

PARTIAL-BIRTH ABORTION BAN ACT OF 1995

SEPTEMBER 27, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY of Florida, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1833]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1833) to amend title 18, United States Code, to ban partial-birth abortions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

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

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Partial-Birth Abortion Ban Act of 1995".

**SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.**

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

**"CHAPTER 74—PARTIAL-BIRTH ABORTIONS**

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

**"§ 1531. Partial-birth abortions prohibited**

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

"(b) As used in this section, the term 'partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

"(c)(1) The father, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

"(2) Such relief shall include—

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

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

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

"(e) It is an affirmative defense to a prosecution or a civil action under this section, which must be proved by a preponderance of the evidence, that the partial-birth abortion was performed by a physician who reasonably believed—

"(1) the partial-birth abortion was necessary to save the life of the mother; and

"(2) no other procedure would suffice for that purpose."

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

"74. Partial-birth abortions ..... 1531".

**PURPOSE AND SUMMARY**

H.R. 1833, the "Partial-Birth Abortion Ban Act of 1995," bans the partial-birth abortion procedure. A partial-birth abortion is any abortion in which a living baby is partially delivered before killing the baby and completing the delivery. An abortionist who violates the ban would be subject to fines or a maximum of two years imprisonment, or both. The bill also establishes a civil cause of action for damages against an abortionist who violates the ban. The cause of action can be maintained by the father of the child or, if the mother is under 18, the maternal grandparents.

**BACKGROUND AND NEED FOR THE LEGISLATION**

Partial-birth abortion goes far beyond the "right" that was created by *Roe v. Wade*. The baby involved is not "unborn." His or her life is taken during a breach delivery. A procedure which obstetricians use in some circumstances to bring a healthy child into the world is perverted to result in a dead child. The physician, tradi-

tionally trained to do everything in his power to assist and protect both mother and child during the birth process, deliberately kills the child in the birth canal. H.R. 1833 would end this cruel practice.

The Court has never decided that human beings in the process of being born are not “persons.” Further, the *Roe* Court rejected the notion that a woman is entitled to abortion “at whatever time, in whatever way, and for whatever reason she alone chooses.”<sup>1</sup> Yet abortion on demand—at whatever time, in whatever way, and for whatever reason—is exactly what proponents of the partial-birth abortion method support. While every abortion takes a human life, the partial-birth abortion method takes that life late in pregnancy as the baby emerges from the mother’s womb.

One abortionist described the partial-birth abortion procedure that he uses in the second and third trimesters of pregnancy:

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

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

The skull lodges at the internal cervical os.

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

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

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

The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.<sup>2</sup>

This method is particularly brutal and inhuman. Brenda Shafer, a registered nurse who witnessed a partial-birth abortion procedure while working for an Ohio abortionist, conveyed the abhorrent nature of the procedure in a letter to Congressman Tony Hall. Nurse

<sup>1</sup>410 U.S. at 153.

<sup>2</sup>Martin Haskell, M.D., “Dilation and Extraction for Late Second Trimester Abortions,” Presented at the National Abortion Federation Risk Management Seminar (September 13, 1992), in *Second Trimester Abortion: From Every Angle*, 1992, [hereinafter Haskell] at 27, 30–31.

Shafer wrote that witnessing the procedure was “the most horrible experience of my life.” She described watching one baby:

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

Next, Dr. Haskell delivered the baby’s head, cut the umbilical cord and delivered the placenta.<sup>3</sup>

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

The partial-birth abortion procedure is performed from around 20 weeks to full term.<sup>4</sup> It is well documented that a baby is highly sensitive to pain stimuli during this period and even earlier.<sup>5</sup> In fact, in a study conducted on fetuses between 20 to 34 weeks of gestation at the Institute of Obstetrics and Gynaecology, Royal Postgraduate Medical School, Queen Charlotte’s and Chelsea Hospital in London researchers concluded:

Just as physicians now provide neonates with adequate analgesia, our findings suggest that those dealing with the fetus should consider making similar modifications to their practice. This applies not just to diagnostic and therapeutic procedures on the fetus, but possibly also to termination of pregnancy, especially by surgical techniques involving dismemberment.<sup>6</sup>

In his testimony before the Constitution Subcommittee on June 15, 1995, Professor Robert White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine, stated, “The fetus within this time frame of gestation, 20 weeks and beyond, is fully capable of experiencing pain.”<sup>7</sup> After specifically analyzing the partial-birth abortion procedure, Dr. White concluded, “Without question, all of this is a dreadfully painful experience for any infant subjected to such a surgical procedure.”<sup>8</sup>

<sup>3</sup>Letter from Brenda Shafer, R.N., to Congressman Tony Hall (July 9, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

<sup>4</sup>There are several abortion techniques employed between 20 weeks and full term. The techniques fall under the general categories of partial-birth abortion, dilation and evacuation, and amniofusion. In the dilation and evacuation procedures the baby is dismembered and removed from the uterus in pieces. See, D.A. Grimes and W. Cates, Jr., “Dilation and Evacuation,” *Second Trimester Abortion—Perspectives After a Decade of Experience* (G.S. Berger et al. eds., 1981). Amniofusion requires the injection of saline or other solutions into the amniotic cavity. The solution kills the baby, and labor is induced. See, Warren M. Hern, M.D., M.P.H. “Abortion Practice” (1984).

<sup>5</sup>See, e.g., K.J.S. Anand and P.R. Hickey, “Pain and Its Effects in the Human Neonate and Fetus,” 317 *The New England Journal of Medicine*, 1321; V. Collins et al., “Fetal Pain and Abortion: The Medical Evidence,” *Studies in Law and Medicine* (1984); S. Reinis and J.M. Goldman, “The Development of the Brain” (1980).

<sup>6</sup>Xenophon Giannakouloupoulos et al., “Fetal Plasma Cortisol and B-Endorphin Response to Intrauterine Needling,” *The Lancet*, July 9, 1994, at 77, 80.

<sup>7</sup>Hearing on Partial-Birth Abortion Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess., (1995) [hereinafter Hearing] (testimony of Robert J. White, M.D., Ph.D.).

<sup>8</sup>Id.

Proponents of the partial-birth abortion method have put forth two arguments against H.R. 1833—both of which contradict each other. First, while it would seem useless to argue against legislation that bans a procedure that does not exist, opponents of H.R. 1833 make just such a claim. They argue that the partial-birth abortion method does not exist. Second, they claim the method is used but only in cases where the mother's life is at stake or the fetus has abnormalities.

