

National Right to Life White Paper:

Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants – and What They Tell Us About His Thinking on Abortion

**By Douglas Johnson, Legislative Director
and Susan T. Muskett, J.D., Legislative Counsel
National Right to Life Committee / Federal Legislation Department**

202-626-8820
<http://www.nrlc.org>
Legfederal@aol.com

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Senator Barack Obama and his campaign staff have made many conflicting claims in an attempt to “explain” his opposition in 2001, 2002, and 2003, while an Illinois state senator, to the Born-Alive Infants Protection Act, legislation to provide legal protection for babies who are born alive during abortions. The language of the Illinois bills was very similar to the language of the federal Born-Alive Infants Protection Act (BAIPA), which was first introduced in Congress in 2000 and enacted into law in 2002. This document provides short rebuttals to a number of the often-shifting Obama claims. For much more extensive documentation on the Obama record on this issue, see <http://www.nrlc.org/ObamaBAIPA/index.html>

Assertion: On many occasions beginning in 2004, and as recently as August 13, 2008, Obama and his official spokespersons said that Obama opposed the Illinois Born-Alive Infants Protection Act because it lacked a one-sentence “neutrality clause” that was added to the federal BAIPA before it was enacted, and that he would have voted for the federal bill (if he had been a U.S. senator when it passed) because it contained the “neutrality clause.” This “neutrality clause” read as follows: “Nothing in this section [that is, the entire bill] shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being ‘born alive’ as defined in this section.” Obama said that such a clause prevented the federal law from conflicting with *Roe v. Wade* (a revealing argument, which is explored in detail below). For example, on August 13, 2008, the *Chicago Tribune* received a “Fact Check” from the Obama campaign that asserted “there are major differences in state and federal bills, including the fact that the federal bill included a ‘neutrality clause’.”

Response: In the first place, the original federal BAIPA introduced in 2000 was only two sentences long – it merely defined as a legal person any human, “at any stage of development,” who achieves “the complete expulsion or extraction from its mother” and then shows signs of life

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(heartbeat, breathing, or “definite movement of voluntary muscles”). This bill, which received initial approval from the U.S. House of Representatives 380-15 in late 2000, said nothing in either direction about the legal status of a human prior to birth. Therefore the “neutrality clause,” added in 2001, simply made explicit what had originally been clear if implicit– that this bill dealt only with the rights of babies who had already been born alive. Yet, starting during his 2004 race for the U.S. Senate, Obama himself insisted that the purported lack of a “neutrality clause” in the state BAIPA was all-important.

That is why it was of considerable significance when the National Right to Life Committee (NRLC) uncovered, and publicly released on August 11, 2008, three documents that proved that on March 13, 2003, Obama, as chairman of the Illinois Senate Health and Human Services Committee, actually presided over a committee meeting at which the original state Born-Alive Infants Protection Act (SB 1082) was revised to make it virtually identical to the federal law – including the addition of exactly the same “neutrality clause.” (To see the exact language of the original bill, next to the final language of the bill that Obama killed, refer to the last page of this document.) Yet, immediately after that change was made, Obama voted against the amended bill, and it was defeated on a party-line vote, 6-4. In other words, Obama led the way in killing a bill that was virtually identical to the federal law – the federal law that, since 2004, he has insisted he would have voted for if he’d had the chance.

Despite the proof released by NRLC, the Obama campaign continued to misrepresent these events. For example, on August 13, 2008, the Obama campaign submitted to the *Chicago Tribune* (among others) a chart that purported to contrast the “2003 Legislation That Obama Opposed” with the “Federal Legislation That Obama Would Have Supported” – and this chart falsely claimed that the “neutrality clause” was a “failed amendment, not included in final [state] legislation.” On August 16, 2008, when David Brody of CBN News asked Obama (on camera) about the NRLC charges, Obama said that we were “lying.” He repeated his claim that he would have been “fully in support of the federal bill that everybody supported – which was to say – that you should provide assistance to any infant that was born – even if it was as a consequence of an induced abortion. That was not the bill that was presented at the state level.”

On August 25, 2008, the independent group FactCheck.org (www.factcheck.org) issued a review of this question that concluded, “Obama’s claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act. . . . The documents from the NRLC support the group’s claims that Obama is misrepresenting the contents of SB 1082.”

