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March 16, 2004

RE: Unborn Victims of Violence Act (H.R. 1997)
and the Feinstein Substitute Amendment

Dear Senator:

Under a time agreement reached by unanimous consent on March 12, as early as March 23 you will vote on two “killer” amendments to the Unborn Victims of Violence Act (H.R. 1997), also known as “Laci and Conner’s Law,” and then on the bill itself.

We believe if a criminal commits a federal crime that injures a pregnant woman and kills her unborn son or daughter, the law should not force federal prosecutors to tell the grieving mother that she did not really lose a baby. If you agree, you should oppose the Feinstein Substitute Amendment, which would codify the doctrine that such a crime has only a single victim – the pregnant woman. Moreover, as explained below, the Feinstein Substitute was drafted with fatal flaws that would prevent *any* new punishments from being imposed in such a case.

We also urge you to oppose the Murray Amendment, a 158-page compendium dealing with mandatory employee leave based on “domestic violence” claims and many other things. This amendment is being offered to the Unborn Victims of Violence Act only in an attempt to mire H.R. 1997 in a host of unrelated issues and doom it procedurally. A vote for the Murray Amendment is a vote to kill the Unborn Victims of Violence Act.

H.R. 1997 would recognize an unborn child as a victim when he or she is killed during commission of a violent federal crime. The bill lists the 68 existing federal crimes to which the bill would apply – each of which *already covers* the pregnant woman. If H.R. 1997 is enacted, when a criminal harms a pregnant woman while violating one of the existing statutes listed in the bill, he will be charged under the existing law as he would be now, but also will face a second charge for the harm done to the second victim.

H.R. 1997 deals only with federal and military crimes, not state crimes. H.R. 1997 does not alter or conflict with any law of any state.

H.R. 1997 explicitly exempts abortion and all acts of a woman with respect to her own unborn child. Twenty-nine (29) states already recognize the unborn child as a homicide victim in at least some circumstances. The federal and state courts have consistently upheld these laws, because they do not affect abortion. The purpose of the state fetal homicide laws, and the purpose of H.R. 1997, is to allow justice to be done for unborn children whose lives are snuffed out by the actions of violent criminals, and for the parents and grandparents of such victims. Documentation on the state laws, the court decisions, and accounts of two-victim crimes, are posted on the NRLC website here: http://www.nrlc.org/Unborn_victims/index.html

We may speak more specifically to the Murray Amendment in later communications. This letter is for the purpose of explaining the differences between H.R. 1997 and the Feinstein Substitute.

Summary of the Feinstein Substitute

The differences between H.R. 1997 and the Feinstein Substitute are profound. However, before moving to those all-important differences, we note that on several points on which the Unborn Victims of Violence Act has been criticized by some opponents, Senator Feinstein has now incorporated comparable provisions in her substitute: (1) H.R. 1997 and the Feinstein Substitute both apply at every point during pregnancy; and (2) under both H.R. 1997 and the Feinstein Substitute, in general the government *would not* be required to prove that an attacker had knowledge that his victim was pregnant – but under both bills, the government *would* be required to prove that the attacker had criminal intent toward the pregnant woman *or* towards some other intended victim (which could be, under H.R. 1997 only, a “child in utero”).

The heart of the divide is this: When a criminal attacks a pregnant woman, injuring or killing both her and her unborn child, has he claimed one victim, or two? Over the past year, the American people have considered that question in light of the much-publicized murders of Laci and Conner Peterson in California -- and by overwhelming margins, they believe that the law should recognize that such crimes have *two* victims. In three national polls conducted during 2003, respondents endorsed “fetal homicide” charges by margins ranging from 8-to-1 to 12-to-1. The polls are posted on the NRLC website here: http://www.nrlc.org/Unborn_victims/UnbornPolls110703.html.

