New York Times Editorial 11/29/95, Coreen Costello

(Pro-Life Republican)

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HEADLINE: Giving Up My Baby

BYLINE: By Coreen Costello; Coreen Costello testified at the Senate Judiciary Committee's hearing on late-term abortions on Nov. 17.

DATELINE: AGOURA, Calif.

BODY:

Those who want Congress to ban a controversial late-term abortion technique might think I would be an ally. I was raised in a conservative, religious family. My parents are Rush Limbaugh fans. I'm a Republican who always believed that abortion was wrong.

Then I had one.

It wasn't supposed to be that way. My little girl, Katherine Grace, was supposed to have been born in the summer. The births of my two other children had been easy, and my husband and I planned a home delivery.

But disaster struck in my seventh month. Ultrasound testing showed that something was terribly wrong with my baby. Because of a lethal neuromuscular disease, her body had stiffened up inside my uterus. She hadn't been able to move any part of her tiny self for at least two months. Her lungs had been unable to stretch to prepare them for air.

Our doctors told us that Katherine Grace could not survive, and that her condition made giving birth dangerous for me -- possibly even life-threatening. Because she could not absorb amniotic fluid, it had gathered in my uterus to such dangerous levels that I weighed as much as if I were at full term.

I carried my daughter for two more agonizing weeks. If I couldn't save her life, how could I spare her pain? How could I make her passing peaceful and dignified? At first I wanted the doctors to induce labor, but they told me that Katherine was wedged so tightly in my pelvis that there was a good chance my uterus would rupture. We talked about a Caesarean section. But they said that this, too, would have been too dangerous for me.

Finally we confronted the painful reality: our only real option was to terminate the pregnancy. Geneticists at Cedars-Sinai Medical Center in Los Angeles referred us to a doctor who specialized in cases like ours. He knew how much pain we were going through, and said he would help us end Katherine's pain in the way that would be safest for me and allow me to have more children.

That's just what happened. For two days, my cervix was dilated until the doctor could bring Katherine out without injuring me. Her heart was barely beating. As I was placed under anesthesia, it stopped. She simply went to

sleep and did not wake up. The doctor then used a needle to remove fluid from the baby's head so she could fit through the cervix.

When it was over, they brought Katherine in to us. She was wrapped in a blanket. My husband and I held her and sobbed. She was absolutely beautiful. Giving her back was the hardest thing I've ever done.

After Katherine, I didn't think I would have more children. I couldn't imagine living with the worry for nine months, imagining all the things that could go wrong. But my doctor changed that. "You're a great mother," he told me. "If you want more kids, you should have them." I'm pregnant again, due in June.

I still have mixed feelings about abortion. But I have no mixed feelings about the bill, already passed by the House and being considered in the Senate, that would ban the surgical procedure I had, called intact dilation and evacuation. As I watched the Senate debate on C-Span this month, I was sick at heart. Senator after senator talked about the procedure I underwent as if they had seen one, and senator after senator got it wrong. Katherine was not cavalierly pulled halfway out and stabbed with scissors, as some senators described the process.

I had one of the safest, gentlest, most compassionate ways of ending a pregnancy that had no hope. I will probably never have to go through such an ordeal again. But other women, other families, will receive devastating news and have to make decisions like mine. Congress has no place in our tragedies.

LANGUAGE: ENGLISH

LOAD-DATE: November 29, 1995

Remarks regarding late term abortion:

Congresswoman Zoe Lofgren

Tomorrow morning the Judiciary Committee will mark up a bill to outlaw late term abortions. There has been a lot of loud rhetoric about this issue. Some view it symbolically. But to me it's about my friend Susie Wilson and her family.

Susie and I served together in local government for 12 years. She is a wonderful person whose background is all-American.She grew up in Texas. She married her high school beau, Bob, and after World War II they moved to San Jose. She taught sewing for her Methodist Church and was a volunteer youth counselor there. She got involved in local government as a neighborhood leader. She and Bob have been married 47 years and have three grown sons. She is now retired and a proud and doting grandmother.

Last year Susie was so pleased when she told me that her son Bill and daughter-in-law Vicky were expecting a third child. She wanted another granddaughter and was going to get one!

It was with a lot of tears and sorrow that we learned, late in Vicky's pregnancy, that the little girl Abigail could not live. She had a rare condition that caused most of her brain tissue to form outside of her cranial cavity, and all of the tissue was abnormal. Vicky had been experiencing strong contractions - which as a proud mother-to-be she felt might indicate a truly strong child. It was devastating to learn that these contractions were because of seizures that Abigail was having in utero. Abigail would not survive the birth process. Further, it was possible that Vicky might not survive child birth.

Susie had made plans to help out with the new baby. Instead, she helped her son, daughter-in-law and two grandchildren to cope with their loss. After a lot of prayer and discussion, Vicky and Bill had a late term abortion that our Congress is now being asked to outlaw.

Bill is a doctor in Fresno, California. As a physician, he knew about the risks to the mother of his two children. He also knew that his new daughter could not survive the birth process. Given the situation, these parents wanted a death that was the least painful for baby and mother. They wanted a chance to properly grieve for their daughter and a chance for their other two children to come to terms with the loss. Susie was there. She also needed a chance to grieve and say good-bye. This they were able to do because of the late term abortion available to them: to hold and bury a whole deceased child and to know that the pain of death was less for her than would have been childbirth.

Abigail's memorial service was held on April 23, 1994. Susie and I talked about the whole tragedy with a lot of tears and love. I was so proud that my friend, Susie, was strong for her family at this terrible time and grateful that Vicky and Bill and their children had had the chance to hold Abigail, grieve and say good-bye. Vicky and Bill are secure knowing that Abigail is in heaven with God.

The loss of Abigail was sad and very personal for the Wilson family and for their friends, like me. It's not the sort of thing I thought I would ever talk about publicly. But the mark-up in Judiciary Committee tomorrow means that this private, personal tragedy cannot be kept private any longer. Susie along with Bill and Vicky have told me to share their family story because they believe that another family who faces the same terrible situation should have the chance to do their best to cope with dignity, love and safety without the intrusion of the Federal government.

This issue isn't about anonymous people. It's about real people facing real tragedies. It's about my friend, Susie Wilson, and her son, daughter-in-law and granddaughter. I promised her that I would do my very best to let people know that her family -- and other families faced with similar circumstances - do not need the Congress of the United States intruding into this most personal situation.

The Wilson family had their memorial service a year ago April. I've enclosed a copy of the memorial program and the autopsy photograph so you can see, as I already know, how real, personal and tragic this situation is. This family tragedy is not one which will be improved with the intervention of the Federal government.

When we meet tomorrow morning, I hope you will remember the Wilson family and vote with me to keep the long arm of the Federal government out of family situations such as these.

Warm regards.

Testimony before the Rules Committee on H.R. 1833
Congresswoman Zoe Lofgren
October 31, 1995

Ms. Lofgren. Mr. Chairman , Mr. Farr and I appear before the Rules Committee today to ask that we be allowed to offer an amendment to H.R. 1833, the Partial Birth Abortion Ban Act of 1995. This amendment will create an exception to the bill which will allow doctors to perform this procedure when it is necessary to preserve the life or health of the mother.

There has been a lot of loud rhetoric about this issue. Some view it symbolically. But to me it's about my friend Susie Wilson and her family.

Susie and I served together in local government for 12 years. She is a wonderful person whose background is all-American.She grew up in Texas. She married her high school beau, Bob, and after World War II they moved to San Jose. She taught sewing for her Methodist Church and was a volunteer youth counselor there. She got involved in local government as a neighborhood leader. She and Bob have been married 47 years and have three grown sons. She is now retired and a proud and doting grandmother.

Last year Susie was so pleased when she told me that her son Bill and daughter-in-law Viki were expecting a third child. She wanted another granddaughter and was going to get one!

It was with a lot of tears and sorrow that we learned, late in Viki's pregnancy, that the little girl Abigail could not live. She had a rare condition that caused most of her brain tissue to form outside of her cranial cavity, and all of the tissue was abnormal. Viki had been experiencing strong contractions - which as a proud mother-to-be she felt might indicate a truly strong child. It was devastating to learn that these contractions were because of seizures that Abigail was having in utero. Abigail would not survive the birth process. Further, it was possible that Viki might not survive child birth.

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The loss of Abigail was sad and very personal for the Wilson family and for their friends, like me. It's not the sort of thing I thought I would ever talk about publicly. But the mark-up in Judiciary Committee tomorrow means that this private, personal tragedy cannot be kept private any longer. Susie along with Bill and Viki have told me to share their family

story because they believe that another family who faces the same terrible situation should have the chance to do their best to cope with dignity, love and safety without the intrusion of the Federal government.

This issue isn't about anonymous people. It's about real people facing real tragedies. It's about my friend, Susie Wilson, and her son, daughter-in-law and granddaughter. I promised her that I would do my very best to let people know that her family -- and other families faced with similar circumstances - do not need the Congress of the United States intruding into this most personal situation.

On behalf of Viki Wilson and other mothers like her, please allow us to offer this amendment to H.R. 1833.

Congress of the United States

Washington, DC 20515

DON'T TURN DOCTORS INTO CRIMINALS
Oppose H.R. 1833

November 1, 1995

Dear Colleague:

This week we had planned to offer an amendment on the Floor to H.R. 1833, the Partial Birth Abortion Ban Act of 1995, which would have allowed this procedure if it was medically necessary to preserve the life or health of the mother. This amendment is critical because it would have made sure that H.R. 1833 didn't risk the life or health of the pregnant woman by outlawing the safest late-term abortion procedure available.

The Rules Committee has just reported out a closed rule on this bill which will prevent us from offering this amendment.

Opponents of our amendment will tell you that the bill already provides the doctor with an affirmative defense if the procedure was necessary to preserve the life of the mother. But, that argument allows doctors to defend themselves after they are dragged into court by prosecutors.

The Partial Birth Abortion Ban Act of 1995 is troubling to us for constitutional reasons, medical reasons, but most importantly, for personal reasons. We know what this bill will do to real-life families who face real-life problems: it will allow the federal government to intrude on the most deeply personal decision that a woman and her family will ever face.

Most of you have heard about our friends Viki Wilson and Tammy Watts who have had this procedure. Last year Viki and Tammy became pregnant to the great joy of their family and friends. It was with a lot of tears and sorrow that they both learned, late in their pregnancy, that their babies could not live.

Viki's baby had a rare condition that caused most of her brain tissue to form outside of her cranial cavity, and all of the tissue was abnormal. Viki's baby would not survive the birth process. Further, it was possible that Viki might not survive it either.

