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Women's Domestic Issues

Partial Birth

file partial birth

September 19, 2000

MEMORANDUM FOR MELANNE VERVEER

FROM: HEATHER HOWARD

SUBJECT: Partial Birth Abortion and the Born Alive Infant Protection Act

I wanted to update you on partial birth abortion and related legislation:

Partial Birth Abortion

It seems like PBA may have been put on the back burner. The Supreme Court loss (and the fact that they would have to re-write it to include a health exception, which they would never accept) may have convinced them to drop it for now.

Born Alive Infant Protection Act

Instead, the pro-choice groups and Rep. Nita Lowey's office seem to think the anti's will pursue the "**Born Alive Infant Protection Act**," which redefines "person" everywhere in the federal code. "Born Alive" is defined as "complete expulsion" from the women "at any stage of development." There was a hearing in the House Judiciary Committee in July and the bill was marked up by the full committee on July 26.

When it was first introduced, pro-choice groups and members didn't know what to make of it. Even OLC has had a hard time figuring it out. (Remember that it took a couple years to really figure out what they were doing with PBA). The sponsor is Canady, who is also the sponsor of the PBA ban, so of course everyone is skeptical. He claimed that all he was attempting to do was prevent the murder of already born children, and not to restrict abortion. (He pointed to testimony about "botched abortions" in which fetuses allegedly survive an abortion and then are left to die). Neonatologists, however, testified in opposition to the bill, arguing that it might require "heroic measures" for premature babies. The bottom line was, it was hard to figure it out, (even though some people worried that it might be getting at the viability line) and even harder to articulate opposition to.

At the mark-up, Rep. Jerry Nadler pressed Canady on the meaning of the bill, and was sufficiently comfortable with the response that he convinced all the Democrats, except for Rep. Mel Watt, to vote for the bill, and it was approved 22-1. The hope was that if everyone voted for it it would take the issue away from the Republicans.

But then it got more complicated. Last week, Hyde and Canady sent around a dear colleague and a manager's amendment. (See attached). They are more inflammatory, and make clear that the legislation is intended to reverse, in part, Carhart v. Stenberg and recent appellate court

interpretations of Carhart. For example: "[This legislation] is designed to . . . repudiate recent judicial expansions of the 'right to abortion' that place some such infants in increasing jeopardy."

The dear colleague says the legislation is expected to be brought up on the House floor in the next two weeks. Next week is the Christian Coalition's lobby day, so it might happen then. Apparently Rep. Nadler and the Judiciary Committee Democrats are now planning to switch their votes, and the House pro-choice task force is trying to figure out what to do.

I've been talking to Bill Marshall and we will be talking internally about our position.

Congress of the United States

Washington, DC 20515

September 13, 2000

Support Passage of H.R. 4292, The Born-Alive Infants Protection Act Reject the Legalization of Infanticide Under *Roe v. Wade*

Dear Colleague:

H.R. 4292, The Born-Alive Infants Protection Act, is expected to be brought up on the House floor during the next two weeks. This simple but critical piece of legislation is designed to insure that all infants who have been born alive are treated as persons who are entitled to the protections of federal law, and to repudiate recent judicial expansions of the "right to abortion" that place some such infants in increasing jeopardy. We strongly urge you to support this legislation, as well as the attached Manager's Amendment that will be offered to the bill.

Why, you may ask, is such legislation necessary? Hasn't it long been accepted as a legal principle that infants who are born alive are persons who are entitled to the protections of the law? Indeed it has. But the corrupting influence of a seemingly illimitable right to abortion has brought this well settled principle into question.

Just weeks ago, for example, in *Stenberg v. Carhart*, the United States Supreme Court struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist delivers an unborn child's body until only the head remains inside of the mother, punctures the back of the child's skull with scissors, and sucks the child's brains out before completing the delivery. What the Supreme Court described in *Roe v. Wade* as a right to abort "unborn children" has now been extended by five Justices to include the violent destruction of *partially-born* children just inches from birth.

