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Testimony of Douglas Johnson
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on the Partial-Birth Abortion Ban Act (H.R. 929, S. 6)
at a Joint Hearing Before
the U.S. Senate Judiciary Committee
and
the Constitution Subcommittee of the U.S. House Judiciary Committee
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Chairman Hatch, Chairman Hyde, Chairman Canady, and distinguished members of the Judiciary committees, I thank you for this opportunity to present the views of the National Right to Life Committee on the subject of partial-birth abortions and the Partial-Birth Abortion Ban Act.

The National Right to Life Committee (NRLC) is the nation's largest organization devoted entirely to defending the right to life of all members of the human family from the lethal threats of abortion, infanticide, and euthanasia. NRLC is a federation of state right-to-life organizations in all 50 states.

NRLC strongly supports the Partial-Birth Abortion Ban Act (H.R. 929, S. 6). This bill would prohibit the practice of partial-birth abortion, unless this procedure were ever necessary to prevent the death of a mother. [1] Since Congressman Canady first authored and introduced the Partial-Birth Abortion Ban Act in June, 1995, NRLC has been in the forefront of the coalition of secular and religious organizations that have worked to enact this legislation.

NRLC is strongly opposed to the "phony ban" proposal currently being promoted by President Clinton, Senator Daschle, and a number of their allies in the media. The Clinton-Daschle phony ban would allow the 4,000 or more partial-birth abortions that are performed annually on perfectly healthy babies of perfectly healthy mothers, in the fifth and sixth months of pregnancy, to continue with no limitation whatsoever. Leon Panetta, then the White House chief of staff, confirmed when pressed by NBC News' Tim Russert on *Meet the Press* on

December 15 that President Clinton will *not* sign the bill unless its scope is narrowed to the seventh month and later.

The Clinton-Daschle proposal is a political construct, designed to provide political cover for lawmakers who want to appear to their constituents as if they have voted to restrict partial-birth abortions, while actually voting for a hollow measure that is not likely to prevent a single partial-birth abortion, and which therefore is inoffensive to the pro-abortion lobby. This political ploy will become increasingly transparent as time goes on.

Regarding the Phrase "Late-Term Abortions"

On a related point: the news media does the public a disservice with its sloppy use of the phrase "late-term abortion." Many organs of the press say that the bill before these committees would ban certain "late-term abortions." However, when the pro-abortion lobby and the White House use the phrase "late-term abortion" nowadays, it is code for "third-trimester abortion." So this bill and President Clinton would both restrict so-called "late-term" abortions, according to the news media. Yet, more than 90% of the abortions that would be banned by the Partial-Birth Abortion Ban Act are *not* third-trimester abortions.

Therefore, this careless use of the phrase "late-term abortion" -- usually adopted in an effort to avoid the term adopted by Congress, *partial-birth abortion* -- engenders a confusion that is very much to President Clinton's advantage. This confusion misleads the public into the erroneous belief that the Clinton-Daschle proposal largely overlaps with this bill to ban partial-birth abortions -- and that is exactly the impression that President Clinton and Vice-president Gore have worked hard to create. But this is a deception, because the Clinton-Daschle proposal would place *no limitations* on the thousands of partial-birth abortions performed on healthy babies of healthy mothers in the fifth and sixth months of pregnancy.

Pro-abortion Disinformation Campaign Revealed

Since this legislation was originally introduced in June, 1995, we have seen a concerted disinformation campaign by the leadership of the major pro-abortion lobbies. They emphatically insisted, in writing and on the airwaves, that the procedure banned by the Partial-Birth Abortion Ban Act is performed only 500 or so times annually, and only in the most extreme medical circumstances.

This disinformation campaign experienced a setback in late January with the release of an edition of the PBS media-criticism program *Media Matters* that examined how the press has covered the partial-birth abortion issue [2], and then received a far harder blow last month when Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers (NCAP), admitted in interviews first with the *American Medical News* and then with

numerous other news outlets that he had lied when he made such claims in an interview with *ABC News Nightline*. [3]

The importance of this admission was not that Fitzsimmons himself had lied on one occasion -- after all, that portion of his *Nightline* interview never even aired. The important point is found in Fitzsimmons' explanation for what he said during the *Nightline* interview: "I just went out there and spouted *the party line*." [Knight-Ridder, Feb. 28, emphasis added.]

The "party line" referred to, of course, was the "party line" disseminated by the leaders of the major Washington-based pro-abortion lobbies-- the National Abortion and Reproductive Rights Action League (NARAL), the Planned Parenthood Federation of America (PPFA), and the National Abortion Federation (NAF). I will discuss this campaign in more detail later in this testimony.

Dr. Martin Haskell Starts the Debate

The debate over the partial-birth abortion method -- as a discrete facet of the overall debate on the practice of abortion -- really began in earnest in 1993, when NRLC obtained a copy of a paper in which Ohio abortionist Martin Haskell described in detail, step-by-step, how to perform the procedure.

Dr. Haskell is a family practitioner who has performed over 1,000 such abortions in his walk-in abortion clinics. Anyone who is seriously seeking the truth behind the conflicting claims regarding partial-birth abortions should start by reading Dr. Haskell's paper, and the transcripts of the explanatory interviews that Haskell gave in 1993 to two medical publications, *American Medical News* (the official AMA newspaper) and *Cincinnati Medicine*. [4] (I have included these materials with several other attachments to my written testimony, and would ask that they be made part of the hearing record.) Here is how Haskell explained a key part of the abortion method:

With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. The skull lodges at the internal cervical os [the opening to the uterus]. Usually there is not enough dilation for it to pass through. The fetus is oriented dorsum or spine up. At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).... [T]he 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." [5]

Haskell wrote that he "routinely performs this procedure on all patients 20 through 24 weeks LMP [i.e., from 4½ to 5½ months after the last menstrual period] with certain exceptions," these "exceptions" involving complicating factors such as being more than 20 pounds overweight. He also wrote that he used the procedure through 26 weeks [six months] "on selected patients." [p.28] He added, "Among its advantages are that it is a quick, surgical outpatient method that can be performed on a scheduled basis under local anesthesia." [p. 33]

So, the partial-birth abortion method is generally used *beginning* at 20 weeks-- which is the middle of the fifth month of pregnancy. The plastic medical models displayed by NRLC since this debate began in 1995 is a medically accurate representation of the average human being at 20 weeks. The seven-inch surgical scissors, which we also regularly displayed at hearings and press conferences, is the Metzenbaum surgical scissors specified in Haskell's paper. It is used to pierce a human being's skull.

The NRLC Drawings

NARAL and other prominent pro-abortion voices say that the drawings used by NRLC since 1993 show a full-term or nearly full-term baby. This claim was repeated by syndicated columnist Ellen Goodman in a column just last week. Goodman wrote that "in 1995 . . . pro-life members of the 104th Congress introduced drawings of full-term perfect Gerber babies being aborted."

Yet anyone with a ruler can quickly ascertain the falsity of such claims, by comparing the length of the baby to the length of the doctor's hand. You will discover that these drawings show a baby 8-10 inches long, which corresponds exactly to average length during the 20-24 week range, as shown in charts in obstetrical textbooks, one of which I have attached to my testimony.

As to "perfect Gerber babies," Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, recently conceded that the overwhelming majority of fetuses/babies aborted during this period are indeed completely normal, and their mothers are healthy. Thus, the drawings show the typical case.

Moreover, Professor Watson Bowes, eminent authority in fetal and maternal medicine and co-editor of the *Obstetrical and Gynecological Survey*, certified in writing before we ever published the drawings in 1993 that these drawings accurately depict what Dr. Haskell's paper describes. Even Dr. Haskell in 1993 told the *American Medical News* that these same drawings are "technically accurate."

Why Not Use "Medical" Terminology?

Pro-abortion groups also dispute the terminology used in the bill. Dr. Haskell referred to this

procedure as "dilation and extraction," a name he said he had "coined." In 1995, Haskell said the method is "somewhat equivalent to a breech type of delivery," and said he had learned that this breech delivery process had been developed as an abortion method by Dr. James McMahan of Los Angeles.

Dr. McMahan performed thousands of these abortions before he died in October, 1995. He referred to the method by his own coined term, "intact dilation and evacuation."