Assertion: The BAIPA was unnecessary, because “Illinois law already stated that in the unlikely case that an abortion would cause a live birth, a doctor should ‘provide immediate medical care for any child born alive as a result of the abortion.’” (August 19, 2008, Obama campaign document)

Response: Obama explained in 2001, **and has never recanted**, that he opposed the Illinois

BAIPA because it declared a “pre-viable fetus” to be a legal person – even though the bill only did so if the baby had achieved “complete expulsion or extraction from its mother.” (Obama’s statements are quoted verbatim further on in this white paper.) The old Illinois law in question (720 ILCS 510.6) covered **only situations where an abortionist declares before the abortion that there was “a reasonable likelihood of sustained survival of the fetus outside the womb.” Humans are often born alive a month or more before they reach the point where such “sustained survival” – that is, long-term survival – is likely or possible (which is often called the point of “viability”).** The old Illinois law has no bearing on many of the induced-labor abortions about which the nurses testified before the committees in Congress and the Illinois state legislature, because many of them were performed on unborn humans who were capable of being born alive, and who often were born alive, but who were not old enough to have a “reasonable likelihood of sustained survival . . . outside the womb.”

Even with respect to “viable” infants, the old law is riddled with loopholes. It does not apply except when the abortionist himself declares that there is “a reasonable likelihood of sustained survival of the fetus outside the womb.” This already-weak law was further weakened by a lengthy consent decree issued by a federal court in 1993, which among other things permanently prohibits authorities from enforcing the law’s definitions of “born alive,” “live born,” and “live birth.” **On April 4, 2002, Obama spoke on the Illinois Senate floor against a bill (SB 1663 – which was not the BAIPA) that would have more strictly defined the circumstances under which the presence of a second physician (to care for a live-born baby) would be required; Obama argued that this would “burden the original decision of the woman and the physician to induce labor and perform an abortion . . . [I]t’s important to understand that this issue ultimately is about abortion and not live births.”**

The September 2000 committee report of the U.S. House of Representatives' Judiciary Committee on the federal BAIPA (H. Rept. 106-835) summarized some of the testimony that indicated why such legislation (federal and state) was necessary:

Two nurses from the hospital’s delivery ward, Jill Stanek and Allison Baker (who is no longer employed by the hospital), testified before the Subcommittee on the Constitution that physicians at Christ Hospital have performed numerous ‘induced labor’ or ‘live-birth’ abortions, a procedure in which physicians use drugs to induce premature labor and deliver unborn children, many of whom are still alive, and then simply allow those who are born alive to die. . . . According to the testimony of Mrs. Stanek and Mrs. Baker . . . physicians at Christ Hospital have used the procedure to abort healthy infants and infants with non-fatal deformities . . . Many of these babies have lived for hours after birth, with no efforts made to determine if any of them could have survived with appropriate medical assistance. The nurses also witnessed hospital staff taking many of these live-born babies into a ‘soiled utility room’ where the babies would remain until death. Comfort care, the nurses say, was not provided consistently.” (see pages 8-9 of H. Rept. 106-835).

One example given by Mrs. Stanek was that an aborted baby “was left to die on the counter of the Soiled Utility Room wrapped in a disposable towel. This baby was accidentally thrown in the garbage, and when they later were going through the trash to find the baby, the baby fell out of the

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towel and on to the floor.” (Id. at 9). Mrs. Baker testified that she “happened to walk into a ‘soiled utility room’ and saw, lying on the metal counter, a fetus, naked, exposed and breathing, moving its arms and legs.” (Id. at 10).

In testimony by Stanek before the Illinois Senate Judiciary Committee, on March 27, 2001, she said: “It is not uncommon for a live aborted babies to linger for an hour or two or even longer. At Christ Hospital one of these babies once lived for almost an entire eight-hour shift. Last year alone, of the 13 babies that I am aware of who were aborted at Christ Hospital, at least four lived between 1-1/2 to 3 hours, two boys and two girls.”

The House Judiciary Committee members of both parties apparently found the nurses’ testimony in 2000 to be compelling (although it should be noted that the committee’s report also provides ample additional justifications for enactment of the BAIPA); the bill was approved by the committee 22-1, and by the full House of Representatives 380-15, notwithstanding the vehement objection of the National Abortion Rights Action League. This was the original, two-sentence version of the legislation, and did not contain the “neutrality clause” that Obama later said was so important.

The BAIPAs recognize pre-viable (as well as viable) live-born babies as persons under the law, which is intended to ensure that they are treated humanely and given whatever care (e.g., comfort care of warmth and nutrition, and medical assessment if appropriate) that a similar baby who had not been marked for abortion would have received. Moreover, under the BAIPAs, any overt act of violence against one of these babies would be a crime against a legal “person,” not merely the inappropriate handling of medical waste products.

