



Legislative Bulletin.....October 2, 2003

S. 3—Partial-Birth Abortion Ban Act of 2003

Order of Business: The conference report is scheduled to be considered on October 2, 2003.

On June 4, 2003, the House considered the Partial-Birth Abortion Ban Act (H.R. 760) and passed the ban 282-139 (Roll no. 242) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2003&rollnumber=242>. The same day the House inserted the text of H.R. 760 into S. 3 and requested a conference with the Senate.

The conferees have removed the Sense-of-the-Senate language added in the Senate regarding *Roe v. Wade* (see 108th Congress section below), and thus the Conference Report is virtually identical to the bill passed on June 4, 2003.

Summary: The Partial-Birth Abortion Ban Act (S. 3) makes it illegal in the United States for a physician to perform a partial-birth abortion. It is estimated that at least 2,200 to 5,000 partial-birth abortions are performed each year in the United States. Partial-birth abortion is a procedure where a pregnant woman's cervix is forcibly dilated over a three-day time period. On the third day, her child is pulled feet first through the birth canal until his or her entire body, except for the head, is outside the womb. The head is held inside the womb by the woman's cervix. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the abortionist inserts scissors into the base of the baby's skull and the scissors are opened, creating a hole in the baby's head. The skull is either then crushed with instruments or a suction catheter is inserted into the hole, and the baby's brain is suctioned out. Since the head is now small enough to slip through the mother's cervix, the now-lifeless body is pulled the rest of the way out of its mother and the baby's corpse is discarded, usually as medical waste.

Three years ago, in *Stenberg v. Carhart*, the United States Supreme Court struck down Nebraska's partial-birth abortion ban, which was similar, but not identical, to the previous bans passed by Congress. To address *Stenberg*, the Partial-Birth Abortion Ban Act of 2003 differs from the previous legislation in two ways:

REFUTING THE SUPREME COURT'S CLAIM THAT THE LAW WAS VAGUE:

The five-justice majority in *Stenberg* thought that Nebraska’s definition of partial-birth abortion was vague and potentially outlawed a common abortion procedure where an unborn child is pulled apart limb by limb through dismemberment (dilation and evacuation (D&E)) and sometimes the limbs enter into the birth canal. In a D&E, the justices ruling in the majority explained:

“During a pregnancy’s second trimester (12 to 24 weeks), the most common abortion procedure is “dilation and evacuation” (D&E), which involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum surgical instruments, and (after the 15th week) the potential need for instrumental dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. **When such dismemberment is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal**” (emphasis added).

—<http://supct.law.cornell.edu/supct/html/99-830.ZS.html>

To address the Court’s concerns that the definition of partial-birth abortion was vague, S. 3 contains a new, more precise, definition of the prohibited procedure:

Definition of Partial-Birth Abortion in S. 3:

“The person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.”

Life of the Mother Exception (an exception contained in all previously passed bans):

“This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”

**REFUTING THE COURT’S CLAIM THAT LAW NEEDS
A “HEALTH” EXCEPTION:**

The Court ruled that the Nebraska ban placed an “undue burden” on women seeking abortions because it failed to include an exception to preserve the “health” of the mother. The Court based its conclusion on the trial court’s factual findings regarding the relative health and safety benefits of partial-birth abortions—findings that were highly disputed. The *Stenberg* Court, however, was required to accept these questionable trial court

findings because of the highly deferential “clearly erroneous” standard that is applied to lower court factual findings.

According to the Judiciary Committee, those factual findings are inconsistent with the overwhelming weight of authority on the issue—including evidence received during extensive legislative hearings—which indicate that a partial-birth abortion is never medically necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care. This is supported by the American Medical Association which has said the procedure is “not good medicine” and is “not medically indicated” in any situation.

Although the Supreme Court in *Stenberg* was obligated to accept the district court’s findings, Congress possesses an independent constitutional authority to reach findings of fact. Under well-settled Supreme Court jurisprudence, these congressional findings will be entitled to great deference by the federal judiciary in ruling on the constitutionality of a federal partial-birth abortion ban. Thus, the first section of S. 3 contains Congress’s 14 factual findings that, based upon extensive medical evidence compiled during congressional hearings, a partial-birth abortion is never necessary to preserve the health of a woman.

In a “health” emergency, why wait three days?

