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Recent Developments on Partial-Birth Abortion
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Delaying Tactics by Opponents Delay Final Votes on Partial-Birth Abortion Ban Act Until September, 2003

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WASHINGTON (July 31, 2003) -- It is expected that the Partial-Birth Abortion Ban Act -- a major pro-life federal legislative priority since 1995 -- will be signed into law by President Bush this fall. Pro-abortion groups have vowed to immediately challenge the law in federal courts, arguing that it violates a 2000 U.S. Supreme Court ruling that struck down a Nebraska law banning partial-birth abortion (*Stenberg v. Carhart*).

Douglas Johnson, legislative director for the National Right to Life Committee (NRLC), commented, "**President Bush, 70 percent of the public, two-thirds of Congress, and four Supreme Court justices say there is no constitutional right to deliver most of a living baby and then puncture her head with a scissors. But five Supreme Court justices said that *Roe v. Wade* guarantees the right of abortionists to use the partial-birth abortion method whenever they see fit. We hope that by the time the federal ban reaches the Supreme Court, at least five justices will be willing to reject such extremism in defense of abortion."**

The U.S. Senate passed its version of the ban (S. 3), sponsored by Senator Rick Santorum (R-Pa.), on March 13 by a lopsided vote of 64-33. Before passing the bill, the Senate voted 52-46 to add one amendment opposed by pro-life supporters of the bill: the Harkin Amendment, which endorses the Supreme Court's *Roe v. Wade* decision and urges that it not be overturned.

The House version of the Partial-Birth Abortion Ban Act (H.R. 760) is sponsored by Congressman Steve Chabot (R-Oh.), chairman of the House Judiciary Subcommittee on the Constitution. On June 4, the House approved the bill 282-139, in a form identical to the Senate-passed bill except without the Harkin Amendment.

Because the two bills differ with respect to the Harkin Amendment, a House-Senate conference committee is necessary. NRLC and other supporters of the bill will urge members of the conference committee to drop the Harkin Amendment. The Senate and House must then vote a final time on the "clean" bill before it can be sent to President Bush, who is eager to sign it.

After the House passed the bill in June, pro-life Senate Majority Leader Bill Frist (R-Tn.) attempted to accomplish the procedural step necessary to convene a conference committee, but Democratic senators delayed this action by demanding an additional eight hours of debate and another vote on a "motion to disagree" with the House version of the bill (because it does not contain the Harkin Amendment). On July 30, Senator Frist agreed to this request. The vote to "disagree" will be advisory only and will not bind the actions of the subsequent conference committee regarding the Harkin Amendment. As part of the same deal, Senate Democrats agreed to allow the bill to go to conference without further delay, following the vote. However, because the agreement was reached only two days before the Senate was scheduled to begin a month-long recess, the agreed-on debate cannot occur until after September 1.

In earlier years, Congress approved national bans on partial-birth abortion twice, but they were vetoed by President Clinton. On each occasion, the House voted to override the vetoes, but supporters fell short of the necessary two-thirds majority in the Senate. [Sept. 26, 1996, and Sept. 18, 1998]

In January 22 remarks to the March for Life, President Bush said, "**My hope is that the United States Congress will pass a bill this year banning partial-birth abortion, which I will sign. Partial-birth abortion is an abhorrent procedure that offends human dignity**." The President also urged Congress to act on the bill in his January 28 State of the Union speech.

The January 2003 Gallup poll found that **70% favored** and 25% opposed "a law that would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as 'partial birth abortion,' except in cases necessary to save the life of the mother." (margin of error +/- 3%)

What is a partial-birth abortion?

Supreme Court Justice Clarence Thomas accurately described the partial-birth abortion method in his dissent in *Stenberg v. Carhart* (2000): "After dilating the cervix, the physician will grab the fetus by its feet and pull the fetal body out of the uterus into the

vaginal cavity. At this stage of development, the head is the largest part of the body. . . . the head will be held inside the uterus by the woman's cervix. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the physician uses an instrument such as a pair of scissors to tear or perforate the skull. The physician will then either crush the skull or will use a vacuum to remove the brain and other intracranial contents from the fetal skull, collapse the fetus' head, and pull the fetus from the uterus."

An eight-page instruction paper on how to perform this type of abortion, written by an abortionist in 1992, in a sense began the national debate about partial-birth abortion. It is posted on a congressional website: www.house.gov/burton/RSC/haskellinstructional.pdf.

Most partial-birth abortions are performed in the fifth and sixth months of pregnancy (20-26 weeks). At this stage, an infant who is spontaneously prematurely delivered is usually *born alive*. There is abundant medical evidence that a human baby at this stage is extremely sensitive to pain – whether she is inside the womb, fully born, or halfway between.