Here is a hypothetical scenario that illustrates the need for the Born-Alive Infants Protection Act and the troubling implications of the rationale that state Senator Obama gave for opposing it. (This is merely a hypothetical for the purpose of illustration, not a description of an actual case.)

Hypothetical: In an induced-labor abortion, at 21 weeks gestation, a human is born alive. In this particular case, it appears unlikely that the newborn will survive for more than six hours. However, after one hour the abortion doctor, who has another appointment, simply picks up a hammer and brings it down on the baby’s skull.

Question: Has this hypothetical abortionist violated the Illinois abortion-survivor law (720 ILCS 510.6), the law that Obama is now trying to hide behind? ***Answer:*** He certainly has not violated that law. That law comes into play only when the abortionist declares that the entity being aborted enjoys “a reasonable likelihood of sustained survival . . . outside the womb.” No physician -- pro-life or pro-abortion -- would affirm that a 21-week fetus has “a reasonable likelihood of sustained survival” outside the womb -- the lungs are insufficiently developed.

Question: In such a scenario, what are the implications of state Senator Obama’s stated reason, in 2001, for opposing the Born-Alive Infants Protection Act -- this being that *Roe v. Wade* forbids defining an aborted “pre-viable fetus” (even after live birth) as a legal person? ***Answer:*** Under Obama’s legal theory, the hypothetical doctor would not be committing a crime against a person, because there is no “person” under that theory. It appears that under this theory, the hypothetical

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abortionist would merely be completing the abortion, outside the womb, still operating under the protection of *Roe v. Wade*.

Most people, however, and most lawmakers, would have no trouble affirming that the baby in the hypothetical scenario is indeed a human child and that the hammer blow was a crime against a person. When Congress passed the federal Born-Alive Infants Protection Act in 2002, without a dissenting vote, it clearly affirmed the concept that all live-born humans enjoy legal protection, and implicitly repudiated the notion that anything in the Constitution or U.S. Supreme Court rulings dictates a different policy. Yet, in 2003, Obama killed a virtually identical bill in the committee that he chaired.

Assertion: “Obama voted against these laws in Illinois because they were clear attempts to undermine *Roe v. Wade*.” (August 19, 2008, Obama campaign document)

Response: Many of the Obama defenders who repeat such statements evidently have never read the bills in question. Even some critics of Obama’s position have seemingly picked up the notion that there was something in the federal and state BAIPA bills, at least initially, that spoke directly or indirectly to the legal status of *unborn* children. **But this is false.** These were all very short and simple bills. The original (2001 and 2002) version of the Illinois state Born-Alive Infants Protection legislation consisted of just three operative sentences. The first two sentences tracked the federal bill – they merely recognized as a legal person any human, “at any stage of development,” who achieves “the complete expulsion or extraction from its mother” and then shows signs of life (heartbeat, breathing, or “definite movement of voluntary muscles”). **The 2001-2002 Illinois bills also contained a third sentence that was not found in the federal version, sometimes called the “immediate protection clause.” In a document issued August 19, 2008, the Obama campaign specifically objected to this clause, which read as follows: “(c) A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law.” In a revealing statement, discussed further below, the August 19 Obama document labeled that third sentence as “Language Clearly Threatening *Roe*.”**

At the March 2003 meeting chaired by Obama, this “immediate protection clause” was removed and replaced with the language of the federal “neutrality clause,” which is quoted in full in the second paragraph of this white paper. At that point, the federal law and the state bill were virtually identical. To see the original and amended Illinois BAIPAs side by side, go to the last page of this white paper.

We are critics of *Roe v. Wade* – but even among persons who defend *Roe v. Wade*, we think that most consider that ruling to confer a right to terminate the lives of unborn humans inside the womb, and do not believe that it diminishes the legal status of a baby who is fully born. However, there really are some people who believe that *Roe v. Wade* goes further, and requires that a “preivable fetus” (Obama’s term) who is the subject of an abortion must remain classified as a non-person no matter where that “preivable fetus” is located. In this vision, the so-called “preivable fetus” who happens to be outside the mother is still in the process of being aborted, and that entire process (which Obama regards as constitutionally protected) will end only with the death of the newborn.

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By his actions and his explanations of those actions, Barack Obama showed himself to be among those who hold this expansive vision of the “right to abortion.” In Obama’s view, to declare the fully born and living but “preivable” human to be a legal person **does indeed interfere with “abortion”** and **does indeed conflict** with the full and proper application of “Roe v. Wade.”

