

lexis.com

[Change Client](#) | [Options](#) | [Feedback](#) | [Sign Off](#) | [Help](#)[Search](#) | [Search Advisor](#) | [Get a Document](#) | [Check a Citation](#) | [ECLIPSE](#) | [History](#)View: [Cite](#) | [KWIC](#) | [Full](#) | [Custom](#) | [Print](#) 9 of 19 | [Text Only](#) | [Download](#) | [Fax](#) | [Email](#)
[FOCUS™](#) - [Narrow Results](#) | [Save As ECLIPSE](#) | [More Like This](#) | [More Like Selected Text](#)Source: All Sources : News : **News Group File, All**
Terms: **born-alive infant protection act** ([Edit Search](#))*FDCH Political Transcripts, July 20, 2000*Copyright 2000 eMediaMillWorks, Inc.
(f/k/a Federal Document Clearing House, Inc.)
FDCH Political Transcripts♦ [View Related Topics](#)

July 20, 2000, Thursday

TYPE: COMMITTEE HEARING**LENGTH:** 28088 words**HEADLINE:** U.S. REPRESENTATIVE CHARLES CANADY (R-FL) HOLDS HEARING ON **BORN- ALIVE INFANTS PROTECTION ACT**; WASHINGTON, D.C.**COMMITTEE:** CONSTITUTION SUBCOMMITTEE, HOUSE JUDICIARY COMMITTEE**BODY:**

HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE

CONSTITUTION HOLDS HEARING ON **BORN-ALIVE INFANTS PROTECTION****ACT OF 2000**

JULY 20, 2000

SPEAKERS: U.S. REPRESENTATIVE CHARLES T. CANADY (R-FL), CHAIRMAN

U.S. REPRESENTATIVE HENRY J. HYDE (R-IL)

U.S. REPRESENTATIVE ASA HUTCHINSON (R-AR)

U.S. REPRESENTATIVE SPENCER BACHUS (R-AL)

U.S. REPRESENTATIVE BOB GOODLATTE (R-VA)

U.S. REPRESENTATIVE BOB BARR (R-GA)

U.S. REPRESENTATIVE WILLIAM L. JENKINS (R-TN)

U.S. REPRESENTATIVE LINDSEY GRAHAM (R-SC)

U.S. REPRESENTATIVE MELVIN L. WATT (D-NC)

RANKING MEMBER

U.S. REPRESENTATIVE MAXINE WATERS (D-CA)

U.S. REPRESENTATIVE BARNEY FRANK (D-MA)

U.S. REPRESENTATIVE JOHN CONYERS (D-MI)

U.S. REPRESENTATIVE JERROLD NADLER (D-NY)

PANEL I:

HADLEY ARKES

EDWARD NEY PROFESSOR OF JURISPRUDENCE

AMHERST COLLEGE

ALLISON BAKER

CHARLOTTESVILLE, VIRGINIA

JILL STANEK

MOKENA, ILLINOIS

MATTHEW G. HILE, PH.D.

ST. LOUIS, MISSOURI

GIANNA JESSEN

FRANKLIN, TENNESSEE

PANEL II:

U.S. REPRESENTATIVE STEPHANIE TUBBS JONES (D-OH)

PANEL III:

KENNETH THOMAS

LEGISLATIVE ATTORNEY

AMERICAN LAW DIVISION

CONGRESSIONAL RESEARCH SERVICE

THE LIBRARY OF CONGRESS

GERARD V. BRADLEY

PROFESSOR OF LAW

NOTRE DAME LAW SCHOOL

F. SESSIONS COLE, M.D.

PROFESSOR OF PEDIATRICS AND CELL BIOLOGY

WASHINGTON UNIVERSITY SCHOOL OF MEDICINE

ST. LOUIS, MISSOURI

WATSON BOWES JR., M.D.

PROFESSOR EMERITUS

DEPARTMENT OF OBSTETRICS AND GYNECOLOGY

UNIVERSITY OF NORTH CAROLINA MEDICAL SCHOOL

ROBERT GEORGE

MCCORMICK PROFESSOR OF JURISPRUDENCE

DEPARTMENT OF POLITICS

PRINCETON UNIVERSITY

CANADY: The subcommittee will be in order.

This morning the subcommittee on the constitution convenes to hear testimony concerning H.R. 4292, the **Born Alive Infants Protection Act** of 2000.

It has long been accepted as a legal principle that infants who are born alive are persons entitled to the protection of the law, and that a live birth occurs whenever an infant, at any stage of development, is expelled from the mother's body and displays any of several specific signs of life -- breathing, a heartbeat, or definite movements of voluntary muscles.

Many states have statutes that explicitly enshrine this principle as a matter of state law, and federal courts have recognized the principle in interpreting federal criminal laws. Recent changes in the legal and cultural landscape appear, however, to have brought this well-settled principle into question.

Just weeks ago, for example, in *Stenberg v. Carhart*, the United States Supreme Court struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist delivers an

unborn child's body until only the head remains inside of the mother, punctures the back of the child's skull with scissors, and sucks the child's brains out before completing the delivery. What was described in *Roe v. Wade* as a right to abort "unborn children" has now been extended by the Court to include the violent destruction of partially born children just inches from birth.

The logical implications of the Stenberg Court's holding are both obvious and disturbing. Consider what the Stenberg decision means for a child who survives a botched abortion and is born alive. If the right to abortion entails the right to kill without regard to whether the child remains in the mother's womb, it would seem to follow that infants who are marked for abortion but somehow survive have no legal right to appropriate medical care, or any care at all.

And if a child born alive after a botched abortion does not receive the protection of the law, what is to prevent an abortionist from simply delivering a child and then killing it?

It has been successfully argued before the Supreme Court that killing a partially-born child is -- at least in some cases -- necessary to protect the health of the mother. An equally plausible argument might be made that in some cases preservation of the mother's health requires that a child be fully delivered before it is killed. If partial-birth abortion is protected by the Constitution, why not "post-birth abortion?"

The principle that born-alive infants are entitled to the protection of the law is also being questioned in one of America's most prestigious universities. Princeton University bioethicist Peter Singer argues that parents should have the option to kill disabled or unhealthy newborn babies for a certain period after birth. According to Professor Singer, and I quote, "a period of 28 days after birth might be allowed before an infant is accepted as having the same right to live as others," close quote.

The legal and moral confusion that flows from these pernicious ideas is well illustrated by events that happened last year in Cincinnati, Ohio, after a young woman learned she was pregnant and sought the assistance of abortionist Dr. Martin Haskell, inventor of one variation of the partial-birth abortion procedure. Dr. Haskell performed the first step of the partial-birth abortion procedure -- dilating the woman's cervix -- and she was to return the next day.

That evening the woman began experiencing severe abdominal pains and reported to the emergency room. While she was being examined, she gave birth to a baby girl. The attending physician placed the baby in a specimen dish -- like any other substance that is removed from the body -- to be taken to the lab by a medical technician. When the technician, Shelly Lowe, saw the baby girl in the dish she was stunned when she saw the girl gasping for air.

The doctors examined the baby and concluded it was unlikely she would survive. By some estimates, the baby was born at 22 weeks, although some members of the hospital staff believed she was older. Ms. Lowe then held the baby, whom she named "Baby Hope," until the child died, wrapping her in a blanket and singing to her as she stroked her cheeks. Surprisingly, Baby Hope lived for three hours, without the benefit of an incubator or other intensive care, and breathing room air, but her condition was not reassessed by the physicians.

And although it is impossible to determine at this point whether a reassessment would have made any difference in Baby Hope's ultimate survival, the lack of any such reassessment, coupled with the attending physician's initial placement of then-breathing Baby Hope in a specimen dish, at least raises serious questions as to whether a similarly-situated infant who was wanted by her

mother would have received the same treatment. We will also hear testimony today at this hearing regarding disturbing events at a hospital in Illinois.

H.R. 4292, the **Born-Alive Infants Protection Act** of 2000, was designed to repudiate the pernicious and destructive ideas that have brought the live-birth principle into question, and to firmly establish that, for purposes of federal law, an infant who is completely expelled or extracted from his or her mother and who is alive is, indeed, a person under the law -- regardless of whether or not his or her lung development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

The bill would not require medical personnel to provide medical treatment that is not currently mandated under the applicable standard of care. Instead, the bill would only insure that all born-alive infants -- regardless of their age and regardless of the circumstances of their birth -- are treated the same for purposes of federal law.

I now recognize Mr. Watt.

WATT: Thank you, Mr. Chairman.

It may come as a surprise to some people here that I want to start my comments this morning by commending the chairman and -- of the subcommittee and the chairman of the full committee. Their level of persistence on this issue leaves one feeling that they have to be amazed and complementary of their commitment. They get slapped down by the Supreme Court. It doesn't matter. They just bounce right back and find a new way to approach the issue.

And as one who has been accused in life of being persistent on some issues, I have to express my admiration for that. And I think they're to be commended for that, in sticking to this and pursuing it.

I want to also commend the chairman for having this hearing today. Hearings serve a very, very valuable purpose in our process, because they give us the opportunity to get the opinions and perspectives and input of people from outside the congressional system in the real world, and that's extremely important to the legislative process and hearings serve a very, very valuable purpose.

When, however, the hearing notice is accompanied or followed shortly by a notice of a markup of the bill the next day, one leaves feeling a little like maybe the hearing is more of a show and a charade than a real effort to evaluate the pros and cons of the legislation that is being considered and provide an opportunity to understand its real consequences and evaluate whether it needs to be fixed here or there.

Now, this is a short bill, it's one-page, I think, long. So, clearly, it can be read quickly. We were about to take up a bill in the full committee yesterday where we got a substitute at almost 6:00 the day before yesterday that was close to a hundred pages long and asked to start a markup of the bill or the substitute the following morning.

But I'm told that -- and I think the testimony will actually bear this out, that there are some

15,000 sections of the U.S. Code and over 57,000 sections of the Code of Federal Register, in which the terms "person", "human being," "child" or "individual", are used. And while it's nice to understand and try to accomplish the one singular purpose for which this bill is introduced, we as legislators if we are not single-issue legislators, have an obligation to the public to understand the consequences that a bill would have in other context.

And I'm not sure that between now and tomorrow I'll even have the opportunity to read the testimony of the witnesses who testified today, much less look at the 15,000 sections of the U.S. Code or 57,000 sections of the Code of Federal Regulations and have any appreciation of what this bill does for the totality of the law, as opposed to the singular purpose for which this bill was introduced.

So, I'm trying to be balanced. I want to applaud the persistence of my chairman. I want to applaud the fact that we are having a hearing, whether it is for show purposes or for charade purposes, it can certainly not do any harm. I'm not sure it's going to be able to do a lot of good between now and tomorrow in a full understanding of the bill as we move to a markup, which is scheduled tomorrow, but at least we're having a hearing and I intend to sit right hear and listen to every word of testimony and try to understand as best I can the implications of what is being proposed and I certainly appreciate those witnesses who have given of their time to come and participate whether they are participating in a real effort to shape public policy or whether they are participating in a charade.

I thank the gentleman for having the hearing and I yield back.

CANADY: I'd like to now ask the members of the first panel of witnesses to come forward, to take your seats, if you would, and I'll proceed with the introduction of those who will be making presentations on the first panel.

On our first panel today, we will hear from Professor Hadley Arkes, the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. Professor Arkes has been teaching at Amherst for 33 years and is also (inaudible) on leave from Amherst at the Ethics and Public Policy Center, the Brookings Institution, the Woodrow Wilson Center at the Smithsonian Institution, and Georgetown University.

Professor Arkes has written several books and numerous articles on political philosophy, public policy and constitutional law and I should add, has a long-standing interest in the subject of today's hearing.

The second witness on this panel will be Allison Baker, a registered nurse from Charlottesville, Virginia. Mrs. Baker will be testifying regarding her experience as a nurse in the delivery ward of Christ Hospital in Oak Lawn, Illinois.

Following Ms. Baker will be Jill L. Stanek, of Mokena, Illinois. Ms. Stanek is a registered nurse and will also be sharing her experiences as a nurse in the delivery ward of Christ Hospital in Oak Lawn, Illinois.

After Ms. Stanek, we will hear from Dr. Matthew G. Hile. Dr. Hile is a research associate professor of psychiatry at the Missouri Institute of Mental Health at the University of Missouri-Columbia,

School of Medicine in St. Louis, Missouri. e will be sharing his family's experiences following the birth of his daughter, Amelia, who was born with severe birth defects.

To conclude our first panel, we will hear from Gianna Jesson, of Franklin, Tennessee. Ms. Jesson will be sharing her experiences as a survivor of an attempted abortion. In addition to speaking regularly all across the country, Ms. Jesson writes music and is currently collaborating with other musicians on a soon to be released compact disk. And I'd like to also note that Ms. Jesson has testified previously before the Judiciary Committee.

I want to thank all of you for being with us this morning, and I would ask that you do your best to summarize your testimony in five minutes or less. And without objection, your written statements will be made a part of the permanent hearing record.

Professor Arkes.

ARKES: Thank you.

Chairman Canady, Congressman Watt, good to see you again.

UNIDENTIFIED SPEAKER: Is your microphone on?

ARKES: Is this on?

We could raise the money, but it would be wrong. Can you hear me?

I'm here to speak today in support of H.R. 4292, The **Born Alive Infants Protection Act**.

Congressman Canady's bill offers the gentlest and the most modest first step of all in engaging the question of abortion. This measure also runs to the root and it offers the best chance of drawing all sides into a conversation and achieving the kind of settlement that I think can be achieved only by the political branches of this country.

We've been told quite often that the country's highly divided on this question. Actually, there are large areas of consensus, which haven't been able to express themselves politically because this matter has been ruled so thoroughly, and exclusively by the courts.

But we need a conversation before we could ever legislate again. Congressman Canady's bill would begin a conversation at a point that would draw support even from people who called themselves pro choice. Our friends on the other side have insisted that abortion is not infanticide, which implies that they're willing to protect the child at some point.

We take that quite seriously and we suggest that we begin at this, the gentlest point of all. Could we not simply agree to protect the child who survives the abortion. That's the earliest point at which the interests of the mother and the child can be detached. Nothing in the move to protect

the child impairs any right to abortion or any right to end the pregnancy because the abortion and the pregnancy have ended.

With this simple measure that we make be simple but momentous parts. If the child has a claim to the protection of the law that doesn't pivot on the question of whether anyone happens to want her, the child then bears an intrinsic significance that's not dependent on the interests or convenience of anyone else.

Her injuries, then, count. They have standing in the eyes of the law. In a notable case in 1977, *Floyd v. Anders*, a child survived for 20 days from an abortion and a surgery. The question was posed as to whether there's an obligation to preserve the life of that child, and the answer tended by Judge Clement Haynsworth was no. That was not a child protected by state law. That was a fetus marked for termination. In other words, the right to an abortion entailed the right to an effective abortion for a dead child.

Just as Powell once remarked in passing that this kind of argument was remarkable. But to say that it's remarkable is not the same as saying that it's wrong and still less is it to explain the grounds of the wrongness.

ARKES: This bill offers the chance for Congress to do exactly that. And the problem is made all the more urgent for us by the decision of the court three weeks ago in *Stenberg v. Carhart*. The court, with that decision, brought us to a new threshold of crisis by bringing us to the threshold of accepting infanticide itself. The court established, in effect, that the law could not protect a child, even at the point of birth, if that protection might, just might, inhibit the child -- inhibit an abortion. It couldn't protect the child to the point of birth if might hadn't been an abortion.

In the hands of Justice Breyer, as Congressman Canady suggested, the argument in defense of partial-birth abortion is at one with the argument that would justify delivering the baby whole and letting it die, if that procedure would be arguably safer for the mother.

Our friends on the side can't be warranted in arguing that the claim is far-fetched or inconceivable that the right to an abortion is the right to an effective abortion or a dead child. Regrettably, it is quite conceivable, and the courts seem to be concerting now to make that claim more and more plausible.

The burden, I'm afraid, truly lies with our friends on the other side. To make it clear that the right to an abortion does not entail for them the right to infanticide.

Now, it doesn't take rare powers of conjecture to anticipate the argument that, yes, we'd like to protect the child, but we don't want to take the first steps in getting the federal government involved in abortion. Now, we're lucky to hear this even from people who were support FOIA (ph) years ago, who didn't think that the Constitution cast up barriers to Congress legislating on the matter of abortion.