When the Partial-Birth Abortion Ban Act was written in 1995, neither "dilation and extraction" nor "intact dilation and evacuation" appeared in any medical dictionary or in the Medline medical database. Nor did either term appear in the textbook on abortion methods, *Abortion Practice*, by late-term abortion specialist Dr. Warren Hern.

Thus, these terms were merely a kind of pseudo-medical jargon. Idiosyncratic jargon cannot be employed in a criminal law, or the courts will declare that law to be "void for vagueness." Moreover, both Haskell and McMahan used their coined terms to apply to a variety of quite different operations. For example, McMahan's written submission to the House Judiciary Constitution Subcommittee showed that he often performed what he called an "intact dilation and evacuation" procedure to remove a baby who had died in utero *of a natural causes* -- which is not an abortion and which no one wants to ban.

Therefore, Congressman Canady had to develop a precise term for the procedure he sought to prohibit, and then define that term with the clarity required for a criminal law. The definition incorporated into the bill is crystal clear, so clear that any doctor or layperson can immediately grasp what the bill prohibits: an abortion in which "the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

Opponents of the bill say that the term "partial-birth" is misleading and that the definition of "partial-birth abortion" is vague, but their real problem is that they find the name and the definition convey to the public all too *explicitly* exactly how these abortions are performed. Therefore, they demand that the press avoid the term adopted by Congress and instead employ pseudo-medical terms, even though they have no genuine medical pedigrees and are inaccurate, since they refer to broader classes of procedures than those banned by the bill.

But Is This Really a Partial Birth?

Opponents of the bill often object to the term "partial-birth" because they claim that the term is misleading. For example, in response to the recent publicity surrounding interviews given by Ron Fitzsimmons, a World Wide Web site called *The Abortion Rights Activist*, which is very closely allied with the National Abortion Federation, offered these complaints on or about March 1:

Supporters of the bill spoke of fetuses that would be born alive if fully extracted, and often referred to "inches" as the only difference between an aborted fetus and a living baby. Illustrations were produced showing a fetus that, by its size and level of development, was clearly in the final stages of pregnancy. . . . A fetus in the 20th, or even the 24th, week of pregnancy is not viable. It does not possess the neural capacity to feel pain. It is not "inches" away from life -- life outside the womb is not possible for it. It is not the large, fully-developed fetus shown in the National Right to Life Committee illustrations . . .

Every sentence in the above quotation from *The Abortion Rights Activist* contains at least one demonstrable error of fact or interpretation. Because the new "party line" from the pro-abortion lobbies largely mirrors (or is mirrored by) *The Abortion Rights Activist's* objections, it is worthwhile to refute them in detail. (As explained earlier, the NRLC drawings accurately depict a baby in the 20-24 week range.)

First, the term "partial-birth" is legally perfectly accurate. "Full-term" and "birth" are too entirely different things. A baby expelled alive from the womb, whether by a deliberate act or otherwise, has indeed been "born." As a matter of law, in every state, if a baby emerges completely from the uterus, and shows even the briefest signs of life, legally a *live birth* has occurred. That is true *regardless* of whether or not the baby has yet reached the stage where she can survive independently of the mother (23-24 weeks), and *whether or not* the baby suffers from profound or even lethal medical disorders. (By 23 weeks, lung development has advanced to the point that the baby has a 1-in-4 chance of sustained survival with assistance, and the survival rate rises sharply over the next few weeks.)

Obstetricians and perinatologists confirm that even during the 20 to 23-week range, if a baby is expelled or removed completely from the uterus, she will usually gasp for breath for some time, even though her lung development is still insufficient to permit successful sustained respiration until 23 weeks. So the victim is indeed only "inches from her first breath," when the surgical scissors penetrates her skull.

Moreover, even at 20 to 23 weeks, there will be movements and a heartbeat after the child is expelled -- sometimes for an hour or more -- as the infant struggles to hold on to life.

What is at Stake In This Debate

Under the doctrine of the Supreme Court, a living just-delivered baby, no matter how premature, is a person under the Constitution. The deliberate killing of such a just-delivered baby-- regardless of stage of development or handicap -- is legally murder.

A partial-birth abortion is really a lethal adaptation of a long-known procedure for delivering babies, feet first, in certain unusual circumstances. But when used as an abortion method, the abortionist must take care that he does not dilate the cervix a little too much, because if he did so, the head could slip across the Supreme Court's constitutional "line of personhood." That must not happen until after the surgical scissors and the suction machine have done their deadly work.

But if we step back for a moment from the Supreme Court's doctrine, we all really know-- don't we?-- that it is *the same* little girl or boy *whether or not* she or he has traveled that extra three inches. And each of us once was there.

Each individual member of the human family killed in a partial-birth abortion is *at most* a few weeks short of the point at which she could survive to experience a full lifespan of experiences as wondrous and varied as those of anyone here today, or anyone who views this hearing. Many of the victims of partial-birth abortion are actually *past* the point at which they could survive in our nation's neonatal units. Even at 23 weeks, the survival rate is now between one-fourth and one-third, and the survival rate curves sharply upward week by week after that. According to the landmark survey of neonatal units in the National Institute of Child Health and Human Development Neonatal Research Network, conducted in 1987 and 1988 by Dr. Maureen Heck, et al, babies born at 23 weeks had on average a 23% chance of survival, rising to 34% at 24 weeks, and 54% at 25 weeks.

Opponents of this legislation continue to insist that partial-birth abortions are "rare" -- by which they mean, rare compared to the total number of all types of abortions. But for each human being who is at the pointed end of the surgical scissors, a partial-birth abortion is a one-hundred-percent proposition. As Senator Daniel Patrick Moynihan said on March 2, 1997, "it is infanticide, and one would be too many."

And what does "rare" mean, anyway? Human beings cannot be reduced to statistics. Ron Fitzsimmons of the National Coalition of Abortion Providers now puts the number as high as 5,000. Even that number may turn out to be low, because we do not know how much of the "iceberg" we are seeing. If a new virus swept through neo-natal units and killed even 500 premature babies, that would be a top news story -- not dismissed as an event too "rare" to be of consequence.

Rare is the man or woman who, upon reflection, would disagree with the following statement: "If *my* individual life had been cut off before birth, whether by accident or otherwise, *no other human being* could ever have become the unique, irreplaceable individual that I am -- not even another child born later to my same parents." You see, to each person, his or her *own* intrinsic uniqueness, his or her own unrepeatable "personhood," and its infinite value, are really self-evident.

Those of us who hold the right-to-life position simply recognize that the same applies to the individual unborn or partly born human beings whom we seek to protect. Regardless of how many of these procedures actually occur, not one of the victims is disposable, and not one is interchangeable with anyone else who ever came before or who will ever come after. As they now are, we each once were.

Why Use this Method?

Some press accounts suggest that the baby's skull must be collapsed because "the head is too big to pass through." But the head is "too large" only in the sense that the abortionist dilates the cervix (the opening to the womb) just enough to get the shoulders out, but not the small additional amount that would allow the head to emerge. (If the procedure is performed according to instructions, "*usually* there is not enough dilation for it to pass through," says Dr. Haskell in his paper. [emphasis added])

Last year, Chairman Hyde, you posed this question: "A partial-birth abortion involves the almost complete delivery of a living baby, who is then killed. Now, if the entire baby has been delivered alive, except for the head, supposedly without jeopardy to the mother, why can't the doctor simply deliver the head as well, without killing the baby?" And as you went on to note, when a reporter for the *American Medical News* put essentially that very question to Dr. Haskell, he replied, "The point here is you're attempting to do an abortion... not to see how do I manipulate the situation so that I get a live birth instead."

Is the Baby Alive?

Doctors Haskell and McMahon were the subjects of tape-recorded interviews with the *American Medical News* in 1993, in which they addressed many of the disputed issues surrounding this abortion method. For example, Haskell said that 80% of these abortions were "purely elective" in his practice. The transcript also contains the following exchange:

American Medical News: Let's talk first about whether or not the fetus is dead beforehand.