The Feinstein Substitute, however, is intended to codify the doctrine that when a criminal attacks a pregnant woman and kills her unborn son or daughter, he has really claimed only one victim – the position supported by 7 to 10% of the public in the three polls cited above. Senator Feinstein has replicated large portions of the Unborn Victims of Violence Act, but she has removed all references to the second victim, substituting instead references to “the pregnant woman.”

Although she sees only one victim, Senator Feinstein says she favors two separate criminal charges. **Yet, as the substitute is drafted – and it cannot be altered under the unanimous consent agreement – it really would never permit a successful prosecution, nor does it succeed in imposing any punishment for the offenses that it purports to create.** We explain these observations in detail below.

The Feinstein Substitute’s Wide-Open Exception

Consider this hypothetical federal crime: A terrorist explodes a bomb in a post office. A postal clerk survives the blast, but her unborn daughter is killed. Under H.R. 1997, the approach is straightforward. The bomber would be charged as currently under applicable federal law for the crime against the postal worker (most likely under Title 18, Section 1114, attacks on federal employees, and/or Section 844, explosive materials), and then charged, under the Unborn Victims of Violence Act, for the harm he has done to the second victim, the unborn child.

Under the Feinstein Substitute, the bomber would also be charged first as under existing law, and in theory would then be charged a second time under the Feinstein law, for “termination of a pregnancy.” **However, the second charge would be futile – because other provisions of the substitute would shield the bomber from such a charge, and would result in no additional penalty being imposed**

even if the shield was somehow defeated.

Subsection (c) of the Feinstein Substitute provides that the bill “*does not permit prosecution for conduct relating to any medical treatment of the pregnant woman, or matters related to the pregnancy.*” The exception for “medical treatment” merely copies one of the exceptions in H.R. 1997 – but after that comes the “*or,*” and the subsequent clause renders the entire bill meaningless. Under the Feinstein Substitute, the only *possible* offenses are “termination of a pregnancy” and “interruption of the normal course of the pregnancy,” both of which are clearly “matters related to the pregnancy” – *and the exception says that prosecutions are not permitted for “matters related to the pregnancy.”*

Arguably, in the event that some court tried to disregard the plain language of the exception and make some sense out of this, with difficulty the exception might be construed to eliminate prosecutions “only” when the predicate crime against the pregnant woman was actually *motivated by* or *related to* the fact that the woman was pregnant. Under this construction, no prosecution would be possible in the many cases in which the attack occurs *precisely because* the attacker wishes to kill the unborn child – because his girlfriend has refused his demand that she procure an abortion, because his ex-wife is now pregnant by another man, etc. These horrific baby-targeting crimes are undeniably “matters related to the pregnancy,” and therefore they could not be prosecuted under even this narrower construction of the Feinstein exception. Yet these cases cry out loudly for justice, because the woman often survives such an assault but loses her baby, and without a fetal homicide law, that loss of life cannot be recognized or subject to appropriate punishment.

Even in the unlikely event that a court rewrote the exception to say that the bill did not allow prosecutions for “*medical treatment* related to the pregnancy,” which may or may not be what the author *intended*, the wording of the penalty clauses in the Feinstein Substitute also renders the substitute ineffectual in every case, as explained in the next section.

Feinstein’s No-Penalty Penalty Clauses

Paragraph (a)(1) of the Feinstein Substitute purports to allow a second charge to be brought in certain federal crimes in which the victim is a pregnant woman. The second charge must be for either “termination of a pregnancy” or “interruption of the normal course of a pregnancy,” neither of which is defined in the bill, but both of which are conceived as harms done to a single victim – the pregnant woman.

Feinstein’s subparagraph (a)(2)(A) provides that in general, the punishment for such an offense is “the same as the punishment provided for that conduct under Federal law had that injury or death occurred to the pregnant woman.” Senator Feinstein has copied this clause from H.R. 1997, but in H.R. 1997 it referred to an “injury or death” inflicted on the “child, who is in utero,” so it made sense. In the Feinstein Substitute, it does not make any sense, because there is no “child in utero,” no “fetus,” nobody at all except “the pregnant woman.”