The first argument is based on the absence of the term partial-birth abortion in medical literature. However, the term partial-birth abortion is a legal term defined clearly in H.R. 1833 as any "abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."<sup>9</sup>

This definition includes procedures that have been coined "dilation and extraction," "intact dilation and evacuation," and "intra-uterine cranial decompression," by individual abortionists. Just as the term partial-birth abortion is not found in medical literature, these terms are not found in medical literature<sup>10</sup> because these horrific procedures are not generally accepted by the medical community. In fact, Dr. Pamela Smith, an obstetrician at Mt. Sinai Hospital in Chicago, testified before the Subcommittee on the Constitution that when she described the procedure to other physicians, "many of them were horrified to learn that such a procedure was even legal."<sup>11</sup> Dr. Smith also stated:

[T]here is no uniformly accepted medical terminology for the method that is the subject of this legislation. Dr. McMahon does not even use the same term as Dr. Maskell, while the National Abortion Federation implausibly argues that there is nothing to distinguish this procedure from the D & E abortions. The term you have chosen, "partial-birth abortion," is straightforward. Your definition is also straightforward, and in my opinion, covers this procedure and no other.<sup>12</sup>

Opponents of H.R. 1833 further argue that the partial-birth abortion procedure does not exist because it is only use to deliver babies who are already dead. This argument is nonsensical because the definition of a partial-birth abortion requires the partial delivery of a "living fetus."<sup>13</sup>

Even if this argument made sense, past statements of abortionists and eyewitness accounts directly contradict claims that the babies are dead before pulled into the birth canal. Dr. Martin Haskell and Dr. James McMahon, two abortionists who use the partial-birth abortion method, were interviewed by the American Medical News in 1993. These doctors "told the AMNews that the majority

<sup>9</sup>H.R. 1833, 104th Cong., 1st Sess. (1995).

<sup>10</sup>Constitution Subcommittee staff conducted a Medline search on July 11, 1995, during which no references to the terms were found.

<sup>11</sup>Hearing, supra note 9 (testimony of Pamela Smith, M.D., FACOG).

<sup>12</sup>Id.

<sup>13</sup>H. R. 1833, supra note 11.

of fetuses aborted this way are alive until the end of the procedure.”<sup>14</sup>

Dr. Haskell and the National Abortion Federation disputed the accuracy of the AMNews article after the “Partial-Birth Abortion Ban Act” was introduced this year, claiming that out-of-context quotes were used.<sup>15</sup> The editor of the AMNews responded to these accusations in a letter to Constitution Subcommittee Chairman Charles T. Canady, dated July 11, 1995. The letter states, “AMNews stands behind the accuracy of the report. \* \* \* We have full documentation of these interviews, including tape recordings and transcripts.”<sup>16</sup> The editor also released portions of the transcript from Dr. Haskell’s interview containing the following exchange:

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

*Haskell:* No it’s not. No, it’s really not. A percentage are for various numbers of reasons. Some just because of the stress—intrauterine stress during, you know, the two days that the cervix is being dilated. Sometimes the membranes rupture and it takes a very small superficial infection to kill a fetus in utero when the membranes are broken. And so in my case, I would think probably about a third of those are definitely are [sic] dead before I actually start to remove the fetus. And probably the other two-thirds are not.<sup>17</sup>

In a letter to the Honorable Charles T. Canady, Dr. James McMahan, an abortionist who uses the partial-birth abortion method, implies that large doses of analgesia kill the baby before the doctor begins delivery. He states:

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

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

<sup>14</sup>Diane M. Gianelli, “Shock-Tactic Ads Target Late—Term Abortion Procedure: Foes Hope Campaign Will Sink Federal Abortion Rights Legislation,” *American Medical News*, July 5, 1993, at 3, 21.

<sup>15</sup>Letter from Martin Haskell, M.D., to Congressman Charles T. Canady (June 27, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary); Letter from Vicki Saporta, Executive Director, National Abortion Federation, to Congressman Charles T. Canady (June 27, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

<sup>16</sup>Letter from Barbara Bolsen, Editor, *American Medical News*, to Congressman Charles T. Canady (July 11, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

<sup>17</sup>*Id.*

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

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

Although it is true that analgesic medications given to the mother will reach in [sic] the fetus and presumably provide some degree of pain relief, the extent to which this renders this procedure pain free would be very difficult to document. I have performed in-utero procedures on fetuses in the second trimester, and in these situations the response of the fetuses to painful stimuli, such as needle sticks, suggest that they are capable of experiencing pain.<sup>19</sup>

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

When the cervix is open enough for a safe delivery of the fetus he uses ultrasound guidance to gently deliver the fetal body up to the shoulders and then very quickly and expertly performs what is called a cephalocentesis. Essentially this is removal of cerebrospinal fluid from the brain *causing instant brain herniation and death.*<sup>20</sup>

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

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

The National Abortion Federation’s statement that “fetal demise does in fact occur early on in the [partial-birth abortion] procedure”<sup>21</sup> is clearly inconsistent with prior statements by the abortionist and eyewitness accounts. The claim betrays the desperation of partial-birth abortion advocates who know that partially delivering a live baby and then killing him cannot be justified to the American public. Instead of defending partial-birth abortion, they attempt to convince the public that it does not exist.

In the event they cannot convince the public that the partial-birth abortion procedure does not exist, abortion advocates claim

<sup>19</sup>Letter from Watson A. Bowes Jr., M.D., to Congressman Charles T. Canady (July 11, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

<sup>20</sup>Letter from Dru Elaine Carlson, M.D., to Congressman Henry J. Hyde (June 27, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary) (emphasis added).

<sup>21</sup>Letter from Vicki Saporta, supra note 16.

that the procedure does exist, but it is only used in limited circumstances.

Once again, this claim is contradicted by the evidence. The writings of both Dr. Haskell and Dr. McMahon advocate partial-birth abortion as the method they prefer for all late-term abortions.<sup>22</sup> Dr. Haskell told the AMNews that the vast majority of the partial-birth abortions he performs are elective. He stated, "And I'll be quite frank: most of my abortions are elective in that 20-24 week range. \* \* \* In my particular case, probably 20% are for genetic reasons. And the other 80% are purely elective. \* \* \*"<sup>23</sup>

Dr. McMahon uses the partial-birth abortion method through the entire 40 weeks of pregnancy. He claims that most of the abortions he performs are "non-elective," but his definition of "non-elective" is extremely broad. Dr. McMahon sent a letter to the Constitution Subcommittee in which he described abortions performed because of the mother's youth or depression as "non-elective."<sup>24</sup>

Dr. McMahon also sent the subcommittee a graph which shows the percentage of "flawed fetuses" that he aborted using the partial-birth abortion method. The graph shows that even at 26 weeks of gestation half the babies that Dr. McMahon aborted were perfectly healthy and many of the babies he described as "flawed" had conditions that were compatible with long life, either with or without a disability. For example, Dr. McMahon listed nine partial-birth abortions performed because the baby had a cleft lip.<sup>25</sup>

The National Abortion Federation in the past recognized that partial-birth abortions are performed for many reasons other than to save the life of the mother or for fetal abnormalities. In a 1993 memorandum to its members, the group counseled members not to apologize for this "legal procedure" and stated, "There are many reasons why women have late abortions: life endangerment, fetal indications, *lack of money or health insurance, social-psychological crises, lack of knowledge about human reproduction, etc.*"<sup>26</sup>

Clearly, the partial-birth abortion procedure is used in a wide variety of circumstances. Focusing the debate on babies with abnormalities is a blatant attempt to avoid addressing the realities of this inhuman procedure. During a partial-birth abortion, the baby is partially delivered alive, then stabbed through the skull. No baby's life should be taken in this manner whether that baby is perfectly healthy or suffers from the most tragic of disabilities. Abnormalities do not make babies any less human or any less deserving of humane treatment. The only justification for using this brutal and inhuman procedure would be if a mother needed a partial-birth abortion to save her life.

Eminent medical authorities, including Dr. Watson Bowes and Dr. Pamela Smith, have stated that a partial-birth abortion would

<sup>22</sup> Haskell, supra note 4 at 27; Letter from James T. McMahon, M.D., to the Subcomm. on the Constitution of the House Comm. on the Judiciary (June 6, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

<sup>23</sup> Letter from Barbara Bolsen, supra note 17.