Tammy's fetus was afflicted with a deadly fetal anomaly -- Trisomy 13. There was no surgical or genetic therapies to help her child, which was already suffering and would not live, even if carried to full term. Further, if Tammy and her husband decided to continue the pregnancy, dangerous toxins would have been released into Tammy's body as her baby died in utero, causing great risk to her health.

The bill we will vote on this week will criminalize doctors who perform the very procedure that probably saved Viki and Tammy's life and certainly preserved their ability to have a child in the future.

We urge you to vote no on the Rule and oppose H.R. 1833 because there is

circumstances like theirs. Don't add to the trauma that already faces mothers and fathers who are forced to terminate a wanted pregnancy.

Sincerely,

Zoe Lofgren
Member of Congress

Sam Farr
Member of Congress

WillowCreek Community Church

January 3, 1996

President Clinton
c/o Nancy Hernreich
The White House
1600 Pennsylvania Avenue
Washington DC 20500-2000

Dear Bill:

Happy New Year! I trust that you and your family got some rest and "together time" over the holidays.

Enclosed are two items. The first is an approach to the end of the State of the Union Address. I'll do further work on it, if you request. The second is some reading for you on the partial birth abortion legislation. I can't stress enough what being on the wrong side of this issue will do to your support base in the Christian community. Although less that 600 of these procedures are done each year, the moral outrage over it has captured the hearts of tens of millions of Americans. In my opinion, signing the bill will cost you very little. Vetoing it will come to haunt you, not only in the near term, but all throughout the upcoming campaign. And if you ask me what I think Jesus would do if He were in your shoes. . . well, enough said.

You're a good man, Bill. And you are not only going to win re-election, but in your second term you are going to leave a legacy that will be honored for centuries! Really!

Here to help. . .

Your friend in Christ,

Bill

Bill Hybels

67 East Algonquin Road • South Barrington, IL 60010-6143 • 708/765-5000

Memo to Bill Hybels
from Lee Strobel
date: January 3, 1996
re: *Partial-Birth Abortion Bill*

At your request, I have thoroughly reviewed medical documentation, testimony before House and Senate subcommittees, and other relevant data concerning "partial-birth abortions," or the "dilation and extraction" procedure, used on late-term fetuses. I am firmly convinced that the bill outlawing such practices is (1) morally and ethically correct; (2) medically appropriate; and (3) Constitutionally defensible. The following summarizes my reasoning; I can provide documentation of any point as necessary.

I start with this uncontested description of the procedure from *The Los Angeles Times*: "The procedure requires a physician to extract a fetus, feet first, from the womb and through the birth canal until all but its head is exposed. Then the tips of surgical scissors are thrust into the base of the fetus' skull, and a suction catheter is inserted through the opening and the brain is removed."

Physicians employ this procedure in abortions of fetuses of 4 1/2+ months.

Despite rhetoric to the contrary, there is convincing evidence that:

1. This procedure is frequently performed on infants who are healthy or have defects that are consistent with long life.

-- In a taped interview with the *American Medical News*, the official newspaper of the American Medical Association, Dr. Martin Haskell, a leading practitioner of the procedure, said 80% of the partial-birth abortions he performs are "purely elective." For example, Dr. Nancy Romer, an obstetrician/gynecologist, said she referred three patients to Dr. Haskell's clinics for abortions "well beyond" the half-way point of pregnancy and "none of these women had any medical illness, and all three had normal fetuses."

-- James McMahon gave the House Judiciary Constitution Subcommittee a self-selected sample of 175 such abortions he personally performed. An analysis by an expert shows that 39 of the abortions -- or 22% -- were performed because of "maternal depression," while another 16% were "for conditions consistent with the birth of a normal child (e.g., sickle cell trait, prolapsed uterus, small pelvis)." At 26 weeks of gestation, half the aborted babies were perfectly healthy and many of those that Dr.

McMahon defined as "flawed" had conditions compatible with long life, with or without disability (nine, for example, had cleft palates).

2. The fetus is alive, in most cases, until the end of the procedure and is not killed by anesthesia given to the mother.

-- Dr. Haskell said: "And so in my case, I would think probably about a third of those are definitely dead [from the early part of the abortion procedure] before I actually start to remove the fetus. And probably the other two-thirds are not." (When Dr. Haskell recently tried to back away from this assertion he made to the *American Medical News*, the editors produced a transcript of the taped interview containing this quote and others.)

-- Responding to Dr. McMahon's suggestion that the mother's anesthesia causes "fetal demise," Dr. Watson Bowes, Professor of Obstetrics and Gynecology and Pediatrics at the University of North Carolina at Chapel Hill School of Medicine, wrote: "This statement suggests a lack of understanding of maternal/fetal pharmacology. . . . Having cared for pregnant women who for one reason or another required surgical procedures in the second trimester, I know that they were often heavily sedated for the procedures, and the fetuses did not die."

-- The president of the American Society of Anesthesiologists added that there is "absolutely no basis in scientific fact" for the claim that the mother's anesthetic results in the fetus' death. Dr. David Birnbach, Director of Obstetric Anesthesiology at St. Luke's-Roosevelt Hospital Center, and numerous other experts back that up.

-- Dr. Dru Elaine Carlson, a Perinatologist and Director of Reproductive Genetics at Cedars-Sinai Medical Center, has observed Dr. McMahon actually perform this procedure and said that it's not until the point of "removal of cerebrospinal fluid from the brain" that "instant brain herniation and death" occur.

3. It's likely that many of these fetuses feel pain.

-- "The fetus within this time frame of gestation, 20 weeks and beyond, is fully capable of experiencing pain . . . . Without question, all of this is a dreadfully painful experience for any infant subjected to such a surgical procedure." -- Dr. Robert J. White, Professor of Neurosurgery at Case Western University, testifying before the House Judiciary Constitution Subcommittee.

-- "It may be concluded with reasonable medical certainty that the fetus can sense pain at least by 13 1/2 weeks." -- Dr. Vincent J. Collins, Professor of Anesthesiology at Northwestern University and author of *Principles of Anesthesiology*, a leading medical text on pain control.

-- Dr. Haskell said in 1992 that he performs partial-birth abortions under "local anesthesia," which would provide no pain-deadening for the fetus. The American Society of Anesthesiologists told the Senate Judiciary Committee that the regional anesthesia used in some partial-birth abortions wouldn't affect the fetus; general anesthesia may sedate the fetus to some degree, but less than the mother, and pain relief for the fetus would be doubtful.

I. Signing the bill is morally and ethically correct.

1. Babies subjected to this procedure are two-thirds delivered before being killed, making this barely distinguishable from infanticide. Indeed, one expert told the House subcommittee that the doctor has to work hard to keep the baby's head inside of the mother, because "if by chance the cervix is floppy or loose and the head slips through, the surgeon will encounter the dreadful complication of delivering a live baby. The surgeon must therefore act quickly to ensure that the baby does not manage to move the inches that are legally required to transform its status from one of an abortus to that of a living human child."

2. Even numerous abortionists and pro-choice advocates believe that this procedure is barbarous and shocks the conscience.

-- "In my own personal opinion, particularly when there are other techniques available, the introduction of a sharp instrument into the brain and sucking out the brain constitutes cruel and unusual fetal punishment." -- Dr. Harlan R. Giles, Professor of High-Risk Obstetrics at the Medical College of Pennsylvania, who performs abortions.

-- "I'm not going to vote in such a way that I have to put my conscience on the shelf." -- U.S. Rep. Jim Moran of Virginia, one of a dozen abortion-rights supporters in the House who voted for the bill to outlaw partial-birth abortions.

-- Although the American Medical Association has not taken an official position, the AMA's Council on Legislation unanimously recommended support of the House bill, with one member calling the partial-birth abortion procedure "basically repulsive."

3. From a Biblical perspective, those who are subjected to partial-birth abortions are fully human and deserving of complete legal protection. See the attached analysis by Dr. Francis J. Beckwith (Ph.D., philosophy, Fordham University; currently a lecturer in philosophy at the University of Nevada), who convincingly dismantles attempts by pro-choice advocates to reconcile abortion with Scripture.

4. Outlawing "partial-birth abortions" is not impermissibly imposing personal morality on others. We would not allow a segment of the population to kill members of a minority group because they consider them "subhuman." Similarly, we should not allow some to terminate the lives of these babies because of their belief that they are less than human, when the evidence strongly supports the conclusion that they are human beings deserving complete legal protection.

5. We should have sympathy for women who carry gravely deformed children, as is the case in some instances in which this procedure is used. These babies would have died a natural death if allowed, and sometimes there are medical grounds for early delivery. But even a brief life can contribute positively to others. For example, a couple in our church decided against abortion and instead gave birth to a son named Joshua, who was born with the absence of the brain cortex, resulting in total retardation. The couple wrote this: "As time went by, as a family, our faith began to grow. And we loved our son Joshua so much that the handicap didn't matter anymore. God taught us to give love rather than just receive it, and there was a great peace within us. Joshua went to be with the Lord at age 21 months. The beautiful experience of his life impacted not just our family, but our community and acquaintances as well."

6. Permitting something as grotesque as partial birth abortions is a form of extremism. "Those who defend it reflexively because it may lead to other legislation are in the exact position of gun lobbyists who shoot down bans on assault weapons because those bans may one day lead to a roundup of everybody's handguns. They refuse, on tactical grounds, to confront the moral issue involved." -- John Leo, *U.S. News & World Report.*

II. Signing the bill is medically appropriate.

1. Even doctors who routinely perform late abortions say the partial-birth abortion technique is unneeded and unnecessary. Dr. Warren Hern, author of the standard textbook *Abortion Practice*, said: "I have very serious reservations about this procedure . . . You really can't defend it. . . . I would dispute any statement that this is the safest procedure to use."

Dr. Nancy G. Romer, Assistant Clinical Professor of Obstetrics and Gynecology at Wright State University School of Medicine, told the Senate Judiciary Committee: "If this procedure were absolutely necessary, then I would ask you why does no one that I work with do it? We have two high-risk obstetricians, a medical department of about 40 obstetricians, and nobody does it. And we care for and do second trimester abortions."

2. Partial-birth abortions can present special risks to the mother. Dr. Pamela Smith, Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital, told the Senate Judiciary Committee: "You should have grave concerns about the health of the mother if you're going to do a delivery like this in the office." She said this procedure, because it takes three days to complete, can heighten emotional harm to the mother. She also testified that "the damage that could possibly be done to the bottom of a woman's womb by doing this procedure should not be underestimated or glossed over."