After all, under the Feinstein Substitute, if the woman survives the crime but loses her “pregnancy,” there has been no “death,” because the sole victim still lives. (But if someone thinks that under the substitute there *was* a death, then *who* was it who died?)

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If the loss of the surviving mother's unborn child is to be regarded, under the Feinstein Substitute, not as a "death" but as an "injury" to the pregnant woman, then what is the punishment? The punishment is, says the Feinstein Substitute, "the same as the punishment provided under Federal law had that injury . . . occurred to the pregnant woman." But under the Feinstein model, the injury *did* occur to the pregnant woman. *More importantly, "the same as" clause points to nothing, because **there is no penalty provided under any Federal law for the "injury" of having one's pregnancy "interrupted" in a crime.***

Thus, the punishment to be imposed under the Feinstein Substitute is "the same as" . . . nothing.

To illustrate the circular, nonsensical nature of the Feinstein penalty clause, let us go back to the hypothetical case of the post office bombing, in which the pregnant postal worker survives, but her unborn daughter is killed. Setting aside the possible constitutional problems with trying to charge the bomber twice for "injury" to the same victim in exactly the same act – the bombing – what is the penalty for the "termination of the pregnancy"? There is none specified in the Feinstein Substitute, and none exists in current law.

The subparagraph of the Feinstein substitute [(a)(2)(C)] that deals with a person who "*intentionally causes or attempts to cause the termination of or the interruption of the pregnancy*" has the same fatal defect. This subparagraph provides that for such pregnancy-targeting acts, "that person shall be punished as provided under section 1111, 1112, or 1113, as applicable." But these are statutes that deal with murder and manslaughter. None of these statutes contain any provisions "applicable" to cases in which the attacker's intent is not to kill the mother and in which the mother does not die.

On the other hand, in crimes in which the pregnant woman does die, the Feinstein provision is also useless, because the offender cannot be charged twice for the same harm done to the same victim. ***In other words, the attacker cannot be charged with two homicides if there was only one victim.***

The parallel provisions of H.R. 1997, in contrast, make perfect sense, because under H.R. 1997, there are two victims, each separate charge will be appropriate for the attacker's conduct with respect to each victim, and the penalty for the unborn victim charge will correspond to the penalty that would apply if the same harm had occurred to the other victim, the mother. This structure allows for appropriate charges and penalties in any of the possible outcomes of a two-victim crime (the mother may live while the baby dies, or the mother may die while the baby survives, or both may die, or both may survive but with injuries).

It is constitutionally required that criminal laws must draw sharp lines, so as to give people proper warning of what conduct is prohibited and what penalties will apply if they engage in that conduct. Because of the nonsensical penalty clauses and the inclusion of an exception that, on its face, covers every case, Senator Feinstein has made it likely that her entire proposal would be declared "void for vagueness." Even if this did not occur, the profound internal contradictions of the Feinstein Substitute would make it unlikely that prosecutors would waste their time attempting to employ it.

**What Do Members of Families Who Have Lost Loved Ones
Say About the Feinstein Substitute?**

Even if the Feinstein Substitute had been drafted without the wide-open exception and nonsensical penalty clauses, it would still have the fundamental defect of writing into federal law the doctrine that when a criminal kills an unborn child, nobody really dies – a falsehood rejected by members of families who have lost loved ones, born and unborn, in crimes of violence, and rejected as well by the laws of 29 states.

The state represented by Sen. Feinstein is one of these states – in 1970, the California legislature added the words “or a fetus” to the state murder statute. The state is utilizing that law to prosecute Scott Peterson, who is charged with two murders in the death of his wife, Laci Peterson, and unborn son Conner.