But there's a curious screening here of the powers of Congress and the principles of the Constitution. One would think that the federal courts are somehow not part of the federal government. But we can ask, how is it possible that the federal courts can address abortion in all

of its dimensions, yet people could argue for keeping the Congress and the national government away from the subject.

People seem to be forgetting here the deepest axioms of the American government. Chief Justice Marshall once observed in *Cohens v. Virginia* in 1821 that the judicial power of every well-constituted government must be co-extensive with the legislative and must be capable of reaching every question that arises out of the Constitution and laws.

But people curiously seem to forget the corollary that any -- that if the court can articulate new rights under the Fourteenth Amendment, civil rights, a right to abortion, the legislative branch must be empowered, also, to vindicate those same rights and in filling them out, marking their limits. The one thing that should not be tenable under this Constitution is that the court can articulate new rights, and then assign to itself a monopoly of the legislative power in shaping those rights.

The ground on which we take this simplest of all measures will clarify our understanding of the human person as a bearer of rights. To rework the line of Lincoln's, we might say, that in securing this simplest of all rights, we secured the rights of us all, born and unborn. And to take one other line of Lincoln from another occasion, this step, this has been so long in the taking. This is the simplest of steps, for as Lincoln once said, may the vast future not lament our having failed to take it now.

CANADY: Thank you, Professor.

Ms. Stanek.

STANEK: My name is Jill Stanek, and I'm a registered nurse who has worked in the labor and delivery department at Christ Hospital in Oak Lawn, Illinois, for the past five years. Christ Hospital performs abortions on women in their second or even third trimesters of pregnancy. Sometimes the babies aborted are healthy, and sometimes they are not.

The method of abortion that Christ Hospital uses is called "induced labor abortion," also now known as "live birth abortion." This type of abortion can be performed different ways, but the goal always is to cause a pregnant woman's cervix to open so that she will prematurely deliver a baby who dies during the birth process or soon afterward.

The way that the induced abortion is most often executed at Christ Hospital is by the physician inserting a pill called Cytotec into the birth canal close to the vagina. Cytotec irritates the cervix and stimulates it to open. When this occurs, the small, pre-term baby drops out of the uterus, often alive. It is not uncommon for a live aborted baby to linger for an hour or two or even longer. One of these babies was known to live for almost an entire eight-hour shift.

In the event that a baby is aborted alive, he or she receives no medical assessments or care but is only given what the Christ Hospital calls "comfort care." "Comfort care" is defined as keeping the baby warm in a blanket until he or she dies, although even this so-called compassion is not always provided. It is not required that these babies be held during their short lives.

One night, a nursing co-worker was taking an aborted Down syndrome baby who was born alive to

our soiled utility room because his parents did not want to hold him, and she did not have time to hold him. I could not bear the thought of this suffering child dying alone in a soiled utility room, so I cradled and rocked him for the 45 minutes that he lived.

He was about 22 weeks old, weighed about a half a pound, and was about 10 inches long, about the size of my hand. He was too weak to move very much, expending any energy that he had trying to breathe. Toward the end of his life, he was so quiet that I couldn't tell if he was still alive unless I held him up to the light to see if his little heart was still beating through his chest wall. After he was pronounced dead, we folded his little arms across his chest, tied his hands together with a string, wrapped him in a tiny shroud, and carried him to the hospital morgue where all of our dead patients go.

STANEK: The mark that this little person's untimely death left on my heart will never go away. In large part, I ended up here today because of that baby.

Other co-workers have told me upsetting stories about live aborted babies whom they have cared for. I was told about an aborted baby who was supposed to have spina bifida but was delivered with an intact spine. Another nurse is haunted by the memory of an aborted baby who came out weighing much more than expected -- almost two pounds. She is haunted because she doesn't know if she made a mistake by not getting that baby any medical help.

A support associate told me about a live aborted baby who was left to die on the counter in our soiled utility room wrapped in a disposable towel. This baby was accidentally thrown in the garbage. Later, when they later were going through the trash trying to find the baby, the baby fell out of the towel and on to the floor.

I was recently told about a situation by a nurse who said, "I can't stop thinking about it." She had a patient who was 23 plus weeks pregnant, and it did not look as if her baby would be able to live inside of her. The baby was healthy and had up to a 39 percent chance of survival, according to our national statistics.

But the patient chose to abort. The baby was born alive. If the mother had wanted everything done for her baby at Christ Hospital, there would have been a neonatologist, a pediatric resident, a neonatal nurse, and a respiratory therapist present for the delivery, and the baby would have been taken to our neonatal intensive care unit for specialized care. Instead, the only personnel present for this delivery were an obstetrical resident and my co-working friend. After delivery the baby, who showed early signs of thriving, her APGARs improved, was merely wrapped in a blanket and kept in the labor and delivery department until she died two and a half hours later.

To me, something is very wrong with a legal system that requires doctors to pronounce babies dead but does not require them to assess babies for life. I am also very uncomfortable with the fact that the very doctors who may be miscalculating birth weights, due dates, or misdiagnosing fetal handicaps, are the same ones deciding that these babies should not be assessed after delivery.

Shouldn't these babies be given a simple opportunity for a second opinion, just as you and I do? No other children in America are medically abandoned like this.

Thank you for your time.

CANADY: Thank you, Ms. Stanek.

Ms. Baker?

BAKER: I'm also an RN. I worked at Christ Hospital for a year, between the time of August of 1998 to August of 1999. I am now presently a pediatric nurse in Charlottesville.

During this time, I witnessed three cases. When I first started, I was on day shift. I walked into the soiled utility room to throw something away, and laying on the metal part of the table with nothing underneath, there was a fetus, a baby, moving vigorously, just laying there.

I went out to find the nurse, who was responsible for this baby, and she said that the mother had been a therapeutic -- what they call a therapeutic abortion, as Jill had explained, and that she just didn't have time to do anything with the baby at the time, and that if I could, can I wrap the baby and put the baby in a warmer.

So, I went to the soiled utility room, wrapped the baby and held the baby and found a warmer and placed the baby in the warmer. And for about two and a half hours, the baby maintained a heartbeat. The baby was alive.

And for me, that was a new experience. I was there working in a high-risk facility. My patient was a 23-weeker ruptured who was trying to save her baby, laying in Trendelenburg position, with her head down. So, therefore, I took care of a mom, and I took care of an aborted baby.

The next case that I actually participated in was, I had come on the shift and the -- there was a patient that had delivered a baby -- a 20 week fetus who had spina bifida. The baby, once again, was alive, and the baby had a heartbeat. It took an hour and 45 minutes for this baby to finally expire.

Once again, my question was, what was the right of this baby? Some of the nurses said to me, just leave the baby in the warmer, and some of them said, comfort the baby. When I was at Christ Hospital, there was no -- no one explained to me what we were supposed to do. And there was -- there was -- nurses were doing all various kinds of things.

The last case that I experienced while I was there was 16 week fetus that was aborted. And the baby was supposed to have Downs. And the baby, at 16 weeks, was born with a heartbeat. And the parents thought that the baby would die right away because it was so early. The baby ended up living for approximately 45 minutes. And during this time, the parents were very upset and kept questioning me and the other nurses, how come their baby wasn't dead? When was their baby going to die? Why was their baby alive?

For me, as a nurse in a labor and delivery unit, this was confusing. It was confusing for all the nurses. It was confusing for the parents. They thought they were just doing something good, but yet they had to sit and ask questions of when their baby was going to expire. For us as nurses,

we're taking care of babies that we really want to survive, and we're taking care of babies that are supposed to just die.

Thank you.

CANADY: Thank you, Ms. Baker.

Mr. Hile?

HILE: Mr. Chairman, honorable representatives, staff and visitors.

My name is Matthew Hile. I hold a Ph.D. in clinical psychology; sit on the executive committee of the American Psychological Association's Division on mental retardation and developmental disabilities and on the St. Louis Children's Hospital ethics committee.

However, today I come to offer testimony as the father of Amelia Meliss Hile.

Fourteen years ago, after an apparently normal pregnancy, we were waiting for a much-anticipated birth of our first child and the first grandchild. However, the result was not as we expected, and during a sweltering June and July, I kept a very personal journal of the brief days of our daughter's life.

The following has been excerpted from my journal.

"June 17th: We had an ultra sound, it always makes me nervous to have all those people bustling about, first one tech, then another, then a doctor -- two hours under the scan. We thought that there was just some difficulty in getting the precise measurements."

"June 18th: Another sonogram, with the head of the genetics department. He came into the room with a tech and our pediatrician. He began talking and showing us things on the monitor, the curved spine, the splayed hips, the twisted legs and feet, the oddly bent hands and huge amounts of amniotic fluid. He says we are in for a lot of difficulties and suggests that our baby may not survive. He suspects central nervous system damage. Through our tears, we call the grandparents. Through their tears, they try to comfort us.

"Meetings with physicians from Children's Hospital. With the Regan administration and the Baby Doe decision on our minds, we need to understand what that hospital can and cannot do. We need to be clear about our desire to avoid heroic measures. We fear having our role as parents and protectors of our child's welfare snatched from our hands."

"June 25th: My wife labors for 13 hours before a c-section. The operating room is filled with doctors, nurses and technicians. 11:14 the baby is born. Simon or Amelia? There is no noise, no crying. They are working on him or her. Silence in the room. The silence is deafening. I let go of my wife's hand to see the child's twisted little body. It's a girl. They try to start an IV, but I cannot watch and turn back to cry with my wife. I go back and forth to touch my daughter as my wife's

incision is closed. They wheel Amelia out, taking her to Children's Hospital.

"At three am, I take the long walk through corridors that will soon be familiar, up to the fifth floor. I am shown how to wash and gown and then enter the unit. The nurse introduces herself and shows me how they have hooked up Amelia. Heart rate, respiration, a temperature probe to turn the lights on and off and an oxygen helmet. Wires, tubes, lights and alarms are everywhere. I touch Amelia and look, wish her good night and gently kiss her. I feel strangely better for having wished her good night."

"June 26th: I visited Amelia for a couple times today. More importantly, I get to hold her in my arms, this poor twisted body. I sit and rock her and cry and cry. I am sorry for her, for us, but mostly for Amelia. As I hold her I feel a great unexpected warmth wash over me. Until now, she was a potential but not a person to me. Now she is still a potential, but also a person in need of care and nurturing. Someone who needs our intelligence and energy if she is going to survive and someone who needs those same qualities if she is going to have but a little time in this world. She is a person now and it is, in part, her responsibility to survive and thrive. We will do what we can, but it is up to her."

"June 27th: Mother and daughter have the opportunity to bond. I take pictures and cry; sad about the event I was hoping to be celebrating.

"Testing begins. Cat scan -- abnormal right side brain development. This rings in my head again and again, resounding in its implications -- right side, pattern recognition. Doctor says it may be that she could not recognize high notes or not appreciate the world around her. Not be able to read, listen and understand, hear music or recognize her mother. More tests.

"Amelia has periods where she stops breathing and her heart rate drops. Her lips become blue and her skin gray. What if she dies? What if she doesn't die? Do we have the right to subject this child to tubes, wires, lights and tests? Tests that help diagnose but do nothing to help her. My wife pumps breast milk that our daughter is fed with a tube. Our daughter cannot swallow. She cannot close her eyes. Her arms and legs are put in splints that do nothing."

"July 9th: The nurse calls cheerily, Oh she is doing very well, we did have to bag her once and her feed tube is blocked and she had two periods of her heart rate stopping, but she is doing great.

"More tests -- brain stem abnormalities with higher cortical functioning areas also having irregularities. No gag response. Nothing is getting better. The doctor says give her more time. We trust him."

"July 14th: We held, cuddled, dressed and photographed Amelia. She looks a little better -- better color. The next day she has two bad heart rate drops lots of aspirations and needs a transfusion in the night. The following day she has moved a little, but was much slower to recover from heart rate drops. At those times, she dies and the technology brings her back."

"July 18th: Another meeting with the staff. One young doctor wants to put her on a ventilator. One with more experience says he would not ventilate -- medically, he says, this would not be in her best interest."

"July 25th: We become angry in a meeting with the medical staff. What are you making her suffer like this? You have nothing to do to help her, why do you make her go through this over and over again? Why can't you let her go? If the nursing staff can't do this, we can."

"July 26th: After being taught how to gavage feed Amelia, we are allowed to take our daughter into a room by ourselves. We suction, feed and dress her. We have never been able to take her for a walk in the park, she has never been in the fresh air, she has never seen a tree. We play music, read Winnie the Pooh and hold her up to the window to see trees through her unblinking eyes. We cry. We choose not to suction her again and let her go. My wife holds the baby to the breast but she is unable to suckle. We continue to feed her pumped breast milk.

"Medical staff checks on us throughout the day. After the 10 p.m. feeding Amelia is looking blue. Amelia lay silently in my wife's arms. After five minutes I tried but could find no heart beat. After 10 minutes, I listened with a stethoscope and could hear nothing. We were still, afraid to move her, but Amelia's suffering was over. Her spirit had flown to a better place."

HILE: Today I am here to suggest that you have the power to make the journals of others in similar positions have a very different and more painful ending. It could read that Amelia suffered another month, or another year, before her death. As it was, Amelia lived, in her 31 days, to the fullness of her life. I urge you to leave these agonizing decisions to those most involved, the physicians and families who care deeply about their children.

Thank you.

CANADY: Thank you, Mr. Hile.

Ms. Jessen?

JESSEN: I'll do my best to do this. I'm struggling with a head cold today. But we're still here.

My name is Gianna Jessen, and I would like to say thank you for the opportunity to speak today.

I count it no small thing to speak the truth. I depend solely on the grace of God to do this. In fact, I invite God here today. I am 23 years old. I was aborted and I did not die. My biological mother was seven and a half months pregnant when she went to Planned Parenthood in southern California and they advised her to have a late- term saline abortion.

A saline abortion is a saline salt solution that is injected into the mother's womb. The baby then gulps the solution, it burns the baby inside and out and then she is to deliver a dead baby within 24 hours. Ladies and gentlemen, this happened to me.

My medical records state, "Born during saline abortion."

I remained in the solution for approximately 18 hours and was delivered alive on April 6, 1977 at 6:00 am in a southern California abortion clinic. There were young women in the room that had already been given their injections and were waiting to deliver dead babies. When they saw me, they experienced the horror of murder. They realized what they had done.

Ladies and gentlemen, I unashamedly stand here today and say I was saved by the sheer power of Jesus Christ and him alone. I'm a Christian and not ashamed.

I should be blind and burned. I should be dead. And yet, I live. And I do live. Due to a lack of oxygen supply during the abortion, I live with cerebral palsy.

When I was diagnosed with this, all I could do was lay there and they said that was all I would ever do. Through prayer and hard work by my foster mother, I was walking at age of three and a half with the help of a walker and leg braces. At that time, I was also adopted into my wonderful family. Today I am left only with a slight limp. I no longer have need of a walker or leg braces.

I am so thankful for my cerebral palsy. It allows me to really to depend on Christ for everything.

When the freedoms of one group of helpless citizens are infringed upon, such as the unborn, the newborn, the disabled and the so- called imperfect, what we do not realize is that our freedoms as a nation and individuals is in great peril.

I come today in favor of this bill, in favor of the protection of life. I come to speak on behalf of the infants who have died and for those appointed to death. Learned Hand, a well respected American jurist, who's in our own century said, quote, "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of him who, near 2000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there is a kingdom where the least shall be heard and considered side by side with the greatest."

Where is the soul of America? Members of this committee, where is your heart? How can you deal with the issues of this nation without examining her soul? A murderous spirit, and I say it again, a murderous spirit will stop at nothing until it has devoured a nation. Psalm 53:1-3 says: "The fool says in his heart, 'there is no God'; they are corrupt, and have done abominable iniquity; there is none who does good. God looks down from heaven upon the children of men," he's even looking now, upon this hearing, even now, "to see if there are any who understand and who seek God. Every one of them has turned aside; they have together become corrupt; there is none who does good, no, not one."

Adolph Hitler once said: "The receptive ability of the great masses is only very limited, their understanding is small; on the other hand their forgetfulness is great. This being so, all effective propaganda should be limited to a very few points which in turn, should be used as slogans until the very last man is able to imagine what is meant by such words." I say that today's slogans are, "a woman's right to choose" and "freedom of choice," et cetera.

There was once a man speaking from hell, recorded in Luke 16, who said, "I am tormented in this

flame." Hell is real and so is Satan, and the same hatred that crucified Jesus Christ 2000 years ago, still resides in the hearts of sinful people today. Why do you think this whole room trembles when I mention Jesus Christ? It is because he is real and he is able to give grace for repentance that we need as Americans. We are proud and boastful and we kill without shame.

