, pig, or other animal source of food could rely on the legitimate governmental purpose in not unnecessarily subjecting living creatures to pain, cruelty, or indignity, even in the process of killing them. In addition, the proposed ban is rationally related to the legitimate government purpose of protecting the value of constitutional persons by drawing a clearer and broader line between abortion and childbirth, and between the fetus in the womb and the neonate outside of the mother. Those concerned with the integrity of the medical profession could support the statute because it lessens the confusion between the roles of physician in abortion and in childbirth, and hence alleviates the fear, moral outrage, and potential moral degradation that occurs by mixing these roles. By contrast, those who consider the human fetus to be a form of human life could rely on the purpose of providing a modicum of protection for human life, by proscribing a particularly cruel and/or painful form of killing, or by granting some protection to the developing human within the birth canal. (Under Casey and Webster government may legislate in the interests of the fetus, and based on the view that the fetus is human life, so long as the law does not substantively violate the abortion right. See Casey, 112 S.Ct. at 2817-25; Webster, 492 U.S. at 504-07.) Finally, those who believe that at least some of these procedures may involve the killing of a constitutional person, would also possess a legitimate purpose for the law, although this latter purpose should, to assure constitutionality, be supplemented by at least one of the other clearly legitimate purposes.

Under rationality review, the Courts would not be free to

undermine the constitutionality of the law because it did not proscribe other seemingly "shocking," painful, or cruel abortion techniques, such as the dismemberment of the fetus in D & E abortion. Under rationality review, the legislature is free to address a portion of a problem, while leaving other parts of the problem unaddressed. In addition, there are rational reasons for distinguishing between partial-birth abortion, and other forms of abortion. Methods of abortion that kill the fetus within the womb do not present the same degree of confusion created by mixing the roles of the physician and abortionist within the same procedure; nor do they present the same degree of confusion present by a killing of the fetus who is physically partially born, and present within the birth canal. Similarly, the dismemberment of the fetus within the womb, however morally shocking to some, does not, to the same degree, blur the line between fetus and neonate, as does the killing of the fetus in the birth canal. Moreover, it appears clear that the banning of the previously-existing, standard methods of abortion would, under Danforth and Casey, present a closer constitutional question. Thus, it makes constitutional sense to proscribe the most recent, and most shocking, method of abortion.

II. CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

Congress possesses ample authority under the Commerce Clause of the Constitution, U.S. Const., Art. I, § 8, cl. 3, to enact the proposed prohibition of partial-birth abortions.

As a starting point, the testimony of the Attorney General, regarding the then-proposed Freedom of Access to Clinic Entrances Act, is useful:

> The provision of abortions services is commerce. The entities that provide these services, including clinics, physician's offices, and hospitals, purchase or lease facilities, purchase and sell equipment, goods, and services, employ people, and generate income. Not only do their activities have an effect on interstate commerce, but they engage directly in interstate commerce. It should be easy to document that they purchase medicine, medical supplies, surgical instruments, and other supplies produced in other States.
>
> Moreover, it is well-established that many serve significant numbers of patients from other States. For example, in Bray v. Alexandria Women's Health Clinic, 113 S.Ct. at 762, the Supreme Court accepted the district court's finding that substantial numbers of patients at abortion clinics in the Washington, D.C., area traveled interstate to obtain the services of the clinics. In Wichita, KS, the Federal district court found that some 44 percent of the patients at one clinic came from out of State. See New York State NOW v. Terry, 886 F.2d at 1360 (many women travel from out-of-State to New York clinics). Thus, there can be little doubt that abortion providers are engaged in interstate

> commerce and Congress should not have difficulty developing a legislative record allowing it to make such a finding.

Prepared Statement of Attorney General Janet Reno, Hearing Before the Committee on Labor and Human Resources, United States Senate, 103rd Congr., 1st Sess., on the Freedom of Access to Clinic Entrances Act of 1993, May 12, 1993, at 16.

The relatively few number of abortion providers who perform partial-birth abortions appear particularly likely to be involved in serving out-of-state patients, given the relatively specialized nature of the services they provide. Some providers of abortion services do not perform abortions in the second half of pregnancy, during the period for which partial-birth abortions were designed; thus, those abortion providers who provide late term abortions are even more likely to receive referrals, and patients, from outside of their immediate geographical area.

The Supreme Court's recent decision in United States v. Lopez, 115 S.Ct. 1624 (1995), does not alter the conclusion that Congress possesses the authority to enact the proposed ban on partial-birth abortions. Lopez concerned the proscription of a noncommercial activity: the possession of a firearm in a school zone. The United States argued unsuccessfully that this noncommercial activity substantially affected interstate commerce because of its negative impact upon education. 115 S.Ct. at 1632. The Court rejected the dissent's view that schools (including public schools) are commercial. 115 S.Ct. at 1633. The Court also noted the lack of any "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 115 S.Ct. at 1631.

Lopez does not present any reason to question the Attorney General's conclusion that "[t]he provision of abortion services is commerce," see supra, at least where payment is received, from some source, for the services. Abortion services would generally be classed within the broader category of medical and health care services, for purposes of commerce clause analysis. Health care constitutes, as the Congress well knows, a large and significant portion of the national economy, and it would seem absurd to hold that an industry comprising one-seventh of the national economy could not be regulated under the commerce clause.

The regulation of abortion services is therefore a regulation of commerce, and this alone sufficiently distinguishes the proposed ban from Lopez, which concerned an attempted regulation of noncommercial activity. The proposed statute, moreover, limits its reach to "[w]hoever, in or affecting interstate or foreign commerce," performs a partial-birth abortion, and thus the statute contains the individualized jurisdictional requirement lacking in Lopez. Such an individualized determination is probably unnecessary to safeguard the constitutionality of the statute, but its existence further brings the statute well within the ambit of Congressional authority, even after Lopez.

TESTIMONY OF DOUGLAS W. KMIEC
PROFESSOR OF CONSTITUTIONAL LAW
UNIVERSITY OF NOTRE DAME
BEFORE THE SENATE JUDICIARY COMMITTEE
NOVEMBER 17, 1995
Re: S.939
THE PARTIAL-BIRTH ABORTION BAN ACT OF 1995

Mr. Chairman, members of the committee, I am pleased to respond to the committee's request to address the constitutionality of S.939, "The Partial-birth Abortion Ban Act of 1995." I have taught constitutional law for close to two decades and serve as professor of constitutional law at the University of Notre Dame. On academic leave this year, I presently hold the Straus Distinguished Chair in Law at Pepperdine University in California. During the Reagan Administration, I served as Assistant Attorney General for the Office of Legal Counsel in the U.S. Justice Department.

I. Are There Constitutional Concerns?

My task this morning is to address various concerns that have been raised by the Clinton Administration, individuals within the Department of Justice, and a few others, regarding the legality of this legislation. These concerns are styled as constitutional, but in truth, they are not. Those wanting to perpetuate a practice that, in some states is already expressly treated as homicide, and except for a few inches, would be classified as infanticide under the laws of all states will have to do so without the conscience-easing pretense of constitutional justification. As I explain below, the Constitution can no more shield the killing of a partially-born child, than it can excuse the criminally negligent actions of a careless doctor that results in the avoidable death of a pregnant woman. Abortion practice is not "presumptively privileged." Punishing doctors for killing partially-born children no more "chills" a constitutional right than punishing doctors for a botched abortion. [Such "privilege" claim was explicitly rejected in Ketchum v. Ward, 422 F. Supp. at 938; see also, Roe, noting that "[i]f an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." 410 U.S. at 166 (1973)].

II. A Radical Procedure Beyond Civilized Description

When I was contacted by the committee late last week to testify, I confess I was surprised by the committee's decision to hold hearings, given both the thorough review this legislation received in the House of Representatives, and especially given the impardonable practice aimed at defenseless human beings. The radical, violent, inhumane nature of the procedure demands prompt enactment of this legislation. I have made my own views against

abortion well known throughout my career. But, as noted above, the hideous nature of this practice transcends the issue of abortion. It is one of those rare places where people on both sides of the abortion debate should agree: no civilized republic can permit a gruesome procedure in which, as one nurse described, the doctor pulls the moving body of the baby into the birth canal;

> "his little fingers were clasping together. He was kicking his feet. All the while his little head was still stuck inside. [The doctor takes] a pair of scissors and insert[s] 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." [Majority Report, Hearings on H. 1833, House Judiciary Committee, September 27, 1995, citing the testimony of Nurse Shafer at 3-4].