Some proponents of partial-birth abortion claim the bill needs an exception for the “health” of the mother. In a paper he presented at a September 1992 meeting of the National Abortion Federation, Ohio abortionist Martin Haskell, M.D. described the partial-birth abortion procedure, which he is credited with inventing. The procedure, he said, takes up to three days. If a woman’s health is in danger, why wait three days?

The procedure, he describes, takes three days:

“Day 1—Dilation

... Five, six, or seven large Dilapan hydroscopic dilators are placed in the cervix. The patient goes home or to a motel overnight.”

“Day 2—More Dilation

The patient returns to the operating room where the previous day’s Dilapan are removed. The cervix is scrubbed and anesthetized. Between 15 and 25 Dilapan are placed in the cervical canal. The patient returns home or to a motel overnight.

“Day 3—The Operation

The patient returns to the operating room where the previous day’s Dilapan are removed.”
[The procedure is then described in vivid detail]

—Source: Martin Haskell, M.D., "Dilation and Extraction for Late Second Trimester Abortion," in "Second Trimester Abortion: From Every Angle," Fall Risk Management Seminar, September 13-14, 1992, Dallas, Texas, National Abortion Federation.

Entire paper: <http://www.house.gov/burton/RSC/haskellinstructional.pdf>

Additional Information:

Legislative History:

104th Congress:

On November 1, 1995, the House first considered the Partial-Birth Abortion Ban Act (H.R. 1833), which passed 288-139 (Roll Call No. 756 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1995&rollnumber=756>)

On December 7, 1995, the ban passed the Senate 54-44, with a few minor modifications. (http://www.senate.gov/legislative/vote1041/vote_00596.html)

On March 27, 1996, the House agreed to the Senate modifications, 286-129, 1 voting present (Roll Call No. 94 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1996&rollnumber=94>)

On April 10, 1996, the Partial-Birth Abortion Ban Act was vetoed by President Bill Clinton.

On September 19, 1996, the House overrode the veto, 285-137 (Roll No. 422) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1996&rollnumber=422>

On September 26, 1996, the Senate failed by to override the veto 58-40 http://www.senate.gov/legislative/vote1042/vote_00301.html

105th Congress:

On March 20, 1997, the House considered the Partial-Birth Abortion Ban Act (H.R.1122). After defeating a motion to recommit the bill with instructions (that would have gutted the ban) 149 - 282 (Roll no. 64) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1997&rollnumber=64> the House passed the ban 295-136 (Roll Call No.65 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1997&rollnumber=65>)

On May 20, 1997, the ban passed the Senate with amendments 64-36 http://www.senate.gov/legislative/vote1051/vote_00071.html

On October 8, 1997 the House agreed to the Senate amendments and passed the ban 296-132 (Roll no. 500 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1997&rollnumber=500>)

On October 10, 1997, the Partial-Birth Abortion Ban Act was vetoed by President Bill Clinton for the second time.

On July 23, 1998 the House overrode the President's veto 296-132 (Roll No. 325) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1998&rollnumber=325>

On September 18, 1998, the Senate failed by to override the veto 64-36 http://www.senate.gov/legislative/vote1052/vote_00277.html

106th Congress:

On April 5, 2000, the House considered the Partial-Birth Abortion Ban Act (H.R.3660). After defeating a motion to recommit the bill with instructions (that would have gutted the ban) 140-289 (Roll no. 103) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2000&rollnumber=103> the House passed the ban 287-141 (Roll Call No.104 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2000&rollnumber=104>)

On October 21, 1999, the Senate considered the Partial-Birth Abortion Ban Act (S. 1692) and approved it with amendments 63-34
http://www.senate.gov/legislative/vote1061/vote_00340.html

On May 25, 2000, the House took up S. 1692 as amended, struck the entire text, inserted the House-passed text of H.R. 3660, passed the bill and requested a conference with the Senate. This passed by voice vote.

The Senate refused to go to conference with the House on the Partial-Birth Abortion Ban act, and the bill died at the end of the 106th Congress.

107th Congress:

July 24, 2002, the House considered the Partial-Birth Abortion Ban Act (H.R. 4965). After defeating a motion to recommit the bill with instructions (that would have gutted the ban) 187-241 (Roll no. 342) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=342> the House passed the ban 274 - 151, 1 Present (Roll no. 343) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=343>

108th Congress:

March 12, 2003, the Senate considered the Partial-Birth Abortion Ban Act (S.3). The following amendment affirming *Roe v. Wade* was adopted 52-46:
http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00048

SEC. 4. SENSE OF THE SENATE CONCERNING ROE V. WADE.