<sup>24</sup> Letter from James T. McMahon, M.D., supra note 20.

<sup>25</sup> Id.

<sup>26</sup> Letter from Barbara Radford, Executive Director, National Abortion Federation, to National Abortion Federation members (June 18, 1993) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary) (emphasis added).



never be necessary to save a mother's life.<sup>27</sup> In fact, Dr. Smith told the Constitution Subcommittee that in a situation where a mother's life was in danger, "no doctor would employ the partial-birth method of abortion, which—as Dr. Haskell carefully describes—takes three days!"<sup>28</sup>

Nevertheless, H.R. 1833 provides for such a situation. If a doctor reasonably believes a partial-birth abortion is needed to save a mother's life, he can perform the procedure.

The Supreme Court has never decided the constitutional status of a child in the process of being born. But even under *Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey*, H.R. 1833, the "Partial-Birth Abortion Ban Act of 1995," is constitutional both before and after fetal viability.

The Supreme Court in *Roe v. Wade* held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."<sup>29</sup> However, the Court has never addressed the constitutional status of those who are in the process of being born. In fact, in *Roe* the Court specifically noted that a Texas statute that made killing a child during the birth process a felony had not been challenged. The statute stated:

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.<sup>30</sup>

"Parturition" is defined in Webster's Dictionary as "the act or process of giving birth to offspring."

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

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

Even if the Court somehow decided that a partially-born child is not a person under the Fourteenth Amendment, the "Partial-Birth Abortion Ban Act" would be upheld under *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>31</sup>

The Supreme Court in *Roe v. Wade* created a fundamental right for a woman to choose to have an abortion. The Court established a trimester framework during which the State's interests in mater-

<sup>27</sup>Letter from Watson A. Bowes, Jr., M.D., to Congressman Charles T. Canaday (July 17, 1995) (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary); Hearing supra note 12.

<sup>28</sup>Hearing, supra note 12.

<sup>29</sup>410 U.S. at 158.

<sup>30</sup>410 U.S. at 188 n. 1, citing Art. 1195 of Chapter 9 of Title 15 in the Texas Penal Code.

<sup>31</sup>*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992).

nal health and potential life became increasingly compelling, and therefore, the State's ability to regulate abortion increased each trimester of pregnancy.<sup>32</sup> The Court explicitly rejected the argument that the right to an abortion is absolute and that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."<sup>33</sup>

In *Casey*, the Court reaffirmed the essential holding of *Roe v. Wade* but rejected the trimester framework. The Court stated that, "The woman's liberty is not so unlimited \* \* \* that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."<sup>34</sup>

The *Casey* Court established a bifurcated approach to determine whether an abortion statute is constitutional, drawing a line at fetal viability.<sup>35</sup> Subsequent to viability of the fetus, the government can prohibit abortion except in cases where the abortion is needed to protect the life or health of the mother.<sup>36</sup>

Before viability, the *Casey* Court established the "undue burden" test. The threshold question of the test is whether the abortion statute imposes an "undue burden" on a mother's right to choose to have an abortion.<sup>37</sup> An "undue burden" is placed on the mother if the purpose or effect of the statute "is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>38</sup>

If the statute does not impose an "undue burden" on the mother, rational basis scrutiny is applied.<sup>39</sup> The statute is constitutional if it reasonably relates to a legitimate governmental purpose.

Prior to *Casey*, the Supreme Court struck down a ban on "saline or other solution" abortions in *Planned Parenthood of Missouri v. Danforth*.<sup>40</sup> However, in *Danforth* the Court considered protection of the health of the mother the only government interest compelling enough to regulate abortion during the second trimester. Because saline was considered the safest abortion procedure at the time, the Court found that the ban was not reasonably related to the government interest of protecting the health of the mother.<sup>41</sup> The Court did not analyze whether the statute imposed an "undue burden" on a mother's right to choose to have an abortion.

Using the bifurcated approach of the *Casey* decision, H.R. 1833, the "Partial-Birth Abortion Ban Act," would be constitutional both before and after viability. H.R. 1833 is a regulation on abortion. The Act would prohibit only abortions "in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."<sup>42</sup>

<sup>32</sup> 410 U.S. at 162-163.

<sup>33</sup> 410 U.S. at 153.

<sup>34</sup> 112 S.Ct. at 2816.

<sup>35</sup> 112 S.Ct. at 2818.

<sup>36</sup> 410 U.S. at 164-165 and 119 S.Ct. at 2818.

<sup>37</sup> 112 S.Ct. at 2819. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 463 (1983) (O'Connor, J., dissenting).

<sup>38</sup> 119 S.Ct. at 2820.

<sup>39</sup> *Id.* See also 462 U.S. at 463.

<sup>40</sup> *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

<sup>41</sup> 428 U.S. at 76.

<sup>42</sup> H.R. 1833, *supra* note 11.

After viability, the government under both *Roe* and *Casey* may prohibit all abortion, except those that are necessary to save the life or health of the mother. Therefore, the government can clearly prohibit partial-birth abortion, a method of abortion preferred by only a handful of abortionists<sup>43</sup> that is particularly offensive to humanity. H.R. 1833 leaves alternative procedures, including other methods of abortion, available for a physician to use in a case where a mother's life or health is threatened by bringing her child to term.

Before viability, *Casey* allows regulation of abortion that is reasonably related to a legitimate state interest, unless the regulation places an "undue burden" on a woman's right to choose to have an abortion.<sup>44</sup>

The "Partial-Birth Abortion Ban Act" does not place a "substantial obstacle" in the path of a mother seeking to abort her child. The Act prohibits only abortions in which the child is partially delivered alive and then killed. It does not prohibit alternative and, in fact, more frequently used late-term abortion techniques. Partial-birth abortions are not performed due to any special circumstances of a mother or her pregnancy. The procedure is used by a handful of abortionists who "routinely" perform the procedure late in pregnancy.<sup>45</sup>

Banning this particularly heinous procedure does not place an "undue burden" on a mother's right to choose to have an abortion. Since H.R. 1833 does not impose an "undue burden," rational basis scrutiny is applied to determine whether H.R. 1833 is constitutional.

Rational basis scrutiny requires H.R. 1833 to be reasonably related to a legitimate government interest. The Supreme Court has recognized many legitimate interests on which abortion statutes have been based. In *Roe v. Wade*, the Court recognized that the government has legitimate interests in "safeguarding health, maintaining medical standards, and in protecting potential life."<sup>46</sup> The Court has also expressly recognized as legitimate interests; protecting immature minors,<sup>47</sup> promoting general health,<sup>48</sup> promoting family integrity,<sup>49</sup> and encouraging childbirth over abortion.<sup>50</sup>

H.R. 1833 serves several legitimate governmental interests some of which are mentioned above. Among the important interests served by banning partial-birth abortion is the government's interest in protecting human life. During a partial-birth abortion a child is killed after he is partially delivered from his mother's womb. The difference between partial-birth abortion and infanticide is a mere three inches. The "Partial-Birth Abortion Ban Act" would protect children from being killed during the delivery process.