3. The law *does* permit partial-birth abortions in the unlikely case that it would be necessary to save the life of the mother. But as Dr. Pamela Smith, Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital, noted: "There is absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life of the mother." Even so, Rep. Charles T. Canady (R-Fla.), who introduced the House legislation, said: "No physician is going to be prosecuted and convicted under this law if he or she reasonably believes the procedure is necessary to save the life of the mother."

III. Signing the bill is Constitutionally defensible.

1. The official report of the House Judiciary Committee makes the argument that the partial-birth abortion ban could be upheld by the Supreme Court without overturning *Roe v. Wade*. The Supreme Court's current doctrine suggests that a human being becomes a legal "person" upon emerging from the mother; the Court has not dealt with the question of a human being who is two-thirds across the line of "personhood." So the Court could retain its *Roe v. Wade* doctrine while at the same time declaring that partial-birth abortions are not Constitutionally protected.

2. David M. Smolin, Professor of Law at Cumberland Law School at Samford University, testified before the House Judiciary Committee that the banning of partial-birth abortions would be Constitutional for several reasons. These are set forth in the attached brief, which I urge you to read.

Note Professor Smolin's assertion that the partial-birth abortion ban can be upheld as Constitutional despite the *Planned Parenthood of Missouri v. Danforth* decision: ". . . It is clear that a prohibition of partial-birth abortions would leave in place the currently standard and dominant methods of abortion during the second half of pregnancy. Thus, the current [proposed] law cannot be viewed, as was the law in *Danforth*, as having the purpose or effect of inhibiting the majority of abortions during a certain

period. *The proposed ban on partial-birth abortions is a true regulation, and not in any way a prohibition of abortion.*" (emphasis added)

There are other Constitutional Law scholars, including Professor Douglas W. Kmiec of the University of Notre Dame, who concur that this law can pass Constitutional scrutiny. (See attached brief)

3. U.S. District Court Judge Walter Rice in Ohio recently struck down an Ohio law banning partial-birth abortions. However, this state law is fundamentally different from the proposed federal legislation, and its definition of the relevant abortion procedure is much more inclusive and vague. Thus, the Ohio decision is basically irrelevant to the federal issue.

Conclusion

At its core, this is a moral and ethical issue. Even those who believe in the legality of abortion should recoil at the violent ugliness of this procedure. And anyone who opposes this legislation must live with this description by Brenda Pratt Shafer, a registered nurse who assisted in three of these abortions -- two performed on normal babies and one on an infant with Down's syndrome. In testimony before the House Judiciary Committee, she recalled the first procedure, a partial-birth abortion of a baby boy at 26 1/2 weeks (or about 6 months):

"[The doctor] 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 clasping and unclasping, 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."

"The radical, violent, inhumane nature of this procedure demands prompt enactment of this legislation." -- Constitutional Law scholar Douglas W. Kmiec.

TESTIMONY OF DAVID M. SMOLIN, PROFESSOR OF LAW,
CUMBERLAND LAW SCHOOL, SAMFORD UNIVERSITY
BEFORE THE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON THE CONSTITUTION,
UNITED STATES HOUSE OF REPRESENTATIVES
CONCERNING CONSTITUTIONALITY OF PROHIBITING
PARTIAL-BIRTH ABORTIONS

June 15, 1995

Mr. Chairman and members of the Committee, I am honored to have been invited to testify regarding the proposed prohibition of partial-birth abortions. The following testimony represents my own views as a law professor, teaching and writing in the area of constitutional law, and is not intended to represent the views of my employer, Cumberland Law School of Samford University.

My testimony will concentrate on two constitutional questions: First, is the prohibition of this abortion method constitutional under Planned Parenthood v. Casey and other binding precedent?; and second, does Congress possess the authority, under the Commerce Clause of the Constitution, to enact this law?

I. CONSTITUTIONALITY OF PROHIBITING PARTIAL-BIRTH ABORTIONS UNDER PLANNED PARENTHOOD V. CASEY AND OTHER BINDING PRECEDENTS

My conclusion is that a prohibition of partial-birth abortions, such as the one proposed by Chairman Canady, is constitutional under current United States Supreme Court precedent, including in particular Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992).

The proposed prohibition of this particular method of abortion constitutes, in constitutional terms, a regulation of abortion. The proposed law would merely alter the manner in which a minority of the small minority of abortions occurring in the second half of pregnancy are performed. See, e.g., Centers for Disease Control, Abortion Surveillance--United States, 1990, 42 Morbidity and Mortality Weekly Report 29, 31 (December 17, 1993)(approximately one percent of abortions performed at or after 21 weeks; four percent performed at 16 to 20 weeks); see Martin Haskell, Second Trimester D & X, 20 Weeks and Beyond, Presentation to National Abortion Federation (Sept. 13, 1992)(partial-abortion method designed for abortions at twenty weeks and beyond). Thus, the law would potentially alter the method of abortion used in less than twenty thousand abortions per year, out of the more than 1.5 million annual abortions; as a practical matter, given current preferences for other methods, the law would probably have some influence in the choice of method in less than five thousand abortions annually. Thus, although the proposed law is in statutory terms a prohibition of certain conduct, in constitutional terms it is a regulation of abortion.

This conclusion is supported by a comparison of the proposed law with the Supreme Court's 1976 invalidation of a ban on saline abortions after twelve weeks; in Planned Parenthood of Missouri v.

Danforth, 428 U.S. 52, 75-79. The Supreme Court concluded in Danforth that 68% to 80% of all post-first-trimester abortions employed the saline method. 428 U.S. at 77. Thus, the ban in Danforth prohibited the dominant abortion method for this period of pregnancy. Further, the primary alternative method relied on by Missouri, that of prostaglandin instillation, was at that time a new method, and was not proven to be available in Missouri; further, the Court interpreted the saline abortion prohibition as possibly also prohibiting prostaglandin abortions, as well as potentially safe future methods. Id. at 77-78. Thus, the Court concluded that the post-twelve week saline abortion prohibition "was designed to inhibit, and ha[d] the effect of inhibiting, the vast majority of abortions after the first 12 weeks." Id. at 79. Under these circumstances, the Missouri law was held unconstitutional.

By contrast, Dr. Martin Haskell's September 13, 1992 presentation to the National Abortion Federation introduced partial-birth abortions as a new alternative to the standard techniques employed in post nineteen week abortions. Dr. Haskell's paper notes that current methods at this stage include induction methods, classic D & E abortion, and two modified methods of D & E abortion; Dr. Haskell specifically states that "most late second trimester abortions are performed by an induction method." Martin Haskell, supra, at 28. Further, Dr. Warren Hern, author of the much-cited text, Abortion Practice, has clearly outlined a modified D & E procedure, employing "adjunctive urea amnioinfusion," as an effective method for these late term abortions. See Warren Hern, Abortion Practice 127, 144-46 (1990)(cited in Martin Haskell, supra, at 28). Thus, it is clear that a prohibition of partial-birth abortions would leave in place the currently standard and dominant methods of abortion during the second half of pregnancy. Thus, the current law cannot be viewed, as was the law in Danforth, as having the purpose or effect of inhibiting the majority of abortions during a certain period. The proposed ban on partial-birth abortions is a true regulation, and not in any way a prohibition, of abortion.

The present proscription appears constitutional even under the standards applied by Justice Blackmun in Danforth; it is even clearer that the law is constitutional under the less stringent constitutional standards decreed in Casey. Danforth applied Roe's trimester approach, which forbade any regulation of second-trimester abortion in the interests of the fetus. See Danforth, 428 U.S. at 61 (citing Roe v. Wade, 410 U.S. 113 (1973)). Casey, by contrast, overruled Roe's trimester system, and held that it was permissible to regulate abortion throughout pregnancy in the interests of the fetus, or unborn child, so long as any previability regulations did not constitute an "undue burden" on the abortion liberty. See 112 S.Ct. at 2818-20 (joint opinion); see, e.g., Planned Parenthood v. Casey, 114 S.Ct. 909, 910 fn 2 (1994)(Souter, J.)(joint opinion sets constitutional standard under Marks v. United States, 430 U.S. 188 (1977)). Thus, the prohibition on partial-birth abortions could be constitutional even

if such prohibition did not specifically serve the interests of maternal health.

The proposed prohibition on its face applies throughout pregnancy; however, Dr. Haskell claims to have developed the method for use at twenty weeks and beyond, and has noted that a colleague uses "a conceptually similar technique" "up to 32 weeks or more." Martin Haskell, supra, at 27-28, 33. Thus, the method apparently is only applicable to the period shortly before, and the period after, viability. Constitutional analysis of the prohibition under Casey therefore requires a bifurcated approach.

Under Planned Parenthood v. Casey, previability regulations of abortions are constitutional so long as they do not constitute an undue burden on the abortion liberty. See 112 S.Ct. at 2819-21. The essence of the undue burden test is the question of whether the law, on its face, places a "substantial obstacle" on the woman's liberty that effectively deprives her of the right to make the "ultimate decision" of whether or not to abort. See id. Given the existence of several standard abortion techniques for previability abortions, other than partial-birth abortions, it is clear that this prohibition would not constitute an undue burden. There is no indication in the case law that women possess a constitutional right to demand that the fetus they carry be killed in the birth canal. If women lack such a constitutional right to demand that the unborn child they carry be killed in the birth canal, then physicians lack any corollary right to kill fetuses in the birth canal. The abortion liberty exists for the woman, and physicians are constitutionally protected from regulation only to the degree necessary to protect the constitutional liberties of the woman.

The primary application of this regulation of abortion to the second half of pregnancy further suggests a lenient constitutional standard of review. The Supreme Court in Webster v. Reproductive Health Serv., 492 U.S. 490, 513-20 (1989), upheld a viability testing requirement at twenty weeks, based on the common tendency to miscalculate gestational age by as much as four weeks; Justice O'Connor's concurring opinion stressed the permissibility of a presumption of viability at twenty weeks, and the permissibility of regulating abortion during the period when "viability is possible." See 492 U.S. at 525-31. It appears that regulations of abortion operating at the periphery of viability (which can occur as early as 23 to 24 weeks according to Casey, 112 S.Ct. at 2811,) benefit in some ways from the more lenient standards applicable to postviability abortions.