He is able to give forgiveness to us and to this nation that was once great. And it's falling, not because, not because we don't have the technology or the books or the knowledge that we think we're so incredible by. It is because we know better. Good men have stood before us, listen to me. They have stood, they have stood up for righteousness and today, we are nothing but cowards in America.

We can't even say the truth, because we are so afraid of what our colleagues will think at the expense of life. I have that to say, and I will now continue on with the rest, and I'm almost finished. But you listen!

I didn't die. Because I was supposed to be here today to say, shame on America. And as leaders here today, you have an opportunity. If you are standing up, you continue standing. If you are fighting, you continue fighting for life.

I will have none of this. I am an American and we ought to be good and noble people.

I will end with this. We are under the judgment of God, whether or not we want to hear it, and I will end by reading this, Romans 5:8- 10. And listen very well, "But God demonstrates his own love towards us, in that while we were still sinners, Christ died for us. Much more then, having now been justified by his blood, we shall be saved from wrath through him. For when we were enemies we were reconciled to God through the death of his Son, much more having been reconciled, we shall be saved by his life."

Death did not prevail over me, ladies and gentlemen, and I am so thankful.

CANADY: Thank you, Ms. Jessen.

I want to thank all the members of this panel for your testimony. There is a vote proceeding on the House floor. The subcommittee will have to stand in recess while the members go to the floor for the vote. We will return for a round of questions, so I appreciate your patience and I apologize for this interruption.

The subcommittee will stand in recess. I encourage the members to come back immediately after the vote.

(RECESS)

CANADY: The subcommittee will be in order. And again, I apologize for the interruption.

Mr. Watt's recognized for five minutes.

WATT: Mr. Chairman, I just have one question to Mr. Arkes. And I do want to express my thanks to the other witnesses for being here. And I think the -- sitting Mr. Hile and Ms. Jessen beside each other certainly pointed -- very difficult issues that is designed to address.

This is not a trick question, Mr. Arkes, so...

ARKES: Oh, I never suspect a trick question, Mr. Watt.

WATT: The only question I have is whether you have done any analysis whatsoever of what implications, if any, this has on other areas of the law, and if you haven't, that's fine. If you have, I'd like to know.

ARKES: I've looked at a few of the statutes, just canvassing several of them, but it struck me, and after your comments before, that you could offer this interesting thought experiment. Let's say it was 1861, when Edward...

WATT: Could you try to answer my question first?

ARKES: Yes, sir. I am answering it. I guess I get in trouble with this committee offering that rare thing called an analogy. But it seems to me that what your question could be posed in a similar way by asking someone, what if the Lincoln administration and Edward Bates, in putting forth that document about revising the Dred Scott case said; this administration considers all free blacks born in the United States to be citizens, and therefore persons in the law. And someone came back and said how would that effect all the places in which persons are mentioned in the law.

If you think it's in principle...

WATT: I have -- and maybe this is just a personal thing to me, but I get real offended when people try to put everything that I ask into some racial context. I asked you a simple question. If you didn't -- if you haven't analyzed the impact on other things, that's fine. That's why I started out by trying to reassure you that this was not a trick question. But what we're talking about today has little, in my opinion, to do with Dred Scott, and so, I mean, just because I happen to be black, you don't have to give me a black response today. A simple yes or no answer to my question would sufficient.

BACHUS: Mr. Chairman. Would the gentleman yield? Would the gentleman yield?

WATT: I'm happy to yield to the gentleman.

BACHUS: Mr. Watt, in fairness to the witness, I wouldn't assume that he's answering that question in that way.

WATT: Mr. Bachus, don't...

BACHUS: But I don't that, but you don't know that. I mean, only he knows that.

WATT: And I started my response to him by saying this is a personal response, and I'm just trying, you know, if you have done an analysis of what this implication, this bill has on other laws, then I would like to hear that. If you haven't, then you can just tell me you haven't. And that was the only question I had. I was actually planning to yield the rest of my time to the chairman, because I thought he might make better use of it.

ARKES: May I say that I'm offended by this attempt to keep blocking off an -- I'm trying to give you a proper answer to the question.

WATT: The question is, have you done any analysis...

ARKES: Yes, Mr. Watt, I have, and if you don't like the analogy of race, I could simply the ball rolling down the inclined plane.

WATT: OK. Well, keep going then.

ARKES: If somebody says, we have the principle by which that ball -- have you tried this with the yellows balls, the blue ones. If you're clear on the principle, then you're clear that that principle would not be affected, even by the numerous instances that arise under the law.

WATT: OK. Thank you, Mr. Arkes. I appreciate the clear and concise response to my question. And I'm happy to yield to the chairman the balance of my time.

CANADY: And I appreciate that -- and I appreciate that, Mr. Watt. Let me just say that it's my belief that this bill does not change the principle that is in the law of the United States now, that has been recognized for a long time, and is in the statutes of a large number of states.

We basically track what the current law is. We're doing this, however, because we believe that that principle that is currently is the law is subject to challenge and is under threat given other developments in the law. That's why we're here doing what we are today.

HUTCHINSON: Would the gentleman yield? Would the gentleman yield?

CANADY: The gentleman's time has expired. Without objection, Mr. Watt will have two additional minutes.

WATT: Mr. Chairman, I don't seek it at this time.

CANADY: OK.

The gentleman from Arkansas is recognized for five minutes.

HUTCHINSON: Thank you, Mr. Chairman.

I just want to express my thanks to the witnesses for their testimony today. It's certainly not something that the average citizen sees every day. Many of you are in circumstances, work in hospitals, nurses that are affected by this and impacted by this every day. And I don't see that in my life, and so I'm just grateful for you sharing your testimony today.

I just had a couple of questions. Ms. Baker, you testified about your time at Christ Hospital. And the cases that you described, the infants who were aborted, did not suffer from fatal deformities, is that correct?

So was the induced labor abortion procedure used more often on fatally deformed infants, non-fatally deformed infants or healthy infants.

BAKER: They were infants with -- the ones that I experienced were infants with either Down syndrome or spinal bifida. I never -- I never saw cases of things that the baby would not survive life with. They were, you know, Downs or spinal bifida, were both -- of all the cases that I've seen.

HUTCHINSON: Now, was that the reason for the abortion?

BAKER: Yes. That was the reason.

HUTCHINSON: And you're saying that they could not survive life with those deformities?

BAKER: Well, they could survive life with those deformities. They were being induced in labor at 20, 22 weeks, so they were too small to actually intubate, and that was -- that was the reason. However, there are infants that are being, like Ms. Stanek said, they are being induced labor and they are saying they are 22 weeks, but when the baby is born, it's a whole lot bigger than a 22 week fetus. And the question is, for the nurses, is what do we do, then? This child could be intubated.

HUTCHINSON: So, your concern is just simply how you, as a nurse, are to -- who is there to help life and preserve life and to provide comfort, how are you to deal, under this very difficult circumstance?

BAKER: Right. Not so much, for me, the question is, of these born babies, that are born alive, what is the right there for these babies? What is going to happen -- should they be left -- it is OK to leave them on a metal table to move and to just suffocate in the means of all they can do. Or is there some other measure we should take, as far as comfort.

HUTCHINSON: And is there a hospital policy that gives you direction?

BAKER: At that time that I was there, I believe -- there was nothing mentioned to me. The nurses -- I was a new grad, when I went into that hospital. Some of the nurses said, oh, I just leave the baby in a blanket on a stretcher. I leave the baby in the soiled utility room in a warmer. There was no -- there was no policy.

HUTCHINSON: Is there now?

BAKER: Since I have left, Jill has informed me there is a comfort care that they talk about. They did not have anything like that when I was there.

HUTCHINSON: Ms. Stanek, did you want to comment on that?

STANEK: They, under public pressure, and the Illinois attorney general's office looked into their practice, they instituted a policy last October, and it was supposed to take place on January 1, but it has not been put in any of our policy and procedures books yet, which I have also reported to the attorney general again.

HUTCHINSON: Thank you.

Finally, Ms. Jessen, I would assume that you went back and looked at the medical records surrounding your birth. Do you know what the reason was for the decision for the abortion?

JESSEN: Sir, I have not been told why -- her particular reasoning for having her saline abortion.

HUTCHINSON: There's nothing in the medical records.

JESSEN: No. I was just -- I've just been given a copy of my medical records that just say exactly what happened to me, but no reasoning. She was 17, but that's all I know.

HUTCHINSON: Thank you very much.

I yield back, Mr. Chairman.

CANADY: Thank you.

The gentleman from New York is recognized.

Mr. Nadler?

NADLER: Thank you, Mr. Chairman.

Mr. Chairman, I confess that I'm very confused on this bill. I read all the material on it. As far as I can tell, it changes the law in no way at all. I think it's, frankly, it's demeaning to the Congress to pass laws that don't change -- pass bills that don't change the law in any way. I know that the anti-choice forces have placed great stock in this bill, I can't -- I think, mistakenly.

I know that the pro-choice forces are very fearful of this bill. I'm not sure that they're not mistaken. As I read the law -- one of the reasons I came to this hearing today is that I'm going to ask some witnesses how this would change anything.

My understanding today is that any baby that is born, and whether it's born after nine months of pregnancy or it's premature or whatever, if it's in good health, it lives fine. If it's in desperate shape, it's up to the parents and the doctors to decide whether to take heroic actions, put it on the aspirator, whatever, or not, exactly as the law is with respect to next of kin for an old person who is coming to the end of his life.

And the question is, do you prolong his pain and suffering by a few hours before the inevitable, or do you just not do that. And that decision is normally left to the doctors and the next of kin.

How -- I'll ask Mr. Arkes -- how would this bill change that in any way?

ARKES: I think you're partially right, Congressman. This is the gentlest of bills. Most of -- you see, most of things, I think, say Mr. Hill (sic) were complaining about were the current provisions of the law, that I think would interpose objections if people withdrew medical care from newborn infants with maladies.

You're right. Most of this is taken care of right now. But...

NADLER: Excuse me. My question is, isn't -- maybe there are problems with the law and maybe not. But if there are problems with the law, I don't see that this bill changes the law in any way to solve whatever problems there may be.

ARKES: Yes. It changes it, I think, in a gentle way that addresses...

NADLER: How so?

ARKES: ...addresses Ms. Stanek's situation.

NADLER: How do you think it changes the law?

ARKES: Well, if you have a situation with a newborn, let's say, the one she described, a newborn afflicted with Down syndrome or spina bifida. We thought this was exactly the kind of case that the legislation of the early '80s, the Baby Doe legislation was meant to address, of withdrawal of

medical care.

Now, would we assume...

NADLER: Now, wait a minute. What did that legislation say?

ARKES: That legislation obliges, as I recall -- prohibited the withdrawal of medical care from newborns...

NADLER: Prohibited it?

ARKES: Yes. Yes.

NADLER: Now, given the fact that that's on the law, on the books, how does this change that?

ARKES: It deals with the problem that was -- the misunderstanding that was apparently affecting -- or the clear understanding that was affected many people here, that if the child had been marked for an abortion, that child was not covered by the laws that would ordinarily be in place to cover newborns.

NADLER: My reading of the law...

ARKES: Yes.

NADLER: And I'm not an expert and I haven't done a lot of research on this. I first heard of this bill a day or two ago, or at least, reminded myself of it, I think we heard about it last year, is that whether a child is intended for an abortion or not, if it's born alive, if it's delivered and it's living, you have the normal laws apply. It's a person, the normal laws apply and the question of withdrawal of heroic measures or whatever, is whatever the law is. That being the case, how does this law change that?

And let me just say one other thing. If, in fact, your answer is going to be what I think you implied a moment ago, that is simply to eliminate confusion, you don't pass laws to eliminate confusion. I mean, that's why we have courts, that's why we have administrative agencies.

The law is what it is, and if the law says one thing and people are confused about it, someone ought to unconfused them. But if -- a new law that simply reiterates the old law, first of all, it's worthless to pass new laws that don't change the law. Has does this change the existing law with respect to that situation?

ARKES: Well, we haven't had this morning an opinion from Mr. Ken Thomas, in which he objects to the bill...

NADLER: Who?

ARKES: Mr. Ken Thomas, objecting to the bill on the grounds that this could possibly implicate 14th Amendment liberty interests on the part of a woman. That is, there are many people out there who do think that the right to abortion, articulated in *Roe v. Wade* alters this situation now, so that if it was a child marked for an abortion, the usual laws that would come into play in regard to the treatment of newborns, are now superseded. It's worth making that point.

NADLER: Excuse me a minute. Wait a minute.

CANADY: The gentleman's time has expired. Without objection, the gentleman will have two additional minutes.

NADLER: People may think whatever they like, and they're either right or wrong in what they think.

ARKES: Right.

NADLER: The question is, well, do you think that that is the law at the moment? A child who was intended for an abortion and is alive outside the mother that that -- what is the law, under current law, with respect to that child or whatever you want?

ARKES: I think that law is in a state of confusion, because the answer tended by Judge Haynsworth in *Floyd v. Anders*, that that is not a child protected by the law. That argument still remains plausible because it hasn't been explicitly refuted or rejected. And it is open to the legislature. After all, the legislature -- after all, you know, why give this task on to many people in administrative posts, where this is a prime moment for the authors of that legislation to make clear their own intent, and make explicit even what we thought was lurking there implicit all the while. It not so clear.

NADLER: I never (inaudible) clear was explicit.

ARKES. Yes. I'm afraid it's not.

CANADY: Would the gentleman...

NADLER: Go ahead.

CANADY: Would the gentleman yield?

NADLER: Yes.

CANADY: At the federal level, this principle, which is embodied in this bill, has not been codified. I believe, as the gentleman from New York states, that it is currently the law. But it has been

subject to some question because of the developments we discussed.

And let me suggest, there's nothing at all unusual about Congress codifying, in statute, a rule that the courts have developed, to prevent erosion of that rule, or an abandonment of that rule. That's an appropriate and...

NADLER: Let me take back my time.

CANADY: ...and by no means unique thing for the Congress to do.

NADLER: Well, I'm still very confused about this. I'm not aware of any erosion of that rule, and I was not aware till today that any judge had ever questioned -- you say that Judge Haynsworth did. I don't think that's the law of the land, whatever Judge Haynsworth said.

As I said before, I, at this point, and I remain open-minded, at this point I don't see that the law changes -- that this bill changes anything. I don't see that it does any harm; I don't see that it does any good, and I'm not sure why we should be dealing with it at all.

ARKES: Well, it would certainly address the question that Jill Stanek confronted at Oak Lawn, and that would be -- have a powerful effect just in addressing that kind of case.

Can I say also that I'm an old fan of Justice Harlan's dissent in Plessy, where he showed you we could make the argument against desegregation simply on the basis of the old text of the Constitution? You could argue that we really didn't need the 14th and 15th Amendments. I think that's all implicit in the original document, but -- and the 13th Amendment. But there was something to be gained.

NADLER: The Civil War says that that wasn't so clear.

ARKES: Yes, that's right. There was something to be gained by making all that explicit.

NADLER: Thank you, Mr. Chairman.

CANADY: Thank you, Mr. Nadler.

Mr. Hyde is recognized for five minutes.

HYDE: No questions.

CANADY: Would you mind yielding your time to me?

HYDE: With pleasure.

CANADY: I appreciate that, Mr. Hyde.

Just following up on this discussion between Mr. Nadler and Professor Arkes, which I think is actually very helpful, I think we -- everybody should understand that the principle that we are attempting to put in the statutes of the United States through this bill, is a principle that is already on -- in the statutes of many states across the country, including the State of New York.

CANADY: Now, there was time when that statute in New York did not exist, but the legislature decided that the legislature would codify the common law rule, which again, this bill reflects, on this point.

And we're -- in some ways; we're simply belatedly following the lead of the New York legislature, and the legislatures of many states across the country, which have put this principle into the statute books.

I think it's important, and this is a fundamental point, that it is not our intent to change the law, which has been recognized for an extended period of time. It is our intent to reaffirm that principle and to shore it up and to protect it from erosion. And on the point of whether that is a necessary enterprise or not, I'll have to humbly submit.

But I think if you look at the statements made by Judge Haynsworth that have been referred to, and look at the logic of other judicial decisions, including the recent case involving partial birth abortion, which I referred to in my opening statement, you have to conclude that there is some threat to this fundamental principle of the law.