The first time the BAIPA reached the Illinois Senate floor, on March 30, 2001, Obama was the only senator to speak against it, and his remarks clearly reflect that he holds the most expansive view on the scope of *Roe v. Wade* and the “right to abortion.” He said that “whenever we define a preivable fetus as a person that is protected by the equal protection clause or the other elements in the Constitution, what we’re really saying is, in fact, that they are persons that are entitled to the kinds of protections that would be provided to a – a child, a nine-month-old -- child that was delivered to term.”

Moreover, Obama’s insistence that the “immediate protection clause” was “Clearly Threatening [to] Roe,” reiterated in the August 19, 2008, Obama campaign document, can only be understood as another expression of the same underlying concept: **To Obama, *Roe v. Wade* stands for the proposition that prior to viability, a human “fetus” or infant must not be regarded as a legal person or as a “child,” whether inside or outside of the mother – at least, not in any context remotely related to abortion. Obama knows that this proposition does not appeal to a wide audience, so since 2004 he has actively misrepresented his record on this issue, and attacked those who try to draw attention to it.**

[There are other areas, as well, in which Obama has pushed for “abortion rights” beyond those that the U.S. Supreme Court has imposed under *Roe v. Wade*. The Supreme Court has upheld as not inconsistent with *Roe v. Wade* several types of limitations on abortion, including parental notification laws (with certain judicial bypass provisions), restrictions on government funding of abortion, and a federal ban on partial-birth abortions, but all of those laws (and many others) would be invalidated by the proposed “Freedom of Choice Act” (S. 1173), of which Obama is a cosponsor. In a speech to the Planned Parenthood Action Fund on July 17, 2007, Obama said, “Well, the first thing I’d do as president is sign the Freedom of Choice Act. That’s the first thing that I’d do.” For more information on the “Freedom of Choice Act,” including statements by its chief sponsors and advocates, see <http://www.nrlc.org/FOCA/index.html>]

Assertion: Those who have sharply disputed Obama’s conflicting accounts of his actions on this issue, or criticized the ideological or policy premises on which his actions were based, are being “deeply offensive and insulting,” are engaging in “distortions and lies,” are “an example of the kind of politics that we have to get beyond,” and so forth.

Response: As Ramesh Ponnuru with *National Review* observed (August 20, 2008), “Bereft of an argument, the Obama campaign is pounding the table.” This sort of manufactured indignation is yet another attempt to deflect attention away from uncomfortable questions: What expansive vision of “abortion rights” and *Roe v. Wade* caused Obama to perceive as especially dangerous the sentence in the original state bill that said, “A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law”? Why did he kill the bill in his committee in 2003 even after that sentence was removed and replaced with the

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“neutrality clause” from the federal bill/law? Why, beginning with his Senate race in 2004, did Obama insist that the state bill he had opposed was very different from the federal law, because only the federal law contained the “neutrality clause,” and that he therefore would have voted for the federal bill if he had been a U.S. Senator when it was passed? Five days after National Right to Life released documents (on August 11, 2008) proving that Obama had in fact killed a bill virtually identical to the federal law, including the neutrality clause, why did Obama say we were “lying”?

When will Obama apologize to National Right to Life, to Bill Bennett, and to others who he and his campaign repeatedly accused of propagating lies or distortions, for saying things that are now proven as true? [On August 25, 2008, the independent group FactCheck.org (www.factcheck.org) issued a review of this question that concluded, “Obama’s claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act. . . . The documents from the NRLC support the group’s claims that Obama is misrepresenting the contents of SB 1082.”]

Obama’s words and action support this conclusion: His commitment to defend the practice of abortion without qualification was so absolute that it led him to reflexively view the issue of babies born alive during abortions through the prism of his concept of *Roe v. Wade*, and worse, to conclude that a breathing, squirming, fully born pre-viable human baby is still covered by *Roe v. Wade*. Once he realized how difficult his position was to defend in the world outside the halls of the Illinois Senate, he began to misrepresent his record.

Assertion: Obama would have voted for the federal BAIPA, because “Federal law does not regulate abortion practice,” but he could not vote for a virtually identical state bill because it would “undermine *Roe v. Wade* or pre-existing Illinois state law regulating reproductive healthcare . . .” (8/19/08 Obama campaign document)

Response: This is really nonsense. There are about two dozen federal laws that regulate abortion in various programs and contexts. Moreover, the Supreme Court’s abortion-related constitutional doctrines, on which Obama based his opposition to the BAIPA, apply with equal force to both federal and state laws. Thus, for anyone who thought that it was wrong to define a live-born human as a “person” prior to the point of “viability,” the federal bill would have been just as unacceptable as the Illinois state bills, because they did exactly the same thing.