Further, it should be underscored that any claims that partial-birth abortions are superior to the standard existing techniques must be evaluated separately for previability, and postviability, abortions. The undue burden standard is only relevant to previability abortions; after viability, the state may actually proscribe some abortions. See Casey, 112 S.Ct. at 2816-17, 2821. Thus, for example, Dr. Haskell's concern regarding the "toughness of fetal tissues" at "twenty weeks and beyond," making dismemberment (and hence classic D & E abortion) difficult, at some

point becomes less significant, for within several weeks the toughening fetal tissues comprises a viable fetus, or, as the Casey joint opinion described it, an " independent ... second life," or "developing child." 112 S.Ct. at 2817. To gain the burden of the undue burden standard, a physician would have to demonstrate that there was no medically-viable alternative method of abortion, during this short period from twenty weeks to viability at twenty-three to twenty-four weeks. Yet, even Dr. Haskell's paper documents the alternatives of induction methods, and of Dr. Hern's technique for softening the fetal tissues prior to D & E abortion.

Upon viability, the state can proscribe some abortions, because "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." Casey, 112 S.Ct. at 2817; see also Roe v. Wade, 410 U.S. 113, 163-64 (1973). The proposed ban on partial-birth abortions is merely a regulation of abortion, and therefore is, in its application to the abortion of viable fetuses, well within constitutional limits. The Supreme Court has never given women the right to demand that the viable "developing child," Casey, 112 S.Ct. at 2817, be killed in the birth canal.

Both before and after viability, the statute would, in the broad sense, be subject to lenient rational basis review, which would require that the prohibition of partial-birth abortions be rationally related to some legitimate governmental interest. This is the same lenient review applied in the modern era to economic regulatory review, and laws are almost always found constitutional under this standard of review. Public morality, for example, is a legitimate governmental interest. Thus, a sense of particular moral outrage at partial-birth abortions would be a sufficient reason to sustain the law. The spectre of partially delivering a fetus, and then suctioning her brains, may mix the physician's disparate roles at childbirth and abortion in such a way as to particularly shock the conscience. In childbirth the physician considers the fetus her "second patient," and thus works to guard and protect the life and health of the fetus; by contrast in abortion the physician often acts directly to kill the fetus as a part of the abortion procedure. Proscribing a procedure that seems, even momentarily, to evoke simultaneously these disparate roles is itself a "legitimate governmental purpose."

Further legitimate purposes for the law would include protecting respect for human life, and for constitutional persons, by not permitting a fetus present in the birth canal to be deliberately assaulted and killed. The birth canal represents, in constitutional terms, the passage from constitutional non-personhood to recognition and protection as a constitutional person; even a viable fetus is not a constitutional person within the womb, while even a nonviable fetus aborted or born alive apparently is a constitutional person upon birth, particularly if the fetus is of substantial size and development. See, e.g., Showery v. State, 690 S.W.2d 689 (Tex.App. 8 Dist. 1985) (upholding murder conviction when physician, subsequent to abortion, killed infant; noting that viability is irrelevant upon birth). A

physician deliberately killing a fetus whom the physician has moved partway on the journey from nonpersonhood to personhood, and who is physically literally on the verge of constitutional personhood, undermines respect for human life and for constitutional personhood, because such a fetus appears indistinguishable from a constitutional person. Requiring that the fetus be killed within the womb, rather than within the birth canal, in a small way widens the line between permissible and impermissible conduct. It undermines respect for constitutional persons, and for human life, to deliberately bring a fetus within proximity of constitutional personhood, and then, as such fetus lies literally within inches of constitutional personhood, assault and kill her.

It is possible that at least some of the fetuses killed by partial-birth abortions are constitutional persons. The Supreme Court in Roe v. Wade held that "the world 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. The Court, however, has never addressed the constitutional status of those who are "partially born." Indeed, in Roe the Court noted that the following Texas statute had not been constitutionally challenged:

> Art. 1195. Destroying unborn child.
>
> Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

410 U.S. at 118 n. 1.

"Parturition" means "the act or process of giving birth to offspring," Webster's Seventh New Collegiate Dictionary 615 (1967). Typical legal definitions of "live birth" require complete expulsion or extraction, whether or not the umbilical cord has been cut or the placenta is attached; the neonate must, after such expulsion, evidence signs of life such as breathing, heartbeat, pulse, or voluntary movement. Significantly, "duration of pregnancy" (and hence viability) are explicitly stated as irrelevant to the definition of live birth. See, e.g., Ill. Rev. Stat., ch. 111 1/2 para. 73-1(5); Fla. Stat. Ann. §382.002(10).

It seems reasonable to suppose that an infant who has been only partially extracted from the mother, and hence not yet legally born, might be considered a constitutional person, even though (for example) only the head and shoulders have been extracted from the mother. It would certainly seem wrong to remove all legal protection from such a partially-born neonate, and thereby subject her to being killed, assaulted, or the subject of medical experimentation, upon the direction of another. In the same way, it would not be unreasonable to find that a fetus delivered into the birth canal has already become a constitutional person. A fetus delivered into the birth canal has commenced the journey toward legal personhood and hence legal protection; indeed, where such a fetus is or may be viable, she or he is literally inches

away from maintaining a sustainable, developing, independent life completely apart from her mother. It seems odd to demand that such a journey be completed before legal recognition and protection are assumed.

However, it is important to underscore that the partial-birth abortion prohibition is fully constitutional, under current standards, even if the Court were to hold that all of the fetuses protected were NOT constitutional persons. Even if the infant in the birth canal (or partially extracted from the mother) is NOT a constitutional person, the government nonetheless may be concerned with her fate, and with the wider implications of permitting killing within the birth canal or during the process of birth. The decision of abortion rights litigants not to challenge the Texas prohibition of killing the unborn during the process of birth suggests a broad agreement that there is no constitutional right to kill during the process of birth; the proposed prohibition on partial-birth abortion extends this reasoning only slightly, by preventing physicians from delivering the unborn into the birth canal, and then killing them.

Indeed, one notable feature of the proposed legislation is that it is supportable by a variety of legitimate state interests, which in turn reflect a variety of views of the status of the fetus. Animal cruelty laws can regulate the manner in which cattle and other sources of meat are cared for and slaughtered; thus, one who believes the human fetus to be morally equivalent to a cow, pig, or other animal source of food could rely on the legitimate governmental purpose in not unnecessarily subjecting living creatures to pain, cruelty, or indignity, even in the process of killing them. In addition, the proposed ban is rationally related to the legitimate government purpose of protecting the value of constitutional persons by drawing a clearer and broader line between abortion and childbirth, and between the fetus in the womb and the neonate outside of the mother. Those concerned with the integrity of the medical profession could support the statute because it lessens the confusion between the roles of physician in abortion and in childbirth, and hence alleviates the fear, moral outrage, and potential moral degradation that occurs by mixing these roles. By contrast, those who consider the human fetus to be a form of human life could rely on the purpose of providing a modicum of protection for human life, by proscribing a particularly cruel and/or painful form of killing, or by granting some protection to the developing human within the birth canal. (Under Casey and Webster government may legislate in the interests of the fetus, and based on the view that the fetus is human life, so long as the law does not substantively violate the abortion right. See Casey, 112 S.Ct. at 2817-25; Webster, 492 U.S. at 504-07.) Finally, those who believe that at least some of these procedures may involve the killing of a constitutional person, would also possess a legitimate purpose for the law, although this latter purpose should, to assure constitutionality, be supplemented by at least one of the other clearly legitimate purposes.

Under rationality review, the Courts would not be free to

undermine the constitutionality of the law because it did not proscribe other seemingly "shocking," painful, or cruel abortion techniques, such as the dismemberment of the fetus in D & E abortion. Under rationality review, the legislature is free to address a portion of a problem, while leaving other parts of the problem unaddressed. In addition, there are rational reasons for distinguishing between partial-birth abortion, and other forms of abortion. Methods of abortion that kill the fetus within the womb do not present the same degree of confusion created by mixing the roles of the physician and abortionist within the same procedure; nor do they present the same degree of confusion present by a killing of the fetus who is physically partially born, and present within the birth canal. Similarly, the dismemberment of the fetus within the womb, however morally shocking to some, does not, to the same degree, blur the line between fetus and neonate, as does the killing of the fetus in the birth canal. Moreover, it appears clear that the banning of the previously-existing, standard methods of abortion would, under Danforth and Casey, present a closer constitutional question. Thus, it makes constitutional sense to proscribe the most recent, and most shocking, method of abortion.

II. CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

Congress possesses ample authority under the Commerce Clause of the Constitution, U.S. Const., Art. I, § 8, cl. 3, to enact the proposed prohibition of partial-birth abortions.

As a starting point, the testimony of the Attorney General, regarding the then-proposed Freedom of Access to Clinic Entrances Act, is useful:

> The provision of abortions services is commerce. The entities that provide these services, including clinics, physician's offices, and hospitals, purchase or lease facilities, purchase and sell equipment, goods, and services, employ people, and generate income. Not only do their activities have an effect on interstate commerce, but they engage directly in interstate commerce. It should be easy to document that they purchase medicine, medical supplies, surgical instruments, and other supplies produced in other States.
>
> Moreover, it is well-established that many serve significant numbers of patients from other States. For example, in Bray v. Alexandria Women's Health Clinic, 113 S.Ct. at 762, the Supreme Court accepted the district court's finding that substantial numbers of patients at abortion clinics in the Washington, D.C., area traveled interstate to obtain the services of the clinics. In Wichita, KS, the Federal district court found that some 44 percent of the patients at one clinic came from out of State. See New York State NOW v. Terry, 886 F.2d at 1360 (many women travel from out-of-State to New York clinics). Thus, there can be little doubt that abortion providers are engaged in interstate

> commerce and Congress should not have difficulty developing a legislative record allowing it to make such a finding.

Prepared Statement of Attorney General Janet Reno, Hearing Before the Committee on Labor and Human Resources, United States Senate, 103rd Congr., 1st Sess., on the Freedom of Access to Clinic Entrances Act of 1993, May 12, 1993, at 16.

The relatively few number of abortion providers who perform partial-birth abortions appear particularly likely to be involved in serving out-of-state patients, given the relatively specialized nature of the services they provide. Some providers of abortion services do not perform abortions in the second half of pregnancy, during the period for which partial-birth abortions were designed; thus, those abortion providers who provide late term abortions are even more likely to receive referrals, and patients, from outside of their immediate geographical area.

The Supreme Court's recent decision in United States v. Lopez, 115 S.Ct. 1624 (1995), does not alter the conclusion that Congress possesses the authority to enact the proposed ban on partial-birth abortions. Lopez concerned the proscription of a noncommercial activity: the possession of a firearm in a school zone. The United States argued unsuccessfully that this noncommercial activity substantially affected interstate commerce because of its negative impact upon education. 115 S.Ct. at 1632. The Court rejected the dissent's view that schools (including public schools) are commercial. 115 S.Ct. at 1633. The Court also noted the lack of any "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 115 S.Ct. at 1631.