III. Killing A Partially-Born Child Is Homicide, Not Abortion

As Nurse Shafer's candid summary of her experience reveals, the subject of this bill defies humane description. The practice proposed to be outlawed has been denominated an abortion procedure, though as I will show, it actually falls between infanticide or homicide on the one hand and abortion on the other. In any event, whatever label it is given, its gruesome nature suggests it ought to be treated like one of those crimes, as Blackstone wrote, that is so heinous, it deserves no name. As far back as the 13th century, the common law classified the abortion of a "formed and animated" fetus as homicide. [See H. De Bracton (c. 1250), On the Laws and Customs of England 341 (S. Thorne ed. 1968); for a compilation of these common law sources, see Linton, "Planned Parenthood v. Casey in the Supreme Court," 13 St. Louis Pub. L. Rev. 15, Appendix A (1993)].

Yet, with the exception of one recently enacted state law, [Ohio Stat. Section 2307.51, effective November 15, 1995, tro granted awaiting judicial review on the merits, outlawing on terms similar, but not identical, to that of this legislation, the "dilation and extraction procedure"] the fate of an alive, partially-born child has escaped the attention of the modern law.

IV. Partially-Born Children Reside In A Legal Twilight Zone Between Children Born Alive and Unborn Children

The lives of partially-born children are at risk when they reside in a constitutional twilight zone between full constitutional recognition and incomplete recognition as part of the complex intellectual balancing of the Supreme Court's abortion doctrine. The risk that this class of partially-born children faces is fully manifested by the procedure sought to be banned by this legislation -- the deliberate manipulation of the child into, and partly out of, the birth canal to die a painful and gruesome death by means of jamming a pair of scissors into the back of the

child's skull and siphoning out the brain.

Partially-born children are neither fully born, and therefore protected by the homicide and infanticide statutes in every state as a child "born alive" [(that is, a child whether or not viable who is completely expelled or extracted from its mother, whether or not the umbilical cord is cut, and who shows evidence of life, see State Modal Vital Statistics Act, Section 1(6), Vol. 38, p.121, Council of State Governments, adopted by the Department of Health and Human Services and most states; see, e.g., Ill. Rev. Stat., ch. 111 1/2, para 73-1(5)], nor an unborn child whose interests are acknowledged and governed, at least in the abortion context, by the Court's decision in Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) [outside the abortion context the deliberate taking of an unborn child's life may be punished in one-third of the states as feticide or a form of homicide. Linton, supra., citing statutes at 60]. These partially-born children are thus largely invisible to the modern law. But they are not invisible to life. They are living human beings.

V. The Existing Legal Protection of Partially-Born Children

Today, several states in statute or case decision recognized that a child in the process of being born has to fall somewhere under the law -- either as legal person or not. In these states, the choice was made to put these partially-born children largely within the category of legal person, subject only to those medical actions necessary to save the life of the mother. Thus, one criminal law treatise writes:

> "A more advanced view, . . ., based upon practical considerations rather than the literal meaning of the phrase is that after the actual start of the birth process by a viable child it is to be regarded as having been born alive for the purpose of the law of homicide. This draws the line between stillborn and born alive, limiting the former to those instances in which the fetus is dead before birth starts. Where such is not the fact, . . ., the killing of a viable child shall have the same consequences whether it is during the birth process or after its completion." Perkins on Criminal Law at 30 (2d ed. 1969).

In conformity with this view, since the 19th century, Texas has regulated the taking of a child's life during "parturition," or the act or process of giving birth to offspring. The Texas statute, which was recently re-codified in 1993, provides:

> "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 born alive, shall be confined in the penitentiary for life or for not less than five years." [Vernon's Ann.Texas Civ.St.

Art. 4512.5 (West 1995)].

The Texas Attorney General has opined that this statute is unaffected by the Supreme Court's abortion decisions since, unlike an abortion, the statute applies only to those situations in which the victim is in the process of being born. [Op. Atty. Gen. 1974, N. H-368]. For the same reason, the Texas courts' early recognition of the validity of the statute is undisturbed by developments in the abortion area. [Hardin v. State, 106 S.W. 353 (1908) (a charge brought under this statute differs from infanticide where the child must be born alive; here, the child merely would have been born alive, but for the action of the accused); see also, State v. Rupe, 41 Texas 33 (1874).]

The U.S. Supreme Court has averted to the constitutional difference between a partially-born child and an unborn child. In Roe v. Wade, the Court expressly noted that the previous codification of the above Texas statute making it a crime punishable by a sentence of up to life in prison to "destroy the vitality or life in a child in a state of being born" was not challenged. [410 U.S. at 118 n.1]. Arguably, the U.S. Supreme Court's notation is best explained by a decision of the California Court of Appeals, People v. Chavez, 77 Cal. App. 2d 621 (1947), in which a mother being tried for the murder/manslaughter of her baby argued unsuccessfully that the homicide statute could not be applied to a child in the process of being born alive. Rejecting the mother's argument, the court stated:

> "Beyond question, it is a difficult thing to draw a line and lay down a fixed general rule as to the precise time at which an unborn infant, or one in the process of being born, becomes a human being in the technical sense. There is not much change in the child itself between the moment before and a moment after its expulsion from the body of the mother. . . .It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby . . . . .[The question should not depend] on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed." [Id. at 625-626].

The Supreme Court of California later adhered to the reasoning in Chavez, commenting that "a viable fetus 'in the process of being born is a human being within the meaning of the homicide statutes.'" Keeler v. Superior Court, 2 Cal. 3d 619 (1970).

It is uniformly conceded that the partially-born child is alive when the child is yanked into the birth canal. For example, as Dr. Dru Carlson, director of Reproductive Genetics at Cedar-

Sinai Medical Center in Los Angeles and an opponent of the legislation, observed: it is the removal of the fluid from the brain that causes "instant brain herniation and death." [Majority Report, supra, at 7]. So too, Dr. Pamela Smith indicated that prior to the time the scissors are smashed into the child's skull, there is no real difference between a breech delivery [feet first] and the partial-birth abortion procedure. [Transcript of the House Subcommittee on the Constitution Hearing, June 15, 1995 at 34].

Dr. Smith also points out that an abortionist has to work hard to keep the child's head trapped in the cervix, because: "if by chance the cervix is floppy or loose and the head slips through, the surgeon will encounter the dreadful complication of delivering a live baby. The surgeon must therefore act quickly to ensure that the baby does not manage to move the inches that are legally required to transform its status from one of an abortus to that of a living human child." [Id. at 35]. The procedure is made even more cruel by the fact that doctors spiking the brain with scissors are not trained brain surgeons; they are not using a surgeon's instrumentation; and therefore, they are aggravating the already excruciating pain felt by the partially-born child. [House Hearing Transcript, Testimony of Dr. Robert J. White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine, supra, at 51-53].

VI. U.S. Supreme Court Dicta Concerning Post-Viability Abortion Does Not Negate the Separate Legal Status of a Partially-Born Child

That the alive, partially-born child has a different status under the law than the unborn child is buttressed by several further facts. First, the Court's contemplation of post-viability abortions in Casey is dicta and occurs without extended discussion. [112 S.Ct. at 2821]. Contemplating post-viability abortions is at odds with the very definition of abortion. As a CRS Report recites, Dorland's Medical Dictionary defines abortion as the premature expulsion . . . of a nonviable fetus." [Irene E. Stith-Coleman, Specialist in Life Sciences, "Abortion Procedures," CRS Report for Congress, November 7, 1995, at 1, citing Dorland's Illustrated Medical Dictionary, W. B. Saunders Co., (Philadelphia, etc., 1994) at 4 (emphasis supplied)]. Accord, Illustrated Stedman's Medical Dictionary, Fifth Unabridged Lawyers' Edition, Jefferson Law Book Company, (Washington, D.C., 1982), at 3, "abortion -- [g]iving birth to an embryo or fetus prior to the stage of viability at about 20 weeks of gestation" (emphasis supplied); Taber's Cyclopedic Medical Dictionary, 15th Edition, F.A. Davis Company, (Philadelphia, 1985), at 6, "abortion, [t]he termination of pregnancy before the fetus reaches the age of viability, . . ." (emphasis supplied). Thus, the Court in Casey seems to have erroneously assumed that medical science sees a pregnancy termination after viability as an abortion, rather than the taking of human life.