Dr. Haskell: No it's not. No, it's really not. A percentage are for various numbers of reasons.... **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.** [6]

In an interview in the Dec. 10, 1989 *Dayton News*, Haskell conveyed that the scissors thrust is usually the lethal act:

"When I do the instrumentation on the skull. . . it destroys the brain tissue sufficiently so that even if it (the fetus) falls out at that point, it's definitely not alive," Dr. Haskell said. [7]

Brenda Pratt Shafer, a registered nurse from Dayton, Ohio, stood at Dr. Haskell's side while he performed three partial-birth abortions in 1993. In testimony before the House Judiciary Constitution Committee, Nurse Shafer described in detail the first of the three procedures-- which involved, she said, a baby boy at 26½ weeks (over 6 months). According to Mrs. Shafer, the baby was alive and moving as the abortionist

delivered the baby's body and the arms -- everything but the head. The doctor kept the baby's head just inside the uterus. The baby's little fingers were claspng and unclaspng, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp. [8]

The Anesthesia Myth

Recognizing how distressing such accounts are to persons of normal moral sensibilities, on numerous occasions, leading opponents of the bill, including syndicated columnist Ellen Goodman and NARAL President Kate Michelman, repeatedly insisted that anesthesia given to the mother peacefully induces a painless death in the fetus before the rest of the procedure is performed. This claim was widely accepted and repeated as fact in news stories and editorial commentaries. Here is how Michelman put it on one occasion:

The other side grossly distorted the procedure. There is no such thing as a 'partial-birth.' ... before the procedure begins, the anesthesia that they give the woman already causes the demise of the fetus. That is, it is not true that they're born partially.
(KMOX-AM radio, St. Louis, Nov. 2, 1995)

Thus, Ms. Michelman argued that it was misleading to call this process a "partial-birth," *precisely because*, she claimed, these fetuses were already dead from the anesthesia before they were removed.

Likewise, Planned Parenthood distributed to Congress a "fact sheet" signed by Dr. Mary Campbell, Medical Director of Planned Parenthood of Metropolitan Washington, which stated:

The fetus dies of an overdose of anesthesia given to the mother intravenously....This

induces brain death in a fetus in a matter of minutes. Fetal demise therefore occurs at the beginning of the procedure while the fetus is still in the womb. [9]

However, this claim that anesthesia kills the baby was just another fabrication. The "anesthesia myth" was emphatically refuted in authoritative testimony presented to the Senate and House committees in late 1995 and early 1996 (yet the myth still sometimes appears in press accounts). [10]

In his initial testimony before the Senate Judiciary Committee on November 17, 1995, Dr. Norig Ellison, the president of the 34,000-member American Society of Anesthesiologists (ASA), said "I think the suggestion that the anesthesia given to the mother, be it regional or general, is going to cause brain death of the fetus is without basis of fact." [11]

Under questioning by Senator Abraham, Planned Parenthood's Dr. Campbell, who wrote the "fact sheet" quoted above, admitted, "I do not know what causes the fetus to die. . . . I simplified that for Congress. I do not believe that you want a full discussion of when death occurred."

Dr. Ellison also told the Senate committee:

Drugs administered to the mother, either local anesthesia administered in the paracervical area or sedatives/analgesics administered intramuscularly or intravenously, will provide little-to-no analgesia [pain relief] to the fetus. [12]

In a hearing on anesthesia and fetal pain before the House Judiciary Constitution Subcommittee on March 21, 1995, the "anesthesia myth" was again emphatically refuted by Dr. Ellison and by Dr. David Birnbach, the president-elect of the Society for Obstetric Anesthesia and Perinatology. They testified that a *local* anesthetic -- which is what Dr. Martin Haskell's paper specifies -- *does not affect* the fetus. These experts also testified that dosages of *general* anesthesia, safe for the mother, would provide little if any pain relief to the baby, much less induce "fetal demise."

Dr. Birnbach testified, "Having administered anesthesia for fetal surgery, I know that on occasion we need to administer anesthesia directly to the fetus because even at these early ages the fetus moves away from the pain of the stimulation." [hearing record, page 288]

In an attempt to recover, the proponents of the anesthesia myth claimed that Dr. McMahon had given his patients doses of narcotic anesthesia of 36 to 100 times the normal dose. Dr. Birnbach responded, "Although there is no evidence that this massive dose will cause fetal demise, there is clear evidence that this excessive dose could cause maternal death."

Other medical experts at that hearing gave unrebutted testimony that the partial-birth abortion

procedure must subject the baby to great pain. For example, Professor Jean A. Wright, associate professor of pediatrics and anesthesia at Emory University School of Medicine in Atlanta, testified that recent research (which she described) shows that by the stage of development that a baby could be a "candidate" for a partial-birth abortion, the fetus "is more sensitive to pain than a full-term infant would be if subjected to the same procedures."

Prof. Wright also said that these fetuses have "the anatomical and functional processes responsible for the perception of pain," and have "a much higher density of Opioid (pain) receptors" than older humans.

Documentation and Disinformation

Beginning in early 1995, the House Judiciary Constitution Subcommittee collected the available literature and did further research on the subject of partial-birth abortion. Among other new material, the subcommittee counsel received detailed and lengthy written submissions from Dr. McMahon, including a breakdown of a "series" of over 2,000 of these procedures that he had performed. [13]

Thus, by the time the legislation was introduced in June, 1995, there was already a considerable body of primary documentation on the issue, including Dr. Haskell's instructional paper, published interviews with Haskell and McMahon by Diane Gianelli of *American Medical News* and others, and McMahon's written submissions to the House subcommittee. From the start, the materials published by NRLC regarding partial-birth abortion relied very heavily on this body of primary documentation.

Certainly, the mass of such material has grown as the debate has proceeded. But as John Leo points out in his column in the March 10 edition of *U.S. News & World Report* [14], at the time that Congressman Canady introduced the bill on June 15, 1995, the basic facts regarding partial-birth abortions were already amply documented, and those facts were as follows: the method was being employed by some abortionists as a routine abortion technique in the fifth and sixth months of pregnancy, mostly for entirely non-medical reasons; that it had often been employed even later, at least by Dr. McMahon, and not only in cases involving medical difficulties of the mother or baby; and that the babies were alive when they were removed from the womb, dying from the thrust of the surgical instrument through the base of the skull, and the subsequent suctioning out of the brain.

In June, 1995, the leaders of the major pro-abortion lobbies were well familiar with that body of documentation. Yet, from the day this bill was introduced in June, 1995, the major Washington-based abortion-advocacy and abortion-industry lobbies, notably the National Abortion Federation (NAF), the Planned Parenthood Federation of America (PPFA), and the National Abortion and Reproductive Rights Action League (NARAL), spouted to the media and to the Congress a "party line" on partial-birth abortion that departed radically from this

body of primary documentation. They asserted that the procedure that the bill would ban was very rare, performed only around 500 times annually in the U.S.. And more importantly, they asserted that the procedure was performed only or almost only to save the mother's life and in cases of profound malformations of the baby.

The abortion industry's "cover story" would have been of limited consequence, except that so many journalists and commentators who covered the bill, both here in Washington and elsewhere, eagerly adopted these assertions and presented them to the public as simple fact.

Indeed, it was striking and frustrating to us how little interest there was among many in the press corps in examining the primary documentation. NRLC distilled this documentation into factsheets which we very energetically disseminated from the time this bill was introduced. More than that, we repeatedly and widely distributed the underlying primary documentation, such as Dr. Haskell's paper and the interviews conducted with Haskell and McMahon by the *American Medical News*. I know that Mr. Canady's office also made strenuous efforts to place this material in the hands of the press and lawmakers. Yet in all too many cases, it was clear that many -- not all-- of those covering the issue already had the set of "facts" that fit their preconceptions -- and those were the assertions that they had received from the abortion-industry lobby.

For example, on December 8, 1995, the day after the bill passed the Senate, the Associated Press bureau in Washington -- despite being repeatedly provided with that documentation -- sent its clients a dispatch that contained this unattributed explanation: "Late second- or third-trimester abortions are performed to remove a severely deformed or already dead fetus that could cause the mother to die, become infertile or otherwise desperately ill."

Another example: On April 10, 1996, the day after President Clinton vetoed the bill, NRLC Senior Congressional Liaison Maureen Malloy Ferguson telephoned the *Washington Post* reporter who was writing the story on the veto, Ann Devroy, to offer documentation refuting the claims that Mr. Clinton had made at the "veto ceremony." Ms. Devroy coolly replied, "I have everything I need." The next morning, her story asserted in the *Post's* own voice, "The procedure is said to be rarely used and usually only when severe birth defects, such as the absence of brain development or conditions threatening the life of the woman, are discovered too late in pregnancy to use other abortion methods." [15]

In September, 1996, even *after* the *Record* (Bergen, N.J.) and the *Washington Post* had published reports concluding that such claims were false, on the basis of interviews with numerous additional abortionists, the pro-abortion disinformation continued to be presented to the American people as fact by many news outlets.