Lopez does not present any reason to question the Attorney General's conclusion that "[t]he provision of abortion services is commerce," see supra, at least where payment is received, from some source, for the services. Abortion services would generally be classed within the broader category of medical and health care services, for purposes of commerce clause analysis. Health care constitutes, as the Congress well knows, a large and significant portion of the national economy, and it would seem absurd to hold that an industry comprising one-seventh of the national economy could not be regulated under the commerce clause.

The regulation of abortion services is therefore a regulation of commerce, and this alone sufficiently distinguishes the proposed ban from Lopez, which concerned an attempted regulation of noncommercial activity. The proposed statute, moreover, limits its reach to "[w]hoever, in or affecting interstate or foreign commerce," performs a partial-birth abortion, and thus the statute contains the individualized jurisdictional requirement lacking in Lopez. Such an individualized determination is probably unnecessary to safeguard the constitutionality of the statute, but its existence further brings the statute well within the ambit of Congressional authority, even after Lopez.

TESTIMONY OF DOUGLAS W. KMIEC
PROFESSOR OF CONSTITUTIONAL LAW
UNIVERSITY OF NOTRE DAME
BEFORE THE SENATE JUDICIARY COMMITTEE
NOVEMBER 17, 1995
Re: S.939
THE PARTIAL-BIRTH ABORTION BAN ACT OF 1995

Mr. Chairman, members of the committee, I am pleased to respond to the committee's request to address the constitutionality of S.939, "The Partial-birth Abortion Ban Act of 1995." I have taught constitutional law for close to two decades and serve as professor of constitutional law at the University of Notre Dame. On academic leave this year, I presently hold the Straus Distinguished Chair in Law at Pepperdine University in California. During the Reagan Administration, I served as Assistant Attorney General for the Office of Legal Counsel in the U.S. Justice Department.

I. Are There Constitutional Concerns?

My task this morning is to address various concerns that have been raised by the Clinton Administration, individuals within the Department of Justice, and a few others, regarding the legality of this legislation. These concerns are styled as constitutional, but in truth, they are not. Those wanting to perpetuate a practice that, in some states is already expressly treated as homicide, and except for a few inches, would be classified as infanticide under the laws of all states will have to do so without the conscience-easing pretense of constitutional justification. As I explain below, the Constitution can no more shield the killing of a partially-born child, than it can excuse the criminally negligent actions of a careless doctor that results in the avoidable death of a pregnant woman. Abortion practice is not "presumptively privileged." Punishing doctors for killing partially-born children no more "chills" a constitutional right than punishing doctors for a botched abortion. [Such "privilege" claim was explicitly rejected in Ketchum v. Ward, 422 F. Supp. at 938; see also, Roe, noting that "[i]f an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." 410 U.S. at 166 (1973)].

II. A Radical Procedure Beyond Civilized Description

When I was contacted by the committee late last week to testify, I confess I was surprised by the committee's decision to hold hearings, given both the thorough review this legislation received in the House of Representatives, and especially given the impardonable practice aimed at defenseless human beings. The radical, violent, inhumane nature of the procedure demands prompt enactment of this legislation. I have made my own views against

abortion well known throughout my career. But, as noted above, the hideous nature of this practice transcends the issue of abortion. It is one of those rare places where people on both sides of the abortion debate should agree: no civilized republic can permit a gruesome procedure in which, as one nurse described, the doctor pulls the moving body of the baby into the birth canal;

> "his little fingers were clasping together. He was kicking his feet. All the while his little head was still stuck inside. [The doctor takes] a pair of scissors and insert[s] them into the back of the baby's head. Then he opened the scissors up. Then he stuck the high-powered suction tube into the hole and sucked the baby's brains out." [Majority Report, Hearings on H. 1833, House Judiciary Committee, September 27, 1995, citing the testimony of Nurse Shafer at 3-4].

III. Killing A Partially-Born Child Is Homicide, Not Abortion

As Nurse Shafer's candid summary of her experience reveals, the subject of this bill defies humane description. The practice proposed to be outlawed has been denominated an abortion procedure, though as I will show, it actually falls between infanticide or homicide on the one hand and abortion on the other. In any event, whatever label it is given, its gruesome nature suggests it ought to be treated like one of those crimes, as Blackstone wrote, that is so heinous, it deserves no name. As far back as the 13th century, the common law classified the abortion of a "formed and animated" fetus as homicide. [See H. De Bracton (c. 1250), On the Laws and Customs of England 341 (S. Thorne ed. 1968); for a compilation of these common law sources, see Linton, "Planned Parenthood v. Casey in the Supreme Court," 13 St. Louis Pub. L. Rev. 15, Appendix A (1993)].

Yet, with the exception of one recently enacted state law, [Ohio Stat. Section 2307.51, effective November 15, 1995, tro granted awaiting judicial review on the merits, outlawing on terms similar, but not identical, to that of this legislation, the "dilation and extraction procedure"] the fate of an alive, partially-born child has escaped the attention of the modern law.

IV. Partially-Born Children Reside In A Legal Twilight Zone Between Children Born Alive and Unborn Children

The lives of partially-born children are at risk when they reside in a constitutional twilight zone between full constitutional recognition and incomplete recognition as part of the complex intellectual balancing of the Supreme Court's abortion doctrine. The risk that this class of partially-born children faces is fully manifested by the procedure sought to be banned by this legislation -- the deliberate manipulation of the child into, and partly out of, the birth canal to die a painful and gruesome death by means of jamming a pair of scissors into the back of the

child's skull and siphoning out the brain.

Partially-born children are neither fully born, and therefore protected by the homicide and infanticide statutes in every state as a child "born alive" [(that is, a child whether or not viable who is completely expelled or extracted from its mother, whether or not the umbilical cord is cut, and who shows evidence of life, see State Modal Vital Statistics Act, Section 1(6), Vol. 38, p.121, Council of State Governments, adopted by the Department of Health and Human Services and most states; see, e.g., Ill. Rev. Stat., ch. 111 1/2, para 73-1(5)], nor an unborn child whose interests are acknowledged and governed, at least in the abortion context, by the Court's decision in Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) [outside the abortion context the deliberate taking of an unborn child's life may be punished in one-third of the states as feticide or a form of homicide. Linton, supra., citing statutes at 60]. These partially-born children are thus largely invisible to the modern law. But they are not invisible to life. They are living human beings.

V. The Existing Legal Protection of Partially-Born Children

Today, several states in statute or case decision recognized that a child in the process of being born has to fall somewhere under the law -- either as legal person or not. In these states, the choice was made to put these partially-born children largely within the category of legal person, subject only to those medical actions necessary to save the life of the mother. Thus, one criminal law treatise writes:

> "A more advanced view, . . ., based upon practical considerations rather than the literal meaning of the phrase is that after the actual start of the birth process by a viable child it is to be regarded as having been born alive for the purpose of the law of homicide. This draws the line between stillborn and born alive, limiting the former to those instances in which the fetus is dead before birth starts. Where such is not the fact, . . ., the killing of a viable child shall have the same consequences whether it is during the birth process or after its completion." Perkins on Criminal Law at 30 (2d ed. 1969).

In conformity with this view, since the 19th century, Texas has regulated the taking of a child's life during "parturition," or the act or process of giving birth to offspring. The Texas statute, which was recently re-codified in 1993, provides:

> "Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years." [Vernon's Ann.Texas Civ.St.

Art. 4512.5 (West 1995)].

The Texas Attorney General has opined that this statute is unaffected by the Supreme Court's abortion decisions since, unlike an abortion, the statute applies only to those situations in which the victim is in the process of being born. [Op. Atty. Gen. 1974, N. H-368]. For the same reason, the Texas courts' early recognition of the validity of the statute is undisturbed by developments in the abortion area. [Hardin v. State, 106 S.W. 353 (1908) (a charge brought under this statute differs from infanticide where the child must be born alive; here, the child merely would have been born alive, but for the action of the accused); see also, State v. Rupa, 41 Texas 33 (1874).]

The U.S. Supreme Court has averted to the constitutional difference between a partially-born child and an unborn child. In Roe v. Wade, the Court expressly noted that the previous codification of the above Texas statute making it a crime punishable by a sentence of up to life in prison to "destroy the vitality or life in a child in a state of being born" was not challenged. [410 U.S. at 118 n.1]. Arguably, the U.S. Supreme Court's notation is best explained by a decision of the California Court of Appeals, People v. Chavez, 77 Cal. App. 2d 621 (1947), in which a mother being tried for the murder/manslaughter of her baby argued unsuccessfully that the homicide statute could not be applied to a child in the process of being born alive. Rejecting the mother's argument, the court stated:

> "Beyond question, it is a difficult thing to draw a line and lay down a fixed general rule as to the precise time at which an unborn infant, or one in the process of being born, becomes a human being in the technical sense. There is not much change in the child itself between the moment before and a moment after its expulsion from the body of the mother. . . .It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby . . . . .[The question should not depend] on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed." [Id. at 625-626].

The Supreme Court of California later adhered to the reasoning in Chavez, commenting that "a viable fetus 'in the process of being born is a human being within the meaning of the homicide statutes.'" Keeler v. Superior Court, 2 Cal. 3d 619 (1970).

It is uniformly conceded that the partially-born child is alive when the child is yanked into the birth canal. For example, as Dr. Dru Carlson, director of Reproductive Genetics at Cedar-

Sinai Medical Center in Los Angeles and an opponent of the legislation, observed: it is the removal of the fluid from the brain that causes "instant brain herniation and death." [Majority Report, supra, at 7]. So too, Dr. Pamela Smith indicated that prior to the time the scissors are smashed into the child's skull, there is no real difference between a breech delivery [feet first] and the partial-birth abortion procedure. [Transcript of the House Subcommittee on the Constitution Hearing, June 15, 1995 at 34].

Dr. Smith also points out that an abortionist has to work hard to keep the child's head trapped in the cervix, because: "if by chance the cervix is floppy or loose and the head slips through, the surgeon will encounter the dreadful complication of delivering a live baby. The surgeon must therefore act quickly to ensure that the baby does not manage to move the inches that are legally required to transform its status from one of an abortus to that of a living human child." [Id. at 35]. The procedure is made even more cruel by the fact that doctors spiking the brain with scissors are not trained brain surgeons; they are not using a surgeon's instrumentation; and therefore, they are aggravating the already excruciating pain felt by the partially-born child. [House Hearing Transcript, Testimony of Dr. Robert J. White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine, supra, at 51-53].