The Act also serves the interest of protecting the dignity of human life. During a partial-birth abortion, the abortionist holds a

<sup>43</sup> Diane M. Gianelli, "Shock-tactic Ads Target Late-term Abortion Procedure," *American Medical News*, July 5, 1993, at p. 3.

<sup>44</sup> 119 S.Ct. at 2820.

<sup>45</sup> Gianelli, *supra* note 46 and Haskell, *supra* note 4 at 28.

<sup>46</sup> 410 U.S. at 154.

<sup>47</sup> 462 U.S. at 427, n. 10 and *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 489 (1983).

<sup>48</sup> 462 U.S. at 430, n. 13 and 462 U.S. at 489.

<sup>49</sup> 462 U.S. at 443, n. 32.

<sup>50</sup> 462 U.S. at 444, n. 33.

helpless child's body in his hands and forces blunt scissors through the back of the child's skull. The abortionist's actions completely disregard the humanity of the child and strip that child of the dignity normally accorded members of the human race. Allowing an abortionist to kill a child in this manner reduces society's respect for human life.

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

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

H.R. 1833 is reasonably related to these and other legitimate government interests. The "Partial-Birth Abortion Ban Act" is constitutionally permissible and morally imperative.

#### HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on H.R. 1833 on June 15, 1995. Testimony was received from the following witnesses: Dr. Pamela Smith, M.D., Director of Medical Education, Mt. Sinai Hospital, Department of Obstetrics and Gynecology; Dr. J. Courtland Robinson, M.D., M.P.H., John Hopkins University, School of Hygiene and Public Health; Dr. Robert J. White, M.D., Ph.D., Professor of Surgery, Case Western Reserve University, School of Medicine, Director of Neurological Surgery and the Brain Research Laboratory, Metro Health Medical Center; Mrs. Tammy Watts, Public Citizen; Mary Ellen Morton, R.N., B.S.N., Neonatal Specialist, Flight Nurse; and Professor David Smolin, Cumberland Law School, Samford University.

#### COMMITTEE CONSIDERATION

On June 15, 1995, the Subcommittee on the Constitution met in open session and ordered reported the bill H.R. 1833, by a rollcall vote of 7 to 5, a quorum being present. On June 21, 1995, the Committee met in open session and ordered reported the bill H.R. 1833 with amendments by a rollcall vote of 20 to 12, a quorum being present.

## VOTES OF THE COMMITTEE

The Committee then considered the following amendments, two of which were adopted.

1. An amendment was offered by Mr. Hoke to clarify the language of who has standing to sue. The amendment was adopted by a 31-1-2 rollcall vote, with Mr. Becerra and Ms. Lofgren voting "present."

YEAS	NAYS	PRESENT
Mr. Hyde	Mr. Serrano	Mr. Becerra
Mr. Moorehead		Ms. Lofgren
Mr. Sensenbrenner		
Mr. McCollum		
Mr. Gekas		
Mr. Coble		
Mr. Smith (TX)		
Mr. Schiff		
Mr. Gallegly		
Mr. Canady		
Mr. Inglis		
Mr. Goodlatte		
Mr. Buyer		
Mr. Hoke		
Mr. Bono		
Mr. Heineman		
Mr. Bryant (TN)		
Mr. Chabot		
Mr. Flanagan		
Mr. Barr		
Mr. Conyers		
Mrs. Schroeder		
Mr. Frank		
Mr. Schumer		
Mr. Berman		
Mr. Bryant (TX)		
Mr. Reed		
Mr. Nadler		
Mr. Scott		
Mr. Watt		
Ms. Jackson-Lee		

2. An amendment was offered by Mr. Frank to strike the civil cause of action. The amendment was defeated by a 12–14 rollcall vote.

YEAS	NAYS
Mrs. Schroeder	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Berman	Mr. Coble
Mr. Bryant (TX)	Mr. Smith (TX)
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Mr. Becerra	Mr. Buyer
Mr. Serrano	Mr. Bono
Ms. Lofgren	Mr. Heineman
Ms. Jackson-Lee	Mr. Bryant (TN)
	Mr. Flanagan
	Mr. Barr

3. An amendment was offered by Mr. Canady to clarify terms in the affirmative defense. The amendment was adopted by a 20–11 rollcall vote.

YEAS	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorehead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Berman
Mr. McCollum	Mr. Reed
Mr. Gekas	Mr. Nadler
Mr. Coble	Mr. Scott
Mr. Smith (TX)	Mr. Watt
Mr. Schiff	Mr. Becerra
Mr. Gallegly	Mr. Serrano
Mr. Canady	Ms. Lofgren
Mr. Inglis	Ms. Jackson-Lee
Mr. Goodlatte	
Mr. Buyer	
Mr. Hoke	
Mr. Bono	
Mr. Heineman	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Flanagan	
Mr. Barr	

4. An amendment was offered by Mr. Watt to eliminate the affirmative defense. The amendment was defeated by a rollcall vote of 10–16.

YEAS	NAYS
Mr. Coble	Mr. Hyde
Mrs. Schroeder	Mr. Moorehead
Mr. Berman	Mr. Sensenbrenner
Mr. Reed	Mr. Gekas
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Schiff
Mr. Watt	Mr. Canady
Mr. Serrano	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

5. An amendment was offered by Mrs. Schroeder creating exceptions to the prohibition on performing partial-birth abortions. The amendment was defeated by a rollcall vote of 13–20.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorehead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Boucher	Mr. Coble
Mr. Bryant (TX)	Mr. Smith (TX)
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

6. An amendment was offered by Mr. Frank to strike the criminal sanctions for performing partial-birth abortions. The amendment was defeated by a rollcall vote of 13–20.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorehead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Boucher	Mr. Coble
Mr. Bryant (TX)	Mr. Smith (TX)
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

7. An amendment was offered by Ms. Lofgren to expand the circumstances or which the affirmative defense could be used. The amendment was defeated by a rollcall vote of 12–19.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorehead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Bryant (TX)	Mr. Coble
Mr. Reed	Mr. Smith (TX)
Mr. Nadler	Mr. Schiff
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr



8. An amendment was offered by Ms. Jackson-Lee to replace the affirmative defense for performing a partial-birth abortion to save the life of the mother with an exception. The amendment was defeated by a rollcall vote of 11–20.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorehead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Bryant (TX)	Mr. Gekas
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Schiff
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Jackson-Lee	Mr. Inglis
	Mr. Goodlatte
	Mr. Buyer
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

9. Final Passage. Mr. Hyde moved to report H.R. 1833, as amended, favorably to the whole House. The resolution was ordered favorably reported by a rollcall vote of 20–12.

YEAS	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorehead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Frank
Mr. McCollum	Mr. Schumer
Mr. Gekas	Mr. Berman
Mr. Coble	Mr. Bryant (TX)
Mr. Smith (TX)	Mr. Reed
Mr. Schiff	Mr. Nadler
Mr. Gallegly	Mr. Scott
Mr. Canady	Mr. Watt
Mr. Inglis	Ms. Lofgren
Mr. Goodlatte	Ms. Jackson-Lee
Mr. Buyer	
Mr. Hoke	
Mr. Bono	
Mr. Heineman	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Flanagan	
Mr. Barr	

## COMMITTEE OVERSIGHT FINDINGS

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

## COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

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

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

## INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1833 will have no significant inflationary impact on prices and costs in the national economy.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1833, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 21, 1995.*

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1833, the Partial-Birth Abortion Ban Act of 1995, as ordered reported by the House Committee on the Judiciary on July 19, 1995. CBO estimates that enacting this legislation would have no significant impact on the federal budget. While the bill could lead to increases in both direct spending and receipts, the amounts involved would be less than \$500,000 a year. Because H.R. 1833 could affect direct spending and receipts, pay-as-you-go procedures would apply. The bill would not affect the budgets of state or local governments.