For example: CBS's *This Morning*, Sept. 20, 1996, correspondent Linda Douglass, "[The bill would ban] rare, late-term abortions, usually done only in cases where the fetus is severely

deformed." *Time*, Sept. 30, 1996: "Experts estimate that partial-birth abortion accounts for perhaps 600 of the 1.5 million abortions performed in the U.S. each year," and, "In many such abortions, the fetus is so severely deformed or the pregnancy so complicated that carrying the child to term would threaten the life or health of the mother." *Los Angeles Times*, Sept. 27, 1996: "The [partial-birth abortion] procedure is generally used when the fetuses have fatal birth defects or when the mother's health is in jeopardy." We have, I estimate, hundreds of such examples in our files.

NRLC Materials Have Been Consistent and Accurate

As requested by the committees, we have submitted what we believe to be a complete set of NRLC's press releases, factsheets, media background papers, and letters to Congress on this issue, going back to the introduction of this legislation in June, 1995. Previously, we had submitted a set of these same materials to the journalists associated with PBS's *Media Matters*.

We welcome scrutiny of this material. Such examination will show that, from the beginning, we explicitly emphasized that most partial-birth abortions are performed in the fifth and sixth months and for purely non-medical reasons.

For example, consider the very first NRLC factsheet sent out to the press on this issue, dated June 21, 1995, in which we quoted various items of what we called "misinformation" that had appeared in the press in the days immediately following the bill's introduction on June 15. The very first item of misinformation that we rebutted was the claim that the bill was aimed primarily at "third-trimester" abortions. We explained, "In fact, the partial-birth method is generally used starting at 20 weeks (four and one-half months, or halfway through the second trimester) -- and the bill bans use of the method at any stage of development." [16]

We continued to vigorously challenge the same misconception in innumerable later factsheets, letters, and memos to editors. For example, on May 28, 1996, I sent a memo to a *60 Minutes* producer, Amy Cunningham, who was working on a story on partial-birth abortion, in which I said:

I have noticed that critics of HR 1833 are working overtime to artificially constrict the debate to "third-trimester" abortions, in order to evade discussion of the many partial-birth abortions performed -- mostly for social reasons -- during the late second trimester. (Haskell's 80%, etc.) But a "third-trimester" demarcation, while in some respects convenient for the White House and its allies, is without legal or medical justification. . . . there is no non-ideological basis for focusing only on "third-trimester" partial-birth abortions.

Notwithstanding this objection, *60 Minutes* adopted precisely the "filter" sought by the pro-

abortion lobby. Many similar communications from NRLC to other news outlets were equally ineffectual. [16]

Another example: in the September 11, 1996 edition of our comprehensive factsheet -- issued before the *Washington Post* and *Bergen Record* published quotes from a number of previously unreported practitioners of the method -- we said:

It appears that the substantial majority of partial-birth abortions are performed late in the *second* trimester -- that is, before the 27-week mark -- but usually after 20 weeks (4½ months). There is compelling evidence that the overwhelming majority of these pre-week-27 partial-birth abortions are performed for purely 'social' reasons. In an attempt to 'filter out' this documentation, many opponents of the bill attempt to narrow the debate to only *third-trimester* partial-birth abortion procedures. . .

The conclusion of the PBS *Media Matters* investigation was that those of us who were in the forefront of the campaign for this bill asserted, *from the beginning*, that partial-birth abortions are performed thousands of times annually, mainly in the second trimester, for non-medical reasons in the great majority of cases, while the pro-abortion groups asserted that it was used only hundreds of times, in the third trimester, only in extreme circumstances.

Therefore, it is rather vexing to read statements over the past two weeks, by pro-abortion advocacy groups, and by some journalists, suggesting that the leading supporters of the bill originally framed the issue primarily in terms of third-trimester abortions, and only recently switched the focus. This is revisionist history. It is an effort by the pro-abortion lobby to control damage and salvage credibility. But it is irreconcilable with the documents that NRLC has submitted to these committees, and will make available to others.

It is true that there were some public statements by some lawmakers and other supporters of the bill that spoke of partial-birth abortions as if they were most often performed in the third trimester, and/or that unduly emphasized those abortions that Dr. James McMahan performed even in the eighth and ninth months. When we urged such speakers to place their emphasis on the typical practice rather than exceptional cases, the typical response we received was more or less along the lines of, "But that's what we read in the paper!" And they had read it in the paper because the paper had adopted "the party line" of the abortion lobby that this was a third-trimester issue, over our objections.

Success of Pro-Abortion Disinformation Documented by PBS *Media Matters*

That assessment by NRLC is confirmed by the findings of the investigative report released by *Media Matters*, the quarterly PBS program of media criticism. In an edition released in late January, the *Media Matters* journalists concluded that many journalists "did little original reporting and willingly accepted information from pro-choice sources -- which turned out to

be inaccurate," said the producers. From the time the Partial-Birth Abortion Ban Act was introduced in June, 1995, until the final votes on President Clinton's veto in September, 1996, most "reporters tended to accept as true the assertions of the abortion-rights side, despite evidence calling into question their claims."

The program focused on three specific disputed issues. From the beginning, correspondent Terry Eastland stated, "Abortion opponents claimed that the procedure was used thousands of times a year, mainly in the second trimester of pregnancy, and mostly on the healthy fetuses of healthy mothers. Countering their campaign, abortion-rights groups said that the procedure was used only several hundred times a year, mainly in the third trimester, and almost always in cases of severe fetal deformity and to protect the health or the life of the mother."

After displaying press releases in which NAF, NARAL, and PPFA made just such claims regarding the number and circumstances of the procedures, the program showed how the pro-abortion side's assertions were adopted as fact by the *Washington Post*, the *Los Angeles Times*, and many others.

A June 2, 1996 *60 Minutes* program on partial-birth abortion received particularly sharp criticism from *Media Matters*. "The piece that *60 Minutes* did really fell into all the traps that this whole debate presented," *Time* magazine's Karen Tumulty said during the program. "They used these incredibly tragic examples, but examples that only portrayed basically one side of the debate."

60 Minutes "made little effort to convey the view of abortion opponents that the procedure is most often used on healthy fetuses in the second trimester," noted *Media Matters*. @

NCAP's Ron Fitzsimmons Blows the Whistle

The abortion industry's disinformation continued to be asserted by prominent voices in the abortion lobby, and accepted by many in the press, until just two weeks ago, when Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers (NCAP), told the press that he lied when he claimed that partial-birth abortions were performed only rarely and in extreme medical circumstances. He knew this was untrue, he said, because when the Partial-Birth Abortion Ban Act was first introduced (in June, 1995), he called doctors who use the method, and "I learned right away that this was being done for the most part in cases that did not involve those extreme circumstances."

Fitzsimmons now estimates that up to 5,000 partial-birth abortions are performed annually, and that "they're primarily done on healthy women of healthy fetuses." *The New York Times* (Feb. 26) reported, "As much as he disagreed with the National Right to Life Committee and others who oppose abortion under any circumstances, he said he knew they were accurate when they said the procedure was common. . . . 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, Mr. Fitzsimmons said."

(Curiously, in a March 6 Associated Press dispatch, these statements by Fitzsimmons were translated as, "not all are medically necessary.")

[The 5,000 "ceiling" also may eventually prove to be low, because we still don't know how much of the iceberg we are seeing. The Alan Guttmacher Institute, an affiliate of PPFA, has reported for one year 164,000 abortions performed after the first trimester, and that figure is based on incomplete, voluntary reports. The Centers for Disease Control has reported that in 1993, over 17,000 abortions were performed at 21 weeks and later-- and the CDC acknowledges that the reports that it receives are very incomplete.]

Were the Pro-abortion Groups Confused?

Faced with this whistleblower in their ranks, the leaders of NARAL, PPFA, and NAF have offered as their defense a claim that they were confused. They claim that material put out by NRLC and other prominent supporters of the bill misled them into believing that the bill was aimed at *third-trimester* partial-birth abortions. Therefore, all of their past public statements as to the frequency and circumstances in which the partial-birth method is employed, they say, should be retroactively edited to refer to only those abortions performed in the seventh month and later.

This really won't wash.