Some partial-birth abortions are performed in the seventh month and later – and not only in cases of fetal disorders or maternal distress. **It is noteworthy that in Kansas, the only state in which the law requires separate reporting of partial-birth abortions, abortionists reported in 1999 that they performed 182 partial-birth abortions on babies who were defined by the abortionists themselves as "viable," and they also reported that *all 182* of these were performed for "mental" (as opposed to "physical") health reasons.** See: www.kdhe.state.ks.us/hci/99itop1.pdf (on page 11).

Five justices said *Roe v. Wade* covers partial-birth abortions

In June 2000, the U.S. Supreme Court, in a 5-4 ruling in *Stenberg v. Carhart*, struck down a Nebraska law that was similar to the federal ban that was under consideration in Congress at that time, citing *Roe v. Wade*. In response to the *Stenberg v. Carhart* ruling, the new federal bill differs in two significant respects from the bans approved by the 104th Congress and 105th Congress (which were vetoed by President Clinton).

The five-justice majority in *Carhart* thought that Nebraska's definition of "partial-birth abortion" was vague and could be construed to cover not only abortions in which the baby is mostly delivered alive before being killed, but also the more common second-trimester "dilation and evacuation" (D&E) method. In a "D&E," a well-developed unborn child is

dismembered piece by piece. (For a better understanding, see the Nucleus Medical Art image at www.nrlc.org/abortion/pba/DEabortiongraphic.html)

During a D&E, an arm or leg is sometimes pulled into the birth canal before being twisted off, while the baby is still alive in the womb, so the justices thought this might be considered a "partial-birth abortion" under the Nebraska definition. (Even after one or more limbs are twisted off, it takes a little while for the baby to bleed to death, or to be killed by the final stage, the crushing of her skull.)

In order to avoid any possibility of such confusion, the new bill defines a prohibited partial-birth abortion as one in which "the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, *the entire fetal head is outside the body of the mother*, or, in the case of breech presentation, *any part of the fetal trunk past the navel is outside the body of the mother*," and then kills the baby. [italics added for emphasis] Some pro-abortion groups continue to assert that this definition covers abortion methods other than that depicted. (For example, in a letter published in the February 23, 2003 issue of *The New York Times*, the chief executive of Planned Parenthood of New York City wrote that the bill "as written would outlaw some of the safest and most common methods of abortion used throughout a woman's pregnancy, as early as 10 weeks in some cases.") But they have not explained how. It appears that such advocates are counting on journalists not to demand details on how the actual language of S.3/H.R. 760 could possibly be applied to any first-trimester abortions, or to second-trimester or third-trimester dismemberment procedures.

In *Stenberg*, the five-justice majority also ruled that an abortionist must be allowed to use the partial-birth abortion method if he believes that it is the method which has the lowest risk of side effects for any particular woman seeking an abortion in the late second trimester (not only women with a "health" problem). The majority reached this result by deferring to findings of fact by the trial court, which were based on acceptance of assertions by late-term abortionist Dr. LeRoy Carhart and others that the partial-birth abortion method was sometimes the method least likely to cause side effects.

The new federal bill responds to the five-justice holding with congressional findings that partial-birth abortion is never necessary to protect the health of a woman and, indeed, exposes a woman to substantial and additional health risks. The bill concludes that, based on the extensive congressional hearing record on partial-birth abortion, "Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion

and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned."

Pro-abortion disinformation persists, although discredited

When legislation dealing with partial-birth abortion was first introduced in Congress in 1995, major pro-abortion groups insisted that the method was used very rarely, only a few hundred times a year, and only in cases involving acute medical crises. There was always ample documentation to the contrary; these claims were political concoctions, dictated by polling data, not facts (see, for example, the leaked memo by Democratic pollster Celinda Lake, "Positioning on so-called 'partial birth' abortion," September 16, 1996, here: http://www.nrlc.org/abortion/pba/lakememopba.pdf)

Nevertheless, these assertions were accepted and repeated incessantly as fact by many major organs of the media until at least late 1996, when several newspapers published reports based on interviews with various abortionists who acknowledged that the method was employed frequently and mostly for purely elective abortions.

The pro-abortion disinformation campaign suffered another blow in February 1997, when Ron Fitzsimmons, then and now the executive director of the National Coalition of Abortion Providers (NCAP), admitted that he and leaders of other pro-abortion groups knew better when they claimed that the partial-birth method was used rarely and only in extraordinary circumstances. Fitzsimmons said this was merely a "party line" adopted by the major pro-abortion advocacy groups. Regarding his own (albeit minor) role in disseminating this "party line," he said, "[I] lied through my teeth." *The New York Times* reported (Feb. 26, 1997, p. A11), **"In the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus that is 20 weeks or more along, Fitzsimmons said."** (20 weeks is the halfway point in pregnancy – 4½ months in layperson's terms.) (See this and related clippings at www.nrlc.org/abortion/pba/index.html, in the late 1996 and early 1997 archive.)