(a) FINDINGS.--The Senate finds that--

- (1) abortion has been a legal and constitutionally protected medical procedure throughout the United States since the Supreme Court decision in *Roe v. Wade* (410 U.S. 113 (1973)); and
- (2) the 1973 Supreme Court decision in *Roe v. Wade* established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy.

(b) SENSE OF THE SENATE.--It is the sense of the Senate that--

- (1) the decision of the Supreme Court in *Roe v. Wade* (410 U.S. 113 (1973)) was appropriate and secures an important constitutional right; and
- (2) such decision should not be overturned.

and the Senate passed the ban 64-33 with this one amendment.

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00051

On June 4, 2003, the House considered the Partial-Birth Abortion Ban Act (H.R.760). The House considered and defeated 133-287 (Roll no. 240) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2003&rollnumber=240> this substitute amendment offered by Rep. Jim Greenwood (R-PA):

SECTION 1. SHORT TITLE.

This Act may be cited as the "Late Term Abortion Restriction Act".

SEC. 2. PROHIBITION ON CERTAIN ABORTIONS.

(a) IN GENERAL.--It shall be unlawful, in or affecting interstate or foreign commerce, knowingly to perform an abortion after the fetus has become viable.

(b) EXCEPTION.--This section does not prohibit any abortion if, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman.

(c) CIVIL PENALTY.--A physician who violates this section shall be subject to a civil penalty not to exceed \$10,000. The civil penalty provided by this subsection is the exclusive remedy for a violation of this section [emphasis added].

Note: This amendment would have created civil (not criminal) penalties when abortionists themselves determined their activity was illegal.

The House then defeated a Rep. Tammy Baldwin (D-WI) motion to recommit the bill with instructions (that would have gutted the ban) 165-256 (Roll no. 241) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2003&rollnumber=241> and passed the ban 282-139 (Roll no. 242) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2003&rollnumber=242>

The same day the House inserted the text of H.R. 760 into S. 3 and requested a conference with the Senate.

Other Resources:

Drawings of partial-birth abortion procedure: <http://www.nrlc.org/abortion/pba/diagram.html>

Background and talking points on partial-birth abortion: <http://www.nrlc.org/abortion/pba/index.html>

Why delivering a child in a breech (feet-first) position and puncturing the skull is not recommended medical practice for the "health" of the mother:

<http://www.nrlc.org/abortion/pba/pbafact11.html> & <http://www.nrlc.org/abortion/pba/pbafact12.html>

Resources from physicians against partial-birth abortion. Physicians'Ad-hoc Coalition for Truth (PHACT) <http://www.geocities.com/CapitolHill/9707/>

Administration Position: During the June 4, 2003 consideration of the ban in the House, the Administration released the following statement of policy:

The Administration strongly supports enactment of H.R. 760, which would ban an abhorrent procedure commonly known as partial-birth abortion. The bill is narrowly tailored and exempts those procedures necessary to save the life of the mother.

Partial-birth abortion is a procedure that is not accepted by the medical community. Approximately 30 States have attempted to ban it. The Administration strongly believes that enactment of H.R. 760 is both morally imperative and constitutionally permissible.

Source: <http://www.whitehouse.gov/omb/legislative/sap/108-1/hr760sap-h.pdf>

Cost to Taxpayers: CBO estimates that implementing S. 3 would not result in any significant cost to the federal government. Because the bill would establish a new federal crime, there could be an increase in law enforcement, court proceedings, or prison operations costs, but CBO does not estimate a significant cost due to the low number of cases expected. Any fines collected from prosecutions would be deposited into the Crime Victims Fund.

Does the Bill Create New Federal Programs or Rules?: S. 3 would create a new federal crime under Title 18 of the U.S. Code for a physician to perform a partial-birth abortion (except to save the life of the mother), punishable by a fine and/or imprisonment for up to two years. A pregnant mother who undergoes a partial-birth abortion may not be prosecuted under S. 3.

Constitutional Authority: The Judiciary Committee (in Report No. 108-58) finds authority in Article I, Section 8, Clause 3 of the Constitution (commerce clause).

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