Of course, the law is free to re-define the reality of personhood as it chooses, see Dred Scott v. Sanford, 60 U.S. 393 (1856), but when it does so without extended discussion, there is reason to construe such unnatural mis-adventures narrowly. This is especially true when the more expansive definition contradicts other, long-established common law traditions. In this regard, "[t]he overwhelming majority of jurisdictions (thirty-six States and the District of Columbia) now allow recovery under wrongful death statutes for prenatal injuries that result in stillbirth where the injury causing death (or at least the death itself) occurs after viability." [Linton, supra, citing cases]. Of perhaps even greater significance, "more than one-third of the States have defined by statute the killing of an unborn child (outside the context of abortion) as a form of homicide (or feticide), and nearly half of these statutes make it a crime to take the life of an unborn child at any stage of pregnancy." [Id. at 60, citing statutes]. All such laws have withstood recent constitutional scrutiny. [Id., citing cases].

VII. The Debate Over Reproductive Choice Does Not Determine The Legal Status of a Partially-Born Child

No responsible voice in defense of human life, whether for or against the ideas packed within the concept of reproductive choice, can defend this type of deliberate killing of a partially-born child. [One advocate of legal abortion in a standard medical text put it this way: "I would argue that women must have access to legal abortion . . . . However, our society will not countenance infanticide." Obstetrics and Gynecology, Lipincott, at 1327.] It is simply the age-old distinction between freedom and license. An informed freedom of choice regarding abortion surely does not include slashing open the skull of a half-born child any more than the allowance of reasonable surgical procedures frees a doctor from liability for homicide if he or she acts with criminal negligence and exercises the medical craft -- including the medical craft of abortion -- badly. [See Ketchum v. Ward, 422 F. Supp. 934 (W.D. N.Y. 1976), affirmed 556 F.2d 557 (2d Cir 1977), finding abortionist criminally liable for negligent homicide).

Because it addresses intentional conduct, the ban on the practice described in this legislation stands on even firmer ground than negligent homicide convictions that result from the negligent death of the mother. Compare, for example, the recent New York murder conviction of Dr. David Benjamin for a late-term abortion that resulted in the death of Guadalupe Negron. [New York Times, section A, page 1, col. 5, August 9, 1995]. If criminal laws can punish doctors who show a depraved indifference to a woman's life, there is every reason to punish a doctor who intentionally takes the life of a partially-born child.

There is a great deal of loose talk about how the doctor-patient relationship is sacrosanct. It is indeed important, but in

no civilized society does it trump human life itself. Just as it was right for the New York District Attorney to intercede into the doctor-patient relationship between Dr. Benjamin and Mrs. Negron, it is right for Congress to intercede to outlaw an abortion practice that deliberately kills a live child already in the birth canal.

VIII. This Federal Statute is Needed To Prevent A Partially-Born Child From Falling Within A Legal Twilight Zone Between A Child Born Alive and An Unborn Child

The laws in a number of states rescue some partially-born children from the twilight zone that clouds their status as legal persons, but partially-born children in other places remain at risk. For this reason, S.939 is an imperative and prudent federal means to fill this gap. After careful consideration, the House of Representatives overwhelmingly passed the legislation that is before you to make it clear that in all but the extraordinary, and largely hypothetical, case where this gruesome procedure could be reasonably shown to be medically necessary to save a mother's life, the killing of a partially-born child would be understood, as it was and is under the laws of some states -- a form of homicide.

IX. Even if the Abortion Precedent Applies; Casey does not preclude this Legislation

As discussed above, the killing of a partially-born child is not an abortion. But even assuming one characterized this action as an abortion, the Court's abortion precedent does not preclude the Congress from banning this unspeakable practice. As I outline below, the alleged "constitutional" concerns are without merit. Given the radical and extreme nature of partial-birth homicide, no amount of lawyerly obfuscation should be allowed to delay the return of this legislation as is to the Senate floor for prompt and favorable action.

Under the Supreme Court's abortion law in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (the plurality or joint opinion of Justices O'Connor, Kennedy, and Souter arguably providing the standard for the Court), the specious concerns raised about the legislation can be grouped within the following headings: whether (1) the bill makes adequate provision for a women's health; (2) whether the bill's use of an affirmative defense improperly chills a constitutionally protected abortion claim; and (3) whether the bill is unconstitutionally vague.

A. A Woman's Health

The Justice Department argues that "the bill fails to make an adequate exception for preservation of a woman's health." The Department misapplies Casey. Casey recognizes that the government has an interest in protecting the life of the unborn child

throughout the pregnancy. To the Court, this interest grows in significance as the unborn child develops, and therefore, abortion claims are treated differently depending upon whether the claim is asserted pre- or post-viability. Prior to viability, which is not definitively established by the Court but is speculated to be between 23 and 24 weeks, the government may not place an undue burden on a women's desire to terminate her pregnancy. After viability, the government may "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 . . ." [112 S.Ct. at 2831.]

1. Post-Viability

While the bill appropriately bans the partial-birth abortion method at any stage of viability, logic and the medical testimony submitted to the House reveals that the procedure is largely, if not exclusively, employed after viability. Focusing, therefore, first on the post-viability stage, Casey requires that law adequately provide accommodation for "the preservation of the life or health of the mother" whenever the government seeks to regulate or proscribe all post-viability abortion procedures. However, it is a substantial leap to infer further that the government may not ban merely one, singularly cruel and gruesome abortion procedure, as long as provision is made for an exception where the mother's life is actually threatened. To read Casey in this over-broad fashion is to lose sight of the Court's desire to more carefully calibrate what the Court sees as the competing interests of mother and unborn child, and in particular, to correct the under-recognition of the life of the unborn child in that balance. As the plurality writes: "Roe speaks with clarity in establishing not only the woman's liberty but also the State's important and legitimate interest in potential life.' That portion of [Roe] has been given too little acknowledgement . . ." [112 S.Ct. at 2817].

Casey thus modified Roe in order to acknowledge the State's interest in the life of the unborn child throughout the pregnancy. As applied to the facts in Casey, this heightened awareness of the interests of the child took the form of the Court's abandonment of the trimester analysis and the articulation of the undue burden standard which applies to pre-, but not post-, viability abortions. Even as the Court did not have the factual occasion to address it in Casey, this greater acknowledgment of the interests of the unborn child also guides the constitutional evaluation of regulations and prohibitions pertaining to late-term abortions as well. In particular, there is no reason to believe that the Court would read the post-viability health exception mechanically to require that the government must make available an abortion procedure which by design gives zero weight to the interests of the life of the unborn child.

No one drafting this bill denies the importance of protecting

the health and life of the mother. This legislation provides for both. As discussed below, despite the paucity of medical testimony demonstrating the partial-birth method to be necessary to preserve the life of the mother, the bill expressly provides for an affirmative defense that obviates criminal and civil penalties when a doctor reasonably believes the life of the mother is at stake and requires this procedure. Similarly, the bill by its focussed, targeted structure implicitly provides for the health of the mother by not banning all abortion procedures at this late stage of the pregnancy, but only the one seen as patently and inhumanely offensive. Contrary to the Justice Department and other opponents of this legislation, not every law passed affecting post-viability abortions needs a separate life and health exception. It is enough if, after the passage of the law, a mother's life or health interests can be addressed by means other than that being prohibited.

The Justice Department assessment is misled by its reliance upon pre-Casey case decision, most notably Planned Parenthood of Missouri v. Danforth 428 U.S. 52 (1976) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). The holdings in these cases have been substantially superseded by Casey. [112 S.Ct. at 2823; see also, Linton, supra at 36 detailing the differences]. Even if that were not the case, the Department reads these cases completely out of their largely pre-viability context.