First, the Partial-Birth Abortion Ban Act is a short, simple bill. Typewritten, it fits on one page. The bill has never contained any reference to the developmental age of the baby. It simply bans any abortion in which "the person performing the abortion partially vaginally delivers a living fetus before killing the infant and completing the delivery." In a March 5, 1997 memo to editors, NARAL on one page argues that statements by bill supporters caused NARAL to make statements that should now be understood to apply only to third-trimester abortion. But on the very next page of the memo, NARAL acknowledged:

The intent of the legislation has been clear from the beginning. The bill would outlaw the procedure in the second and third trimesters, both before and after fetal viability.

Second, as discussed above, from the beginning the materials disseminated to congressional offices and to the press, by the House Judiciary Constitution Subcommittee, by Congressman Canady's personal office, and by NRLC, have all emphasized that most of the abortions affected by the bill occur in the fifth and sixth months -- specifically, beginning at 20 weeks.

Third, anyone who takes the time to look at the past public statements of the leaders of

NARAL, NAF, and PPFA, in context, will find that they clearly did *not* confine their sweeping assertions to *third-trimester* partial-birth abortions. Typical of many such claims was the release issued by the Planned Parenthood Federation of America (PPFA) when the bill passed the House on November 1, 1995, which said regarding the method the bill would ban: "The procedure, dilation and extraction (D&X), is extremely rare and done only in cases when the woman's life is in danger or in cases of extreme fetal abnormality."

The same claim was made continuously by the National Abortion Federation in materials provided to journalists in print and through that organization's page for journalists on the World Wide Web, even after the publication of the *Bergen Record* and *Washington Post* stories last September. As recently as February 25, 1997, the day before the Ron Fitzsimmons story broke, the NAF page informed journalists and other web visitors, "This particular procedure is used only in about 500 cases per year, *generally after 20 weeks of pregnancy*, and most often when there is a severe fetal anomaly or maternal health problem detected late in pregnancy." [emphasis added] Many, many other such examples are on record.

Most of the members of Congress who voted against the Partial-Birth Abortion Ban Act last year justified their position, at least in part, on the claims that the procedure was extremely rare and done only in cases of dire necessity -- not by citing *Roe v. Wade*. It will be instructive to see how many of those lawmakers support the bill this year, now that these assertions have been discredited, and the truth is laid clearly before them and their constituents.

Why Are Abortions Typically Performed in the Fifth and Sixth Months?

Very few abortions in the fifth and sixth months involve any of the medical circumstances that President Clinton and others have relied on to justify their opposition to the Partial-Birth Abortion Ban Act. The overwhelming majority of partial-birth abortions (like other second-trimester abortions) are purely "elective" procedures -- that is, they are performed for purely non-medical reasons.

On September 15, 1996, the *Record* (Bergen, New Jersey) published a report by staff writer Ruth Padawer, based on separate interviews with two abortionists at a single abortion clinic in Englewood, who independently told her that they perform **over 1,500** partial-birth abortions annually in that facility-- triple the *nationwide* figure given out by pro-abortion advocacy and industry groups. As to *why* they perform these procedures:

"We have an occasional amnio abnormality, but it's a minuscule amount," said one of the doctors at Metropolitan Medical, an assessment confirmed by another doctor there. "Most are Medicaid patients, black and white, and most are for elective, not medical, reasons: people who didn't realize, or didn't care, how far along they were. Most are

teenagers." [18]

The September 17, 1996 edition of the *Washington Post* contained the results of an investigation conducted by reporters Barbara Vobejda and David M. Brown, M.D., who interviewed several doctors (*not* those in New Jersey), and concluded:

Furthermore, in most cases where the procedure is used, the physical health of the woman whose pregnancy is being terminated is not in jeopardy.... Instead, the "typical" patients tend to be young, low-income women, often poorly educated or naive, whose reasons for waiting so long to end their pregnancies are rarely medical. [19]

The *Post's* Brown later explained to *Media Matters*:

Cases in which the mother's life were at risk were extremely rare. . . . Most people who got this procedure were really not very different from most people who got abortions.

Indeed, there is really no evidence that the reasons for which abortions are performed in the fifth and sixth months by the partial-birth abortion method are any different, in general, from the reasons why abortions are performed during that period by other abortion methods -- and it is well established that the great majority of second-trimester abortions do not involve any illness of the mother or the baby. In 1987, the Alan Guttmacher Institute (AGI), an affiliate of the Planned Parenthood Federation of America (PPFA), collected questionnaires from 1,900 women who were at abortion clinics procuring abortions. Of the 1,900, "420 had been pregnant for 16 or more weeks."

These 420 women were asked to choose among a menu of reasons why they had not obtained the abortions earlier in their pregnancies. Only two percent (2%) said "a fetal problem was diagnosed late in pregnancy," compared to 71% who responded "did not recognize that she was pregnant or misjudged gestation," 48% who said "found it hard to make arrangements," and 33% who said "was afraid to tell her partner or parents." The report did not indicate that any of the 420 late abortions were performed because of maternal health problems. ["Why Do Women Have Abortions?," *Family Planning Perspectives*, July/August 1988.]

Also illuminating is an 1993 internal memo by Barbara Radford, then the executive director of the National Abortion Federation:

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.*" [emphasis added]

In June, 1995, Dr. James McMahon submitted to the House Judiciary Constitution Subcommittee a report on a "series" of more than 2,000 "intact dilation and evacuation"

procedures that he had performed. Of these, by Dr. McMahon's own reckoning, only 175 cases (9%) were for "maternal indications," the most common of which was "depression." Another 1,183 cases (about 56%) were for "fetal flaws," but these included a great many non-lethal disorders, such as cleft palate and Down Syndrome. (Although this material was published in the official hearing record, when asked at a November 7, 1995 press conference about "arguments. . . that these procedures. . . are given for depression or cleft palate," NARAL's Kate Michelman response, "That is . . . not only a myth, it's a lie.")

In an op ed piece written for the *Los Angeles Times*, Dr. Katherine Dowling, a family physician at the University of Southern California School of Medicine, examined Dr. McMahon's report on this "fetal flaws" group. She concluded that "most of the partial-birth abortions in that [McMahon] survey were done for problems that were either surgically correctable or would result in some degree of neurologic or mental impairment, but would not harm the mother. Or they were done for reasons that were pretty skimpy: depression, chicken pox, diabetes, vomiting." [20]

Over one-third of McMahon's 2,000-abortion "series" involved *neither* fetal nor maternal health problems, however trivial. This should not be surprising, given McMahon's philosophy on the matter, as he expressed in a 1993 interview with *American Medical News*:

"[A]fter 20 weeks where it frankly is a child to me, I really agonize over it because the potential is so imminently there. I think, 'Gee, it's too bad that this child couldn't be adopted.' On the other hand, I have another position, which I think is superior in the hierarchy of questions, and that is: 'Who owns the child?' It's got to be the mother."

Does the Ban Interfere With "the Practice of Medicine"?

In a March 5, 1997 press release, PPFA avoided discussion of its past misstatements and argued, "Congress should not be telling doctors how to practice medicine." But the killing of these members of the human family is not the practice of "medicine" in the way that term is usually understood. Those who perform these procedures are really cloaking the brutality of what they do behind the aura of respect that we all hold for those who practice true healing arts. Dr. Warren Hern, who performs many third-trimester abortions (although not by the partial-birth method, which he has criticized as risky [21]), has written:

It is in the interest of the abortion service to use the social status of the physician and the legitimate medical activity associated with the physician to overcome community resistance to the abortion service. For the physician, particularly one in solo practice, this can mean establishing, displaying, or maintaining all the substance and appearance of a 'normal' professional status to the extent possible and obtaining, by proxy,

acceptance of one's activity with regard to abortion. [22]

Our laws require that partial-birth abortion, like other abortion, be performed by licensed medical professionals, but that does not make it medicine in the true sense. It is not a healing art. Partial-birth abortion is the unmerciful killing of a member of the human family who is indeed almost within reach -- just a few short weeks, or a few short inches -- of the lifespan of varied experiences of any one of us, of anyone viewing this hearing.

Last year, Congress banned the practice of "female genital mutilation" (that is the term adopted by Congress, although the "medical terms" are "infibulation" or "female circumcision"). Some physicians had argued that if they refuse to perform this procedure for immigrants whose cultural norms demand this practice, then the procedure will be performed by those who are less technically proficient. Congress rejected this rationale, and banned the procedure even by physicians, with a five-year prison sentence for violations of the ban. Congress concluded -- rightly, I believe -- that even if performed by a physician, female genital mutilation is a cruel form of child abuse. So, too, is partial-birth abortion.