VI. U.S. Supreme Court Dicta Concerning Post-Viability Abortion Does Not Negate the Separate Legal Status of a Partially-Born Child

That the alive, partially-born child has a different status under the law than the unborn child is buttressed by several further facts. First, the Court's contemplation of post-viability abortions in Casey is dicta and occurs without extended discussion. [112 S.Ct. at 2821]. Contemplating post-viability abortions is at odds with the very definition of abortion. As a CRS Report recites, Dorland's Medical Dictionary defines abortion as the premature expulsion . . . of a nonviable fetus." [Irene E. Stith-Coleman, Specialist in Life Sciences, "Abortion Procedures," CRS Report for Congress, November 7, 1995, at 1, citing Dorland's Illustrated Medical Dictionary, W. B. Saunders Co., (Philadelphia, etc., 1994) at 4 (emphasis supplied)]. Accord, Illustrated Stedman's Medical Dictionary, Fifth Unabridged Lawyers' Edition, Jefferson Law Book Company, (Washington, D.C., 1982), at 3, "abortion -- [g]iving birth to an embryo or fetus prior to the stage of viability at about 20 weeks of gestation" (emphasis supplied); Taber's Cyclopedic Medical Dictionary, 15th Edition, F.A. Davis Company, (Philadelphia, 1985), at 6, "abortion, [t]he termination of pregnancy before the fetus reaches the age of viability, . . ." (emphasis supplied). Thus, the Court in Casey seems to have erroneously assumed that medical science sees a pregnancy termination after viability as an abortion, rather than the taking of human life.

Of course, the law is free to re-define the reality of personhood as it chooses, see Dred Scott v. Sanford, 60 U.S. 393 (1856), but when it does so without extended discussion, there is reason to construe such unnatural mis-adventures narrowly. This is especially true when the more expansive definition contradicts other, long-established common law traditions. In this regard, "[t]he overwhelming majority of jurisdictions (thirty-six States and the District of Columbia) now allow recovery under wrongful death statutes for prenatal injuries that result in stillbirth where the injury causing death (or at least the death itself) occurs after viability." [Linton, supra, citing cases]. Of perhaps even greater significance, "more than one-third of the States have defined by statute the killing of an unborn child (outside the context of abortion) as a form of homicide (or feticide), and nearly half of these statutes make it a crime to take the life of an unborn child at any stage of pregnancy." [Id. at 60, citing statutes]. All such laws have withstood recent constitutional scrutiny. [Id., citing cases].

VII. The Debate Over Reproductive Choice Does Not Determine The Legal Status of a Partially-Born Child

No responsible voice in defense of human life, whether for or against the ideas packed within the concept of reproductive choice, can defend this type of deliberate killing of a partially-born child. [One advocate of legal abortion in a standard medical text put it this way: "I would argue that women must have access to legal abortion . . . . However, our society will not countenance infanticide." Obstetrics and Gynecology, Lipincott, at 1327.] It is simply the age-old distinction between freedom and license. An informed freedom of choice regarding abortion surely does not include slashing open the skull of a half-born child any more than the allowance of reasonable surgical procedures frees a doctor from liability for homicide if he or she acts with criminal negligence and exercises the medical craft -- including the medical craft of abortion -- badly. [See Ketchum v. Ward, 422 F. Supp. 934 (W.D. N.Y. 1976), affirmed 556 F.2d 557 (2d Cir 1977), finding abortionist criminally liable for negligent homicide).

Because it addresses intentional conduct, the ban on the practice described in this legislation stands on even firmer ground than negligent homicide convictions that result from the negligent death of the mother. Compare, for example, the recent New York murder conviction of Dr. David Benjamin for a late-term abortion that resulted in the death of Guadalupe Negron. [New York Times, section A, page 1, col. 5, August 9, 1995]. If criminal laws can punish doctors who show a depraved indifference to a woman's life, there is every reason to punish a doctor who intentionally takes the life of a partially-born child.

There is a great deal of loose talk about how the doctor-patient relationship is sacrosanct. It is indeed important, but in

no civilized society does it trump human life itself. Just as it was right for the New York District Attorney to intercede into the doctor-patient relationship between Dr. Benjamin and Mrs. Negron, it is right for Congress to intercede to outlaw an abortion practice that deliberately kills a live child already in the birth canal.

VIII. This Federal Statute is Needed To Prevent A Partially-Born Child From Falling Within A Legal Twilight Zone Between A Child Born Alive and An Unborn Child

The laws in a number of states rescue some partially-born children from the twilight zone that clouds their status as legal persons, but partially-born children in other places remain at risk. For this reason, S.939 is an imperative and prudent federal means to fill this gap. After careful consideration, the House of Representatives overwhelmingly passed the legislation that is before you to make it clear that in all but the extraordinary, and largely hypothetical, case where this gruesome procedure could be reasonably shown to be medically necessary to save a mother's life, the killing of a partially-born child would be understood, as it was and is under the laws of some states -- a form of homicide.

IX. Even if the Abortion Precedent Applies; Casey does not preclude this Legislation

As discussed above, the killing of a partially-born child is not an abortion. But even assuming one characterized this action as an abortion, the Court's abortion precedent does not preclude the Congress from banning this unspeakable practice. As I outline below, the alleged "constitutional" concerns are without merit. Given the radical and extreme nature of partial-birth homicide, no amount of lawyerly obfuscation should be allowed to delay the return of this legislation as is to the Senate floor for prompt and favorable action.

Under the Supreme Court's abortion law in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (the plurality or joint opinion of Justices O'Connor, Kennedy, and Souter arguably providing the standard for the Court), the specious concerns raised about the legislation can be grouped within the following headings: whether (1) the bill makes adequate provision for a women's health; (2) whether the bill's use of an affirmative defense improperly chills a constitutionally protected abortion claim; and (3) whether the bill is unconstitutionally vague.

A. A Woman's Health

The Justice Department argues that "the bill fails to make an adequate exception for preservation of a woman's health." The Department misapplies Casey. Casey recognizes that the government has an interest in protecting the life of the unborn child

throughout the pregnancy. To the Court, this interest grows in significance as the unborn child develops, and therefore, abortion claims are treated differently depending upon whether the claim is asserted pre- or post-viability. Prior to viability, which is not definitively established by the Court but is speculated to be between 23 and 24 weeks, the government may not place an undue burden on a women's desire to terminate her pregnancy. After viability, the government may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother . . ." [112 S.Ct. at 2821.]

1. Post-Viability

While the bill appropriately bans the partial-birth abortion method at any stage of viability, logic and the medical testimony submitted to the House reveals that the procedure is largely, if not exclusively, employed after viability. Focusing, therefore, first on the post-viability stage, Casey requires that law adequately provide accommodation for "the preservation of the life or health of the mother" whenever the government seeks to regulate or proscribe all post-viability abortion procedures. However, it is a substantial leap to infer further that the government may not ban merely one, singularly cruel and gruesome abortion procedure, as long as provision is made for an exception where the mother's life is actually threatened. To read Casey in this over-broad fashion is to lose sight of the Court's desire to more carefully calibrate what the Court sees as the competing interests of mother and unborn child, and in particular, to correct the under-recognition of the life of the unborn child in that balance. As the plurality writes: "Roe speaks with clarity in establishing not only the woman's liberty but also the State's important and legitimate interest in potential life.' That portion of [Roe] has been given too little acknowledgement . . ." [112 S.Ct. at 2817].

Casey thus modified Roe in order to acknowledge the State's interest in the life of the unborn child throughout the pregnancy. As applied to the facts in Casey, this heightened awareness of the interests of the child took the form of the Court's abandonment of the trimester analysis and the articulation of the undue burden standard which applies to pre-, but not post-, viability abortions. Even as the Court did not have the factual occasion to address it in Casey, this greater acknowledgment of the interests of the unborn child also guides the constitutional evaluation of regulations and prohibitions pertaining to late-term abortions as well. In particular, there is no reason to believe that the Court would read the post-viability health exception mechanically to require that the government must make available an abortion procedure which by design gives zero weight to the interests of the life of the unborn child.

No one drafting this bill denies the importance of protecting

the health and life of the mother. This legislation provides for both. As discussed below, despite the paucity of medical testimony demonstrating the partial-birth method to be necessary to preserve the life of the mother, the bill expressly provides for an affirmative defense that obviates criminal and civil penalties when a doctor reasonably believes the life of the mother is at stake and requires this procedure. Similarly, the bill by its focussed, targeted structure implicitly provides for the health of the mother by not banning all abortion procedures at this late stage of the pregnancy, but only the one seen as patently and inhumanely offensive. Contrary to the Justice Department and other opponents of this legislation, not every law passed affecting post-viability abortions needs a separate life and health exception. It is enough if, after the passage of the law, a mother's life or health interests can be addressed by means other than that being prohibited.

The Justice Department assessment is misled by its reliance upon pre-Casey case decision, most notably Planned Parenthood of Missouri v. Danforth 428 U.S. 52 (1976) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). The holdings in these cases have been substantially superseded by Casey. [112 S.Ct. at 2823; see also, Linton, supra at 36 detailing the differences]. Even if that were not the case, the Department reads these cases completely out of their largely pre-viability context.

As already noted, Casey, unlike Roe, authorizes regulation throughout the pregnancy in behalf of the interests of the unborn child. This was not the law applied in Danforth where the state's ban on "saline or other solution" abortions in the pre-viability second trimester had to be sustained only in light of the health interests of the mother. Now, of course, the interest of the unborn child is relevant as well. Danforth is also distinguishable because it effectively banned the most prevalent form of abortion at the time, and not, as in this legislation, an abortion practice that is employed in far less than one percent of all abortions.

Similarly, Thornburgh's invalidation of a state statute designed to have a physician employ the abortion technique that would provide the best opportunity for the unborn child to be aborted alive is both pre-Casey and far more limiting upon a doctor and patient than the legislation before the committee -- which is aimed at prohibiting the abortion technique that is the most cruel and inhumane to the unborn child. Thornburgh survives Casey to the extent that Thornburgh's holding stands for the proposition that prior to viability a woman has a right to terminate her pregnancy free of an undue burden, and that prior to viability, directing a doctor to use a particular abortion technique is likely to constitute such a burden. Thornburgh has no constitutional relavance, however, to banning a particularly hideous abortion technique that is used almost exclusively post-viability.

The claim that a woman has an unfettered choice to any abortion technique disregards the basic constitutional fact and acknowledgement of Casey that there are two lives in the balance throughout the pregnancy and especially late in the term when partial-birth abortions are performed. [112 S.Ct. at 2816]. The holding that a state cannot "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health" cannot be transmuted into the proposition that a state cannot interfere with a woman's choice to undergo a particular abortion procedure. [Id. at 2822]. Even in Roe the Court explicitly rejected the argument that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." [410 U.S. at 153].