H.R. 1833 would ban most instances of a late-term abortion procedure known as "partial-birth abortion." Violators of the bill's provisions would be subject to a criminal fine or imprisonment.

Enacting H.R. 1833 could increase government receipts from additional fine collections, but we estimate that any such increase

would be less than \$500,000 annually. Criminal fines would be deposited in the Crime Victims Fund and would be spent in the following year. Thus, direct spending from the fund would match the increase in revenues with a one-year lag.

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

Sincerely,

JUNE E. O'NEILL, *Director*.

#### SECTION-BY-SECTION ANALYSIS

H.R. 1833 amends title 18 of the United States Code by adding sec. 1531 to ban partial-birth abortions.

##### SECTION 1. SHORT TITLE

This section states that the short title of the bill is "Partial-Birth Abortion Ban Act of 1995."

##### SECTION 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS

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

Paragraph (b) defines "partial-birth abortion" as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the deliver."

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

Paragraph (c) establishes a civil cause of action for the father, and if the mother is a minor at the time of the abortion, the maternal grandparents of the baby, to obtain damages from the abortionist who performs the partial-birth abortion. Damages include compensation for all injuries, physical and psychological, caused by the partial-birth abortion and statutory damages equal to three times the cost of the partial-birth abortion.

Equitable defenses would apply in any case where the plaintiff's criminal conduct resulted in the mother's pregnancy or where the plaintiff consented to the partial-birth abortion. However, language in this paragraph clarifies that a plaintiff who consented to the abortion or engaged in criminal conduct which resulted in the mother's pregnancy would not be entitled to recover damages.

This language does not preclude the application of any other equitable defenses that might be available.

Paragraph (d) ensures that a woman who has undergone a partial-birth abortion cannot be prosecuted for any offense based on a violation of this section.

Paragraph (e) establishes an affirmative defense for the abortionist. The abortionist must show that it was more likely than not that he reasonably believed that the partial-birth abortion was necessary to save the life of the mother and that no other procedure would have saved her life.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

**TITLE 18, UNITED STATES CODE**

\* \* \* \* \*

**PART I—CRIMES**

Chap.		Sec.
<b>1.</b>	<b>General provisions .....</b>	<b>1</b>
	* * * * *	
<b>74.</b>	<b><i>Partial-birth abortions</i> .....</b>	<b>1531</b>
	* * * * *	

**CHAPTER 74—PARTIAL-BIRTH ABORTIONS**

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

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

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

(b) *As used in this section, the term “partial-birth abortion” means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.*

(c)(1) *The father, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff’s criminal conduct or the plaintiff consented to the abortion.*

(2) *Such relief shall include—*

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

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

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

(e) *It is an affirmative defense to a prosecution or a civil action under this section, which must be proved by a preponderance of the evidence, that the partial-birth abortion was performed by a physician who reasonably believed—*

(1) *the partial-birth abortion was necessary to save the life of the mother; and*

*(2) no other procedure would suffice for that purpose.*

\* \* \* \* \*

## DISSENTING VIEWS

We strongly oppose this legislation, which, if enacted, would constitute the first-ever general federal ban on a form of abortion. H.R. 1833 represents an effort to exploit a highly sensitive and personal family issue; namely a decision to seek a late-term abortion where a fetus is severely disfigured and has no opportunity for long term survival, or where a woman's life, health or future reproductive capacity may be severely threatened.

Legislation reported out by this Committee criminalizing the procedure which the majority refers to as "partial birth abortion", notwithstanding evidence that the term "partial birth" does not exist in medical terminology, is not merely objectionable for what the legislation specifically addresses; we also oppose it because it is part of an effort to make it virtually impossible for any abortion to be performed late in a pregnancy, and a large step toward stripping away as many of the protections for legal abortion that the majority can manage.

The legislation will and appears designed to chill doctors from performing legal abortions in all circumstances. Criminal penalties, civil sanctions, egregious and inflammatory characterizations by the bill's proponents of medical procedures and those who must undergo them, and explicit refusals to exempt criminal charges even when the woman's health is at stake are all part of a strategy to eliminate legal abortion in this country. This is why during consideration of this legislation, Representative Inglis (R-SC) referred to physicians who conduct abortions as "hired killers" (Tr. at 85) and Chairman Hyde acknowledged that his ultimate goal as Committee Chairman was to adopt a full-fledged Constitutional amendment banning abortion and overturning *Roe v. Wade*, 410 U.S. 113 (1973) (Tr. at 59).

### *Federal regulation of a medical procedure is wrong*

The legislation outlaws a valid medical procedure used when other methods of late term abortion may be more dangerous to the health or life of the woman who has decided to undergo an abortion. There is no other example in Federal law of Congress prescribing which of a series of valid medical procedures a licensed doctor may or may not undertake. It is inappropriate for Members to substitute their judgment for the professional opinion of doctors, and we oppose the effort to do it. The decision to perform one form of abortion over another is a difficult one, often made during a complicated, premature labor, which requires expert, professional judgment of a doctor. This legislation indefensibly interferes with the medical judgment of licensed doctors.

Further, the creation of a new Federal tort and criminal statute in this area is completely inconsistent with the majority's professed position that the States are competent to determine these and

other matters. This is properly a state criminal and civil issue, as evidenced by the fact that some states have chosen to regulate the procedure. The position of the majority is that the Federal government should leave to the States matters to which they are competent, but a State is by the majority's definition incompetent if its people have chosen to not regulate an issue in the manner which Congress thinks they should regulate.

While this issue did not determine our opposition to the bill, it should not go unnoticed that the Federal tort created here is in sharp contrast to the majority's clear position on other matters of civil liability: there are no caps on damages, and no restrictions on joint and several liability. The fact that States are wholly competent to determine matters of civil litigation, and the fact that the majority's support for capping damages and removing joint and several liability are principles revealed to be not so deeply held when the matter is one about which the majority disapproves of the heretofore competent States' handling of a matter.

*The legislation is unconstitutional*

We object to the legislation on the further ground of its extreme vagueness, especially dangerous in a criminal statute. Since "partial birth abortion" is not a medical term, and "abortion", "delivery" and "living fetus" are not only not defined under federal law but also defined differently from state to state, constitutional concerns over vagueness make the bill impermissible. The legislation does not give fair warning of the prohibited acts to a physician, and falls short of the clarity required of criminal laws that infringe on constitutionally protected conduct. At the one truncated hearing on this legislation before Subcommittee markup, Dr. Courtland Robinson, Associate Professor in the Department of Gynecology and Obstetrics at Johns Hopkins University School of Medicine, testified that "'partially vaginally delivers' is vague, not medically oriented, just not correct. In any normal 2nd trimester abortion procedure by any method, you may have a point at which a part, a one inch piece of cord for example, of the fetus passes out of the cervical os before fetal demise has occurred. This doesn't mean you're performing a 'partial birth'."