Sharon Rocha – the mother of Laci and grandmother of Conner – released an audio-recorded statement after the House passed H.R. 1997 on February 26, in which she said:

I am dismayed that my own senators from California, Dianne Feinstein and Barbara Boxer, are standing in the way. Senator Feinstein has a bill that says that crimes like the murder of Laci and Conner have only one victim. But Laci knew that Conner was her son, and I know it too. Two people, Laci and Conner, would be here with us today if they had not been murdered. There were two victims in this crime, not one.

Ms. Rocha also addressed the “single-victim” approach in a letter sent last year to Senator DeWine and other leading sponsors of the Unborn Victims of Violence Act, in which she said:

The application of a single-victim law . . . would be even more offensive in the many cases that involved mothers who themselves survive criminal attacks, but who lose their babies in those crimes. I don't understand how any legislator can vote to force prosecutors to tell such a grieving mother that she didn't really lose a baby -- when she knows to the depths of her soul that she did. A legislator who votes for the single-victim amendment, however well motivated, votes to add injury to injury. The advocates of the single-victim amendment seem to think that the only thing that matters is how severe a sentence can be meted out -- but they are wrong. It matters even more that the true nature of the crime be recognized, so that the punishment -- which should indeed be severe -- will fit the true nature of the crime. This is a question not only of severity, but of justice. The single-victim proposal would be a step away from justice, not toward it.

Please also consider the testimony of Tracy Marciniak before the House Judiciary Committee on June 8, 2003 (www.nrlc.org/Unborn_victims/MarciniakTestimony.htm). She described the brutal attack that killed her unborn son Zachariah. At Zachariah's funeral, a powerfully moving photograph was taken of Mrs. Marciniak holding her son for the last time. The photo is posted here: http://www.nrlc.org/Unborn_victims/index.html

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Tracy Marciniak testified, "If you vote for that [single-victim] bill . . . you would be saying to all of the future mothers, fathers, and grandparents, who lose their unborn children in future federal crimes, 'You didn't really lose a baby.' Please don't tell us that. Please don't tell me that my son was not a real murder victim. If you really think that nobody died that night, if you really think there is no dead baby in the picture, then vote for the Lofgren [single-victim] bill. But please remember Zachariah's name and face when you decide."

Carol Lyons, whose 18-year-old daughter Ashley and unborn grandson Landon were slain in Kentucky on January 7, said, "Nobody can tell me that there were not two victims -- I placed Landon in his mother's arms, wrapped in a baby blanket that I had sewn for him, just before I kissed my daughter goodbye for the last time and closed the casket."

Stephanie Alberts, whose daughter Christina and unborn granddaughter, Ashley Nichole, were slain during an armed robbery in West Virginia, said, "When I laid my daughter to rest, a baby girl lay in her arms. Ashley was a beautiful little girl with dark brown hair, a little upturned nose, ten fingers and ten toes. She was a little girl that had the right to be born and grow and pursue her dreams. All of that was taken from her, with full knowledge, and yet no one is held accountable for that." (See photo: http://www.nrlc.org/unborn_victims/christyandashley.html)

Conclusion

We urge that you vote to allow federal prosecutors to tell grieving mothers who survive federal crimes, "We will charge your attacker for manslaughter or murder for killing your unborn child," as H.R. 1997 would allow – not, "We're sorry, but in the eyes of federal law, nobody really died," as the Feinstein Substitute would require. We urge also that you recognize that, as drafted, the Feinstein Substitute would result in no additional penalty being imposed on such a criminal, despite Senator Feinstein's declared desire to do so.

H.R. 1997 exempts abortion and actions by the mother herself, and is built on the firm legal foundation established in numerous federal and state court decisions upholding state fetal homicide laws. In order to deter two-victim crimes and to allow true justice to be done when they occur, this bill deserves your support. Please oppose the Feinstein and Murray killer amendments and support Laci and Conner's Law.

Sincerely,



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http://www.nrlc.org/Unborn_victims/index.html