On March 4, 2003, Fitzsimmons (still head of the NCAP) confirmed that he believes that the statements quoted in that *New York Times* story are still accurate today.

A great deal of other evidence – collected by congressional committees, journalists, and other entities both before and since 1997 – supports Fitzsimmons' statements. In January 2003, even the Alan Guttmacher Institute – an affiliate of Planned Parenthood – published a survey of abortion providers that estimated that 2,200 abortions by the method were

performed in the year 2000. While that figure is surely low for reasons discussed by NRLC elsewhere (www.nrlc.org/press_releases_new/release011503.html), it is *more than triple* the number that AGI estimated in its most recent previous survey (for 1996).

Despite all of that and more, some journalists and some advocates continue to disseminate the old, discredited misinformation. To cite just one example: "A so-called partial-birth abortion is defined generally as a late-term procedure in which the fetus is aborted after it is partially outside the mother's body. It is usually performed in cases when the mother's life is threatened or the fetus is deformed." (From "Anti-abortion lobby counting on victories in 108th Congress," by Pam Brogan, Gannett News Service, December 17, 2002.) In another recent example, in "Senate OKs ban on a later-term form of abortion" (March 14), *Boston Globe* reporter Susan Milligan told readers that the method is used because "of fetal abnormalities or medical conditions threatening a woman" (no other reasons were mentioned in the story). The mythology ("It is generally performed late in pregnancy after discovery of damage to or abnormalities in the fetus") was also recited in a news story in the March 15 *San Francisco Chronicle*.

For more information, see "Some Journalists Just Won't Give Up Discredited Myths About Partial-Birth Abortion," http://www.nrlc.org/abortion/pba/PBAmythsmemo01303.html. In addition, an NRLC monograph, "Revival of Some Old Myths on *Roe v. Wade* and Partial-Birth Abortion," critiques some other "media myths" about partial-birth abortion and about the Supreme Court decisions that bear on the subject, including *Roe v. Wade.* You can read or download it from www.nrlc.org/abortion/pba/roevwademyths.html.

Pro-Abortion Substitute Amendments (Phony Bans)

Many lawmakers who oppose the Partial-Birth Abortion Ban Act tell their constituents that they instead favor a bill to ban "late-term" abortions with a "health" exception. These competing proposals (offered as "substitute amendments") are complete shams -- hollow bills concocted to provide political cover for lawmakers who wish to keep perfect ratings in pro-abortion "scorecards," while hoodwinking their constituents into believing that they oppose partial-birth abortions.

The leading House advocates of phony-ban legislation (H.R. 809) are Reps. Steny Hoyer (D-Md.) and Jim Greenwood (R-Pa.). Hoyer has a 100 percent voting record in NARAL scorecards, and Greenwood is co-chair of the Pro-Choice Caucus. Hoyer and Greenwood have written that this so-called "ban" actually would allow *third-trimester* abortions even for "mental health." (www.nrlc.org/abortion/pba/Phony%20ban%20on%20late-term.pdf)

In a press conference on March 12, 1997, Hoyer suggested this "mental health" clause should apply when "it poses a psychological trauma to the woman to carry to term." On June 4, 2003, Reps. Greenwood and Hoyer were permitted to offer their bill on the House floor as a "substitute amendment" to the Partial-Birth Abortion Ban Act, but it failed, 133-287 (House roll call no. 240).

In the Senate, similar "phony ban" substitute bills were offered by Senator Dick Durbin (D-Il.) and by Senator Dianne Feinstein (D-Ca.); both were rejected. The Feinstein Substitute would have explicitly allowed abortions after "viability" for any "health" reason. Senator Hillary Clinton (D-NY), a backer of the amendment, took the floor to defend keeping abortions available -- after viability -- based on "mental health" justifications. (See *Congressional Record*, March 12, 2003, page S-3587.)

Resources

Additional documents on medical, legal, and legislative aspects of partial-birth abortion are posted at www.nrlc.org/abortion/pba/index.html. A good primer is the testimony NRLC presented to a joint hearing of the U.S. Senate Judiciary Committee and the U.S. House Judiciary Constitution Subcommittee in March 1997, which contains footnoted citations to some of the more thorough journalistic examinations (including interviews with partial-birth abortionists) and to primary documents: www.nrlc.org/abortion/pba/test.html.