As already noted, Casey, unlike Roe, authorizes regulation throughout the pregnancy in behalf of the interests of the unborn child. This was not the law applied in Danforth where the state's ban on "saline or other solution" abortions in the pre-viability second trimester had to be sustained only in light of the health interests of the mother. Now, of course, the interest of the unborn child is relevant as well. Danforth is also distinguishable because it effectively banned the most prevalent form of abortion at the time, and not, as in this legislation, an abortion practice that is employed in far less than one percent of all abortions.

Similarly, Thornburgh's invalidation of a state statute designed to have a physician employ the abortion technique that would provide the best opportunity for the unborn child to be aborted alive is both pre-Casey and far more limiting upon a doctor and patient than the legislation before the committee -- which is aimed at prohibiting the abortion technique that is the most cruel and inhumane to the unborn child. Thornburgh survives Casey to the extent that Thornburgh's holding stands for the proposition that prior to viability a woman has a right to terminate her pregnancy free of an undue burden, and that prior to viability, directing a doctor to use a particular abortion technique is likely to constitute such a burden. Thornburgh has no constitutional relavance, however, to banning a particularly hideous abortion technique that is used almost exclusively post-viability.

The claim that a woman has an unfettered choice to any abortion technique disregards the basic constitutional fact and acknowledgement of Casey that there are two lives in the balance throughout the pregnancy and especially late in the term when partial-birth abortions are performed. [112 S.Ct. at 2816]. The holding that a state cannot "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health" cannot be transmuted into the proposition that a state cannot interfere with a woman's choice to undergo a particular abortion procedure. [Id. at 2822]. Even in Roe the Court explicitly rejected the argument that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." [410 U.S. at 153].

The constitutionality of this legislation does not depend on a comparison of the relative safety of abortion procedures. That is, the Casey exception for the health of the mother is not an entitlement to a specific abortion procedure, even if it were believed marginally safer. [112 S.Ct. at 2821]. That would ignore the interests of the child acknowledged in Casey. [Id. at 2816]. In other words, the issue is whether taking into account both the mother and the child's interests, the health of the mother is capable of being preserved following the legislative ban, and not whether a particular means of abortion remains available. Justice O'Connor, a member of the Casey plurality, made this point in her Thornburgh dissent. In particular, she concluded that a state statute which mandated an abortion method most likely to save a post-viability child should not be enjoined even as it posed some additional risk to the life of the mother. [476 U.S. at 830]. Since the unborn child's interest is more clearly articulated and re-stated in Casey, it cannot be seriously argued -- as the opponents of this legislation do -- that a partial-birth abortion method must be available because for some women the method poses fewer medical risks.

Abortion partisans claim that Casey upheld the 24 hour waiting period only because the medical emergency exception was construed by the Third Circuit Court of Appeals to not pose any significant threat to the life or health of a woman. [Statement of Kathryn Kolbert, The Center for Reproductive Law & Policy, before the Constitution Subcommittee of the House Judiciary Committee, June 22, 1995 at 8]. That may be true, but again, it has no relevance to the issue at hand, since under Casey there is an elementary difference between banning all abortions -- even for a 24 hour period when the life or health of the mother may be jeopardized -- and banning one gruesome procedure that medical testimony indicates is not at all necessary to save a mother's life. [112 S.Ct. at 2825-26].

A woman is entitled to a post-viability abortion only when her life or health is threatened by a continuation of her

pregnancy. She is not entitled to a post-viability abortion without this threat. [Id. at 2821]. In the House Hearings on this legislation, Dr. Pamela Smith, Director of Medical Education at Mt. Sinai Hospital, stated that in her extensive years of professional experience in obstetrics and gynecology, she has "never encountered a case in which it would be necessary to deliberately kill the fetus in [the partial-birth] manner in order to save the life of the mother." [House Hearing Transcript at 38]. But even were we to conjure up such a life threatening case, the legislation allows for the procedure to be used without criminal or civil penalty if a doctor can reasonably demonstrate that he or she reasonably believed it was more likely than not that only a partial-birth abortion could save the life of the mother.

Even if Casey could be read as an entitlement to a specific abortion procedure, premised exclusively on the health interests of the mother, the partial-birth abortion procedure would not qualify. The partial-birth abortion technique, itself, is not necessarily safe even for the mother. As Dr. Smith relates, the claims of safety are not substantiated. [House Hearing Transcript, supra, at 35]. The data for a safety evaluation is not available, id., and even within the small sampling that exists, there is evidence of severe hemorrhaging, id., and infectious cardiac complications, id.. The Congressional Research Service similarly reveals that "[l]ittle information, if any, has been published in the medical literature on the [partial-birth] procedure . . . ." [CRS Report, supra at 6].

Under standard medical teaching, the partial-birth procedure is a variant of a breech delivery which, itself, creates maternal risks. As the well-known text used world-wide Williams Obstetrics 19th Edition (1993) comments: "[W]ith complicated breech deliveries, there are increased risks of maternal health." [Williams at 586]. The partial-birth procedure magnifies this because it is a deliberate manipulation of a favored birth presentation into a reverse and less desirable presentation. Again, Williams observes: "[m]anual manipulations within the birth canal increase the risk of maternal infection." [Id.]. What's more, it is the reverse manipulation precipitated by the partial-birth procedure that likely increases the risk of rupture of the uterus, lacerations of the cervix, or both. "Such manipulations also may lead to extensions of the episiotomy and deep perineal tears. Anesthesia sufficient to induce appreciable uterine relaxation may cause uterine atony and, in turn, postpartum hemmorrahage." [Id.] While Williams suggests a normal breech delivery may be preferable in some contexts to a Cesarean delivery, a manipulated, reverse partial-birth procedure under the logic of Williams's discussion of manipulation is not.

An abortion advocacy organization asserts that late term abortions are pursued by women with heart disease, kidney failure,

or rapidly advancing cancer. [Fact sheet prepared by Mary Campbell, M.D. of the National Abortion Federation, and cited in the CRS Report, supra, at 6]. But, in truth, these conditions along with others such as "sickle cell trait, uterine prolapse, depression and diabetes . . . [are all] . . .conditions [] frequently associated with the birth of a totally normal child." [House Hearing Transcript, Dr. Pamela Smith, supra, at 39]. In this regard, the partial-birth procedure is not designed to meet any specialized health risk of the mother. Induction methods of abortion and premature delivery of the child by Cesarean section would also alleviate these conditions. The violent procedure outlawed by this legislation is especially unsuited to dealing with emergency health risks, since it is described by one of its practitioners, Dr. Haskell, as taking three days. [Majority Report, supra at 9].

According to the American Medical Association, Encyclopedia of Medicine, Random House, (New York, 1989) at 58: "[a]fter the 15th week, it is normally considered safer to perform an abortion by causing the uterus to contract so that the fetus is expelled, as in natural labor. Contractions are induced by introducing saline solution or, more commonly, a prostaglandin hormone into the uterus." [Cf., CRS Report, supra, indicating a decline in preference for instillation methods in favor of dilation and evacuation (D & E) in the second trimester (weeks 13 to 24), apparently to avoid such side effects as diarrhea and vomiting, and the fact that sometimes the induced labor solves the mother's claimed health problem by ending the pregnancy with a "living abortus" (i.e., a child) which, in the words of the CRS Report, can be "problematic."]

Again, none of this is intended to disparage women who face health problems in the context of a pregnancy; rather, it is merely to indicate that following passage of the legislation any believed health risks can be addressed — according to the available medical testimony and information -- by either alternative abortion procedures, or often, by delivery via Cesarean section. Therefore, as a matter of law, the Congress is under no constitutional obligation to leave the partial-birth abortion method in place or to carve an explicit health exception in the available affirmative defense. Certainly, the partial-birth abortion method need not be made available for the 80% of mothers who choose to have their partially-born child's brains brutally extracted for "purely elective" reasons. [Majority Report, House Hearings, supra, at 8, citing Dr. Haskell, one of the primary providers of partial-birth abortions].