The constitutionality of this legislation does not depend on a comparison of the relative safety of abortion procedures. That is, the Casey exception for the health of the mother is not an entitlement to a specific abortion procedure, even if it were believed marginally safer. [112 S.Ct. at 2821]. That would ignore the interests of the child acknowledged in Casey. [Id. at 2816]. In other words, the issue is whether taking into account both the mother and the child's interests, the health of the mother is capable of being preserved following the legislative ban, and not whether a particular means of abortion remains available. Justice O'Connor, a member of the Casey plurality, made this point in her Thornburgh dissent. In particular, she concluded that a state statute which mandated an abortion method most likely to save a post-viability child should not be enjoined even as it posed some additional risk to the life of the mother. [476 U.S. at 830]. Since the unborn child's interest is more clearly articulated and re-stated in Casey, it cannot be seriously argued -- as the opponents of this legislation do -- that a partial-birth abortion method must be available because for some women the method poses fewer medical risks.

Abortion partisans claim that Casey upheld the 24 hour waiting period only because the medical emergency exception was construed by the Third Circuit Court of Appeals to not pose any significant threat to the life or health of a woman. [Statement of Kathryn Kolbert, The Center for Reproductive Law & Policy, before the Constitution Subcommittee of the House Judiciary Committee, June 22, 1995 at 8]. That may be true, but again, it has no relevance to the issue at hand, since under Casey there is an elementary difference between banning all abortions -- even for a 24 hour period when the life or health of the mother may be jeopardized -- and banning one gruesome procedure that medical testimony indicates is not at all necessary to save a mother's life. [112 S.Ct. at 2825-26].

A woman is entitled to a post-viability abortion only when her life or health is threatened by a continuation of her

pregnancy. She is not entitled to a post-viability abortion without this threat. [Id. at 2821]. In the House Hearings on this legislation, Dr. Pamela Smith, Director of Medical Education at Mt. Sinai Hospital, stated that in her extensive years of professional experience in obstetrics and gynecology, she has "never encountered a case in which it would be necessary to deliberately kill the fetus in [the partial-birth] manner in order to save the life of the mother." [House Hearing Transcript at 38]. But even were we to conjure up such a life threatening case, the legislation allows for the procedure to be used without criminal or civil penalty if a doctor can reasonably demonstrate that he or she reasonably believed it was more likely than not that only a partial-birth abortion could save the life of the mother.

Even if Casey could be read as an entitlement to a specific abortion procedure, premised exclusively on the health interests of the mother, the partial-birth abortion procedure would not qualify. The partial-birth abortion technique, itself, is not necessarily safe even for the mother. As Dr. Smith relates, the claims of safety are not substantiated. [House Hearing Transcript, supra, at 35]. The data for a safety evaluation is not available, id., and even within the small sampling that exists, there is evidence of severe hemorrhaging, id., and infectious cardiac complications, id.. The Congressional Research Service similarly reveals that "[l]ittle information, if any, has been published in the medical literature on the [partial-birth] procedure . . . ." [CRS Report, supra at 6].

Under standard medical teaching, the partial-birth procedure is a variant of a breech delivery which, itself, creates maternal risks. As the well-known text used world-wide Williams Obstetrics 19th Edition (1993) comments: "[w]ith complicated breech deliveries, there are increased risks of maternal health." [Williams at 586]. The partial-birth procedure magnifies this because it is a deliberate manipulation of a favored birth presentation into a reverse and less desirable presentation. Again, Williams observes: "[m]anual manipulations within the birth canal increase the risk of maternal infection." [Id.]. What's more, it is the reverse manipulation precipitated by the partial-birth procedure that likely increases the risk of rupture of the uterus, lacerations of the cervix, or both. "Such manipulations also may lead to extensions of the episiotomy and deep perineal tears. Anesthesia sufficient to induce appreciable uterine relaxation may cause uterine atony and, in turn, postpartum hemmorrahage." [Id.] While Williams suggests a normal breech delivery may be preferable in some contexts to a Cesarean delivery, a manipulated, reverse partial-birth procedure under the logic of Williams's discussion of manipulation is not.

An abortion advocacy organization asserts that late term abortions are pursued by women with heart disease, kidney failure,

or rapidly advancing cancer. [Fact sheet prepared by Mary Campbell, M.D. of the National Abortion Federation, and cited in the CRS Report, supra, at 6]. But, in truth, these conditions along with others such as "sickle cell trait, uterine prolapse, depression and diabetes . . . [are all] . . .conditions [] frequently associated with the birth of a totally normal child." [House Hearing Transcript, Dr. Pamela Smith, supra, at 39]. In this regard, the partial-birth procedure is not designed to meet any specialized health risk of the mother. Induction methods of abortion and premature delivery of the child by Cesarean section would also alleviate these conditions. The violent procedure outlawed by this legislation is especially unsuited to dealing with emergency health risks, since it is described by one of its practitioners, Dr. Haskell, as taking three days. [Majority Report, supra at 9].

According to the American Medical Association, Encyclopedia of Medicine, Random House, (New York, 1989) at 58: "[a]fter the 15th week, it is normally considered safer to perform an abortion by causing the uterus to contract so that the fetus is expelled, as in natural labor. Contractions are induced by introducing saline solution or, more commonly, a prostaglandin hormone into the uterus." [Cf., CRS Report, supra, indicating a decline in preference for instillation methods in favor of dilation and evacuation (D & E) in the second trimester (weeks 13 to 24), apparently to avoid such side effects as diarrhea and vomiting, and the fact that sometimes the induced labor solves the mother's claimed health problem by ending the pregnancy with a "living abortus" (i.e., a child) which, in the words of the CRS Report, can be "problematic."]

Again, none of this is intended to disparage women who face health problems in the context of a pregnancy; rather, it is merely to indicate that following passage of the legislation any believed health risks can be addressed -- according to the available medical testimony and information -- by either alternative abortion procedures, or often, by delivery via Cesarean section. Therefore, as a matter of law, the Congress is under no constitutional obligation to leave the partial-birth abortion method in place or to carve an explicit health exception in the available affirmative defense. Certainly, the partial-birth abortion method need not be made available for the 80% of mothers who choose to have their partially-born child's brains brutally extracted for "purely elective" reasons. [Majority Report, House Hearings, supra, at 8, citing Dr. Haskell, one of the primary providers of partial-birth abortions].

In the House, there was testimony indicating that mothers of severely deformed children have on occasion used the partial-birth abortion method, rather than delivery or an alternative abortion method. These are truly tragic cases. Their re-telling touch every heart, as they should. But it is the judgment of the House, and I believe it should be that of the Senate as well, that a

severely deformed, partially-born child should not have his head punctured and brains suctioned out of his or her living body. The Court has never held that the severity of a child's deformity authorizes the taking of the child's life. We would never tolerate such a practice at the moment of birth. We must never tolerate such a practice at the moment of partial-birth. Because a partially-born child's deformity has nothing to do with preserving the life or health of the mother, no constitutional analysis impedes Congress' uniform proscription of a practice already outlawed in several states.

2. Pre-Viability

Under Casey at the pre-viability stage, abortion regulations are permissible so long as they do not constitute an undue burden. [112 S.Ct. at 2819]. According to the Center for Disease Control, "the most frequently used method for pregnancy termination in the first trimester is the suction dilation and curettage (D & C) technique." [CRS Report, supra, at 4, specifying this technique as that used in 97% of first trimester abortions]. From 13 to 24 weeks, the most common form of abortion is dilation and evacuation (D & E), although several types of instillation methods are also available. [Id.] None of these procedures are affected by this legislation. It is therefore untenable, if not illogical, to argue that the legislation constitutes "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." [119 S.Ct. at 2820].

It might be argued that partial-birth abortion is often used in a middle case [the near-viability stage at or about 20 weeks], and that removing the partial-birth methodology makes abortions more difficult or more expensive to procure. The argument is without weight, as near-viability is still pre-viability where the undue burden standard governs. As the Casey plurality explained: "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a women's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." [112 S. Ct. at 2819]. Congress' purpose to proscribe a gross and inhumane practice is patent and specifically aimed. The abortionists concede that alternative methods of abortion are available and unaffected. [Statement of Professor David M. Smolin, Subcommittee on the Constitution, U.S. House of Representatives, June 15, 1995, citing the paper of Dr. Haskell, at 4]. There is no undue burden pre-viability; no substantial obstacle.

3. Rational Basis

Because the legislation here does not offend the Casey

standard with regard to either pre- or post-viability abortions, the government may regulate "in ways rationally related to a legitimate state interest." 112 S.Ct. at 2818, citing Webster v. Reproductive Health Services, 492 U.S. at 518 (opinion of Rehnquist, C.J., concurring in the judgment in part and dissenting in part). This lenient standard of review is easily satisfied by the government's interest in promoting childbirth over abortion, 112 S.Ct. at 2820 (state may seek to persuade the woman to choose childbirth over abortion). Obviously, too, allowing doctors -- who are understood as healers, rather than destroyers of life -- to kill a partially-born child in a brutal manner may seriously undermine confidence in the medical profession. Thus, a partial-birth abortion ban can be justified as maintaining medical standards. Roe, 410 U.S. at 154. The House found the purpose of simply protecting human life to be sufficient ("[t]he difference between partial-birth abortion and infanticide is a mere three inches." [Majority Report, supra., at 11]. The government's rational interest in the "prevention of cruel and inhumane treatment" is equally furthered. [Id., at 12].

X. The Affirmative Defense

The Justice Department argues that: "[b]y exposing physicians to the risk of criminal sanction regardless of the circumstances under which they perform the outlawed procedure, the statute undoubtedly would have a chilling effect on physicians' willingness to perform [abortions]." [Letter from Andrew Fois, Assistant Attorney General to Senator Dole, November 7, 1995 at 2]. The argument assumes wrongly that the killing of a partially-born child falls within the abortion right. As earlier explained, it does not; it is a form of homicide under some state law, and it should be under federal law as well.