Claims of Medical Necessity Refuted

Although it is now coming to be generally accepted that the "vast majority" of partial-birth abortions are performed in the fifth and sixth months on healthy babies of healthy mothers, a small fraction -- no doubt under 10%, probably under 5% since Dr. McMahon's death -- actually are performed in the third trimester. What about them?

First, the repeated assertions by pro-abortion groups that partial-birth abortions that have been performed in the third trimester have been performed only in cases of extreme physical disorders of the mother and/or the baby, are false. In 1995, Dr. McMahon submitted to the House Judiciary Constitution Subcommittee a graph and explanation that explicitly showed that he aborted *healthy* ("not flawed") babies *even in the third trimester (after 26 weeks of pregnancy)*. Dr. McMahon's own graph showed, for example, that at 29 or 30 weeks, *one-fourth* of the aborted babies had no "flaw" however slight. Underneath the graph, Dr. McMahon offered this explanation:

After 26 weeks, those pregnancies that are not flawed are still non-elective. They are interrupted because of maternal risk, rape, incest, psychiatric or pediatric indications. [chart and caption reproduced in June 15, 1995 hearing record, page 109, and are attached] [23]

In an interview with Constitution Subcommittee Counsel Keri Harrison, Dr. McMahon explained that "pediatric indication" referred to underage mothers, not to any medical

condition of the mother or the baby.

Still, it is true that a subset of the third-trimester partial-birth abortions involve babies who have grave disorders that will result in death of the baby soon after birth. These unfortunate babies deserve compassion and the best comfort-care that medical science can offer -- not a scissors in the back of the head. In some such situations there are good medical reasons to deliver such a child early, after which natural death will follow quickly.

These cases have been addressed by the Physicians' Ad Hoc Coalition for Truth (PHACT), a group of physicians, mostly professors or specialists in obstetrics or related disciplines, now numbering more than 400, including former Surgeon General C. Everett Koop. Beginning in newspaper ads last fall, these specialists said that "partial-birth abortion is never medically necessary to protect a mother's health or future fertility. On the contrary, this procedure... can pose a significant threat to both her immediate health and future fertility." [24]

The PHACT specialists have also distributed to congressional offices very specific refutations of claims that partial-birth abortion was necessary or medically advisable in any of the cases cited by President Clinton. For example, at his May 23, 1996, and December 13, 1996, press conferences, President Clinton relied heavily the argument that partial-birth abortion is necessary to prevent serious injury to women whose babies have enlarged heads (hydrocephaly). PHACT commented:

We, and many other doctors across the United States, regularly treat women whose unborn children suffer these and other serious conditions. Never is the partial-birth procedure medically indicated. Rather, such infants are regularly and safely delivered live, vaginally, with no threat to the mother's health or fertility.

It is noteworthy that none of the five women who appeared with President Clinton at his April 10, 1996 veto ceremony required a partial-birth abortion because of danger to her life. As one of the women, Claudia Crown Ades, said in a tape-recorded April 12, 1996, radio interview on WNTM (Mobile, AL):

My procedure was elective. That is considered an elective procedure, as were the procedures of Coreen Costello and Tammy Watts and Mary-Dorothy Line and all the other women who were at the White House yesterday. All of our procedures were considered elective. [Complete tape recording available on request from NRLC.]

Ades and one of the other women who appeared with President Clinton had previously said that her condition threatened her life, but they elaborated that the risk would have occurred *if* their babies had died natural deaths within their wombs. But the removal of a baby who dies a natural death, whether by foot-first extraction or in any other manner, is not an abortion and

has nothing to do with the bill. Professor Watson Bowes, Jr., of the University of North Carolina, co-editor of the *Obstetrical and Gynecological Survey*, has stated that weeks would pass between the baby's natural death and the development of any resulting risk to the mother.

Dr. Harlan Giles, a professor of "high-risk" obstetrics and perinatology at the Medical College of Pennsylvania, performs abortions by a variety of procedures up until "viability." However, in sworn testimony in the U.S. Federal District Court for the Southern District of Ohio (Nov. 13, 1995), Prof. Giles said:

[After 23 weeks] I do not think there are any maternal conditions that I'm aware of that mandate ending the pregnancy that also require that the fetus be dead or that the fetal life be terminated. In my experience for 20 years, one can deliver these fetuses either vaginally, or by Cesarean section for that matter, depending on the choice of the parents with informed consent. . . But there's no reason these fetuses cannot be delivered intact vaginally after a miniature labor, if you will, and be at least assessed at birth and given the benefit of the doubt. [transcript, page 240]

Under closer examination, it becomes clear that in some cases, the primary reason for performing the procedure is not concern that the baby will die in utero, but rather, that he/she will be *born alive*, either with disorders incompatible with sustained life outside the womb, *or* with a *non-lethal* disability. (Again, in Dr. McMahon's table of partial-birth abortions performed for "fetal indications," the largest category was for Down Syndrome.)

Viki Wilson, whose daughter Abigail died at the hands of Dr. McMahon at *38 weeks*, said:

I knew that I could go ahead and carry the baby until full term, but knowing, you know, that this was futile, you know, that she was going to die... I felt like I needed to be a little more in control in terms of her life and my life, instead of just sort of leaving it up to nature, because look where nature had gotten me up to this point.
[NAF video transcript, page 4.]

Tammy Watts, whose baby was aborted by Dr. McMahon in the 7th month, said:

I had a choice. I could have carried this pregnancy to term, knowing everything that was wrong. [Testimony before Senate Judiciary Committee, Nov. 17, 1995]

In a 1995 letter opposing the ban, one of Dr. McMahon's colleagues at Cedar-Sinai Medical Center, Dr. Jeffrey S. Greenspoon, put it this way:

As a volunteer speaker to the National Spina Bifida Association of America and the Canadian National Spina Bifida Organization, I am familiar with the burden of raising a significantly handicapped child. . . . The burden of raising one or two abnormal

children is realistically unbearable. [Letter to Rep. Hyde, July 19, 1995]

In many of these cases, therefore, the argument that the mother's "health" requires a partial-birth abortion, upon scrutiny, turns out to be an argument for euthanasia of partly born human beings.

Misconceptions Remain

Even in the light of recent developments, several serious misconceptions remain. It is not true that 41 states ban third-trimester abortions. All but a few of those laws allow the abortionist himself to define what "viability" means (exceptions are New York and Pennsylvania, which specify that restrictions apply after "24 weeks:), and/or contain wide-open exceptions for "health," including emotional "health." These laws do not "ban" or "severely restrict" third-trimester abortions. They amount to a mostly symbolic but unenforceable statement by the state that third-trimester abortions are frowned upon.

As *Washington Post* medical writer David Brown, M.D., concluded in a September 17, 1996 article:

Contrary to a widely held public impression, third-trimester abortion is not outlawed in the United States. The landmark Supreme Court decisions *Roe v. Wade* and *Doe v. Bolton*, decided together in 1973, permit abortion on demand up until the time of fetal "viability." . . . In *Doe v. Bolton* the court ruled that abortion could be performed after fetal viability if the operating physician judged the procedure necessary to protect the life or health of the woman. "Health" was broadly defined. "Medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient," the court wrote. "All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." Because of this definition, life-threatening conditions need not exist in order for a woman to get a third-trimester abortion. [25]

I have been involved in full-time pro-life work since 1980. I have often heard NARAL's Kate Michelman say that most states "ban" third-trimester abortions or ban them "except for life and health," but I have never heard her frankly acknowledge that the Supreme Court's definition of "health" includes any purely "emotional" factors "relevant to the well-being of the patient."

I have seen many press accounts that reported, quite erroneously, that most states have banned third-trimester abortions. For example, a March 7 *Boston Globe* story said that "states have the right to ban late-term abortions," and that "Massachusetts and 40 other states have banned late-term abortions, with few exceptions." Such assertions are extremely misleading.

The Clinton-Daschle "Phony Ban" Scam: Fodder for the Gullible

The March 4 *American Medical News* story in which NCAP's Ron Fitzsimmons blew the whistle on the pro-abortion disinformation campaign also contained the observation that the "abortion rights" side's strategy is "to try to narrow the focus of the debate to third-trimester abortions, which are far fewer in number than those done in the late second trimester and more frequently done for reasons of fetal anomaly."