In the House, there was testimony indicating that mothers of severely deformed children have on occasion used the partial-birth abortion method, rather than delivery or an alternative abortion method. These are truly tragic cases. Their re-telling touch every heart, as they should. But it is the judgment of the House, and I believe it should be that of the Senate as well, that a

severely deformed, partially-born child should not have his head punctured and brains suctioned out of his or her living body. The Court has never held that the severity of a child's deformity authorizes the taking of the child's life. We would never tolerate such a practice at the moment of birth. We must never tolerate such a practice at the moment of partial-birth. Because a partially-born child's deformity has nothing to do with preserving the life or health of the mother, no constitutional analysis impedes Congress' uniform proscription of a practice already outlawed in several states.

2. Pre-Viability

Under Casey at the pre-viability stage, abortion regulations are permissible so long as they do not constitute an undue burden. [112 S.Ct. at 2819]. According to the Center for Disease Control, "the most frequently used method for pregnancy termination in the first trimester is the suction dilation and curettage (D & C) technique." [CRS Report, supra, at 4, specifying this technique as that used in 97% of first trimester abortions]. From 13 to 24 weeks, the most common form of abortion is dilation and evacuation (D & E), although several types of instillation methods are also available. [Id.] None of these procedures are affected by this legislation. It is therefore untenable, if not illogical, to argue that the legislation constitutes "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." [119 S.Ct. at 2820].

It might be argued that partial-birth abortion is often used in a middle case [the near-viability stage at or about 20 weeks], and that removing the partial-birth methodology makes abortions more difficult or more expensive to procure. The argument is without weight, as near-viability is still pre-viability where the undue burden standard governs. As the Casey plurality explained: "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." [112 S. Ct. at 2819]. Congress' purpose to proscribe a gross and inhumane practice is patent and specifically aimed. The abortionists concede that alternative methods of abortion are available and unaffected. [Statement of Professor David M. Smolin, Subcommittee on the Constitution, U.S. House of Representatives, June 15, 1995, citing the paper of Dr. Haskall, at 4]. There is no undue burden pre-viability; no substantial obstacle.

3. Rational Basis

Because the legislation here does not offend the Casey

standard with regard to either pre- or post-viability abortions, the government may regulate "in ways rationally related to a legitimate state interest." 112 S.Ct. at 2818, citing Webster v. Reproductive Health Services, 492 U.S. at 518 (opinion of Rehnquist, C.J., concurring in the judgment in part and dissenting in part). This lenient standard of review is easily satisfied by the government's interest in promoting childbirth over abortion, 112 S.Ct. at 2820 (state may seek to persuade the woman to choose childbirth over abortion). Obviously, too, allowing doctors -- who are understood as healers, rather than destroyers of life -- to kill a partially-born child in a brutal manner may seriously undermine confidence in the medical profession. Thus, a partial-birth abortion ban can be justified as maintaining medical standards. Roe, 410 U.S. at 154. The House found the purpose of simply protecting human life to be sufficient ("[t]he difference between partial-birth abortion and infanticide is a mere three inches." [Majority Report, supra., at 11]. The government's rational interest in the "prevention of cruel and inhumane treatment" is equally furthered. [Id., at 12].

X. The Affirmative Defense

The Justice Department argues that: "[b]y exposing physicians to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute undoubtedly would have a chilling effect on physicians' willingness to perform [abortions]." [Letter from Andrew Fois, Assistant Attorney General to Senator Dole, November 7, 1995 at 2]. The argument assumes wrongly that the killing of a partially-born child falls within the abortion right. As earlier explained, it does not; it is a form of homicide under some state law, and it should be under federal law as well.

But even accepting the Department's sweeping abortion right assumption, it is noteworthy that the Department does not make its "chilling" argument in freestanding constitutional terms. That is because it is not a separate constitutional argument, but only a repetitive variation of its claim that every abortion procedure, even one which is more aligned with partial-birth homicide than abortion must be available to a woman and her doctor. For all of the reasons discussed above rejecting this specious claim, it fares no better here dressed in the language of first amendment free speech jurisprudence. The decision of Ketchum v. Ward, 422 F. Supp. 934, affirmed 556 F.2d 557 (2d Cir. 1977) (upholding the conviction of an abortionist for negligent criminal homicide) settled this long ago. When Dr. Ketchum argued that the abortion practice was presumptively privileged and that the state's criminal law could not apply to him, the court responded that:

> "the petitioner's argument that this court should apply a stricter standard of review in this allegedly privileged area cannot be accepted, for that standard is restricted for

statutes which involve first amendment freedoms and is inappropriate here." [422 F. Supp. at 939].

Casey as well does not allow anyone to conjure up a presumptive privilege to abort by any means, including means which though called "abortion" cross the line of Court-approval.

A pregnant woman has no constitutional right to a particular abortion procedure absent a showing that a particular procedure, and no other, is necessary to save her life or preserve her health. With regard to the procedure outlawed by this legislation, this showing cannot be made in terms of health, and it is pure speculation and highly unlikely in terms of life. A doctor's constitutional interests in this context are derivative of the mother's. As Casey recited: "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." 112 S.Ct. at 2823. Since a pregnant woman is highly unlikely to have any constitutional claim to this particular abortion procedure to save her life, the doctor's constitutional claim is also non-existent. By the terms of the statute, both the woman and her doctor may use the partial-birth abortion method only where the doctor proves that he reasonably believed it is necessary to save the life of the mother and no other procedure is available for that purpose. The statute is thus carefully crafted to track the genuine constitutional interests of the doctor and his or her patient.

There is nothing at all unusual in having even someone's personal claim of right evaluated by means of affirmative defense. For example, throughout the criminal law, it is common practice to place upon criminal defendants the burden of proving affirmative defenses. The best example is the affirmative defense of insanity, 18 U.S.C. section 17. This section requires that the defendant prove this defense by the higher clear and convincing standard, and not mere preponderance, as under the proposed legislation. The Supreme Court has even approved of states requiring defendants prove insanity "beyond a reasonable doubt." Leland v. Oregon, 343 U.S. 790 (1952). As a matter of constitutional fairness, the Court has held that the prosecution must prove beyond a reasonable doubt only those elements included in the definition of the offense of which the defendant is charged. [Patterson v. New York, 432 U.S. 197 (1977) (affirmative defense of emotional disturbance to reduce criminal charge from second-degree murder to manslaughter properly placed on the defendant; the constitution does not require that the prosecution "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." Id. at 210.]

The common law has traditionally placed the burden of proof on the defendant to show that he killed in self-defense. While many states have changed this to the burden of going forward, several

states have kept the burden of proof on the defendant. In Martin v. Ohio, 480 U.S. 228 (1987), the U.S. Supreme Court upheld this approach as constitutionally sound.

The vindication of a personal constitutional right often depends upon the defendant raising the issue. For example, in order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, the Court allows defendants in federal prosecutions to file a motion to suppress. [Weeks v. United States, 232 U.S. 383]. There is no reason to apply different constitutional principles in the abortion context. Neither the Supreme Court nor any federal court has ever held that the abortion context is so privileged that normal standards of constitutional due process and fairness are insufficient. Indeed, the Supreme Court as early as Roe held the exact opposite, recognizing that if an individual abortion practitioner abused the privilege of exercising proper medical judgment, "the usual remedies, judicial and intra-professional, are available." [410 U.S. at 166]. The lower federal courts have similarly applied the usual negligent homicide laws and defenses to the abortion context. [Ketchum v. Ward, 422 F.Supp. 934 (W.D. N.Y. 1976), affirmed 556 F. 2d 557 (2d Cir 1977).

There are special reasons to have doctors bear the slight preponderance burden of proof here. First, as suggested by the common law recited above, there is but a head's length between the partial-birth abortion and criminal infanticide. There is obviously no defense to infanticide and it is extraordinarily generous for the government to make a possible defense available here where there is a very slim chance of justification. Second, the defense is premised upon the reasonable belief of the doctor, and obviously, only he knows what he "believed," and he is in the best position to present evidence pertaining to the mother's medical condition. Third, it has long been established that it is constitutional, even pre-Casey, to place the burden of going forward on the person seeking to justify an abortion as a medical necessity. Simopoulos v. Virginia, 462 U.S. 506 (1983). In Simopoulos, a Virginia statute made it a crime to administer an abortion outside a hospital, subject to medical necessity and various other defenses. The prosecution was not obliged to prove lack of medical necessity until the issue was raised as a defense by the defendant. The Court explicitly found that placing the burden on the defendant of going forward with evidence on an affirmative defense is normally permissible. 462 U.S. at 510. The Court expressly distinguished United States v. Vuitch, 402 U.S. 62 (1971), where the burden was placed on the prosecution as merely a matter of the interpretation of the particular statute there involved.