But even accepting the Department's sweeping abortion right assumption, it is noteworthy that the Department does not make its "chilling" argument in freestanding constitutional terms. That is because it is not a separate constitutional argument, but only a repetitive variation of its claim that every abortion procedure, even one which is more aligned with partial-birth homicide than abortion must be available to a woman and her doctor. For all of the reasons discussed above rejecting this specious claim, it fares no better here dressed in the language of first amendment free speech jurisprudence. The decision of Ketchum v. Ward, 422 F. Supp. 934, affirmed 556 F.2d 557 (2d Cir. 1977) (upholding the conviction of an abortionist for negligent criminal homicide) settled this long ago. When Dr. Ketchum argued that the abortion practice was presumptively privileged and that the state's criminal law could not apply to him, the court responded that:

> "the petitioner's argument that this court should apply a stricter standard of review in this allegedly privileged area cannot be accepted, for that standard is restricted for

statutes which involve first amendment freedoms and is inappropriate here." [422 F. Supp. at 939].

Casey as well does not allow anyone to conjure up a presumptive privilege to abort by any means, including means which though called "abortion" cross the line of Court-approval.

A pregnant woman has no constitutional right to a particular abortion procedure absent a showing that a particular procedure, and no other, is necessary to save her life or preserve her health. With regard to the procedure outlawed by this legislation, this showing cannot be made in terms of health, and it is pure speculation and highly unlikely in terms of life. A doctor's constitutional interests in this context are derivative of the mother's. As Casey recited: "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." 112 S.Ct. at 2823. Since a pregnant woman is highly unlikely to have any constitutional claim to this particular abortion procedure to save her life, the doctor's constitutional claim is also non-existent. By the terms of the statute, both the woman and her doctor may use the partial-birth abortion method only where the doctor proves that he reasonably believed it is necessary to save the life of the mother and no other procedure is available for that purpose. The statute is thus carefully crafted to track the genuine constitutional interests of the doctor and his or her patient.

There is nothing at all unusual in having even someone's personal claim of right evaluated by means of affirmative defense. For example, throughout the criminal law, it is common practice to place upon criminal defendants the burden of proving affirmative defenses. The best example is the affirmative defense of insanity, 18 U.S.C. section 17. This section requires that the defendant prove this defense by the higher clear and convincing standard, and not mere preponderance, as under the proposed legislation. The Supreme Court has even approved of states requiring defendants prove insanity "beyond a reasonable doubt." Leland v. Oregon, 343 U.S. 790 (1952). As a matter of constitutional fairness, the Court has held that the prosecution must prove beyond a reasonable doubt only those elements included in the definition of the offense of which the defendant is charged. [Patterson v. New York, 432 U.S. 197 (1977) (affirmative defense of emotional disturbance to reduce criminal charge from second-degree murder to manslaughter properly placed on the defendant; the constitution does not require that the prosecution "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." Id. at 210.]

The common law has traditionally placed the burden of proof on the defendant to show that he killed in self-defense. While many states have changed this to the burden of going forward, several

states have kept the burden of proof on the defendant. In Martin v. Ohio, 480 U.S. 228 (1987), the U.S. Supreme Court upheld this approach as constitutionally sound.

The vindication of a personal constitutional right often depends upon the defendant raising the issue. For example, in order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, the Court allows defendants in federal prosecutions to file a motion to suppress. [Weeks v. United States, 232 U.S. 383]. There is no reason to apply different constitutional principles in the abortion context. Neither the Supreme Court nor any federal court has ever held that the abortion context is so privileged that normal standards of constitutional due process and fairness are insufficient. Indeed, the Supreme Court as early as Roe held the exact opposite, recognizing that if an individual abortion practitioner abused the privilege of exercising proper medical judgment, "the usual remedies, judicial and intra-professional, are available." [410 U.S. at 166]. The lower federal courts have similarly applied the usual negligent homicide laws and defenses to the abortion context. [Ketchum v. Ward, 422 F.Supp. 934 (W.D. N.Y. 1976), affirmed 556 F. 2d 557 (2d Cir 1977).

There are special reasons to have doctors bear the slight preponderance burden of proof here. First, as suggested by the common law recited above, there is but a head's length between the partial-birth abortion and criminal infanticide. There is obviously no defense to infanticide and it is extraordinarily generous for the government to make a possible defense available here where there is a very slim chance of justification. Second, the defense is premised upon the reasonable belief of the doctor, and obviously, only he knows what he "believed," and he is in the best position to present evidence pertaining to the mother's medical condition. Third, it has long been established that it is constitutional, even pre-Casey, to place the burden of going forward on the person seeking to justify an abortion as a medical necessity. Simopoulos v. Virginia, 462 U.S. 506 (1983). In Simopoulos, a Virginia statute made it a crime to administer an abortion outside a hospital, subject to medical necessity and various other defenses. The prosecution was not obliged to prove lack of medical necessity until the issue was raised as a defense by the defendant. The Court explicitly found that placing the burden on the defendant of going forward with evidence on an affirmative defense is normally permissible. 462 U.S. at 510. The Court expressly distinguished United States v. Vuitch, 402 U.S. 62 (1971), where the burden was placed on the prosecution as merely a matter of the interpretation of the particular statute there involved.

XI. Vagueness

The dissenting views in the House Judiciary Committee assailed

the legislation for its "extreme vagueness," claiming that the legislation does not give fair warning of the prohibited acts, and therefore, the legislation is unconstitutional. Like all of the other arguments discussed above, the hallmark of this claim is over-statement. It is an argument of last resort.

As a matter of law, a facial challenge for vagueness can only be sustained if the law is substantially overbroad or impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 at 493 (1982). As discussed above, the legislation does not reach any, let alone, a substantial amount of constitutionally protected conduct. There is no constitutional right to kill a partially-born child and the woman's right to an abortion under Casey is either not implicated by the targeted nature of the legislation's prohibition or satisfied in the extreme hypothetical case by the affirmative defense for the life of the mother and the unaffected abortion and birth alternatives that can address a mother's health interests.

Beyond overbreadth, a vagueness challenge may go to the person within the statute, to the conduct made unlawful, or to the sanction to be imposed. The test for vagueness is in terms of the perspective of "men of common intelligence," but it is also influenced by whether it would be clear to any of a more narrow class of persons to whom the statute is directed. [Flipside, supra at 498; Grayned v. City of Rockford, 408 U.S. 104 (1972)]. The standards, however, are not to be mechanically applied, since the Constitution, given the imprecision of language, do not expect mathematical certainty. Grayned, supra at 110. So too, the Court has recognized that a scienter requirement may mitigate any residual vagueness within a law's terminology. Colautti v. Franklin, 439 U.S. 379, 395 (1979).

Applying the above standards to the legislation before the committee, it is obvious that a person covered is anyone in or affecting interstate or foreign commerce who knowingly performs a partial-birth abortion. [emphasis of scienter element added]. While the term partial-birth abortion has been assailed as a non-medical term, that is not the legal standard for vagueness. The standard is whether the terminology used gives "fair warning" of the conduct made unlawful to that "narrow class" of individuals to whom the statute is primarily directed [doctors]. Here, the term partial-birth abortion is fully defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." This terminology and accompanying definition is sufficient to convey that any of the varying medical descriptions -- dilation and extraction or intact dilation and evacuation are covered. As Dr. Pamela Smith testified in the House, the prohibited practice is well-differentiated from the dilation and evacuation method used earlier in a pregnancy. Indeed, Dr. Smith noted that the fact sheets provided by one abortionist distinguishes the partial-birth

abortion from other methodologies, [Hearing Transcript, Dr. Pamela Smith at 39]. In Dr. Smith's words, "the term you have chosen, partial-birth abortion, is straightforward. Your definition is straight forward, and in my opinion, covers this procedure and no other." [Id.]

Other terminology, such as "living fetus," is ascertainable from common usage and the generally applicable "born alive" standards that apply throughout vital statistics statutes and the law of infanticide. The fact that a doctor must demonstrate a "reasonable belief" of the life threatening nature of a given health condition is nothing more than the kind of judgment physicians are called upon to make routinely in their practice. United States v. Vuitch, 402 U.S. 62 at 71 (1971) (sustaining an abortion restriction as not unconstitutionally vague). As to applicable penalty, both the criminal penalty of not more than two years imprisonment and the civil penalty of actual and statutory damages are contained on the face of the statute.

There is no unconstitutional vagueness; if anything, there is only extraordinary leniency for a heinous crime.

Summary

By way of summary:

* the killing of a partially-born child is homicide, not abortion;

- today, the killing of a partially-born child is treated as homicide some stats law;

- as a matter of medical science, abortion has not been defined to includs the killing of a viable unborn child, let alone a partially-born child; even though the Court contemplated in dicta extending abortion past viability in Casey that extension should be construed narrowly when it runs directly counter to medical reality;

- the availability of post-viability abortions pursuant to Casey's dictum should also be construed narrowly because it is at odds with the substantial common law allowing recovery under wrongful death statutes for prenatal injuries that result in stillbirth where the injury causing death (or at least the death itself) occurs after viability; the dictum is also contrary to the more than one-third of the States that have defined by statute the killing of an unborn child (outside the context of abortion) as a form of homicide, with nearly half of these statutes making it a crime to take the life of an unborn child at any stage of pregnancy.

* Were Casey assumed to apply, Casey's post-viability health exception language is satisfied when the legislation at issue is a targetad ban of a single, radically violent abortion practice and alternative procedures meet the life and health interests of the mother;

* Casey requires a calibration of the separate life interests of the mother and the child throughout the pregnancy; the targeted ban here is directed at a procedure that gives zero weight to the interests of the child;

* the doctor-patient relationship has always been subject to criminal and civil laws protecting against medical actions that show a grave indifference to human life;

* post-viability, a woman has a constitutional right to terminate a pregnancy if her life or health is threatened by continuation of the pregnancy; she does not have a constitutional right to have an abortion absent that threat to life or health;

* the affirmative defense adequately addresses any possible claim that this procedure is needed for preservation of life; so too, any threats to the health of the mother caused by the pregnancy can be addressed by delivery or alternative means of abortion;

* the issue is not whether one abortion procedure is or is not marginally safer than an alternative; the issue is whether only the partial-birth abortion can save a women's life or preserve her health when considered along with the government's interests in the life of the child that exist throughout the pregnancy;

* even if the issue were the marginal safety of relative abortion procedures, there is no credible showing that the partial-birth abortion procedure is safer than alternative procedures or courses of action available to a woman, including the premature delivery of the child;

* the partial-birth abortion method takes three days, and therefore, is not well-suited to dealing with life-threatening situations;

* since the pregnant woman does not have an entitlement to this specific abortion procedure, a doctor may be required to justify his actions in this context;

* the statute gives "fair warning" of the prohibited conduct under the constitutional standards.

Nothing in the Constitution, as interpreted, impedes the ban

on partial-birth abortion contemplated by S.939. In my judgment, the legislation should be adopted by the Senate in its present form without delay.