And so, it's a prudent and necessary step for us to take to put in the statutes of the United States. Now, do I believe that that will necessarily make the threat to the principle go away? No. I will not tell you that.

NADLER: Will the gentleman yield for a second?

CANADY: I think that there's a possibility that regardless of what we do legislatively, that principle will be -- continue to be threatened. But, we have a legislative responsibility to take this, as Professor Arkes says, modest step to protect that very important principle.

And I'll be happy to yield to the gentleman from New York.

NADLER: Thank you.

Let me ask you this. Assume that this bill were law. Assume that we had passed this bill, it were law and it said what it said. Now you have the situation that I think Ms. Stanek referred to before, a baby born that is in terribly shape, medically, et cetera. The question arises whether or not to take heroic measures, or what to do. And she said there was confusion.

I think that under current law, that question, basically is up the parents and the doctor, to decide whether they should take heroic measures or not. How would this law change that, if at all?

CANADY: This law does not do anything to change the standard of care that would be applicable in such circumstances. And it is true that there are difficult cases where people in good faith can have disagreements.

NADLER: So, we need to dispel that confusion.

CANADY: This does not solve all the world's problems. No one contends that it does. It is, again, as Professor Arkes has said, a modest step, but it establishes this principle, because again, we're finding people that seem to be attacking this principle, who seem to believe that if, particularly in the case where the child is born alive after an abortion has performed, there is some sort of right to have a dead baby as a consequence of the abortion, not simply a right to terminate the pregnancy, but a right to a dead baby.

That is an idea that is being articulated, and I think that is a dangerous idea, and that's an idea that we have a responsibility to respond to.

Well, I appreciate the gentleman's question. And again, I want to thank all the members of this panel for joining us. Your testimony has been very helpful to the subcommittee and we thank you very much.

UNIDENTIFIED SPEAKER: Thank you, Mr. Chairman.

CANADY: We'll now move to our second panel. And I'd like to ask Representative Jones to come forward and take her seat.

We're pleased today to welcome, as the witness on our second panel, the Honorable Stephanie Tubbs Jones, who represents the 11th district of Ohio.

Congressman Jones sits on two committees, banking and financial services and small business. Before coming to Congress, Congresswoman Jones served as a county attorney and judge.

Representative Jones, we want to thank you for being with us here this morning. I've asked that you do your best to summarize your testimony in five minutes or less. And without objection, your written statement will be made a part of the permanent hearing record.

Representative Jones?

JONES: Thank you, Mr. Chairman, Congressman Watts, Congressman Hyde, Scott (ph) Nadler. I thank you for the opportunity to be here this morning to testify with regard to this particular legislation.

I come here today to share my concerns about it, not only as your colleague, but as you've already said, having served as both a judge and a Cuyahoga County prosecutor for some 18 years in combination.

My experience required me to step down from an ivory tower as just making law, but to actually see the impact that laws that were passed by my state colleagues and federal colleagues could have in real life. And as a judge, I was required often to interpret the legislation that was passed.

I have written comments and I also made some briefer comments, but based on the interaction that has happened here already this morning, I thought I would address a couple of things out of order.

One of the things that this piece of legislation attempts to do is to apply a single definition of born alive across every federal statute in place. And I would reference the committee to the CRS report with regard to legislation. And it says specifically that this would -- a computer search of these terms reveals that they appeared in over 15,000 sections of the United States codes and over 57,000 sections of the Code of Federal Regulations.

Consequently, an evaluation of the statutory and regulatory impact of this act is beyond the recourses of our office.

So, it was made clear that based on the CRS, who does the research for Congress, that it is ill advised for us to proceed with a piece of legislation such as this, if we can't be advised as to how this -- the impact of the law.

The other thing that needs to be made clear. In many states, they have enacted legislation or definitions, but the definitions enacted in each of the states don't apply in every instance. They have definitions that are enacted for purpose of a criminal statute, definitions that are enacted for purposes of estate, taxes or estates, or what am I looking for, the word -- probate issues. And so, for us to do something, or codify a piece -- the term or definition of born alive across every federal statute without knowing the impact it would have, in my mind, is ill advised.

Even more, and I want to step to the political piece of this, since the witnesses prior to me testifying were on that. I am a pro-choice member of Congress. And really; what this does is flame the political fire of those who are either pro-choice or anti-choice, by pushing a piece of legislation that has little impact in terms of clearing up the air, or expanding our understanding, or anyone's understanding of the law.

What it could, in fact, do is cause greater confusion. And we all know, those of us that are legislators, know that we should not enact law that are vague, that do not -- do little to assist government in its operation.

And so I would, as I said, I skipped over much of what I would want to say to you just in response to some of those particular issues that had already been raised. And I would say to you that finally, as Congress, we're talking about some concept of born alive. Why aren't we spending the time that we have in Congress today dealing with those children that are alive?

I mean, we're sitting here discussing a concept when we can't seem to pass legislation that will

assist in the education of children, that would assist in providing a prescription drug benefit for senior citizens that deal with social security, that deal with so many other issues.

And we're caught up spending time talking about born alive, which is clear from CRS, we don't know the impact it would have.

I appreciate the opportunity to be heard, Mr. Chairman, and thank the other members of the committee for the chance to appear here today.

CANADY: Thank you, Representative Jones.

And I don't -- I recognize myself for five minutes now. I don't ordinarily ask members questions, and we hopefully won't have too many questions for you, but I guess I'm confused by your opposition to this.

Now, I understand the point that's made that this affects -- the law would affect the whole Federal Code. But can you come up with one example of someplace in the Federal Code where this principle would not be appropriate.

JONES: That was CRS's job. And CRS said that of the 70,000 places where this piece of language was used, they could not tell you the impact that it would have.

But conceptually, we could use -- in my other testimony I said, for example, the federal law defines murder as the unlawful killing of human being with malice or forethought. As currently crafted, this would broaden this provision's protection to pre-viable fetuses. Therefore, a physician at a military hospital who performs an abortion, necessary to...

CANADY: I think that's not correct. Now, perhaps -- is your concern that if a -- as a result of an abortion, a child is born alive, but at a stage when the child is not viable, that this law would prohibit the killing of that child?

JONES: Now, when you use the term born alive, are you using the term that you define born alive?

CANADY: Sure. As defined here. It's moving. It's moving. It's got a heart beating. There's signs of life, as the statute...

JONES: What I'm saying to you is that there is legislation in place across the country to protect a child that's born alive, and we need not enact new legislation to protect a child that's born alive.

CANADY: I understand -- I understand your point. But I don't understand how it's responsive to my question. Can you give me one example in the Federal Code where you believe that this principle that's embodied in the bill, which we'd put in the Federal Code, would be an inappropriate principle.

JONES: Well, it could be an inappropriate principle, assuming the example...

CANADY: Give me an example.

JONES: Wait, wait, wait. Now, you're going to ask me a question. Are you going to let me answer?

CANADY: Well, if you'll answer my question.

JONES: I am answering your question.

CANADY: An example.

JONES: But I'm not going to answer it like you'd like me to answer it. I will have it the way I choose to answer.

CANADY: You don't have an example. You don't have an example.

JONES: I'm going to finish the example I attempted to give you earlier.

CANADY: OK. Please do.

JONES: Therefore, a physician at a military hospital who performs an abortion necessary to save a woman's life or to terminate a pregnancy resulting from rape or incest could be prosecuted for murder under federal criminal law if that physician does not take extraordinary or possibly medically inappropriate measures to resuscitate the fetus, should the fetus final heartbeat or pulse outside the woman's -- have a final heartbeat or pulse outside the woman's body.

CANADY: That is not so. That's not what this bill does. It says nothing about -- it does nothing to change the standard of care that would be applicable under all these state statutes or, quite frankly, under the principle that has been articulated by the federal courts.

JOHNSON: Now, you're saying to me that I can't have an opinion. My opinion is that it does. Your opinion is that it does not.

CANADY: I understand that people have different opinions. Some opinions...

JOHNSON: OK. So don't say that's not your...

CANADY: Well. At some point, we have to make judgments about which opinions are correct or not correct.

JONES: You're not saying yours is more correct than mine, though?

CANADY: Yes, I am. Yes.

(LAUGHTER)

JONES: And I say mine is more correct than yours.

(APPLAUSE)

CANADY: And I think -- and I think -- and I think you're -- and you're asserting that yours is more correct than mine.

JONES: No, I'm not. I'm just giving my opinion. I was not trying to say to you that you were wrong. I said -- I gave -- you asked my opinion and I gave it to you.

CANADY: Well, I would suggest to you that there may be something called the truth.

JONES: You know what? You can't impugn my integrity, Mr. Chairman. I served as a judge for 10 years, a prosecutor as eight, and I'm your colleague. Don't you ever attempt to say me I'm not talking to truth.

CANADY: Oh, Representative Jones.

JONES: Don't you ever attempt to say again I'm not talking truth.

CANADY: Please, please.

JONES: Now you may not agree, but I'm telling truth.

CANADY: No. That was not my suggestion.

JONES: But you said it.

CANADY: No, I did. And I think if you will look at...

JONES: (OFF-MIKE) Do you want to read it back for me? I sound like I'm the judge in a courtroom, don't I?

CANADY: Well, you're not here today. That was not my suggestion...

JONES: Absolutely it was.

CANADY: ...but the point is that sometimes when there are conflicts between opinions, people have to make a judgment about which one is right or wrong. And I respect your right to say that my opinion is wrong.

JONES: I didn't say you were wrong.

CANADY: So, you're agnostic on the question?

JONES: No. I did not -- I said my interpretation -- I came here to give my testimony with regard to the law. And you're here trying to say that I'm not telling truth or that I'm incorrect. And I'm not.

CANADY: Well.

JONES: In my opinion.

CANADY: Well, I understand your opinion and I appreciate your offering it and I respect your right to do that. Let me say that the principle that we are trying to put in the law here is a principle that's already in the law of your state, which I suspect as a state judge, you are aware, there's very little difference, I mean, if any difference between our definition of live birth in this bill and what the State of Ohio has said.

JONES: Let me fall back to my earlier statement.

CANADY: I just don't understand why this should be controversial.

JONES: The reason I gave the earlier statement...

CANADY: Without objection, I have two additional minutes to the gentlelady can respond.

JONES: Thank you. Fantastic.

In Ohio, there is a definition, but it does not apply across the board. The legislation that you offer today, you propose that it would apply in every instance across every federal statute.

Is that not what your legislation says?

CANADY: Let me ask you this. Do you believe that it's appropriate for this definition to apply in the criminal law context?

JONES: It's already in place in the criminal law context.

CANADY: So, you believe it's appropriate...

JONES: In some instances.

CANADY: You believe it's appropriate in that context?

JONES: No, I'm not saying that it's appropriate.

CANADY: Well, I appreciate your being here with us today, and I will recognize any other members who wish to ask you questions.

HYDE: I would like (inaudible).

CANADY: Mr. Hyde is recognized.

HYDE: Judge, as I look at the Constitution, the word "person" is awfully important. No person shall be deprived of equal protection of law, nor shall any person be deprived of due process of law. So, personhood is a pretty important concept.

Now, I'm confused as to when a fetus become a person, if ever, he or she does. From the moment of conception till you die in a nursing home 96 years later, along that continuum, you as a judge, a dealer in the law, and a prosecutor, an enforcer of the law, when does that fetus, that fertilized egg, at what period in it's journey through life, does it become a person?

JONES: I will refer you to the Supreme Court decision on that. I did not...

HYDE: I want you to tell me.

JONES: I will refer you, Mr. Hyde, to the Supreme Court decision on that. I was not required to make a decision as a court judge...

(CROSSTALK)

JONES: No. As I said to you, Mr. Hyde, I will refer you to the Supreme Court decision.

HYDE: I want your opinion, though. What's your opinion?

JONES: I refer you to the Supreme Court decision.

HYDE: Well, tell me what the court decision says. There are so many of them, I haven't committed it to memory.

JONES: Oh, and neither have I.

HYDE: What is your opinion? What is your opinion?

JONES: And neither have I, Mr. Hyde.

CANADY: Will the gentleman yield?

HYDE: Well, I'd love to know when personhood attaches, because it's critical.

JONES: I refer you to the Supreme Court decision.

CANADY: Will the gentleman yield on that point.

(CROSSTALK)

HYDE: The vagueness surprises me on such a concept. Personhood ought to attach, at some time, our Declaration of Independence as you have inalienable rights. Let's forget personhood. When did those inalienable rights attach to that little fertilized egg, growing into an old man or an old woman? At what point in that continuum does the inalienable rights, or do they ever attach?

JONES: I refer you to Roe v. Wade, the Supreme Court decision, Mr. Hyde.

HYDE: Didn't Casey overrule Roe?

JONES: No, not completely. Roe v. Wade is still good law in this country.

HYDE: Now, you said that we shouldn't pass vague laws. Would you say the phrase undue burden is terribly specific?

JONES: It's specific enough for people to understand what it means. And an undue in my mind's eye is to pass a piece of legislation such as this that has application across the board to 70,000 statutes, when CRS doesn't even know -- what impact it would have.

HYDE: What is the protection for an unborn child, a fetus? You mentioned there is existing federal and state already provides adequate protection for fetuses. If you can have a born fetus and put it

in the closet and let it die, I'd like to know what is the protection?

JONES: Of the criminal code, that says that you cannot have -- take a -- have a child that's born, a child born live, and put in a closet. You have an obligation to do something with that child, if there is criminal intent involved. Do you know what? See, it's very interesting that neither one of you, Mr. Canady or Mr. Hyde, say that you generally would ask questions of your colleagues. And you're trying to use me as a pawn to discuss to your issues that I are think are clearly inappropriate.

HYDE: No. I'm fascinate -- I seldom get a chance to cross exam a judge. You're a judge.

(LAUGHTER)

JONES: Oh, now you'll couch in that. I'll take that.

CANADY: Would the gentleman yield?

HYDE: Sure.

CANADY: I just want to follow up on the principle that was stated about the protection of the child born after an abortion, the protections of the law...

JONES: No, I say -- OK, go ahead.

CANADY: OK. Well, if I understood you, you said that a child that is born alive, after an abortion has been performed...

JONES: No. I didn't even use the word abortion, Mr. Canady. Don't put those words in my mouth.

CANADY: OK. I'm sorry. What did you say? Clarify it for me.

JONES: He asked me, was there a protection for a child that was born in a closet. And I said, there is a criminal statute that applies to the conduct of a person. If a child is born and he is alive, and someone then causes some harm to him, him or her...

CANADY: Let me -- OK. Let me, in that circumstance that's been described, does it make any difference whether the child is at a stage of development that some would consider to be pre-viable. The child is living, but the judgment is made that the child cannot survive long-term. Does that make any different to that answer?

JONES: Let me say this to you. That is not enough information upon which I could make a determination as to whether or not it is prosecutable.

HYDE: Mr. Nadler. I yield to you, but I don't have any time.

CANADY: The gentleman from New York is recognized.

NADLER: I want to make a couple of comments, thank you. I wasn't going to ask Representative Jones any questions. I was going to make some comments, but now the -- I'll first make comments on something -- on some of Mr. Hyde's...

(CROSSTALK)

NADLER: On some of Mr. Hyde's comments.

I believe the law is fairly clear at this point. The right of personhood under the Constitution -- personhood under the Constitution attaches when a child is born. A child has no constitutional rights before that point.

HYDE: Ten minutes before birth, it has no constitutional rights?

NADLER: I think as a matter of law...

(CROSSTALK)

NADLER: Let me finish, please. I think it's a matter law that is correct. It has no constitutional rights, and that way, the Supreme Court has ruled that the states have a right to regulate abortion, depending on, you know, on the time scale. And the states certainly have the right to, in the last trimester, to put limits on abortions and so forth, and some have and so forth, but I don't think that that's a constitutional right of the child, as the courts have defined.

I think it's a right of the states to legislate and to recognize that the state may have interests in that child if it's nine months pregnant, or eight months, or whatever, that it wishes to balance against the rights of the mother. And that's the legal framework that the Supreme Court has articulated in Roe and in Casey, although they balance somewhat differently in those two cases.

But I think that as a matter of law, the constitutional right of a person in the 14th Amendment and other protections attach at birth.

Let me say a second, -- and I think that's a correct statement of law.

Secondly, I think, and again, I'm not clear that this bill does anything, one way or the other, but I think that it is clear in the laws of every state in the federal union that if an abortion were performed or a natural birth occurred at any age, at three months, and the product of that were living outside the mother -- living outside the mother, whether it was the result of a natural occurrence or an abortion, but if the product of that were living outside the mother, and somebody came and shot -- and shot it, I don't think there's any doubt that person would be prosecuted for murder in the laws of every state of the union as presently constituted.