The original two-sentence federal bill, the enacted three-sentence federal bill, the original 2001-2002 Illinois bills, and the amended 2003 Illinois bill, all have this in common: None of them spoke in any way to the legal status or legal rights of a human entity prior to being “born alive,” which was defined in every version as requiring “complete expulsion or extraction” from the mother. Thus, no version of the Born-Alive Infants Protection Act ever limited “abortion” in any way – *except in the eyes of those who believe that the “right to abortion” can be extended outside the mother, in certain cases.*

Assertion: The Illinois Born-Alive Infants Protection Act was tied together with, or was linked

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to, or was an amendment to, other bills, such as the “Induced Birth Infant Liability Act,” which would have made various controversial changes to Illinois laws dealing with late abortions.

Response: This is an obvious attempt to change the subject and avoid prolonged scrutiny of Obama’s record on the sole bill that has been the focus of the national debate, that being the bill that was based on the federal bill, the Born-Alive Infants Protection Act. In Illinois, the BAIPA was never attached to any other bill, or offered as an amendment to any other bill. Each of the bills had separate numbers, were each subject to separate amending processes, and each was (of course) voted on separately. The BAIPA could have been enacted without any of the others.

Assertion: Obama was not alone in opposing the Illinois BAIPA bills.

Response: The Illinois BAIPA was initially closely patterned after the original federal bill which passed the U.S. House 380-15 in 2000. In 2003 the Illinois bill was revised, in the committee Obama chaired, to be virtually identical to the final federal bill, which had passed into law the previous year without any dissenting votes in Congress.

So why was the Illinois bill so much more controversial in the Illinois legislature? **Obama himself deserves much of the credit, or blame.** Obama was a rising political star (soon to successfully run for a U.S. Senate seat). He was an articulate law school instructor, who sat on the committees that debated the bill. In 2001, he was the only senator to speak against the bill on the floor. By 2003, he was the chairman of the committee to which the bill was referred, he presided over the meeting at which it was amended to be virtually identical to the federal law, and then led the other Democrats on the committee in killing it. Certainly, Obama influenced other senators to oppose the bill, even after the counterpart bill was enacted by Congress without dissenting vote. **It is unseemly for him to now try to melt into the crowd.**

ADDITIONAL RESOURCES

The NRLC website (<http://www.nrlc.org>) has an archive of key documents on Barack Obama and the Born-Alive Infants Protection Act, at <http://www.nrlc.org/ObamaBAIPA/index.html>

This archive includes the complete text of each version of the federal and state bills, the official Illinois documents that proved that Obama opposed a state BAIPA virtually identical to the federal BAIPA, a side-by-side comparison of the state and federal bills, a side-by-side comparison of the two versions of the state bill (both of which Obama opposed), documents issued by the Obama campaign, NRLC white papers that narrate the chronology of the federal and state Born-Alive Infant Protection bills and Obama’s statements on the issue, and documents dating from the period of congressional consideration of the federal BAIPA.

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The original Illinois Born-Alive Infants Protection Act of 2001-2002
(opposed by state Senator Barack Obama):

SB1095 / SB 1662

AN ACT concerning infants who are born alive.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Statute on Statutes is amended by adding Section 1.36 as follows:

(5 ILCS 70/1.36 new)

Sec. 1.36. Born-alive infant.

(a) In determining the meaning of any statute or of any rule, regulation, or interpretation of the various administrative agencies of this State, the words "person", "human being", "child", and "individual" include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this Section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from its mother of that member, at any stage of development, who after that expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(c) A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law.

Section 99. Effective date. This Act takes effect upon becoming law.

The Illinois Born-Alive Infants Protection Act as amended and then voted down at a meeting of the Illinois state Senate Health and Human Services Committee on March 13, 2003 (Obama voted against this amended bill):

SB 1082

AN ACT concerning infants who are born alive.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Statute on Statutes is amended by adding Section 1.36 as follows:

(5 ILCS 70/1.36 new)

Sec. 1.36. Born-alive infant.

(a) In determining the meaning of any statute or of any rule, regulation, or interpretation of the various administrative agencies of this State, the words "person", "human being", "child", and "individual" include every infant member of the species homo sapiens who is born alive at any stage of development.

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~~(c) A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law.~~

(c) Nothing in this Section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being born alive as defined in this Section.

Section 99. Effective date. This Act takes effect upon becoming law.