XI. Vagueness

The dissenting views in the House Judiciary Committee assailed

the legislation for its "extreme vagueness," claiming that the legislation does not give fair warning of the prohibited acts, and therefore, the legislation is unconstitutional. Like all of the other arguments discussed above, the hallmark of this claim is over-statement. It is an argument of last resort.

As a matter of law, a facial challenge for vagueness can only be sustained if the law is substantially overbroad or impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 at 493 (1982). As discussed above, the legislation does not reach any, let alone, a substantial amount of constitutionally protected conduct. There is no constitutional right to kill a partially-born child and the woman's right to an abortion under Casey is either not implicated by the targeted nature of the legislation's prohibition or satisfied in the extreme hypothetical case by the affirmative defense for the life of the mother and the unaffected abortion and birth alternatives that can address a mother's health interests.

Beyond overbreadth, a vagueness challenge may go to the person within the statute, to the conduct made unlawful, or to the sanction to be imposed. The test for vagueness is in terms of the perspective of "men of common intelligence," but it is also influenced by whether it would be clear to any of a more narrow class of persons to whom the statute is directed. [Flipside, supra at 498; Grayned v. City of Rockford, 408 U.S. 104 (1972)]. The standards, however, are not to be mechanically applied, since the Constitution, given the imprecision of language, do not expect mathematical certainty. Grayned, supra at 110. So too, the Court has recognized that a scienter requirement may mitigate any residual vagueness within a law's terminology. Colautti v. Franklin, 439 U.S. 379, 395 (1979).

Applying the above standards to the legislation before the committee, it is obvious that a person covered is anyone in or affecting interstate or foreign commerce who knowingly performs a partial-birth abortion. [emphasis of scienter element added]. While the term partial-birth abortion has been assailed as a non-medical term, that is not the legal standard for vagueness. The standard is whether the terminology used gives "fair warning" of the conduct made unlawful to that "narrow class" of individuals to whom the statute is primarily directed [doctors]. Here, the term partial-birth abortion is fully defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." This terminology and accompanying definition is sufficient to convey that any of the varying medical descriptions -- dilation and extraction or intact dilation and evacuation are covered. As Dr. Pamela Smith testified in the House, the prohibited practice is well-differentiated from the dilation and evacuation method used earlier in a pregnancy. Indeed, Dr. Smith noted that the fact sheets provided by one abortionist distinguishes the partial-birth

abortion from other methodologies, [Hearing Transcript, Dr. Pamela Smith at 39]. In Dr. Smith's words, "the term you have chosen, partial-birth abortion, is straightforward. Your definition is straight forward, and in my opinion, covers this procedure and no other." [Id.]

Other terminology, such as "living fetus," is ascertainable from common usage and the generally applicable "born alive" standards that apply throughout vital statistics statutes and the law of infanticide. The fact that a doctor must demonstrate a "reasonable belief" of the life threatening nature of a given health condition is nothing more than the kind of judgment physicians are called upon to make routinely in their practice. United States v. Vuitch, 402 U.S. 62 at 71 (1971) (sustaining an abortion restriction as not unconstitutionally vague). As to applicable penalty, both the criminal penalty of not more than two years imprisonment and the civil penalty of actual and statutory damages are contained on the face of the statute.

There is no unconstitutional vagueness; if anything, there is only extraordinary leniency for a heinous crime.

Summary

By way of summary:

* the killing of a partially-born child is homicide, not abortion;

- today, the killing of a partially-born child is treated as homicide some state law;

- as a matter of medical science, abortion has not been defined to include the killing of a viable unborn child, let alone a partially-born child; even though the Court contemplated in dicta extending abortion past viability in Casey that extension should be construed narrowly when it runs directly counter to medical reality;

- the availability of post-viability abortions pursuant to Casey's dictum should also be construed narrowly because it is at odds with the substantial common law allowing recovery under wrongful death statutes for prenatal injuries that result in stillbirth where the injury causing death (or at least the death itself) occurs after viability; the dictum is also contrary to the more than one-third of the States that have defined by statute the killing of an unborn child (outside the context of abortion) as a form of homicide, with nearly half of these statutes making it a crime to take the life of an unborn child at any stage of pregnancy.

* Were Casey assumed to apply, Casey's post-viability health exception language is satisfied when the legislation at issue is a targetad ban of a single, radically violent abortion practice and alternative procedures meet the life and health interests of the mother;

* Casey requires a calibration of the separate life interests of the mother and the child throughout the pregnancy; the targeted ban here is directed at a procedure that gives zero weight to the interests of the child;

* the doctor-patient relationship has always been subject to criminal and civil laws protecting against medical actions that show a grave indifference to human life;

* post-viability, a woman has a constitutional right to terminate a pregnancy if her life or health is threatened by continuation of the pregnancy; she does not have a constitutional right to have an abortion absent that threat to life or health;

* the affirmative defense adequately addresses any possible claim that this procedure is needed for preservation of life; so too, any threats to the health of the mother caused by the pregnancy can be addressed by delivery or alternative means of abortion;

* the issue is not whether one abortion procedure is or is not marginally safer than an alternative; the issue is whether only the partial-birth abortion can save a women's life or preserve her health when considered along with the government's interests in the life of the child that exist throughout the pregnancy;

* even if the issue were the marginal safety of relative abortion procedures, there is no credible showing that the partial-birth abortion procedure is safer than alternative procedures or courses of action available to a woman, including the premature delivery of the child;

* the partial-birth abortion method takes three days, and therefore, is not well-suited to dealing with life-threatening situations;

* since the pregnant woman does not have an entitlement to this specific abortion procedure, a doctor may be required to justify his actions in this context;

* the statute gives "fair warning" of the prohibited conduct under the constitutional standards.

Nothing in the Constitution, as interpreted, impedes the ban

on partial-birth abortion contemplated by S.939. In my judgment, the legislation should be adopted by the Senate in its present form without delay.

NIXED

TO: Women's Outreach Rapid Response Team and State Directors
FR: The Democratic National Committee -- Office of Women's Outreach
DT: April 24, 1996

VETO OF H.R.1833 - LATE TERM ABORTION: There has been a lot of publicity surrounding the President's veto on April 10 of H.R. 1833, a bill prohibiting doctors from performing a specific late-term abortion medical procedure. ~~Opponents have used inaccurate but graphic pictures and descriptions of the procedure.~~ The term "partial birth abortion" is also inaccurate and its use is meant to obscure the real issue at stake - women's health.

"I understand the desire to eliminate the use of a procedure that appears inhumane. But to eliminate it without taking into consideration the rare and tragic circumstances in which its use may be necessary would be even more inhumane."

- President Clinton, April 10, 1996 -

Here is background information which you should use however you think appropriate.

- The President vetoed H.R. 1833 because the bill fails to protect women from serious threats to their health, as both the Constitution and humane public policy require. The President will not sign a bill showing, as this one does, total indifference to the health of women.

- Before vetoing the bill, the President heard from women who desperately wanted children, who were devastated to learn that their babies had fatal conditions, and who wanted anything other than an abortion. They were advised by their doctors that this procedure was their best hope of preventing death or grave harm, including their ability to have children in the future. For these women and others, this was not about choice. These babies were certain to perish before, during, or shortly after birth, and the only question was how much grave harm was going to be done to the women.

- This is a decision which needs to be left to the woman, her family, her doctor and her faith. The American College of Obstetricians & Gynecologists (ACOG), the American Medical Women's Association, and the American Nurses Association all support the President's veto.

- The charge that the President's proposed exemption would create a huge loophole, allowing the widespread use of this procedure, is simply not true. The President's proposed exemption would apply only when there is serious harm to health.