So, again, I'm not sure that this bill does anything at all. It doesn't seem to have -- the questions that are -- that exist, in so far as any questions exist, are questions of what the obligations are for a child born in medical extremis, whether because of being very early in the pregnancy or for some other reason. And there may be confusion on that now, and this law doesn't dispel that confusion.

I want to say one other thing, and that's a political thing. I don't have any doubt, and I am as pro-choice as anybody on this earth, as I think most of the people here know.

UNIDENTIFIED SPEAKER: (inaudible) stipulate.

NADLER: Thank you. I don't think there's much doubt, at least, there isn't in my mind, that the intent of this bill is not to dispel some confusion. The intent of this bill is in various ways to try undermine the constitutional protections of abortion.

I don't think it does that. And I shouldn't say, "I don't think so." I haven't yet seen how it does that in any way, and I'm not sure that as a political matter, it makes much sense for the pro-choice movement to go -- to say that this undermines the rationale -- the constitutional rationale for abortion, if in fact, it doesn't.

And so far, I don't see how it affects that...

HYDE: Would the gentleman yield?

NADLER: ...in any way. Yes.

HYDE: Just very briefly.

I respectfully disagree with my friend. The Roe v. Wade did not say when a person becomes a person. As a matter of fact, the court wouldn't even say when human life begins. They punted on that question.

NADLER: Reclaiming my time. That may be, but the fact is, that it has always been, I think, clear, that as a practical matter, we consider that constitutional rights begin at birth. And I would simply point out that under the criminal laws, I think of all the states, and maybe this has changed recently because of the abortion controversy, I'm not sure, but the traditional law, in some states, I'm not an expert in every state, but the traditional law has always been that if you kill -- if you shoot a woman, and she dies, you're guilty of murder.

If you injure a woman intentionally, and her fetus dies, you're guilty of a tort, but you're not guilty of murder. And that says, to me, that the law does not recognize the fetus at that point, and it doesn't seem to make any difference whether -- at what stage of pregnancy it is, but that tells you that you've committed a tort against the woman by killing her fetus, but you haven't committed murder, which means that that fetus is not considered from that point -- purpose...

HYDE: How about guardian ad litem probate? For an unborn child?

NADLER: I'm not familiar with that area of law. I don't know. Do we have them?

I don't think we ought to have them.

HYDE: I'll explain it to you.

NADLER: But my point is, that shows that obviously if we consider that fetus to have the right of personhood under the 14th Amendment, the laws would be very different. You won't consider that a tort, you'd consider that murder.

And that has always been the case and I understand that there are -- that you, sir, and other anti-choice people would like to change that, but it would be a change. I would oppose that. But it would be a change. It's not the current legal concept.

JONES: I would also, Mr. Canady, like to refer you to the...

CANADY: The gentleman's time has expired. Without...

JONES: In answer to your own question, refer to you...

CANADY: The gentleman's from New York's time -- without objection, the gentleman will have two additional minutes.

JONES: Mr. -- all I want to do is to refer you to your memo. I don't want to testify any further. On the third page, top, as to what you think this legislation will do, and it will expand, based on what you think it will do, the rights of a pre-viable fetus, that is, far and away against what Roe v. Wade said in it's -- the Supreme Court said in Row v. Wade.

CANADY: It's the time of the gentleman from New York.

NADLER: I'm glad I have this (inaudible). I want to make one further comment.

I think that there is some misinterpretation in this room about -- what the bill does, I mean, the bill -- the bill's rights, whatever they may be, accorded by the bill, attach once the fetus or the baby or whatever you want to call it at that point, is outside the woman and still alive at any stage of development, meaning at any stage of pregnancy. So, I don't think it has any -- this bill -- I don't think has comment on viability or stages of pregnancy or anything else, other than to say that once the baby is born, it's a person.

NADLER: I would point out to Mr. Hyde that with respect to the question that we were addressing a moment ago, when personhood attaches, the clear implementation of this bill, if it has any

implication at all, is that personhood attaches once a baby is born. It says the baby is a person, once outside the mother -- outside of the mother, which is what we normally mean by born.

And then it says the baby is a -- that personhood attaches at that point, so one might even say that the implication of this bill would be against any -- those people who wanted to say that the fetus at some point is a person...

HYDE: Would the gentleman yield?

NADLER: Let me just finish.

One might even say that the implication of this bill is against those who would want to say that personhood attaches at some point prior to birth. Yes, I will yield.

HYDE: Would you say that if a woman wanted an abortion and went in to get one, and had an abortion, but it failed in the sense that the baby was delivered alive, that that baby is now a person and entitled to be protected in life?

NADLER: That has always been my understanding.

HYDE: Good. Thank you.

CANADY: Thank you.

The gentleman from Alabama is recognized.

BACHUS: I would just ask my colleague -- all of us keep referring, I think, to the Supreme Court decision. Could we agree, though, that when life begins, the Supreme Court really doesn't determine that.

JONES: Well, the question -- what's your question? Can we agree when life begins? Is that what you said?

BACHUS: Do you agree that the Supreme Court really doesn't determine those things?

JONES: I will agree that the Supreme Court makes a determination that a woman has the right to have an abortion within a certain period of time and that is her -- it is her decision.

BACHUS: Fine. I understand. But as when life begins, and when...

JONES: Yes.

BACHUS: ...the Supreme Court doesn't...

JONES: Yes.

BACHUS: ...doesn't make those decisions.

JONES: But what it does is, it does -- the Supreme Court has made it clear when a person has the right...

BACHUS: No, I understand.

JONES: When a person is a person for purposes of exercising rights guaranteed to us by the Constitution.

BACHUS: I understand that.

JONES: OK.

BACHUS: But I mean, I think we can admit on a more basic thing that when life begins, when a person -- we talked about human beings, we talked about babies as opposed to fetuses. I mean, that's something that the Supreme Court doesn't determine.

JONES: The Supreme Court interprets the laws of our land and the Supreme Court makes a determination as to when a person has the right to the guarantees of the Constitution, so, in essence, the Supreme Court could determine when life begins.

For purposes of the law, but not for purposes of the rhetorical discussion that we may be having here, for religious or moral.

BACHUS: I'm just saying that realistically, the Supreme Court doesn't determine when life begins.

JONES: OK. Assume I agree with that. What's your next question?

BACHUS: No, that's -- that was my only question.

JONES: Oh. OK.

BACHUS: Because in this discussion, it seems like sometimes we, and I'm not saying that you do, but we, to justify things, we actually seem to imply, somehow, that the Supreme Court can make a decision on when life begins.

JONES: Well, for purposes of some statutes, the Supreme Court can make that determination. That's whole issue we're here about.

BACHUS: Well, I understand.

I would like, without objection, to ask Ms. Stanek a question.

JONES: Can I leave if -- I have a committee hearing, and if you're done with me?

Mr. Chairman?

CANADY: Let me, before the gentleman makes his request.

Representative Jones, we thank you for being here.

JONES: I'm glad to be here. And it was a great, wonderful time.

CANADY: You're...

JONES: And I'll come back again. Count on me.

CANADY: We all -- in this subcommittee we always have a wonderful time.

JONES: So I hear. I hear you (inaudible) entertainment sometimes, also.

CANADY: But it is -- we're grateful for your taking the time. We appreciate your interest in this issue. And your testimony has helped illuminate the issues involved in this legislation.

JONES: Maybe, maybe not.

CANADY: Thank you very much.

JONES: But thank you very much.

CANADY: Thank you.

The gentleman from Alabama has a unanimous consent request.

BACHUS: That I be allowed to ask Ms. Stanek a question, please.

WATT: I'm reserving the right to object, Mr. Chairman.

There's some timeframe that we're operating in here.

BACHUS: Yes. What happened, I was called out.

WATTS: Oh, you want five minutes.

BACHUS: Yes.

WATTS: Oh, OK.

CANADY: Without objection, the gentleman be allowed to ask a question.

BACHUS: Ms. Stanek, you testified about a living, aborted baby that was left to die on the counter of a soiled utility room.

STANEK: Right.

BACHUS: And it's wrapped in a disposable towel.

STANEK: Right.

BACHUS: And the baby was accidentally thrown into the garbage?

STANEK: Right.

BACHUS: And was found when she fell out on the floor.

STANEK: Yes.

BACHUS: You testified about how you took a living aborted baby from one of your fellow nurses, a baby that you said was 22 weeks and had Down syndrome and that you held him until he died?

STANEK: Yes.

BACHUS: So he would not have to die in the soiled utility closet.

STANEK: Right.

BACHUS: Was a birth certificate issued?

STANEK: Yes. Birth and death certificates are issued for live, aborted babies.

BACHUS: So, a birth certificate on both these babies was issued.

STANEK: Yes.

BACHUS: How about a death certificate.

STANEK: Yes. It's law.

BACHUS: So a birth certificate -- this was the State of Illinois recognized that this child was born?

STANEK: Right. And died.

BACHUS: These child's (sic) -- you've testified about some living up to eight hours?

STANEK: Right.

BACHUS: The state recognized their birth, recognized that they died?

STANEK: Right.

BACHUS: As human beings?

STANEK: Yes.

BACHUS: Was medical care extended to them?

STANEK: No.

BACHUS: Was any attempt made to transfer them to a neonatal ward?

STANEK: No. That's what's at issue here, I think. That these babies were determined pre-birth, not to have rights to live after birth, but were not assessed after birth.

BACHUS: I was a medic in the army. I have very limited training, but I did visit a ward for a one-week period. And they used the term then that the baby is thriving.

STANEK: Right. Viable, non-viable.

BACHUS: Right. I think the term means it that was, you know, it was breathing on its own, could live on its own. Were these babies -- did any of them show signs of thriving.

STANEK: Yes. There was -- the one that I was talking about this spring, the 23-weeker healthy baby that the mother decided to abort rather than deliver, that baby showed signs of thriving by APGAR scores that improved between the one and five minute APGAR scores, they improved. The baby began to spontaneously breathe on her own.

BACHUS: Because obviously...

STANEK: So, on the short term, yes.

BACHUS: Was it a little boy or girl.

STANEK: Girl. And girls have a higher incidence of thriving premature deliveries also, so she had that going for her.

BACHUS: Was any attempt made to assist her in her life?

STANEK: No. No. No. She was wrapped in a blanket...

BACHUS: But a death certificate -- a birth certificate was issued? A death certificate was issued?

STANEK: Yes. Yes. Yes.

BACHUS: But no assistance was given her in her attempt to live?

STANEK: No. If the baby had been wanted by the mother, when it was time for delivery, the neonatologist would have been called, the pediatric resident, a neonatal nurse and a respiratory therapist would have all been present for the delivery to take care of that baby, and then take the baby over to NICU.

But this baby was not wanted. It was aborted.

BACHUS: What did the death certificate read?

STANEK: I didn't read it. I just know that it is law that they are issued birth and death certificates.

BACHUS: I have no further questions.

STANEK: Thank you.

CANADY: Thank you, Representative Bachus.

We'll now move to our next panel.

I'm sorry. Were there other people who wish to ask questions?

We'll now go to the third and final panel for today's hearing. And I'd like to ask the members of that panel to come forward and take your seats.

And I'll proceed with the introduction of the witnesses on this panel.

The first witness on this panel will be Kenneth R. Thomas, legislative attorney at the American law division at the Congressional Research Service at the Library of Congress. Before joining the American law division, Mr. Thomas was a professional lecturer in law at the National Law Center of Georgetown University and also served as a trial attorney in the U.S. Department of Education's office for civil rights.

Mr. Thomas is accompanied by Jon Shimabukuro, I'm sorry, I mispronounced your name -- who is also a legislative attorney with the Congressional Research Service.

The second witness on this panel will be Professor Gerald -- I'm sorry, Gerard Bradley, a professor at Notre Dame Law School. Professor Bradley teaches courses in legal philosophy, constitutional theory, First Amendment trial advocacy and legal ethics. Before joining the faculty of Notre Dame, Professor Bradley taught at the University of Illinois College of Law and served as an assistant district attorney in the trial division in New York County.

Professor Bradley has written extensively on constitutional law and legal philosophy.

Next, we will hear from Dr. F. Sessions Cole, M.D. Dr. Cole is the Park J. White professor of pediatrics and cell biology and physiology at Washington University School of Medicine in St. Louis, Missouri. Dr. Cole also serves a vice chairman of the department of pediatrics and the director of the newborn medicine division.

He received his BA in 1969 from Amherst and his M.D. in 1973 from Yale University School of Medicine. Dr. Cole has held a number of academic and research positions at Washington University and Harvard Medical School, and has published numerous articles in medical journals.

Following Dr. Cole will be Dr. Watson A. Bowes, Jr., M.D., professor emeritus at University of North

Carolina at Chapel Hill School of Medicine, where he also serves as a full professor in the department of obstetrics and gynecology from 1982 to 1999.

Before joining the faculty at North Carolina, Dr. Bowes was a member of the full time faculty in the department of obstetrics and gynecology at the University of Colorado for 14 years. Dr. Bowes' major professional interests included high-risk obstetrics, pre-term birth and all aspects of labor and delivery. From 1995 to 1999, he served on the committee on ethics of the American College of Obstetricians and Gynecologists, and was for the last two years of that time chairman of the committee.

Dr. Bowes received his medical degree from the University of Colorado in 1955.

Our last witness on this panel and for this hearing today will be Professor Robert P. George, McCormick professor of jurisprudence at Princeton University. Professor George teaches and writes in the areas of philosophy of law, civil rights and liberties, and American constitutional law and theory.

Professor George graduated from Swarthmore College and Harvard Law School. He also holds a doctorate in legal philosophy from Oxford University. Professor George is the author of numerous books and articles on political and legal philosophy, including his most recent book "In Defense of Natural Law," published by Oxford University Press in 1999.

Professor George recently completed a six-year term as a presidential appointee to the United States Commission on Civil Rights. He has also been listed on the Templeton's Foundation's honor roll of outstanding professors.

And I want to thank all of you for being with us here this morning, my script says, but it's actually this afternoon. And I would ask that each of you do your best to summarize your testimony in five minutes or less, and without objection, your written statements will be made a part of the permanent record of the hearing.

Mr. Thomas?

THOMAS: Mr. Chairman and members of the subcommittee.

Good morning. My name is Ken Thomas, and I am here with Jon Shimabukuro. We are attorneys with the American Law Division of the Congressional Research Service, and we are here today to discuss the statutory implications of H.R. 4292, the "**Born-Alive Infants Protection Act** of 2000."

As you know, the Congressional Research Service is statutorily required to be non-partisan and objective, and CRS takes no position for or against the passage of the bill being discussed today. I will be delivering our statement today, but both Mr. Shimabukuro and I have worked on this issue together and we'll both be available for questions.

H.R. 4292 would amend all federal laws and regulations which use the term "person," "human being," "child," or "individual." H.R. 4292 would define these terms to include "every infant

member of the species homo sapiens who is born alive at any stage of development" as evidenced by a "beating heart, pulsation of the umbilical cord or definite movement of voluntary muscles."

THOMAS: This definition would apply when there is complete expulsion or extraction of an infant from a mother as a result of natural or induced labor, as a result of a caesarean section or as a result of an induced labor.

Our office was asked to provide you information on the impact that this definitional change would have. As has been discussed, a computer search of these terms reveals that they appear in over 15,000 sections of the United States Code and in over 57,000 sections of the Code of Federal Regulations.

Consequently, we limited our evaluation to the areas of law we thought most likely to be affected. In our written statement, we addressed three major areas of law -- tort law, trust and estate law and criminal law. We do not anticipate that the act will have significant impact on federal tort law or on estate law, so for purposes of today's testimony, we will limit our discussion to the area of criminal law.

In criminal law, the issue of whether a person is "born alive" most often arises in determining whether charges of homicide or manslaughter can be brought for fetal damage inflicted in utero. If a harmed fetus does not survive until birth, common law homicide statutes generally do not apply. This "born alive" requirement was generally seen as a remnant of a rule of medical jurisprudence, which is developed from the 16th through the 19th century.

This rule was developed because of related evidentiary difficulties in establishing how and why a fetus has died. Thus, under those laws where "born alive" standards still applies, the precise definition of that standard might make a difference in some small number of cases.

I'd like to turn now, though, to specific federal statutes, which would be covered by this.