That diversionary strategy is still being employed by President Clinton and his agents, and by pro-abortion members of Congress led by Senator Tom Daschle (D-SD). Their strategy depends heavily on the continuation of careless and gullible coverage of this issue by elements of the news media. Unfortunately, we are still seeing a good deal of such coverage.

At his televised December 13 press conference, President Clinton (directly or through spokespersons) has told the American people that he would sign "the bill" that he vetoed *if* an exception were added to cover "serious" health-related circumstances. That was a deceptive, because President Clinton's agents have clearly communicated through other channels that Mr. Clinton will *not* sign "the bill" *unless it is also limited to the third trimester.*

In policy terms, those two sets of assurances are light-years apart. It is now recognized by all concerned that the vast majority of partial-birth abortions -- surely over 90% -- are performed in the fifth and sixth months, not the third trimester. So, the televised public statement by President Clinton (and Vice-president Gore [26]), that President Clinton will sign "the bill" if the "health exception" is added, are deceptive. In reality, President Clinton is demanding a radically different bill -- a bill that would allow the thousands of partial-birth abortions performed in the fifth and sixth months of pregnancy, on healthy babies of healthy mothers, to continue with no restriction at all.

NBC News' Tim Russert pinned down White House Chief of Staff Leon Panetta on this point on the Dec. 15, 1996 edition of *Meet the Press*. Mr. Panetta confirmed that President Clinton's position is indeed that he will not sign a bill that places limitations on partial-birth abortions performed in the fifth and sixth months. But that confirmation has not been reflected in most subsequent news stories coming out of the White House press corps, which continue to report that President Clinton would sign the ban if a so-called "health" exception were added.

Last week, we finally saw another couple of attempts to flush President Clinton out on this. On March 5, one reporter questioned White House Press Secretary Mike McCurry about whether Clinton would indeed "sign the bill" if the health exception were added, or whether he is also demanding the removal of all of the fifth and sixth-month partial-birth abortions

from the scope of the bill. Mr. McCurry replied lamely, "The difference between second-trimester ban and third-trimester ban is one I can't address. It may be a little too technical for here."

Then, at President Clinton's March 7 press conference, NBC's Jim Miklaszewski asked the really pertinent question, perfectly directly: "It's since been revealed that there are approximately 5,000 of these so-called partial-birth abortions performed every year -- 90 percent of them in the fifth and sixth month. Would you now support a ban if it included provisions to protect the mother but would ban the procedure also in the fifth and sixth month?" In response, President Clinton launched into a diversionary discourse about the women who, he insists, require the procedure to preserve future childbearing capacity, before concluding, "I can't answer the question that you asked me any clearer than that because I want to see the language of any proposed bill."

President Clinton's response, like McCurry's, was evasive and deceptive. But President Clinton's subordinates have confirmed that Leon Panetta's December 15 statement on *Meet the Press* is still valid. As the *Boston Globe* reported on March 8, "White House spokeswoman Mary Ellen Glynn said Clinton's remarks should be interpreted as an endorsement for a bill banning *third-trimester* abortions . . . with a very narrow exception for health reasons." [emphasis added]

Thus, President Clinton and Senator Daschle are proposing a bill that would explicitly allow *at a minimum* 90% of the partial-birth abortions to continue without *any* limitation -- those performed before the seventh month.

Moreover, their proposal would allow performance of a partial-birth abortion even in the seventh month and later based on an abortionist's mere assertion, however baseless in fact, that this procedure would enhance prospects for future childbearing, or on the basis of his assertion that he did not consider the child to be "viable."

***The Boston Globe* Takes the Bait**

Yet, President Clinton, Senator Daschle, and the abortion lobby hope to market this entirely hollow bill as a great "compromise." This marketing plan depends on their expectation of an unskeptical mindset still prevalent among many in the news media.

That expectation was certainly amply fulfilled by a story that appeared on page 1 of the March 7 edition of the *Boston Globe*. This report, titled "President quietly shifts on late-term abortions, compromise would be first U.S. curb," may be the single most gullible piece of reporting we've seen since the partial-birth abortion debate began in mid-1995 -- and that's saying a lot.

The *Globe* swallowed -- hook, line, and sinker -- the Clinton-Daschle proposal as a great compromise -- indeed, as a historic concession by the pro-abortion forces. The Clinton-Daschle proposal was billed by the *Globe* as "a dramatic shift in the quarter-century political battle over abortion."

The *Globe* even went so far as to predict that "Republicans who oppose abortion might be willing to support the compromise as a way to restrict abortions." Well, nice try. But members of Congress who genuinely "oppose abortion," or who wish to place an authentic ban on partial-birth abortions, will not be as gullible as the *Boston Globe*.

The Clinton-Daschle proposal is entirely hollow. It is a purely political construct, designed to provide political cover for lawmakers who want to maintain high ratings with NARAL while appearing to vote for restrictions on partial-birth abortions. This "phony ban" would allow, without restriction, every one of the roughly 4,000 or more partial-birth abortions that are performed on healthy babies of healthy mothers in the fifth and sixth months of pregnancy -- every single one. And in the seventh month and later, the Clinton-Daschle bill would allow partial-birth abortion at the abortionists' discretion.

Indeed, the Clinton-Daschle is nothing more than a re-packaged version of the unsuccessful amendment offered to the Partial-Birth Abortion Ban Act by Senator Boxer on December 7, 1995 -- an amendment endorsed by the National Abortion and Reproductive Rights Action League (NARAL). The Boxer Amendment said:

The prohibition... shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

What Does "Viability" Mean in the Clinton-Daschle Proposal?

In *medical* terms, "viability" is the point at which a baby born prematurely can be sustained by good medical assistance. Currently, many babies are "viable" a full three weeks before the "third trimester." Therefore, most partial-birth abortions kill babies who are already "viable," or who are at most a few weeks short of "viability," in *medical* terms.

However, it is important to note that when the term "viability" appears in proposals such as the Boxer Amendment or the Clinton-Daschle proposal, the meaning is quite different. First: these formulations invariably fail to define "viability," but rather empower the abortionist himself to decide what "viability" means. This is, by analogy, comparable to a law by which Congress would ban any "assault weapon," while empowering each gun dealer to

determine what constitutes an "assault weapon." That is not a restriction. Under the Clinton-Daschle proposal, it would be logically impossible for any partial-birth abortion ever to be illegal, because the person who is supposedly being "regulated," the abortionist, would have the sole authority to define the point at which the procedure becomes illegal!

According to a press report, a spokeswoman for Dr. George Tiller of Kansas, who regularly performs third-trimester abortions, defended abortions through 26 weeks "because these fetuses are not capable of surviving outside the womb *without artificial life supports*." [emphasis added] But the point at which the baby can survive "without artificial life supports" would be **34 weeks or even later**. Under the Clinton-Daschle proposal, Dr. Tiller's idiosyncratic definition would be the only definition that mattered. [27]

Moreover, in 1995, Dr. Martin Haskell testified in court that 24-week babies should not be presumed viable, because "fetal viability outside the womb at 23 to 24 weeks is about 3 percent." According to the landmark 1987-88 NIH study by Heck, et al, the actual figure should be at least 23 percent -- but under Clinton-Daschle, only Haskell's personal opinion is legally pertinent.

Also, if there were hypothetically a criminal law banning abortions after "viability," that term would have to be understood in the context of the standard of proof, which is "beyond a reasonable doubt." Thus, to convict an individual of performing an illegal abortion past "viability," it would not be sufficient to show that the baby had a one-in-three or a one-in-two or even a three-in-four chance of survival. Unless the baby was indeed past the seven-month point, a "reasonable doubt" might remain as to whether that *particular* baby would have survived, but for being killed by the partial-birth abortion. **Thus, in the context of such a criminal law, the term "viability" really does mean "third trimester," if it means anything at all.**

This particular difficulty is avoided by drawing a firm "time line" in the statute, as New York and Pennsylvania have done at 24 weeks. But such bright-line laws are invariably opposed by the abortion lobby, since they go beyond symbolism and might actually prevent an abortion.

By the way, the Arkansas law to which President Clinton has often referred does not actually "ban" third-trimester abortions," as he claims. Rather, it allows abortion without restriction until "viability," which is explicitly presumed *not* to have occurred "prior to the end of the 25th week of the pregnancy," and then allows abortions after that point for unlimited "health" reasons.