Further, the legislation fails to preserve the safeguards required by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), in which the Court adopted a two-part "undue burden" standard for assessing laws that restrict abortion: whether they have "the purpose or effect of placing a substantial obstacle in the path of woman seeking an abortion." *Id.* at 2820. The legislation contravenes *Roe's* central holding, reaffirmed in *Casey*, that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 2821, citing *Roe v. Wade*, 410 U.S. at 164–165. The legislation, in failing to exempt from civil and criminal charges those procedures in which the doctor determines that the procedure was necessary for the life or health of the woman, violates the constitutional protections required in *Roe* and its progeny.

As well, the legislation is constitutionally suspect pursuant to the Court's recognition that a ban on one method of abortion is impermissible. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) the Court struck a Missouri ban on the use of saline amniocentesis after the first twelve weeks of pregnancy, which, at the time of the ban, was part of a preferred method of late abortion because it was safer than prostaglandin procedures. The Court found that the slaine ban "forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed," *Id.* at 78-79, and invalidated the statute as inconsistent with *Roe*. Because this legislation interferes with a physician's decision to employ a safe method of late abortion and to make the woman's health his or her paramount concern, the legislation requires an impermissible "trade-off" of women's health condemned by the Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 769-70 (1986), overruled on other grounds, *Planned Parenthood v. Casey*, 112 S.Ct. at 2823.

In an attempt to reveal the constitutional and other deficiencies in the legislation, Mrs. Schroeder offered an amendment to except from criminal and civil sanctions those "partial-birth abortions" necessary to preserve the woman's life or health, with health defined to include severe fetal abnormalities, and to remove the affirmative defense. Meant to prevent the unraveling of *Roe v. Wade* that this legislation is designed to start, the amendment would have provided explicit protection for doctors to use the procedure in question when the woman's life or health is in jeopardy (including threats posed by severe fetal abnormalities including Tay-Sachs, dicephaly, holoprosencephaly with cyclopia, multiple congenital anomalies, cystic hygroma with anasarca, encephalocele, acrania, anencephaly, lack of spinal cord, et cetera). It would have removed Congress from the micro-managing of the medical profession, and prevented Congress from declaring that this procedure is criminal, whether or not a doctor determined it was the best procedure for the preservation of the woman's life or health.

The majority, in defeating Mrs. Schroeder's amendment, resorted to trivializing the circumstances in which women and their doctors choose to use this procedure. Ignoring the fact that the procedure is frequently used to terminate pregnancies in which severe and tragic fetal abnormalities are present, the majority instead prefers to characterize the decision to have this procedure to preserve a woman's health as cavalier: "[t]his is an exception which will allow any abortion in any circumstances, including psychological, for psychological reasons, reasons of inconvenience," Tr at 23, or for the "mother's youth or depression", Tr at 24, or "if the pregnant woman wishes to exterminate her unborn child, it becomes a question of her health, she will be depressed if she doesn't, and therefore the abortion occurs," Tr at 39.

The evidence drawn out in the hearing on this issue, notwithstanding that one hearing's truncation by the majority because of a scheduling conflict which the majority created in its rush to move on to other business, makes clear that the pregnancies terminated by this procedure are frequently tragically deformed fetuses with



no chance of survival. Further, these pregnancies can pose a significant health risk to the woman. Submitted into the record was a letter from Dr. Elaine Carlson, Director, Reproductive Genetics, Department of Obstetrics and Gynecology at Cedars-Sinai Medical Center, UCLA School of Medicine. Dr. Carlson wrote that “[o]ften fetuses that have physical abnormalities will have increased amniotic fluid that can cause uterine atony and severe maternal bleeding at birth. Fetuses that have fluid in their lungs and bodies can cause mothers to experience the ‘mirror syndrome’, where they themselves become bloated and dangerously hypertensive. Abnormal fetuses often require operative deliveries, and this puts the mother at increased risk of infection and death. \* \* \* To put it mildly, this is not just a ‘fetal issue’, it is a health care issue for the mother as well.”

In an attempt to preserve a safety valve for those parents who choose this procedure to terminate a late pregnancy, yet reassure those Members who object to a health exception for fear of abuse of that exception, Ms. Lofgren of California offered an amendment to incorporate a health exception within the affirmative defense. The majority dismissed this amendment as if it were the same as Mrs. Schroeder’s above, refusing to permit even a safety valve to preserve a woman’s health within the affirmative defense. The end result is that a doctor must under this legislation as passed prove to a jury that the method chosen was the only one available to save the woman’s life, a standard which will absolutely chill doctors from performing this or other related lawful medical procedures. The affirmative defense will not be available even in cases where the alternative procedure places the woman’s health or future fertility in grave jeopardy.

Next, with the goal of excepting from the ban and thus from criminal prosecution those “partial birth procedures” undertaken to preserve the life of the woman, Ms. Jackson-Lee of Texas offered an amendment to this effect. This narrow construction, meant to preserve constitutional protections mandated in *Roe v. Wade*, would have removed from doctors the burden of a criminal trial in which they would have the burden of proving that the procedure was the only one available to save the woman’s life. The proponents of the bill exercised a zeal to criminalize doctors so great that an exception from prosecution was refused even when the procedure saved the life of the mother. We strenuously object to a piece of legislation which diminishes the value of a woman’s life, and threatens to imprison doctors for a heretofore safe, legal and valid medical procedure.

Another amendment, offered and withdrawn by Mr. Schiff of New Mexico and re-offered by Mr. Watt of North Carolina, would have altered the affirmative defense provision, making the necessity of the procedure to save the life of the woman a defense to the crime. As described by its original proponent, the prosecutor or plaintiff “would have to prove that the life of the mother was not at risk and not that the defendant has to prove it by a preponderance of evidence, just as the State has to prove that a shooting, for example is not in self defense.” Although the amendment was rejected, its original proponent went on to remark that “I think it is virtually unprecedented. I can only think of one example, offhand,

and that is some insanity defenses that start treating defenses in criminal cases as an affirmative defense in which the defendant has to prove anything. That is the purpose of my amendment." Tr at 170.

The failure of the amendments offered by Mr. Watt, Mrs. Schroeder, Ms. Lofgren and Ms. Jackson-Lee demonstrates that the majority wishes to ban even those abortions necessary to protect women's life or health, including those cases where the fetus cannot survive, where the woman is placed at increased risk by carrying the pregnancy to term and undergoing childbirth, or where another method of abortion is more dangerous. We oppose this threat to women and doctors.

*The legislation seeks to frighten doctors from performing legal abortions in a large number of circumstances*

The civil sanctions, criminal remedies, extreme references by the majority to medical professionals as "assassins", "exterminators" and "murderers", all are part of a design to scare medical professionals from performing abortions in circumstances other than those described in this legislation.

Violence at clinics and verbal abuse and demonization of doctors and women who decide to undergo abortion will now be joined by legislation which will imprison doctors who cannot prove that the "partial birth abortion" was the only procedure which would save the life of the woman on whom it was performed as part of the campaign against safe and legal abortion. Doctors may choose not to perform any abortion for fear that they will be unable to afford the cost of or prevail against criminal charges that the method of abortion chosen wasn't the only one available to save the woman's life. Prudent doctors in a jurisdiction in which the prosecutor or many potential jurors are hostile to abortion rights in toto may reasonably fear that almost any abortion could be characterized by an overzealous prosecutor or plaintiff as falling within the vague terms of this bill. But this is precisely the point of the legislation: to chill as many doctors as possible from performing otherwise legal, safe abortions.