Even more striking than the simple holding of the case is the fact that the *Carhart* Court considered the location of an infant's body at the moment of death during a partial-birth abortion – delivered partly outside the body of the mother – to be of no legal significance in ruling on the constitutionality of the Nebraska law. Implicit in the *Carhart* decision was the pernicious notion that a partially born infant's entitlement to the protections of the law is dependent not upon whether the child is born or unborn, but upon whether or not the partially born child's mother wants the child.

Following *Stenberg v. Carhart*, on July 26, 2000, the United States Court of Appeals for the Third Circuit made that point explicit in *Planned Parenthood of Central New Jersey v. Farmer*, in the course of striking down New Jersey's partial-birth abortion ban. According to the Third Circuit, under *Roe* and *Carhart*, it is "nonsensical" for a legislature to conclude that an infant's location in relation to the mother's body has any relevance in determining whether that infant may be killed. The *Farmer* Court concluded that a child's status under the law, regardless of the child's location, is dependent upon whether the mother intends to abort the child or to give birth. The *Farmer* Court stated that, in contrast to an infant whose mother intends to give birth, an infant who is killed during a partial-birth abortion is not entitled to the protections of the law because "[a] woman seeking an abortion is plainly not seeking to give birth."

The implications of these decisions are shocking. Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as a non-entity and would have not the slightest rights under the law – no right to receive medical care, to be sustained in life, or to receive any care at all. And if a child who survives an abortion and is born alive would have no claim to the protections of the law, there would, then, be no basis upon which the government may prohibit an abortionist from *completely* delivering an infant before killing it or allowing it to die. The “right to abortion,” under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.

Credible public testimony received by the Subcommittee on the Constitution indicates that this is, in fact, already occurring. According to eyewitness accounts, “live-birth abortions” are indeed being performed, resulting in live-born premature infants who are simply allowed to die, sometimes without the provision of even basic comfort care such as warmth and nutrition. On one occasion a living infant was found lying naked on a scale in a soiled utility closet, and on another occasion a living infant was found lying naked on the edge of a sink. One baby was wrapped in a disposable towel and thrown in the trash.

Statements made by abortion supporters indicate that they support this expansion of *Roe v. Wade*. For example, on July 20, 2000, the National Abortion and Reproductive Rights Action League, or “NARAL,” issued a press release criticizing H.R. 4292 because, in NARAL’s view, extending legal personhood to premature infants who are born alive after surviving abortions constitutes an “assault” on *Roe v. Wade*. According to NARAL, by seeking to provide legal rights to born-alive infants “at any stage of development,” the proponents of H.R. 4292 are “directly contradicting one of *Roe*’s basic tenets.”

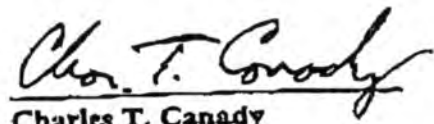
The purpose of this bill is to repudiate the pernicious ideas that result in tragedies such as “live birth abortion” and to firmly establish that, for purposes of federal law, an infant who is completely expelled or extracted from her mother and who is alive is, indeed, a person under the law – regardless of whether or not the child’s development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

The attached Manager’s Amendment is designed to repudiate the Third Circuit’s decision in *Farmer*, which was handed down the day of the Full Committee markup on H.R. 4292, and therefore was not addressed in that forum. The amendment accomplishes this by setting forth findings outlining the tragic implications of the *Farmer* decision, and its interpretation of the Supreme Court’s decision in *Carhart*.

We strongly urge you to support H.R. 4292 and the Manager’s Amendment, and reject the legalization of infanticide under *Roe v. Wade*.

Sincerely yours,


Henry J. Hyde
Chairman
Committee on the Judiciary


Charles T. Canady
Chairman
Subcommittee on the Constitution

**AMENDMENT TO H.R. 4292
OFFERED BY MR. CANADY OF FLORIDA**

After section 1, insert the following:

SECTION 2. FINDINGS AND PURPOSE.