The Bill Poses a New Question for the Supreme Court

The Supreme Court has never said that there is a constitutional right to kill human beings who are mostly born. In its official 1995 report on the bill, the House Judiciary Committee makes

the very plausible argument that the Partial-Birth Abortion Ban Act could be upheld by the Supreme Court without disturbing *Roe*.

In *Roe*, the Supreme Court said that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." But a partial-birth abortion does not involve an "unborn fetus." A partial-birth abortion, by the very definition in the bill, kills a human being who is partly born. Indeed, a partial-birth abortion kills a human being who is four-fifths across the 'line-of-personhood' established by the Supreme Court.

Moreover, in *Roe v. Wade* itself, the Supreme Court took note of a Texas law that made it a felony to kill a baby "in a state of being born and before actual birth," and the Court did not disturb that law. [28]

Thus, the Supreme Court could very well decide that the killing of a mostly born baby, even if done by a physician, is not protected by *Roe v. Wade*.

I again thank the Chairmen and the members for this opportunity. The National Right to Life Committee would welcome the opportunity to provide further documentation on any substantive issue on which I have touched in my testimony.

NOTES

[1] HR 929/S. 6 permits performance of a partial-birth abortion "that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, if no other medical procedure would suffice for that purpose." Yet some press accounts continue to imply that the bill contains no such exception. For example, on March 5, 1997, *CBS Evening News With Dan Rather* reported, "President Clinton says . . . he will again veto any ban that does not make exceptions where the mother's life or health is in danger"-- ignoring both the fact that the bill already contains a life-of-mother exception, and the President's additional demand that all pre-seventh-month abortions be dropped from the ban.

[2] *Media Matters* describes itself as "a series that looks critically at news media performance." The program is hosted by executive editor Alex Jones, a Pulitzer Prize-winning journalist who also hosts National Public Radio's weekly show *On the Media*. The investigation of partial-birth abortion coverage was reported by Terry Eastland, editor of *Forbes MediaCritic Online*, and produced by two-time Emmy documentary nominee Joseph Dorman.

[3] "Abortion Rights Leader Urges End to 'Half Truths'," by Diane M. Gianelli, *American Medical News*, March 3, 1993. See also "Pro-Choice Advocates Admit to Deception," by Ruth Padawer, February 27, 1997 *Record*, and "An Abortion Advocate Says He Lied About Procedure," by David Stout, *The New York Times*, February 26, 1997.

[4] "Shock-tactic Ads Target Late-Term Abortion Procedure," by Diane M. Gianelli, *American Medical News*, July 5, 1993. Also, "Second Trimester Abortion: An Interview with W. Martin Haskell, M.D.," *Cincinnati Medicine*, Fall, 1993.

[5] "Dilation and Extraction for Late Second Trimester Abortion," by Martin Haskell, M.D., National Abortion Federation, 1992.

[6] Transcript submitted with letter from Barbara Bolen, editor of *American Medical News*, to House Judiciary Committee Subcommittee on the Constitution, July 11, 1995.

[7] "Late Abortion Pushes Medicine to the Edge: Accounts Differ in Kettering Case," by Dave Daley, *Dayton Daily News*, December 10, 1989, reproduced in House Judiciary Committee Hearing Before the Subcommittee on the Constitution, June 15, 1996, Serial No. 31.

[8] See "Effects of Anesthesia During a Partial-Birth Abortion," Hearing Before the Subcommittee on the Constitution of the House Judiciary Committee, March 21, 1996, Serial No. 73.

[9] "H.R. 1833: Medical Questions and Answers," "Fact Sheet Prepared by Mary Campbell, M.D., Medical Director, Planned Parenthood of Metropolitan Washington," October, 1995.

[10] See "Anesthesiologists Question Claims in Abortion Debate," by Diane M. Gianelli, *American Medical News*, January 1, 1996.

[11] Senate Judiciary Committee hearing record J-104-54, Nov. 17, 1995, page 153.

[12] Senate Judiciary Committee, Nov. 17, 1995 hearing record, page 226.

[13] Dr. McMahon's submission of June 8, 1995, is reproduced in "Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary," 104th Congress, First Session.

[14] "The First Crack in the Wall," by John Leo, *U.S. News & World Report*, March 10, 1997.

[15] "Late-Term Abortion Ban Vetoed," by Ann Devroy, *Washington Post*, April 11, 1996.

[16] "Partial-Birth Abortions: Misinformation and Rebuttal," NRLC factsheet, June 21, 1995. This factsheet is reproduced in "Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary," 104th Congress, First Session, Serial No. 31, pages 122-127.

[17] See "CBS *60 Minutes* on Partial-Birth Abortions: A Critique," NRLC, June 10, 1996. Available on NRLC Homepage, www.nrlc.org.

[18] "The Facts on Partial-Birth Abortion," by Ruth Padawer, *The Sunday Record* (Bergen, N.J.), September 15, 1996. On *CNN Crossfire* (Sept. 26, 1996), NARAL's Kate Michelman said, "the reporter got it completely wrong...the 1,500 is a lie." But on October 2, 1996, the *Record* published a convincing rebuttal to such attacks on the accuracy of the original story. The clinic has said that all of the abortions it performs on Medicaid-eligible patients are "medically necessary," but it is well established that in Medicaid law, the term "medically necessary" merely means that the abortion was performed by a licensed physician. See "The Editor Replies," Oct. 2, 1996 *Record*.

[19] "Discomfitting Details of Late-Term Abortions Intensify Dispute," by Barbara Vobejda and David Brown, and "Late Term Abortions: Who Gets Them and Why," *Washington Post*, September 17, 1996.

[20] "What Constitutes A Quality Life?," by Katherine Dowling, M.D., *Los Angeles Times*, Aug. 28, 1996.

[21] Late-term abortion specialist Warren Hern told *American Medical News*, "I have very serious reservations about this procedure. . . You really can't defend it. I'm not going to tell somebody else that they should not do this procedure. But I'm not going to do it." See "Outlawing Abortion Method," by Diane M. Gianelli, *American Medical News*, November 20, 1995.

[22] *Abortion Practice*, by Warren M. Hern, M.D.. (J.B. Lippincott Company, 1984). Page 318.

[23] Dr. McMahon's submission of June 8, 1995, is reproduced in "Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary," 104th Congress, First Session.

[24] In an interview published in the August 19, 1996, edition of *American Medical News*, former Surgeon General C. Everett Koop said, "I believe that Mr. Clinton was misled by his medical advisors on what is fact and what is fiction in reference to late-term abortions. Because in no way can I twist my mind to see that the late-term abortions as described-- you know, partial birth, and then destruction of the unborn child before the head is born-- is a medical necessity for the mother. It certainly can't be a necessity for the baby." Dr. Koop also authored an op ed piece in *The New York Times* titled "Why Defend Partial-Birth Abortion" (Sept. 26, 1996), and his photo appeared in full-page newspaper ads produced by the Physicians' Ad Hoc Coalition for Truth (PHACT). Curiously, however, Dr. Koop's forthright challenges to President Clinton's medical claims regarding partial-birth abortion

went almost entirely unreported in news columns and broadcasts -- in striking contrast to the big play given to his challenge to a statement made by Republican presidential candidate Bob Dole regarding the addictiveness of nicotine.

[25] "Viability and the Law," by David Brown, *Washington Post*, September 17, 1996.

[26] In his October 9, 1996 debate with Jack Kemp, Vice-president Gore said, "President Clinton has made it clear that *he will sign legislation outlawing procedures such as this* if there is an exception to protect the health of the mother where serious health consequences, such as the inability to have any further children, are involved and her doctor advises her so." [emphasis added]

[27] *Kansas City Star*, August 26, 1991. Dr. George Tiller was a guest at one of the White House's now renown fundraising coffees, on June 17, 1996. Apparently President Clinton's "opposition" to "late-term" abortions does not extend to opposition to accepting the proceeds thereof. See *The Hill*, February 26, 1997, page 21.

[28] "Partial-Birth Abortion Ban Act of 1995," House Judiciary Committee report 104-267, 104th Congress, 1st Session. See also testimony of Douglas Kmiec, professor of constitutional law, University of Notre Dame, Senate hearing record (Nov. 17, 1995).

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