Mr. Frank of Massachusetts offered an amendment, striking the prison term, to point out the illogical and inconsistent aspect of a bill which its proponents claim is to protect innocent life from "assassins" and "murderers", then punishes those doctors with only two years in prison. The amendment, which was rejected, highlighted the fact that a central goal of the bill is to frighten doctors from performing any kind of late term abortion, and some abortions not in the late term.

The legislation is also unprecedented and unwise in that it allows third parties—the father of the fetus or a parent of a minor woman—to seek civil damages against both the doctor and the woman. A profoundly chilling aspect of the legislation is that for any abortion a physician must obtain the consent of the father to avoid the risk of civil liability. The Supreme Court has refused to grant either the husband of a woman seeking an abortion or the parents of a minor seeking an abortion absolute veto power over the woman's decision. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976); *Planned Parenthood Assn. of*

*Kansas City v. Ashcroft*, 462 U.S. 476, 491 (1983). Permitting fathers or grandparents to sue the doctor for damages when they opposed the procedure is contrary to these holdings.

Because the legislation interferes with the health of women at a point in their lives when they and their families must make profoundly intimate, private decisions, because the legislation will imprison doctors for performing safe, necessary medical procedures, and because the legislation is instructing states that they have not exercised competently matters which under the majority's ideology are wholly within their jurisdiction, we oppose the bill and dissent from it.

JOHN CONYERS, Jr.  
PAT SCHROEDER.  
BARNEY FRANK.  
CHARLES E. SCHUMER.  
HOWARD L. BERMAN.  
JOHN BRYANT.  
JACK REED.  
JERROLD NADLER.  
BOBBY SCOTT.  
MELVIN L. WATT.  
XAVIER BECCERA.  
JOSÉ E. SERRANO.  
ZOE LOFGREN.  
SHEILA JACKSON-LEE.

ADDITIONAL DISSENTING VIEWS OF CONGRESSWOMEN  
PATRICIA SCHROEDER, ZOE LOFGREN, AND SHEILA  
JACKSON-LEE

As the only women who sit on the House Judiciary Committee, we feel a special obligation to speak out against H.R. 1833, an extreme bill that undermines the constitutional rights and reproductive health of all American women.

In 1973, in *Roe v. Wade*, the United States Supreme Court recognized a woman's constitutional right to choose an abortion and make decisions about her own reproductive health. H.R. 1833 unravels the fundamental constitutional right that American women have to make those decisions and is a direct attempt to eliminate the protections of *Roe v. Wade*, procedure by procedure. H.R. 1833 undermines the ability of women to receive medical treatment that we and our doctors have determined are safest and medically best for us. For the record we note that not one of the witnesses who testified before the committee on behalf of this legislation supports *Roe v. Wade*. Indeed, the Chairman of the committee acknowledged that he supports a constitutional amendment overturning *Roe v. Wade*; that measure, and not the one now before us, would have been before the committee were the Republican majority sufficiently large to muster the two thirds vote necessary for a constitutional amendment.

H.R. 1833 is the first bill that the House Judiciary Committee has ever considered and reported out that threatens women's constitutional right to choose in such a direct and extreme way. The House Judiciary Committee has never voted to criminalize any medical procedure, much less any abortion procedure. The House Judiciary Committee has never voted to erode women's constitutional right to choose as upheld in *Roe v. Wade*. Thus, we view the Committee's vote to pass H.R. 1833 as a dangerous and historic precedent that threatens the rights of American women.

We also feel it is important that before any Member of the House makes up his or her mind about this bill, that they listen as we have to the voices of the women who have gone through this procedure. We ask that our colleagues hear their personal stories about the decisions their families made in consultation with their doctors—decisions that were made with dignity, safety, and love and without the intrusion of the Federal government.

No one can better explain why politicians should stay out of this decision than the women who have benefitted from this procedure in cases involving devastating fetal deformities, women whose lives and health have been preserved by the very procedure this committee is trying to ban.

These are tragic stories of wanted pregnancies where something goes terribly wrong.

Viki Wilson, a nurse married to an emergency room physician, ended a wanted pregnancy at 36 weeks because the fetus was diagnosed with encephalocele with severe microcephaly, with a large portion of the brain formed outside the skull, most of its tissue abnormal.

Vicky Smith, an Illinois mother of two children, ages 7 and 11, ended a wanted pregnancy because the fetus was microcephalic and had multiple terrible deformities. Because she went through this safe procedure, she was able to have more children. Vicky Smith is now pregnant again.

Tammy Watts gave moving testimony at the hearing on the bill about the agony she and her family went through as they made the decision to terminate her wanted pregnancy at 28 weeks because the fetus had a lethal chromosomal abnormality called trisomy-13, affecting all of her organs.

Mrs. Watts told the committee:

I had a choice. I could have gone on for two more months, doing everything that an expectant mother does but knowing my baby was going to die and would probably suffer a great deal before dying. My husband and I would have had to endure that knowledge and watch that suffering. We could have never survived that and so we made the choice together, my husband and I, to terminate this pregnancy.

These women's voices are ones that we lawmakers must listen to before we make sweeping legislative changes that would have put these women in jeopardy and their doctors in jail.

Cases like their are rare. But in these cases, the procedure this bill bans is often the safest way to preserve the woman's life, health, and her ability to have future healthy children.

The life of the woman is not mentioned in the heart of the bill, but only as an afterthought in the affirmative defense section. The doctor is still arrested or sued and must still stand trial and carry the burden of proof that this procedure was necessary to save the woman's life—all for performing a life-saving procedure that the Constitution says is legal, but politicians are trying to make illegal.

Preserving the health of the woman is no defense at all under this bill—a conscious decision by the authors of this bill to sacrifice a woman's health to serve their extreme political agenda.

We append to our views a letter from Dr. Dru Elaine Carlson, the Director of Reproductive Genetics at Cedars-Sinai Medical Center and a perinatologist and geneticist, outlining some of the significant health risks such pregnancies can pose for women.

Dr. Carlson points out that often fetuses that have physical abnormalities will have increased amniotic fluid that can cause uterine atony and severe maternal bleeding at birth. She also points out the alternative method of termination of these pregnancies is a traumatic stretching of the cervix that then increases a woman's risk of infertility in the future.

The procedure that H.R. 1833 bans allows very passive dilation of the cervix and allows gentler manipulation to preserve the woman's ability to bear children in the future. For some women, it is their safest alternative.

Another danger this bill poses for women's health is that it is so vague that it will produce a chilling effect on a broad range of abortion procedures, and make those doctors not already intimidated by the murders and violent blockades of medical facilities think long and hard about whether they can endure practicing medicine under the constant threat of imprisonment of civil lawsuits, and with the knowledge that Congress has forbidden them from exercising their best professional judgment on behalf of their patients.

Dr. J. Courtland Robinson of Johns Hopkins University testified that "partial birth abortion" isn't even a medical term. He testified that this bill is so vague and broad and void of legitimate medical terms that it is legislatively mandated malpractice.

H.R. 1833 is bad medicine, bad law, bad policy, and intrusive government at its worst.