- The life exception which Sen. Dole added to the bill is misleading. As stated in a letter on March 26 from Representatives Nita Lowey (D-NY-18) and Nancy Johnson (R-CT-06) to their Congressional Colleagues:

  > *"The life exception is in name only. This bill continues to place the lives and health of American women at risk."*

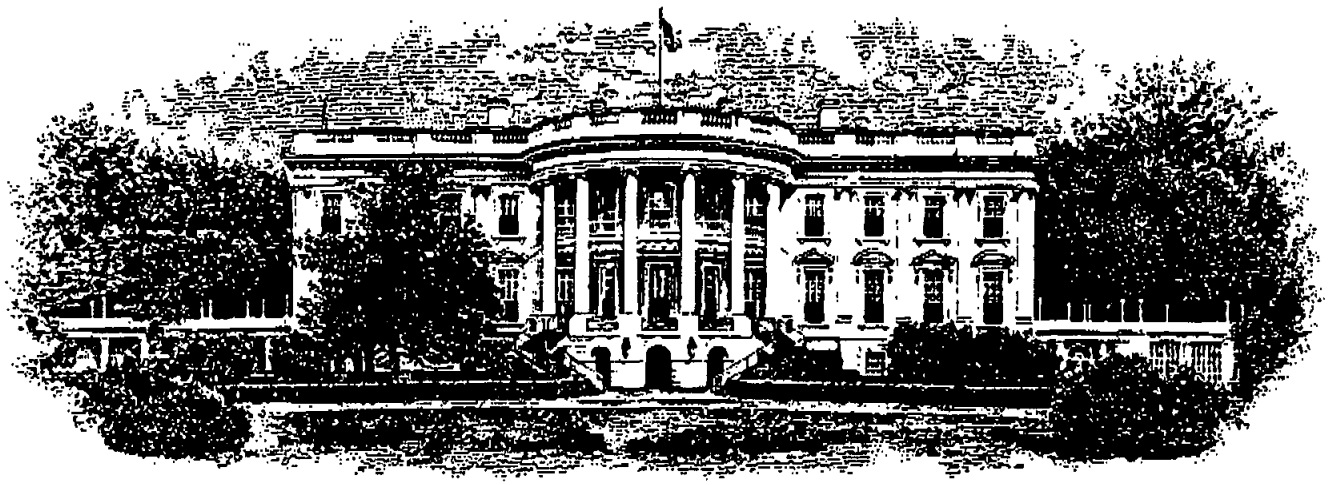
  The Dole provision, for example, does not protect women whose lives are threatened by the actual pregnancy. If doctors determine that an abortion is necessary to save the life of the woman, this amendment would force that woman to choose a method that may leave her unable to bear children in the future.

"I thank God for President Clinton. The people who promoted this bill do not understand the real issues, but he does. It is about women's health, it's not about abortion, and certainly not choice. These decisions belong to families and their doctors, not the government."
- Mary Dorothy Line - April 10, 1996 -

On April 10, Mary Dorothy Line joined four other families who told their personal stories to the President. She is a practicing Catholic whose baby suffered from hydrocephalus - excessive fluid in the brain which impedes proper development - and whose own health would have been jeopardized had the pregnancy continued.

THE WHITE HOUSE

WASHINGTON



Facsimile from Jeff Dailey -- Office of Presidential Letters

Phone: 202-456-5517 Fax: 202-456-5426

To: Elena Kagan

No. of pages (including cover) 3 **Date:** 7-25

Phone: _____ **Fax:** 61647

Comments: Elena – here's the presid.-liab. letter that we have used. As I mentioned in our last discussion, I think we would need to change the opening and closing of this text if we are going to use it for our general tort reform form letter. Do you have any suggestions? Call w/ ?'s. thanks – JEFF

Jeff Darby –

I got the copy of the products liability bill you sent me. Could you now send me the mine general letter that you propose so that I can compare the two? Thanks.

Elena

Why not just use old letter? He'll call back.

EXECUTIVE OFFICE OF THE PRESIDENT

23-Jul-1996 11:01am

TO: Elena Kagan

FROM: Jeff P. Dailey
Presidential Correspondence

SUBJECT: product liability form letter

Elena--
The President has received a good deal of mail over the past couple of months from the general public relating to product liability reform. About 75% of the letters deal with the legislation that the President vetoed and 25% deal with product liability reform in general. As you may know, for the most part my office does not usually see letters from the general public; rather, we respond to letters from elected officials and other vips.

The office that opens the President's letters catagorizes mail from the general public as it comes in, but, for instance, the letters that have been written regarding the product liability legislation are clumped together with the general letters on this topic. Therefore, in responding to all of these letters, we need to craft a single letter that deals with product liability as a whole, but that also addresses the legislation that Potus vetoed. I've written a draft, and I'm wondering if you can give me some guidance on what would be appropriate for Presidential response.

You've been very helpful over the past few months, and I really appreciate your help.

Here's my draft:

Thank you very much for sharing your thoughts regarding product liability. I appreciate having your perspective on this issue.

My Administration believes our civil justice system can and should be improved. In this effort, we must ensure that reform is respectful of the state's important role in the federal system, as well as fair to all parties.

Earlier this year, I vetoed the product liability bill because it went against this belief. Not only did it inappropriately intrude on state authority, it also seriously impaired the ability of consumers to gain fair and adequate compensation for their injuries. In particular, I opposed completely eliminating joint liability for non-economic damages, placing arbitrary caps on punitive damages, and restricting a person's right to sue after fifteen years without regard to the useful life of the

product in question.

I continue to believe that Congress can pass limited, but balanced, product liability reform, without resorting to measures which would harm the consumer. As I continue working with Congress to achieve this end, I appreciate having your perspective and encourage you to stay involved in the future.

###

thanks,
Jeff

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

31-Jul-1996 01:39pm

TO: Elena Kagan

FROM: Jeff P. Dailey
Presidential Correspondence

SUBJECT: product liability

Elena--
I just received your note requesting "the more general" product liability letter so that you can compare them. The attached email contains the most recent draft that I worked on. However, as you probably recall, we also sent out some Presidential letters that were simply shorter versions of the detailed product liability letter -- here is that letter:

Thank you very much for your kind words regarding my veto of product liability legislation.

As you know, I believe our legal system needs reform, and I have repeatedly urged Congress to pass limited, meaningful product liability measures. However, I vetoed the product liability bill Congress sent to me because I concluded that it unduly interfered with state authority and tilted the legal playing field against consumers.

I look forward to your continued involvement as my Administration works with Congress on this matter.

###

thanks for your help,
Jeff

TALKING POINTS FOR PRODUCT LIABILITY EVENT
MARCH 26, 1996

- Thank you for coming to the White House today. We're in a tough fight against some bad legislation, and you all are on the front lines of that fight.

- The bill we're fighting is H.R. 956, the so-called Common Sense Product Liability Legal Reform Act of 1996. John Hilley will discuss with you the legislative status of this bill. What I'd like to talk to you about is why the President opposes it, why he will veto it, and why we have to fight to sustain that veto.

- H.R. 956 would encourage wrongful conduct, and it would prevent injured persons from recovering the full measure of their damages. That's wrong.

- That's why we object to the complete elimination of joint-and-several liability for non-economic damages. We believe this would prevent many victims from obtaining the damages to which they are entitled.

- That's why we object to a stringent cap on punitive damages. We believe that would increase the incentive of manufacturers to knowingly produce and sell defective products.

- And with regard to states' rights, here we have perhaps the greatest irony of all coming out of this Congress. All they talk about is giving power back to the States. I hear Bob Dole thinks it's so important to talk about States' rights that he pulls out a copy of the Tenth Amendment to the Constitution at every campaign speech.

- Well, here's what they really think of States' rights. Under their product liability bill, States can go beyond this new Federal law -- as long as they are taking steps to make the law even more pro-business. But if they try to pass State laws that are more pro-consumer, forget it. This bill says, no way.

- So State's rights are ok if you want to screw consumers. But if you want to protect them, don't even think about it.

- Let me be clear. The President is not opposed to sensible, limited product liability reform. But this legislation doesn't meet that standard.

- Now, I don't have to tell you how hard the Republicans and major business organizations have been working this legislation. They're depicting the President's stand as a giveaway to lawyers.

- Well, you're the people who can stand up and tell the American people what this is really about. It's not about lawyers; it's about the rights of consumers.

- It's about the victims of shootings and the victims of drunk drivers.