The principal federal statute against homicide are 18 United States Code 1111 and 1112, which prohibit murder and manslaughter respectively in the special maritime and territorial jurisdictions. The proposed act would affect these sections, as both of these sections use one of terms of the proposed act, "human being."

Now, the jurisdiction where these laws, 1111 and 1112 apply, is not very large. These laws only apply in the special maritime and territorial jurisdiction of the United States, which includes places of a strong federal interest, such as the high seas, the waters of the United States, certain vessels and on certain aircraft.

Now, one significant area found in this jurisdiction are lands where the United States has direct legislative jurisdiction, such as Indian lands, some national parks and some military bases. But outside of this jurisdiction, murder or manslaughter are generally prosecuted under state law.

Now, the question we were asked to examine is how the proposed act would affect existing law. While the common law "born alive" rule appears to apply to federal murder and manslaughter

statutes already, the Ninth Circuit in the case of *United States v. Spencer* held that the "born alive" rule applies in special maritime and territorial jurisdiction.

So the next question to ask is whether the proposed act would vary the common law definition of being "born alive."

Now, the answer to this question depends on how the proposed act is interpreted. The most significant difference we would note between the common law and the proposed act is that common law homicide did not generally apply to abortions, but the definition of the proposed act specifically does.

So, the situation where it would appear that a difference might occur would be when an infant is expelled or extracted during an abortion and shows some of the vital signs indicated in the bill.

One possible interpretation of this proposed language is that homicide statutes would only apply to actions occurring after an abortion, such as the failure to take due care of an infant showing vital signs as described in the act. So, the question would arise as whether this would be a change from existing law.

We could find no reported cases dealing with the application of the murder or manslaughter statutes in the case of an abortion where an infant was extracted or expelled and showed vital signs. But we would note that there are some state laws that require due care in these circumstances. So, it is difficult to say whether there are any instances where an existing -- where the existing federal murder or manslaughter laws would apply.

I would note, however, that failure to treat cases are not generally analyzed under homicide statutes, but are treated under essentially case law regarding medical treatment. So, under this interpretation, it's not clear if the proposed act would represent any significant change from existing law.

There is, however, another possible interpretation of this language. Another possible interpretation is that the murder or manslaughter provisions would apply to abortions, which resulted in the expulsion or extractions of an infant showing the vital signs, described in this bill.

This interpretation would be consistent with the common law, as it exists in non-abortion cases where damage, which is inflicted in utero, is the basis for the murder or manslaughter charges afterwards.

However, we feel that this interpretation would raise constitutional issues based on a woman's liberty interests under the 14th Amendment. Courts generally resolve statutory ambiguities to avoid constitutional questions. That rule of construction would make this interpretation less likely.

Both Jon and I would be glad to answer any questions that you have on the statutory impact of this bill.

Thank you.

CANADY: Thank you, Mr. Thomas.

Mr. Bradley?

BRADLEY: Thank you, Mr. Chairman. I thank the entire committee for the opportunity to place my written testimony in the record.

I get a chance to thank you again. Thank you all again for the opportunity to put my testimony in the record. But unless there is a vehement objection from the committee, I'd like to skip summarizing my testimony and just take a couple or three minutes to address two points that have been made in opposition to the bill by other witnesses today.

The first point, the act, it is true, ignores, it doesn't follow, it doesn't track the distinction made in abortion jurisprudence between the viable and the pre-viable unborn. But given what the act is trying to do, rightly so, does it ignore this distinction.

In the first instance, most literally, viable, pre-viable refer to stages of development of the unborn child, that's true. But in abortion jurisprudence, viability, pre-viability are always used to refer to stages of pregnancy, and at least before the Casey opinion, there were various rights and opportunities attached to the various stages of pregnancy defined by viability or not.

But this bill is not about pregnant women. It's about protecting people born after pregnancy has been terminated. The bill is about protecting the rights of children after termination of pregnancy by birth. No woman's right to terminate a pregnancy is affected by this bill. I don't think the bill, in this light, is an idle one or makes no difference. I would say at least, as the chairman said earlier, the bill codifies or affirms what Roe and all the cases have been saying, that abortion refers to terminating a pregnancy and has really nothing to do with terminating children.

The second point is one that was made at least in the written testimony of Mr. Thomas. And I think he raises, in this particular part of his testimony, one of several good questions, but here's the good question I wish to respond to.

Towards the end of his written remarks, he raises the question, a question about the situation where the cause of death was inflicted prior to the induced abortion, where the injuries were inflicted upon the unborn prior to an abortion or during an abortion. The child is born and subsequently dies. Could a physician or abortion provider be held liable for homicide of some sort, for injuries inflicted in utero?

I think it's a good question. I do think there is a clear answer in the law and here it is. I think the answer is not. While in the real world, or I might say, the natural world, the abortion takes us into a situation which there is great continuity of events, of intentions and of status. In the real world, whether the unborn are persons from the moment of conception until the end of their lives, is the question. The intentions of people involved in abortions are, throughout that process, was to terminate a pregnancy, and perhaps, indeed, to deliver a dead child.

But in the law -- in the law, there is an abrupt and large change in status and in the legal situation

generally, at the moment of birth. I think the moment of birth, according to this act, establishes the personhood of the now newly born child. There is an abrupt change, but in the law, that's the change that's made by Roe and other cases and by this act.

What that means in terms of applying a homicide law I think is this. The doctor-abortionist takes the new baby as he or she finds him. With regard to the demise of a child born after an induced abortion, he would say that doctor-abortionist takes the victim as he or she finds it, at the moment of birth. If that child comes into the world with injuries inflicted by the abortionist during the course of the abortion, so be it. But effectively speaking the doctor is legally immune for those injuries.

At the time of birth and thereafter, the doctor and all concerned, have the normal, legal duties of care that they would have for any other infant. You might think of it this way, and my final point is an illustration.

You might think of this situation, the application of homicide laws to the induced abortion survivor, who shortly thereafter, dies. You might think of how what I mean by finding or taking the victim as one finds him in this way. Imagine that a normal, walking around person is injured in an auto accident or perhaps even in a shooting, finds him or herself to the door at midnight, of his doctor, knocks on the door, steps through the portal and says to the doctor, "Doctor, I've been injured, please help me."

That doctor has no idea, perhaps, where those injuries came from. But once that person accepts any kind of legal responsibility, either through choice or through circumstances imposed upon the doctor, that doctor has to deal with those injuries, however inflicted, and take the appropriate medical steps.

I hope that illustration helps clarify this important question.

CANADY: Thank you, Professor Bradley.

Mr. Cole? Dr. Cole?

COLE: Thank you very much, Mr. Chairman, Honorable Representatives, staff and spectators. My name is Francis Sessions Cole, and my family, including our two daughters, ages 16 and 14, and my wife of 28 years, resides in St. Louis, Missouri.

I appear before you to offer testimony concerning Representative Canady's **Born Alive Infants Protection Act** of 2000, H.R. 4292, as a physician whose specialty is care of newborn infants.

My testimony is not sponsored by any organization.

I completed my pediatric residency training at Boston Children's Hospital and my specialty training in caring for newborn infants in the joint program in neonatology at Harvard Medical School. Since my board certification in pediatrics in 1981, I have cared for more than 10,000 newborn infants directly, and I currently have administrative responsibility for approximately one half of all the

babies born in St. Louis annually, approximately 13,000 babies.

I also have an active clinical practice that focuses on caring for babies whose transition from womb to world is complicated by one or more problems like pre-maturity, birth defects, infections or problems with the afterbirth or placenta. I routinely encounter babies whose problems place them on the edge of viability.

The language of H.R. 4292 would impose on doctors and parents a universal definition of "life" or "alive" which is, in my experience as a neonatologist, inconsistent with the harsh reality presented by a number of circumstances. The fact is that the characteristics identified in the bill -- breathing, or a beating heart, or pulsation of the umbilical cord, or definite movement of voluntary muscles -- are not themselves necessarily indicative of life or continued viability. Frequently, the heartbeats of infants will be maintained by medicines, not nature; their breathing may be present but ineffective as they die; they may move voluntary muscles during the dying process.

As a physician who cares for ill newborn infants, I feel that I have the greatest practice in medicine, because my practice permits me to participate in miracles every day. Thanks to significant advances in technology over the last 20 years, babies whose parents could have been offered no hope can now see their babies survive and, for the most part, exceed both their parents' and their doctors' expectations as they develop.

Unfortunately, even today's most advanced medical science is still a long way from being able to offer every sick infant a reasonable chance for survival. In fact, in our neonatal intensive care unit, approximately 10 percent of the infants do not respond to advanced technology and pass away. These deaths result from accidents of nature that are no one's fault, and they are excruciatingly difficult for parents, doctors and nurses.

COLE: Frequently, the emotional pain of the decision to terminate treatment in such cases is compounded by the fact that the technology that we provide babies requires painful, invasive procedures. When parents and physicians together decide that life support technology is futile for an infant and is only prolonging the pain of the dying process, parents have a moral and legal obligation to minimize the suffering of their baby, regardless of the pain such a turn of events brings to them in their loss.

The language of H.R. 4292 will, in my view, significantly interfere with the agonizing, painful and personal decisions that must be left to parents in consultation with their physicians. Imposing the proposed definition of "alive" or "life" for statutory purposes may cause parents to prolong the medically inevitable dying process of their infants out of fear that terminating that process might be deemed to be, for legal purposes, the termination of a life, when in fact all that would be terminated would be the painful process of death.

Prolonging treatment in such cases would be not the saving of a life, but the prolonging of the pain and suffering of inevitable death. As a physician whose career has been dedicated to the welfare of newborns, and especially critically ill newborns, I urge the subcommittee not to inject an unnecessary and unrealistic definition of life, with all its legal implications, into the already agonizing and heart-breaking situation faced by parents of infants in the dying process.

Thank you very much.

CANADY: Thank you, Dr. Cole.

As everyone has heard, there is a vote proceeding on the House floor. So the subcommittee will need to stand in recess while members go to vote. This is just one vote, so I encourage the members to come back immediately after the vote and then we will conclude hearing the testimony and have a round of questions.

I, again, apologize and appreciate the -- express my gratitude for the patience of the witnesses.

The subcommittee stands in recess.

RECESS

CANADY: The subcommittee will be in order.

I believe that will be the last interruption in our hearing. And that's certainly my hope. And again, I thank everyone for your patience.

And we will now turn to Dr. Bowes.

BOWES: My name is Watson Bowes. I am a professor emeritus of obstetrics and gynecology at the -- in the department of obstetrics and gynecology at the University of North Carolina at Chapel Hill. I'm board certified in both obstetrics and maternal-fetal medicine. My major professional interest was in the care of women with high-risk pregnancies, especially those at risk of delivery of a premature infant.

From 1982 until 1999, I was a member of the full-time faculty at the University of North Carolina. And during that time, one of my responsibilities, from 1984 until 1998, was the infant -- was being chairman of the Infant Care Review Committee at the University of North Carolina Hospitals.

This interdisciplinary committee had the responsibility of developing guidelines regarding withholding or withdrawing medical care from seriously ill infants and reviewing any instance in which there was concern that these guidelines were not followed. Also, from 1994 until 1999 I served on the committee on ethics of the American College of Obstetricians and Gynecologists and was the chairman of that committee during the last two years of that time.

My comments and opinions about H.R. 4292 are not made in behalf of the University of North Carolina or any other organization.

I have read the legislation proposed in H.R.4292 that states that the criteria that an infant is born alive at any stage of development is that the infant "breaths or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles." This definition applies regardless of the duration of pregnancy at which the infant is born or the means by which it is born. This definition of live birth is consistent with that of the World Health Organization and it is in current use by health department guidelines throughout most of the United States. Furthermore, these criteria of live birth are unambiguous and easily discernible by any birth attendant.

It is my opinion that this definition of being born alive does not and will not have a detrimental effect on either maternal or infant health care. I am confident of this because this is the definition of live birth that is in effect and has been in effect in the state of North Carolina in which I practiced for 18 years. During this time, these criteria for defining live birth did not interfere with physicians making clinical judgments about providing appropriate care for newborn infants nor with parents being involved in those decisions. Importantly, this definition of live birth does not restrict a physician's prerogative to recommend that medical care regarded as futile be withheld or withdrawn.

Finally, in my role on the Infant Care Review Committee at North Carolina -- University of North Carolina Hospitals, I was never aware of the egregious use or prolongation of futile medical interventions that could have been attributed to this definition of life birth.

Thank you for the opportunity to testify before this committee.

CANADY: Thank you very much, Dr. Bowes.

Professor George?

GEORGE: Thank you, Mr. Chairman, Congressman Nadler.

The chairman was kind enough in his introductory remarks to mention my six years of service on the United States Commission on Civil Rights. And in that capacity, I previously had the honor of testifying before this committee in its oversight role.

My basic philosophy of civil rights is simple. It is the philosophy of the Declaration of Independence, and I believe, the Constitution of the United States. At its core is the self-evident principle that all human beings are created equal. Each member of the human family, as a unique and irreplaceable child of God, is endowed with inestimable and equal worth and dignity -- equal.

We human beings may be unlike each other, or, if you will, unequal, in various respects--some are endowed with greater, some with lesser, intelligence, ability, physical strength and vigor, and so forth, but none of these factors vitiates the fundamental sense in which we are truly created equal and entitled as a matter of right to the equal protection of the laws.

Of course, any of us, by the wrongful exercise of his or her freedom, may forfeit liberty and certain other rights. But none of us exists at the pleasure of others or merely to serve their interests or fulfill their desires. There are no natural slaves or masters. No human being is the mere property of anyone else, or disposable at others' whims.

Our most basic rights, including the right to life, are inherent and in no way contingent on a grant from the state or any other merely human authority. As an inherent right, the right to life, which, properly specified, is a right not to be killed either as an end in itself or a means to any other end, comes into being for us when we come into being. It is not a privilege that we earn by achieving a certain level of consciousness or intelligence or other ability or capacity; it's not something that

comes or goes with age, size, stage of development, or condition of disability or dependency; and it is certainly not something that depends on whether someone else happens to want us or would prefer, all things considered, that we not exist.

If my philosophy of civil rights were uncontroversial, there would be no need for me and the other witnesses to be here today or for you to trouble yourselves with this hearing. Infanticide would be unthinkable. Even those who believe in abortion, as I do not, would draw the line at birth, if not before, on the ground that the physical separation of mother and child eliminates any concern that protecting the life of the child would violate the rights of the mother. But today the philosophy of civil rights I hold is far from undisputed. Infanticide is openly defended and even put forward as itself a right. Indeed, in the academy the intellectual groundwork is already in place -- already in place, to extend the right to abortion into the post- natal phase.

In an article entitled "Killing Babies Isn't Always Wrong," Professor Peter Singer, who has since become my colleague at Princeton where he is DeCamp Professor of Bioethics in the University Center for Human Values, made the following proposal, quote, "Perhaps, like the ancient Greeks, we should have a ceremony a month after birth, at which the infant is admitted to the community. Before that time, infants would not be recognized as having the same right to life as older people."

Now, I understand that Professor Singer has since backed away from the proposed ceremony, but he has not altered his view that we should do away in law and ethics with the principle at the core of traditional concepts of human rights and equality, namely, that it is always wrong intentionally to kill innocent human beings; nor has he abandoned his claim that newborn human beings are not "persons" with a right to life that must be respected and protected by law. He continues to insist that human beings only become persons, and acquire a right to life, sometime well after birth. He denies, then, that we are created equal and affirms a concept which, frankly, makes me shudder, that of a class of human beings, including newborn infants, who are, in effect, human non-persons.

Well, is Professor Singer alone or eccentric in these beliefs or in their public advocacy? Far from it. In fact, his position isn't even new. Something very much like it was articulated in a mainstream philosophical journal as early as 1972 by philosopher Michael Tooley. Writing even before legal prohibitions were swept away by the Supreme Court's decisions in Roe and Doe v. Bolton, Professor Tooley bluntly declared that human fetuses and infants, quote, "do not have a right to life." Only "persons" have a right to life, and fetuses and infants are not, he insisted, persons.

GEORGE: Like Singer, Tooley expressed no doubt that infants or, for that matter, fetuses, are human beings. He acknowledged, as does Singer, the plain fact that from the beginning of our lives, well before birth, we are distinct, whole, living members of the species homo sapiens. But, he insisted, we do not become persons -- we do not acquire a right to life, until well after we are born. According to Professor Tooley, a human being, or other organism, quote, "possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity," unquote. Infants do not qualify.