(a) **FINDINGS.** - Congress finds the following:

- (1) It has long been an accepted legal principle that infants who are born alive, at any stage of development, are persons who are entitled to the protections of the law. But recent decisions by the United States Supreme Court and the United States Court of Appeals for the Third Circuit have expanded *Roe v. Wade* and brought this well-settled principle into question.
- (2) In *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), the United States Supreme Court struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist delivers an unborn child's body until only the head remains inside of the womb, punctures the back of the child's skull with scissors, and sucks the child's brains out before completing the delivery. What was described in *Roe v. Wade* as a right to abort "unborn children" has thus been extended by the Court to include the violent destruction of partially born children just inches from complete birth.
- (3) The *Carhart* Court considered the location of an infant's body at the moment of death during a partial-birth abortion - delivered partly outside the body of the mother - to be of no legal significance in ruling on the constitutionality of the Nebraska law. Instead, implicit in the *Carhart* decision was the pernicious notion that a partially born infant's entitlement to the protections of the law is dependent upon whether or not the partially born child's mother wants him or her.
- (4) Following *Stenberg v. Carhart*, on July 26, 2000, the United States Court of Appeals for the Third Circuit made that point explicit in *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3rd Cir. 2000), in the course of striking down New Jersey's partial-birth abortion ban. According to the Third Circuit, under *Roe* and *Carhart*, it is "nonsensical" and "based on semantic machinations" and "irrational line-drawing" for a legislature to conclude that an infant's location in relation to his or her mother's body has any relevance in determining whether that infant may be killed.
- (5) Instead, the *Farmer* Court repudiated New Jersey's classification of the prohibited procedure as being a "partial birth," and concluded that a child's status under the law, regardless of his or her location, is dependent upon whether the mother intends to abort the child or to give birth. Thus, the *Farmer* Court stated that, in contrast to an infant whose mother intends to give birth, an infant who is killed during a partial-birth abortion is not entitled to the protections of the law because "[a] woman seeking an abortion is plainly not seeking to give birth." In other words, a real child, with an objective existence, is treated as merely a conceptual construct, and in that way, swept aside as though he or she had no existence at all that anyone was obliged to acknowledge.
- (6) The logical implications of *Carhart* and *Farmer* are both obvious and disturbing. Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would have not the slightest rights under the law no right to receive medical care, to be sustained in life, or to receive any care at all.

(7) And if a child who survives an abortion and is born alive would have no claim to the protections of the law, there would, then, be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing the child or allowing the child to die. The "right to abortion," under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.

(8) Credible public testimony received by the Subcommittee on the Constitution of the Committee on the Judiciary indicates that this is, in fact, already occurring. According to eyewitness accounts, live-birth abortions are indeed being performed, resulting in live-born premature infants who are simply left to die, sometimes without the provision of even basic comfort care such as warmth and nutrition.

(9) Statements made by proponents of abortion indicate that they support the expansion of *Roe v. Wade*. For example, on July 20, 2000, the National Abortion and Reproductive Rights Action League ("NARAL") issued a press release criticizing the Born-Alive Infants Protection Act because, in NARAL's view, recognizing the legal personhood of premature infants who are born alive after surviving abortions constitutes an "assault" on *Roe v. Wade*. According to NARAL, by seeking legal protection for born-alive infants "at any stage of development," including those not yet considered to have achieved "viability," the proponents of this Act are "directly contradicting one of *Roe*'s basic tenets".

(10) Thus, having created in *Roe v. Wade* a legal regime in which a child's status under the law was dependent upon that child's location in relation to the body of his or her mother - "born" or "unborn" - the Federal judiciary has now rejected that regime as irrational, creating instead an expanded *Roe v. Wade* regime in which a child's entitlement to the protections of the law depends upon whether the child's mother intends to abort the child or to give birth.

(b) PURPOSE. - It is the purpose of this Act -

(1) to repudiate the flawed notion that a child's entitlement to the protections of the law is dependent upon whether that child's mother or others want him or her;

(2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;

(3) to affirm that every child who is born alive - whether as a result of induced abortion, natural labor, or cesarean section - bears an intrinsic dignity as a human being which is not dependent upon the desires, interests, or convenience of any other person, and is entitled to receive the full protections of the law;

(4) to establish firmly that, for purposes of Federal law, the term "person" includes an infant who is completely expelled or extracted from his or her mother and who is alive regardless of whether or not the baby's development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

Redesignate succeeding sections accordingly.