- It's about the victims of products that use biomaterials when the suppliers have been negligent, like the Dow Corning breast implant case.

- For those of you whose organizations have been working against this legislation, keep up the good work. For those that have not, please get involved. Speak out. Get your constituencies to speak out. Alexis Herman is here to talk about how you can help.

- The President is taking a tough stand here, and he's taking a lot of partisan criticism for it. I think he deserves your support. I know he appreciates it.

- Thank you.

TALKING POINTS ON PRODUCT LIABILITY BILL

The President will veto H.R. 956 because it intrudes on the traditional prerogatives of the states and unfairly tilts the legal playing field against consumers.

- The Administration supports limited but meaningful products liability reform at the federal level. Any legislation, however, must respect the important role of the states in our federal system and must fairly balance the interests of consumers with those of manufacturers and sellers. This bill fails to meet these requirements.

- The bill displaces many rules of state tort law -- and does so in a way that peculiarly disadvantages consumers. As a rule, the bill displaces state law only when that law is more favorable to consumers; it allows state law to remain in effect when that law is more helpful to manufacturers and sellers. It is a one-way -- anti-consumer and pro-business -- street of federalism.

In particular, the President opposes the elimination of joint liability for noneconomic damages (such as pain and suffering) and the caps on punitive damages.

The elimination of joint liability for noneconomic damages would prevent many injured victims of defective products from receiving the full measure of their damages.

- This provision would leave the innocent victim to suffer when one wrongdoer, in any case with multiple wrongdoers, goes bankrupt. Under traditional state law, if one wrongdoer goes bankrupt, the other wrongdoers pick up the bankrupt defendant's portion of the damages award. This bill relieves the other wrongdoers of this obligation for any noneconomic damages. The innocent victim has to bear this part of the loss on his own.

- This is of real practical significance because companies sued for manufacturing and selling defective products stand a much higher than usual chance of going bankrupt; consider, for example, manufacturers of asbestos or breast implants or intra-uterine devices.

- This provision is all the more offensive because it disproportionately affects the most vulnerable members of society, such as the elderly, the poor, and nonworking women. This is because the provision applies only to noneconomic (and not to economic) damages, thus cutting most deeply into the damage awards of victims who do not have large amounts of lost income.

The capping of punitive damages would encourage companies to engage in egregious misconduct, such as knowingly manufacturing

and selling harmful products, and thereby endanger the safety of consumers.

- The cap invites potential defendants, deciding whether to manufacture or sell a clearly defective product, simply to weigh the costs of wrongdoing against the potential profits. Punitive awards deter such intentional misconduct by making deliberate wrongdoers pay more than the harm they cause.

- The provision of the bill allowing judges to exceed the cap in certain circumstances does not cure this problem, given the clear intent of Congress, expressed in the Statement of Managers, that "the occasions for additional awards will be very limited."

The President also opposes certain provisions snuck into the Conference Report that expand the scope of the bill and exacerbate its harmful consequences.

- The Conference Report, unlike the Senate version, makes the limitations on noneconomic and punitive damages applicable to so-called negligent entrustment cases -- cases in which, for example, an injured person sues a gun dealer who knowingly sold a gun to a convicted felon or a bar owner who sold a drink to an obviously inebriated customer and then watched him get into his car.

- The Conference Report, unlike the Senate version, makes the limitations on noneconomic and punitive damages applicable to utilities cases, involving accidents caused by electricity, natural gas, water, or steam.

- The Conference Report, unlike the Senate version, would prevent some injured persons from bringing suit against companies that are being reorganized in a bankruptcy court. It does this by eliminating a provision that stopped the statute of limitations from running when a bankruptcy court (as often happens) issues an order preventing lawsuits from being brought during bankruptcy proceedings.

TALKING POINTS ON PRODUCT LIABILITY BILL

The President will veto H.R. 956 in its present form because it intrudes on the traditional prerogatives of the states and unfairly tilts the legal playing field against consumers.

The Administration has supported limited but meaningful products liability reform at the federal level, but has made clear that any legislation must fairly balance the interests of consumers with those of manufacturers and sellers and must respect the important role of the states.

Following passage of the bill in the Senate, the President noted two major problems with the bill: (i) a cap on punitive damages, which are meant to punish and deter egregious wrongdoing and (ii) elimination of joint liability for noneconomic damages such as pain and suffering. The Conference Report on H.R. 956 does not respond to these problems; indeed, it takes several steps backwards. The Conference Report, for example, changes the statute of limitations so as to preclude many suits against bankrupt companies; it also shortens the statute of repose.

<u>If H.R. 956 becomes law in its present form:</u>

- Injured victims of defective products may not receive the full measure of their damages.

  A victim of a defective product who incurs noneconomic damage -- such as pain and suffering -- will have to sue every person or business that contributed to the injury. If one of the wrongdoers has died or gone bankrupt or otherwise become unavailable to suit, the victim will not receive the portion of noneconomic damages for which that wrongdoer is responsible. Under current law, the other wrongdoers pick up this portion of the damages award; under this bill, the innocent victim suffers.

  Remember that companies that manufacture and sell defective products stand a much higher than usual chance of going bankrupt; consider, for example, manufacturers of asbestos or breast implants or intra-uterine devices. For this reason, the situation described above is very likely to occur in products liability cases.

- The incentive for companies to engage in egregious misconduct, such as knowingly manufacturing and selling defective products, will dramatically increase.

The bill's cap on punitive damages invites wealthy potential defendants, deciding whether to manufacture or sell a defective product, to weigh the costs of wrongdoing against the potential gains or profits. Punitive awards prevent sellers and manufacturers from engaging in such coldblooded analysis by making deliberate wrongdoers pay more than the harm they have caused. Under this bill, there is no such deterrence of wrongful conduct.

The provision of the bill allowing judges to exceed the cap in certain circumstances does not cure this problem, given the clear intent of Congress that "the occasions for additional awards will be very limited."

- Injured victims of defective products may not even be able to bring suit.

  A victim of a defective product manufactured by a company that has gone bankrupt may not even be able to bring suit under this bill. This is because the bill, unlike the prior Senate version, does not stop the statute of limitations from running when a bankruptcy court (as often happens) issues an order preventing pending lawsuits from going forward and new lawsuits from being brought.

  Again, remember that companies that manufacture and sell defective products stand a much higher than usual chance of going bankrupt. For this reason, the change in the bill's statute of limitations provision matters greatly.

THE WHITE HOUSE

WASHINGTON

March 20, 1996

MEMORANDUM FOR LEON PANETTA
JOHN HILLEY

FROM: ELENA KAGAN EK

SUBJECT: PRODUCTS LIABILITY BILL

The attached summarizes the changes that Bruce Lindsey just told Senator Rockefeller's staff member we wanted to see in the products liability bill.

NECESSARY FIXES ON PRODUCTS LIABILITY BILL

1. Elimination of provision that liability for noneconomic damages shall be several only.

2. Elimination of all legislative history suggesting that judges should exceed punitive damages caps only in rare circumstances. Slight modification of statutory language to make clear that judges have flexibility in this area.

3. Exemption of negligent entrustment cases (against, for example, gun dealers or bar owners) from the entire bill (as in the Senate version) rather than from Section 103 only. This change will make clear that any limitations on punitive or noneconomic damages in the bill will not apply in such actions.

4. Relengthen statute of repose on durable goods (20 years in Senate version, 15 in Conference Report); return to definition of "durable goods" in the Senate version to make clear that the phrase applies only to workplace goods.

5. Reinsertion of provision in the Senate version tolling the statute of limitations while a stay or injunction on the commencement of civil actions (issued, for example, by a bankruptcy court) is in effect.

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2. Elimination of all language in Statement of Managers suggesting that judges should exceed punitive damages caps only in rare circumstances. Slight modification of statutory language to make clear that judges have flexibility in this area.

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3. Exemption of negligent entrustment cases (against, for example, gun dealers or bar owners) from the entire bill (as in the Senate version) rather than from Section 103 only. This change will make clear that any limitations on punitive or noneconomic damages in the bill will not apply in such actions.

4. Relengthen statute of repose on durable goods (20 years in Senate version, 15 in Conference Report); return to definition of "durable goods" in the Senate version to make clear that the phrase applies only to workplace goods.

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