The proponents of H.R. 1833 are avowed opponents of women's right to reproductive choice and of *Roe v. Wade*. Yet they know that Americans overwhelmingly support a woman's right to choose, to make decisions about their own reproductive health, so they avoid a clear head-on assault of abortion rights. They don't have the political courage to offer a constitutional amendment so they chip away procedure by procedure.

And that is what H.R. 1833 is—one part of a concerted, multistep effort to effectively deprive women of their constitutional rights and their access to abortion. We have seen some of the other aspects of this concerted effort already: ongoing Republican efforts to eliminate family planning services both at home and abroad; to exclude abortion services from federal employees' health insurance; to impede medical schools from teaching abortion procedures; to eliminate funding for abortions for victims of rape and incest and to cut funding for contraceptive research and development.

This is not an abstract debate at the margins of the abortion issues. Passage of H.R. 1833 will harm real women and their families. It will substantially erode *Roe v. Wade* and women's constitutional rights. What is at stake here is whether a woman and her family can make decisions for themselves about how their families will live. We speak out, as the unified voice of the women serving on the Judiciary Committee to urge defeat of this bill.

PAT SCHROEDER.  
ZOE LOFGREN.  
SHEILA JACKSON-LEE.

## APPENDIX

CEDARS-SINAI MEDICAL CENTER,  
*June 27, 1995.*

Hon. PATRICIA SCHROEDER,  
*Rayburn House Office Building,  
Washington, DC.*

DEAR REPRESENTATIVE SCHROEDER: This is a letter to encourage you to defeat bills H.R. 1833 and S. 939. These bills aim to ban the surgical procedure of second trimester abortion known as intact D & E.

I am the Director of Reproductive Genetics and a perinatologist and geneticist at Cedars-Sinai Medical Center in Los Angeles. My practice consists primarily of pregnant women who are referred to me by their Obstetrician for an ultrasound and/or genetic evaluation of their ongoing pregnancy. Sometimes I am asked to see women who have a possible abnormal finding on a prenatal ultrasound done by another practitioner. I am usually the final diagnostician in these cases and I spend a tremendous amount of my time counseling families about what I see, how we can approach this problem, how we can clarify what is wrong, and sometimes, how we can fix the fetal abnormality. Often nothing can be done and we are left with an abnormal fetus that is in the last second trimester and a devastated family. With the help of their private doctor, other geneticists, and genetic counselors, we advise parents that we will support them in whatever decision they choose. If they continue the pregnancy, we will be there with them. If they choose to end the pregnancy or wish to explore that option, I refer them to Dr. James McMahon, a practitioner of the type of abortion that is being singled out to be banned in H.R. 1833 and S. 939.

Dr. McMahon provides an unusual expertise in the termination of late in gestation flawed pregnancies. Without his help, these women would have to go through a pregnancy knowing their child will be born dead, or worse, will live a horribly damaged life. One concept that seems to be lost on the general public is that these pregnancies can have a significant health risk to the mother. Often fetuses that have physical abnormalities will have increased amniotic fluid that can cause uterine atony and severe maternal bleeding at birth. Fetuses that have fluid in their lungs and bodies can cause mothers to experience the "mirror syndrome", where they themselves become bloated and dangerously hypertensive. Abnormal fetuses often require operative deliveries, and this puts the mother at increased risk of infection and death. The usual type of termination of pregnancy is a traumatic stretching of the cervix that then increases a woman's chance for infertility in the future. The procedure that is up for "banning" allows very passive dilatation of the cervix and allows gentle manipulation to preserve the very much desired fertility of these distraught women. To put it mildly, this is not just a "fetal issue", it is a health care issue for the mother as well.

Who is served by having malformed children born to families that cannot financially or emotionally support them? I know that these decisions are not taken lightly by these families. Some do continue; and they are always back in my office for prenatal diag-

nosis in their next pregnancy. Raising a damaged child is a sobering experience. Why should families have to go through this once, much less again and again? For those who believe this is "God's will" I would challenge them to be that child's caretaker for a day, a week, a month, a lifetime. Frankly, I have the religious conviction that fetal malformations are not "God's will" but the devil's work. I cannot believe the Good Lord wants little babies to suffer in this way. And I can't believe the United States of America's Congress is interested in causing families to undergo suffering and pain when they don't have to experience this nightmare. Undergoing a late gestation termination of pregnancy is a terribly heart-wrenching and soul-searching process. Since I refer Dr. McMahan to a large number of families, I have gone to his facility and seen for myself what he does and how he does it. The emotional pain that these families suffer will be life-long. But they are comforted by the fact that Dr. McMahan is caring, and gentle, and ultimately life-affirming in his approach to the abortion procedure. Essentially he provides analgesia for the mother that removes anxiety and pain and as a result of this medication the fetus is also sedated. When the cervix is open enough for a safe delivery of the fetus he uses ultrasound guidance to gently deliver the fetal body up to the shoulders and then very quickly and expertly performs what is called a cephalocentesis. Essentially this is removal of cerebrospinal fluid from the brain causing instant brain herniation and death. There is no struggling of the fetus; quite the contrary, from my personal observation I can tell you that the end is extremely humane and rapid. He provides dignity for all of his patients: the mothers, the fathers, the extended families and finally to the fetuses themselves. He does not "mangle" fetuses, rather they are delivered intact and that allows us (a team of physicians at Cedars) to evaluate them carefully, and for families to touch and acknowledge their baby in saying goodbye. We work with Dr. McMahan in evaluating many of the malformed fetuses with careful autopsy, molecular studies, and dysmorphological examinations to try and provide the clearest and most precise diagnosis we can for our families as to why this happened to them. Often we can reassure them that this won't happen again; too frequently we must advise them that they carry a genetic mutation that does have a risk of recurrence.

If Dr. McMahan did not exist I will assure you that most of these families would simply not have children. The divorce and emptiness that would bring is something that, thankfully, is not necessary now. Certainly we all pray that this does not occur again; but if it does the family knows that they can end that pregnancy and try again until finally they achieve what we all want: a healthy, happy, whole baby. That is the essence of family values and I implore each and every person to see beyond their own prejudices and walk in that family's shoes. What would you do if you, your wife, your daughter, or your son's wife had a fetus with half of a brain; a hole where its face should be; a heart malformation so complex that it will require years of painful and ultimately unsuccessful surgery; a lethal chromosome abnormally where your child would never recognize you or itself? Most people are thankful there is another option besides just enduring this.



My goal is for no family to have to experience abortion. I am working as hard as I know how to understand malformation and the wrong signals of our genes. But until my lofty goal is realized, we need individuals like Jim McMahon to provide the competent services to help these families. This is not just an individual freedom issue, it is a basic issue of society. There is enough tragedy in ordinary life; why make more of it if there are clear and safe alternatives? If you decide that Dr. McMahon and his colleagues should no longer be allowed to practice medicine as they know how, you will be denying women and their families the basic right of freedom of choice and the pursuit of happiness. And you will be condemning a generation of malformed newborns to a life of very expensive pain and suffering. The payment due on that bill is going to be very, very costly to the Government because eventually you and I are going to be maintaining these children. But the payment due on the personal grief this will cause can never be adequately paid. I can't imagine that any of you want to contribute to that debt and you don't have to. Just leave Dr. McMahon alone to do what he does best and let us all work toward the day when he isn't needed anymore.

Thank you for allowing me to express my opinion.

Sincerely,

DRU ELAINE CARLSON, MD.