Here in Washington, D.C., American University philosophy professor Jeffrey Reiman, while expressly declining to settle the issue about the moral status of infanticide, also claims that infants are not persons with a right to life. While he offers some reasons why people might nevertheless think it generally wrong to kill newborn babies, he promotes the view that infants, unlike more mature human beings, do not, quote "possess in their own right a property that makes it wrong to

kill them."

He denies that infants are members of the community who share equal worth, dignity and rights, and explicitly holds that, quote, "there will be permissible exceptions to the rule against killing infants that will not apply to the rule against killing adults and children."

Members of the committee, I could go on with examples. For now, though, sufficed to say that people who wish to destroy a, quote, "unwanted" child, not a child in utero, mind you, an unwanted child, living, breathing, have today in the academy, here in the United States, influential scholars who are willing to say that the baby they seek to have killed is not, in fact, a person with an equal right to life. Some of these scholars promote the idea that killing an infant at the request of its parent, presumably a father as well as a mother in view of the fact that the physical separation of the child from the mother seems to confer on a father an equal right to command the death of the child non-person, is morally acceptable and ought to be legally permitted.

The legitimization of infanticide constitutes a grave threat to the principle of human equality at the heart of American civil rights ideals. If weak and vulnerable members of the human family, and infants are surely among the weakest and most vulnerable, can be defined out of the community of, quote, "persons" whose fundamental rights must be respected and protected by law, the constitutional principle of equal protection becomes a sham. We must begin now putting into place bulwarks against that threat. I therefore respectfully urge passage of H.R. 4292, the **Born Alive Infants Protection Act**.

And I thank you, Mr. Chairman and members of the committee.

CANADY: Thank you, Professor George.

I will now recognize Mr. Watt for five minutes.

WATT: Thank you, Mr. Chairman.

Let me first apologize to Professor Bowes for not getting back in time to hear his testimony. As usual, as on this panel, and on most issues, there are explanations for things. We normally participate in a reflections group at noon on Thursdays, some members, and so I wanted to try to drop there and at least tell them why I was not there and I got trapped a little longer than I expected to.

Again, seating Dr. Cole and Dr. Bowes next to each other, almost like the last panel, or the panel before last, illustrates the difficulty of this issue, even from a medical perspective. And so, I appreciate all of you being here today and taking the time out of your schedules to try to enlighten us on what attitude we should have and what steps we should take on this bill.

Mr. Bradley, I guess the question I have is, and I'm trying to figure out what practical impact this bill would have on a day to day, as we move, basis. Suppose a child is born alive following an abortion, an attempted abortion, but the child is still born alive. Would that, in your judgment, infer for that child if this bill were passed the right to have an independent guardian ad litem?

BRADLEY: Not necessarily. It's a good question. I don't know the answer or don't have an answer that's backed up by conviction about my knowledge of what's involved. But, I would say that the infant born alive after an attempted abortion is entitled to the equal protection of the law. That's what the bill does.

Whether a guardian ad litem would be necessary to vindicate that right to equal protection of law, and to equal treatment, treatment equal to other one hour, one day old infants, I don't know. It could be the case that at times it is required.

WATT: If it -- if it appeared that the infant were terminal and that it would take extraordinary means to keep the infant alive. Let's assume that set of circumstances for a fact, for a moment. Would that injection of a guardian ad litem possibility into the equation cut back or diminish the parents right to make that decision?

BRADLEY: Well, I think it's true that if you introduce a guardian ad litem or the possibility thereof, the question is raised, let's say, in the delivery room, it does complicate a parent's situation. But my real response to the question, the deeper response to the question I'd like to make is, I don't think it complicates the situation of a post-abortion child any more than another child, nor, if this possibility is introduced after an induced abortion, is that post-abortion child being treated better than or, for that matter, worse than any other child.

So, sure...

WATTS: Well, I'm not sure about that. Doesn't existing law give the parent the right to make that decision? I'm talking about extraordinary care situations. It's another...

BRADLEY: I agree completely.

WATT: ... I guess the issue would be a separate set of issues if the child were determined to be able to live without the benefit of any extraordinary measures.

BRADLEY: I agree completely. It's up the parents to decide about the appropriateness of extraordinary measures, especially for a terminal infant.

CANADY: The gentleman's time has expired. Without objection, the gentleman will have three additional minutes?

WATT: Whatever.

All right. So...

BRADLEY: I mean, if I may, Congressman...

WATT: Let's take it one step further and move beyond the necessity of extraordinary means to prolong the life and assume you get to a situation where the child could survive without extraordinary means. Would this bill, in your judgment, require the appointment of a guardian ad litem, first of all.

Would a guardian ad litem currently be required under law, second of all. And then I'd like to ask Mr. Thomas to respond to that same question.

BRADLEY: No, I don't think a guardian ad litem is required under present law for newborn infants, for instance, who don't require extraordinary care. Nor would they be required to be appointed by this bill. I think perhaps where I agree with you and I think where the question is originating is the simple fact, in the case we're contemplating, of a failed abortion. You have at least a mother, perhaps both parents present, who have tried to avoid parenthood, parental responsibilities and rights, and after the birth, accidental, you might say, they presumably remain about as determined to be rid of the child.

So, given that that's the situation, that fundamentally I think you're raising, you have a mother and or a father, or mother or perhaps both parents, who wish to be rid of the child, or like I say, the child's unwanted. Yes, that case is different with regard to issues about protecting the child's rights, frankly, from the parents in the case we're talking about.

So, yes, in the case of the failed induced abortion, there might be a greater frequency with which the question of guardian ad litem comes up, because in that case, you are talking about parents, who at least moments earlier wished not to have this child. And that's as far as I can take it at this point. Yes, they'll be a greater frequency or more complications.

WATT: Mr. Thomas?

THOMAS: Congressman, I'd like to caveat my answer in a number of ways.

First, I'd like to see the statute that's being discussed before I'd be able to answer you. Since we're speaking about basically a very narrow definitional change, it's important, first of all, to look at the statute to see even if the definitional change applies.

WATT: You mean the statute, the guardian ad litem statute as opposed to this statute?

THOMAS: Correct. To extent that there's a guardian ad litem statute. And then my second caveat would be is that some guardian ad litem statutes may exist in court rules, which are not covered by this act. That would be another caveat I'd have to examine before I could answer that.

Third caveat is that most of these cases are going to be in state court, so that that decision would be made by state law and not by federal law. We're not sure if there would be many instances where an infant would be expelled or extracted in this situation in the federal or special maritime territorial jurisdiction.

Having given all those caveats, I think I would tend to agree with the answer of Mr. Bradley, which

is that the guardian ad litem statutes in the context of the failure to treat situation is probably a pretty well established legal system and I don't believe that burying the moment of birth -- now this is again under my first statutory interpretation. It's leaving out the ambiguity, but under the first statutory interpretation, where you're just talking about an infant that's been born alive and you're talking about the treatment of an infant after that birth, then I think the guardian ad litem statutes probably wouldn't varied, and the interests of the child would be represented consistent with existing law on medical treatment and withdrawal of medical treatment.

WATT: Mr. Chairman, could I just ask for one additional minute?

CANADY: Sure. Without objection, the gentleman will have one addition minute.

WATT: To ask either Mr. -- Dr. Coles or Dr. Bowes whether you've been involved in situations where there have been guardian ad litem in conflict with parents, either one of you?

BOWES: I have not.

COLE: Yes we have encountered those situations. Again, they're very complex, because they frequently involve babies with diagnoses that are right on the edge of viability, and the -- in general, my experience now, with these situations is that the parent view the baby as having suffered enough, and the guardian ad litem is an individual is not convinced of that -- not convinced of that possibility.

And so, there is discussion, active discussion, in that area.

WATT: And Dr. Cole, do you view the language of this bill as adding to that complication or neutral on that complication or -- what's your opinion on that?

COLE: My view is that would -- that this bill would add to that complication. We have had experience in the State of Missouri where there statutes almost verbatim similar to these, where recently, at the University of Missouri-Columbia, there were several publicized cases of infants being maintained for up to 30 days after delivery and eventually expiring, but caught in this web of technology and law.

WATT: Thank you, Mr. Chairman.

CANADY: Thank you.

The gentleman from New York is recognized.

NADLER: Thank you, Mr. Cole -- Dr. Cole, I should say.

I'm a little confused by how you think this bill would complicate it. By any -- I mean, frankly, when a baby is born, it's born. It's a person at that point under the meaning of the law. You then have these decisions that have to be made about the use of heroic measures or not.

How would this bill add to that simply by defining that baby as a person when it's frankly a person under the law already?

I fail to see how this bill would affect that in any way, one way or another.

COLE: Well, I can only give you the example that occurred within the last three months in the State of Missouri, where, without law, but with statutes that basically define epidemiological statistical gathering of data, an interpretation at an institution in Missouri was that babies born on the edge of viability, but who exhibited these kinds of vital signs, could not be, at their parents' request, withdrawn from life support.

NADLER: Yes. But this bill doesn't say that. This bill doesn't say they can or cannot be withdrawn from life support. This bill simply says that once a baby is born, it's a person. And then you have the question of can they be withdrawn from life support at the parent's request, and how does this bill impact on that question at all?

COLE: Well, only insofar as the interpretation of the bill by individuals who are then required by law to impose their interpretations. I think that would be the...

NADLER: Yes, but they're required to impose their interpretations the moment there's a live birth, and there's a live birth, with or without this bill. And the whole point I've been trying to figure out listening to all the witnesses on both sides of this, and I keep coming up with a big zero, that this bill doesn't do anything pro, con or in any way.

I don't like enacting laws that do nothing. I think that that's wrong for Congress, but I don't see, you know, you talk in your testimony, you say that when parents and physicians together decide that life support technology is futile and it's prolonging the pain and dying process, parents have a moral and legal obligation to minimize the suffering the baby, regardless of the pain of such a turn of events. (inaudible) granted. And this bill wouldn't change that. Or how would it?

COLE: Well, again, I can only speak to the recent experience in the State of Missouri where, without a bill exactly like this, but with a bill close to this, families of babies who are required to keep their babies on life support, the University of Missouri-Columbia, for approximately 30 extra days until the baby eventually expired and the explanation for that, at least in the press, I was not involved in those cases -- the explanation in the press was that there was concern on the part of the institution and concern on the part of the individuals who were interpreting the statutes and the laws, that once life support was...

NADLER: My point is that concern would be there, with or without the statute, because the moment you can see that the baby is human being, which I don't anybody would question.

Mr. Bradley, would you comment on this, and let me ask you this. As I read your definition, as I read your testimony, you're saying that this wouldn't implicate *Roe v. Wade*; this wouldn't do all these things that the pro-choice people are worried that it would do. What, if anything would it do? I don't see that you're saying that it would do anything.

BRADLEY: Well, I think I say it codifies what is more or less the practice, but only more or less the practice. I think it codifies what the Constitution implies. But frankly, I think the answer to your question, to be honest with you, is probably supplied by the testimony of Dr. Cole.

I can only infer from his testimony that there are at least some cases where medical personnel, at least, have in mind a class of newborns who are not dead, alive, but not quite persons. And I think -- and I think this bills says, well, that's the end of that.

NADLER: Well, let me ask a question. And I'd ask Mr. Thomas the same question after Mr. Bradley.

If a baby were born, and I don't want to prejudice the question by using the term baby, I'm not sure what term to use in this concept, but if an infant is born alive, either through natural process or through a botched abortion, at two months or at three months, it's really not viable, but is alive, outside the mother, if someone came along and shot that infant, is there any question in your mind that that would be murder?

BRADLEY: No.

NADLER: Sir.

THOMAS: I would agree that that would be homicide.

NADLER: OK. If that is the case, well, let me ask you a different question. I was appalled of the testimony of one of the nurses, Ms. Stanek, I think, about the practice at one hospital of having live infants as a result of a certain abortion technique, who are live, of giving them no care whatsoever.

Do you think that's legal under current law?

BRADLEY: I certainly doubt it.

NADLER: You think that hospital is breaking the law.

BRADLEY: I think they are engaged in negligent medical practice and probably -- possibly even criminally liable because of neglectful homicide.

NADLER: Mr. Thomas?

THOMAS: Well, I think that the homicide statute -- homicide statutes are not generally implicated in failure to treat cases. Whether or not what their actions were were consistent with failure to treat would depend on the fact...

NADLER: Failure to treat is a crime?

THOMAS: Failure to treat ---actually, to that I'd like to defer to my colleague Jon Shimabukuro.

JON SHIMABUKURO, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE: If I may.

In the short time that we had to prepare for the subcommittee hearing, we did take a look at a number of state statutes that require a doctor to provide medical care if this situation arises. If there is an abortion that's ineffective and what results is this expelled or extracted infant, several states have enacted statutes that require a doctor to provide care.

However, those statutes define prosecutorial scheme, or define how...

NADLER: Well, wait. Excuse me a second. What I'm really looking for it not this...

CANADY: The gentleman's additional time has expired. Without objection, the gentleman will have three additional minutes.

NADLER: Thank you.

I'm not looking for discourse on existing state statutes that seek to address the same question. What I'm saying is in the absence of specific statutes on that, it's always been my understanding that an infant that is separated from its mother is a person, an infant, and that there are certain legal standards that apply, it's the same legal standards that apply to a person at the other end of life, to someone who's close to death, and there are certain standards that apply that you don't have to do if you think that additional medical treatment is futile and producing simply pain. You don't have to do that, but that's simply (inaudible). You couldn't starve somebody to death.

Is that not the case for any newborn, regardless of its age, pre- birth, and regardless of how it came to be? Is that not the law without this bill. And if this bill were passed, would that change that in any way?

THOMAS: Again, failure to treat is not generally dealt with under the criminal laws. It's generally dealt with under civil laws.

NADLER: And let's assume this bill passes. Would that change that?

THOMAS: That would not -- I don't believe that this bill would have any effect on -- well, the effect that we've identified was on homicide laws, and it certainly is not intended to change the homicide laws.

So, I think the answer is no.

NADLER: So, it would have no effect.

Mr. Bradley?

BRADLEY: Well, I think in a vast majority of cases, you're quite right. Common sense tells us when birth occurs, a new person has come to be, but I think there probably are some cases where that's eroded, that can nip into view is eroded and being replaced, on occasion, at least with a different view.

NADLER: But that's illegal. Are you saying that some people are mistakenly doing that, or are you saying the law has changed?

BRADLEY: Well, frankly, I think it ought to be illegal, but my guess is that because the law in these areas depends upon a kind of consistent application of the word person or vigorous enforcement by various people in the field. I can only infer that the kinds of practices that Dr. Cole has described are done, presently speaking, more or less with impunity, and I think those cases, those practices are problematic.

NADLER: What Dr. Cole described was not improper care. The cases he was talking about were where an infant -- you have to make a judgment as to whether in fact heroic medical procedures have any chance of saving this infant's life or is simply prolonging a painful death. You wouldn't want that to change.

BRADLEY: I agree. That's appropriate. That's a matter for judgment of people concerned. But I also...

NADLER: And this bill would not change that in your view.

BRADLEY: No. This bill doesn't affect that standard of care at all.

NADLER: So, what does it affect?

BRADLEY: Well, I infer that it's going to -- I infer from what he described, the situation he described that there is a conviction on the part of some people concerned that you're dealing with a class of people who aren't quite persons, even though they are now separated from the mother.

NADLER: Is that fair...

BRADLEY: And that situation would be changed by this bill.

NADLER: Is that a fair characterization of what you were saying?

COLE: Well, I have great respect for Mr. Bradley; I've never met him before. I think I've committed my life to having babies be people as soon as they come into my care. And I don't know of any situation where I've been called upon to take care of a baby, no matter how small, where that baby hasn't been given everything that I can possibly give to her or him.

NADLER: Mr. Bowes -- Dr. Bowes, my last question.

CANADY: The gentleman will have one additional minute.

NADLER: OK. My last question. You were in the same field as Dr. Cole, neonatology?

BOWES: No, sir, I'm in maternal-fetal medicine. I take care of the mother before they are born and the fetuses before they are born.

NADLER: All right. Well, let me ask you the question anyway. If you're not competent to answer it, or familiar with it, say so, please.

You talked about judgments about making -- these criteria for defining live birth did not interfere with physicians making clinical judgments about providing appropriate care for newborn infants nor with parents being involved in those decisions. You're talking about the same kinds of cases Dr. Cole was talking about.

Important in this definition of live birth does not restrict a physician's prerogative to recommend that medical care regarding as futile be withheld or withdrawn. So, your testimony is that this bill would have no effect on that.

BOWES: That's correct. I say that from my experience of working in a state where this is the definition of live birth.

NADLER: Now let me ask you this. Is there any -- does this bill do anything at all. If it doesn't affect that, what does it affect?

BOWES: Apart from, as Chairman Canady said, codifying something that's already in place in most states, it would not affect medical care in my view.

NADLER: OK. So, the general consensus -- OK. Very good. Thank you very much.

Thank you, Mr. Chairman.

CANADY: The gentlelady from California is recognized for five minutes.

WATERS: Thank you very much.

I'd like to direct my question to Dr. Cole, and I think Dr. Bowes, is it?

BOWES: Yes, ma'am. Thank you.

WATERS: Dr. Cole, are you familiar with something known as a hydatidiform mole?

COLE: I am familiar with it, but I would defer to my colleagues, Dr. Bowes as the individual who probably has more experience than I do in that area. Thank you.

WATERS: Are familiar with hydatidiform mole?

BOWES: Yes, ma'am, I am.

WATERS: Am I correct in understanding that hydatidiform mole is, in essence, a fetus that is engulfed in wild growth and so it can be expelled from the womb and there can be pulsation and some of the -- well, breathing, heartbeat, and movements, even though it is engulfed in this wild, grape-like growth. Is that correct?

BOWES: No, ma'am. Congresswoman, that's not correct. A hydatidiform mole occurs only when a very small portion of the developing embryo develops. The fetus does not develop a heartbeat, has never developed a pulsation of the heart, breathing, none of the criteria that you see here would be present in hydatidiform mole.

WATERS: I'm sorry. You're saying that it does not get to the point of growth where there's a heartbeat?

BOWES: That's correct. It does not. It develops as only portions of the placenta, which have overgrown. There is no organs, such as heart, kidney or other things you would find in a fetus or an embryo.

WATERS: How long can this growth take place in uterus?

BOWES: Up to generally about 12 to 14 weeks. It's unusual for them to go that long, but they can go that long, and what you simply have is this placental tissue. But it would not fulfill the criterion that are described in this proposed statute.

WATERS: Well, the reason that I asked this question is because that is not my understanding. Number one, it is my understanding that the growth can get to the point of a fetus, whatever that is, and that there can be a heartbeat and that as a matter of fact, the growth can take place in uterus until such time that the doctor would assist in expelling it. And at the time of expulsion, that there can be this heartbeat that's going on which would take it beyond 12 weeks or so. That's my understanding.

BOWES: Well, I don't want to get too much into the technical matter of this, but a hydatidiform

mole is in itself only the placental tissue. A fetus is not there. The fetus did not develop. The embryo did not develop.

Now, there is a condition in which a fetal -- a fetus develops and it has what's called molar degeneration of the placenta. Now, that's quite a different thing. Those fetuses almost never survive, because they...

WATERS: Well, let's take your latter, because -- and I won't prolong the discussion on the hydatidiform mole, but let's take your latter description, whatever that is, and talk about what happens and what it looks like at expulsion.

BOWES: Well, the fetus, which has molar degeneration of the placenta, are usually chromosomally abnormal. They're almost always -- I will have to say, always born way before fetal viability.

WATERS: But are we looking at in this bill is does it have a heartbeat?

BOWES: Yes.

WATERS: Is it breathing?

BOWES: It might -- that fetus might breath, yes.

WATERS: And it could have movements of involuntary muscles, right?

BOWES: Yes.

WATERS: Now, what would you do with that upon delivery or expulsion?

BOWES: Well, if that fetus was alive at the time, it would be cared for...

WATERS: Now, remember we're talking about it has a heartbeat.

BOWES: It has a heartbeat, yes, all right. And it would be alive at that time.

WATERS: Yes.

BOWES: Now, fetuses at that stage of gestation will not survive irrespective of the degree of intensive care that you would provide.

WATERS: But that's not the question here. The question here is did it arrive outside the uterus so-called alive or with a heartbeat.

BOWES: Yes.

WATERS: That's the question. So what then do you do with it?

BOWES: You provide that fetus with what we call comfort care. You provide it with warmth and not intensive care, in the sense of active resuscitation, because that would futile care.

WATERS: So, now you are determining whether or not this fetus, that probably won't live, will receive a certain level of care. You're making some decisions about whether or not to have intensive care or some level of care. You're making some decisions about what to do, is that right?

BOWES: Yes, I think Dr. Cole and I would agree that those decisions have to be made in these situations.

WATERS: Well, I think that really answers my questions. Our questions...

CANADY: The gentlelady's time has expired, without objection; the gentlelady may have three additional minutes.

WATERS: One of the reasons I don't like to get into this kind of discussion is because we're lay people. And we don't know all of the circumstances of birth, and we don't know all of the possibilities of something that is -- that is delivered or expelled, that could have the signs so-called, of life that's described here.

And to determine that someone may be guilty because they did not provide a certain level of care, or they didn't provide any care, that they are guilty, somehow, of not attending to a so-called live birth in ways that this bill would attempt to describe, bothers me.

Because we don't know. We don't know and you just qualified, you know, that a doctor in that case would make a decision about whether or not there is something that you describe as comfort care, with warmth, or whether or not there should be intensive care. But the fact of the matter is, you're making a decision based on your best medical background and knowledge and understanding about how to practice medicine.

Is that right?

BOWES: That's correct.

WATERS: And that's what I want doctors to do. I don't want to be on this panel telling you how to do that. I don't want to tell any doctor how to do that. I trust that you care just as much about those babies as Dr. Cole has described, in the way that he talked about how proud he is to be a doctor and to deliver and how many babies he's been involved with.

And that's why I worry. I worry so much when we start to try and talk about something we don't know. I can talk about some of these things that I know about. And I want to tell you that there are several such things that I know about that fall within this category. That we cannot sit here and tell you that if it's born with a heartbeat, that somehow it's alive and should be cared for and, you know, an attempt to keep it alive, because I don't think even you would with agree with that.

BOWES: With all due respect, Congresswoman, I think those situations -- I think the definitions here do not alter the way that care would be provided in those situations that you've mentioned.

WATERS: I think I disagree with you.

BOWES: Well, what I'm saying is, for 18 years I've practiced in a state where we have exactly this definition and in our tertiary care center, where I was on the committee that had to review all these sorts of situations, this definition did not interfere with making those kinds -- with the physicians making -- and the parents, together, making those kind of judgments and decisions.

WATERS: OK. And let me just say with the time that has been granted unanimous consent if I may for one more minute.

CANADY: Without objection, the gentlelady will have one additional minute.

WATERS: Thank you very much.

The reason that I disagree with you is this, Doctor. That there may be a difference of opinion among doctors about what to do, in one of those unusual circumstances. And the one that decides to do nothing is no -- they're not any -- they're not guilty of causing the death, of a fetus or of being negligent in any way. It was a professional decision that the circumstances such that probably will not survive, should not do anything, or there may be a doctor who would say, I'm going to do something. I'm going, based on what I know and what I understand, I'm going to provide a certain kind of guesswork treatment that may cause this to -- so, what I'm saying is, I disagree because one is no more guilty than the other, whatever they make, either way, in my opinion.

BOWES: Well, let me just comment upon that. I -- there are those difficult situations where there's differences of...

CANADY: The gentlelady's time has expired.

I will recognize myself now and I'd like to recognize -- go to Dr. Bowes to complete his answer and then I want to recognize Professor George who appears to be yearning to say something.

BOWES: Thank you, Chairman Canady.

In those situations where there were -- are differences of opinion, in our hospital, the infant care

review committee was asked to review those situations, become involved, this is a multi-disciplinary committee, with lay people, clergy, social workers and so forth, on it, to review those situations and help resolve those difficult problems. These are times when either the babies are very small, right at the borderline of viability, or there are congenital defects that may or may not be able to be treated and there are -- you've described the situation very well.

There are differences of opinion among physicians and we -- this was our way of resolving those. But this definition of live birth did not interfere with making those kinds of decisions and involving the parents in them.

CANADY: Thank you, Dr. Bowes.

Professor George.

GEORGE: Thank you, Congressman Canady.

I wanted to respond to Congressman Water's question in the spirit of something that Congressman Nadler said earlier.

In cases of severely disabled children, or very premature children, decisions about the level of care will have to be made and within a certain range, the law leaves those decisions to the discretion of parents guided by physicians. However, this is entirely independent of the question, because decisions will have to be made either way.

The question whether the being, the human being, the member of homo sapiens being cared for is a person or not, if that being is a person, then that person is entitled to the same level care as any other person.

The kind of disability we're talking about here can happen as the result of injuries even to five year old or a 13 year old, who are indisputably persons. And at that point, decisions will have to be made.

So now, the only question becomes, are children, once they're separated from their mothers, persons, and therefore entitled to the protection of the law. If they are, the law has to recognize that. It's wrong for the law to fail to recognize that.

What's that?

NADLER: The law already...

GEORGE: Well, now, Congressman Nadler, if I could respond to your point about the law already does.

I afraid I disagree with Professor Bradley and with Mr. Thomas on -- to some extent. I do not think that there is uniformity of opinion even among jurists, much less professors, and the decision by

Clement Haynsworth from years ago is some evidence of this. But I could cite you more. I've got some more of the articles right here, for example, disagreement about whether a child, once separated, as the result of an unsuccessful abortion, is, in fact, a person who has the equal protection -- is entitled to the equal protections of the law.

Professor Reiman, who I cited earlier, for example, says well, if that's the case, if you interpret a case like *Roe v. Wade* that way, then it would eviscerate the right to abortion, once it became possible technologically, to extract the child from the womb at early points and sustain it through the rest of its -- through the rest of its life.

So, there has always been, from the very beginning, a debate. And *Roe v. Wade* is unclear about this. There has always been a debate about whether the right to abortion is the right to be free of pregnancy or is; rather, as many argue, the right not to be a mother, not to have a child that one doesn't want.

In that case, the right to abortion is the right to have the child die. The pro-choice constitutional scholar Ronald Dworkin, in the beginning of his big book from 1993 on this subject, called "Life's Dominion," an argument about abortion, euthanasia, and individual rights, in his very opening sentence says, "Abortion and euthanasia are choices for death, the choice to destroy the embryo or fetus."

Now, that, I understand, is not the view of many people, and not just pro-life people, but also pro-choice people. Now, that's the question. Here's where I disagree with Professor Bradley and Dr. Thomas, only on the question on whether there is a dispute here. I would argue on their side of the issue as to what the current law is. But given what jurists have said in written opinions, given what the law professorate and many law professors have written in Law Review articles commenting on abortion law, and I would be happy to provide the committee when I get back to Princeton with copies of articles and information and citations.

It is not fair to say that it clearly established, that there's no ambiguity that needs to be cleared up about what the right to abortion is a right to. I hope that Congressman Nadler is right. And I would argue that he's right, that it's merely the right to be free of pregnancy, and not the right to have the embryo or fetus destroyed. But there many respectable people, constitutional scholars, jurists and others, who disagree with that, not only as a matter of ethics. I've cited the ones who are in that category in my prepared remarks, but also as a matter of law.

CANADY: Well, thank you, Professor George.

My time's expired, but without objection, I will have three additional minutes and then we will conclude the hearing.

Dr. Cole, I want to just turn back to your testimony. Now, in your testimony, you state that the definition contained in the bill of "born alive" is unrealistic. I think that's the specific term you used and would, quote "significantly interfere with agonizing, painful and personal decisions that must be left to parents in consultation with their physicians," close quote.

Now, you've also testified that you practice medicine in Missouri and I understand the nature of your practice from your testimony. So, I want to quote to you from Section 193.015 subsection five

of the Annotated Missouri Statutes, which defines live birth for purposes of Missouri law, and listen to this definition that's in the statutes of Missouri and I believe has been there since about 1984.

Quote, "Live birth means the complete expulsion or extraction from its mother of a fetus, irrespective of the duration of pregnancy, which after such expulsion or extraction, breathes, or shows any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of the voluntary muscles, " close quote.

Now, I will submit to you, Dr. Cole that that definition is almost identical to the definition of born alive found in the bill under consideration by this subcommittee today. Now, were you aware of that definition in the law of the state where you're licenses to practice medicine when you prepared your testimony?

COLE: Yes, Chairman Canady, and I was, and as I indicated in my response to some of the other questions, there has been in Missouri, not in my personal practice, but in the practice at the University of Missouri-Columbia, situations where interpretation of the statute to which you refer, has led to the prolongation of life support for babies who eventually expired.

CANADY: I don't understand how interpretation of the statute would have anything to do with that, the determination of what the appropriate standard of medical care is. Because that's the question in those cases, is it not?

COLE: Well, I completely agree with you that is a standard of care issue. I think that the issue to which you refer now is that a statute in the State of Missouri defines how a birth certificate, or a death certificate, is filled out.

CANADY: But the only -- the purpose of this statute is to make clear, beyond any doubt, that there is a person, when there is a live birth, correct?

COLE: Well, again, I'm....

CANADY: That's what the statute says.

COLE: I'm not a lawyer, so I can only tell you that the interpretation as you've described with that statute in the State of Missouri as I understand it, in my practice, is that that statute applies to infants and is used for statistical purposes to gather information about live births, neonatal deaths, et cetera.

CANADY: My time has expired. I'm giving myself one additional minute, without objection.

This law -- the purpose of this law has nothing to do with statistical -- there's maybe some additional statute that refers to that. So, I -- and I did not understand your testimony to make references to law such as this existing in the State of Missouri. But the fundamental point remains that this law simply determines that there is a person.

The secondary question about what the appropriate standard of care is with respect to a particular person in a particular circumstance. And I understand that there can sometimes be difficult decisions to make about what the appropriate care is. But that is a separate question.

And all we're attempting to establish through this law, to reaffirm, through this law, is that when there is a live birth, there is a person, entitled to the protections of the law. I don't understand why that should be controversial. And I think Mr. Nadler and I may have substantial, if not entire, common ground on this point. And I do appreciate, especially the testimony of Professor George, who has pointed out very clearly the threat that is being posed to this principle, which explains the reason that we are here today concerning this legislation.

And again, I want to thank all of you for your testimony. Each of you has made a very important contribution to our hearing. Your testimony has been very helpful to the subcommittee. We thank you for that.

And now the subcommittee stands adjourned.

WATERS: Mr. Chairman, unanimous consent to submit to the record my statement.

CANADY: Without objection, and other materials of members also, thanks.

END

NOTES:

Unknown - Indicates speaker unknown.

Inaudible - Could not make out what was being said.

off mike - Indicates could not make out what was being said.

LANGUAGE: ENGLISH

PERSON: CHARLES T CANADY (94%); HENRY J HYDE (57%); SPENCER THOMAS BACHUS (56%); LINDSEY GRAHAM (55%); BARNEY FRANK (54%); JOHN CONYERS JR (54%); MAXINE WATERS (54%); JERROLD NADLER (53%);

LOAD-DATE: July 24, 2000

View: [Cite](#) | [KWIC](#) | [Full](#) | [Custom](#) | [ECLIPSE](#) 9 of 19 | [Text Only](#) | [Download](#) | [Fax](#) | [Email](#)
[FOCUS™](#) - [Narrow Results](#) | [Save As ECLIPSE](#) | [More Like This](#) | [More Like Selected Text](#)

Source: All Sources : News : News Group File, All

Terms: **born-alive infant protection act** ([Edit Search](#))

View: Full

Date/Time: Wednesday, August 2, 2000 - 9:50 AM EDT

[Search](#) | [Search Advisor](#) | [Get a Document](#) | [Check a Citation](#)
[ECLIPSE\(TM\)](#) | [History](#) | [Change Client](#) | [Options](#) | [Feedback](#) | [Sign Off](#) | [Help](#)
[About LEXIS-NEXIS](#) | [Terms and Conditions](#)

Copyright © 2000 LEXIS-NEXIS Group. All rights reserved.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

FAX COVER SHEETDate: 9/15/2000

To: Brian Hoffstadt
Heather Howard

Phone No.: _____

Fax No.: x3-9164 / 456-2878From: Patricia A. FirstPhone No.: 202/514-4810Fax No.: 202/514-9149No. of Pages: 4 (Excluding Cover)

Comments: Attached is a managers amendment
that Hyde/Canedy plan to attach to the
Born Alive bill. We need to figure out
our position on the bill and the
managers amendment.

8/29

Born-Alive Infant Protection Act

Leslie UM
Simor