House Committee on the Judiciary Subcommittee on the Constitution Hearing on Born-Alive Infants Protection Act of 2000 – Testimony Summaries

Summaries of Selected Prepared Testimonies

Robert P. George McCormick, Professor of Jurisprudence, Princeton University

Urging the passage of the Act, Prof. McCormick claimed: "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 member of the human family -- and infants are surely among the weakest and most vulnerable – can be defined out of the community of 'persons' whose fundamental rights must be respected and protected by law, the constitutional principle of equal protection becomes a sham." Arguing that our most basic rights, including the right to life, are inherent and not contingent upon external judgements nor earned privileges, McCormick condemns other scholarly work suggesting rights are linked to more qualitative measures of personhood. He attacks colleague Professor Peter Singer, a theorist mired in the controversy surrounding this Act, for his assertion that human beings only become 'persons,' and acquire a right to life, sometime well after birth. McCormick suggests that failing to pass the Act would allow for the killing of unwanted children feel from moral judgement since they could be argued out of being considered 'person,' and thus robbed of their right to life.

---However, there is a clear distinction between begin a living being and being a person. What does it mean for a being to be a person? What about babies born without brains? What about the implications of technological innovation – i.e. children / beings who would not live or exist without the aid of external assistance or supportive technology? If is difficult to apply such clear classifications when the process of bearing children is inherently complicated.

F. Sessions Cole, M.D.

As a physician whose specialty is the care of newborn infants, Dr. Cole routinely encounters babies whose problems place them on the edge of viability. According to Dr. Cole, "The language of H.R. 4292 would impose on doctors and parents a universal definition of 'life' or 'alive' which is, in [his] ... experience as a neonatologist, inconsistent with the harsh reality resented by a number of circumstances. The fact is that the indicia 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.... The language of H.R. 4292 will ... significantly interfere with the agonizing, painful and personal decisions that must be left to parents in consultation with their physicians." He emphasized that although technological advances have provided much hope for newborn survival, often life support technology may be futile and only prolong the pain of the dying process. He claimed that the Act would 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.

---Interesting that he emphasized infants with complications at birth, rather than babies that have survived abortions. Also, the notion of 'viability' is not value-free and the subjectivity of that term ought to be recognized. Just as the notion of what constitutes a 'person' is debatable, so is the notion of whether a newborn infant is 'viable.'

Ken Thomas, Congressional Research Service

Having been asked to describe the statutory impact of the bill if it becomes law, Thomas discussed the theoretical legal implications of the Act clearly, though it is difficult to determine how this would translate into practice. The Act would amend the United States Code to clarify the definition of the words 'person,' 'human being,' 'child,' and 'individual' as they are used in any act of Congress or any administrative ruling, regulation, or interpretation. Although only able to conduct a "cursory review" of the Code due to time constraints, according to Thomas, it "appears that the addition of this new language would have minimal effect on the prospective application of federal statutes." The interests of those who are 'born alive' are recognized most commonly in the areas of tort law, trusts and estates law, and criminal law.

The most controversial legal implication Thomas discusses is the issue of whether the 'born-alive' requirement for the federal homicide statues would be interpreted consistent with prevailing interpretations of common law. The proposed Act's term seems to be broader than the common law definition since the concept of born alive appears to be intended to apply to fetuses expelled prior to viability. Currently, states vary as to whether or not their definitions of a 'live birth' are limited to viable fetuses. Furthermore, the definition applies where fetal expulsion is the result of natural or induced labor, cesarean section, or induced abortion, which is also broader than the common law definition, generally applied to non-consensual fetal demise, and not abortion. Consequently, it is not clear if the statute would be limited to the situation where the cause of death was inflicted after the fetal expulsion, or whether it could be interpreted to cover injury inflicted in utero during an abortion. Application of the homicide statutes for damage incurred during an abortion would raise constitutional issues based on a woman's liberty interests under the 14th Amendment. As Thomas emphasized, "While the canon on constitutional doubt would lean against the application of a statutory ambiguity in a way that may violate the Constitution, it is not clear how this statute would be applied.

The terms "person," "human being," "child," and "individual" appear in over 15,000 sections of the United States Code, and in over 57,000 sections of the Code of Federal Regulations. Thus, the Congressional Research Service claims an evaluation of the statutory and regulatory impact of the Act is beyond its resources.

---Since a comprehensive analysis of the implications of the proposed Act is essentially impossible, more cautious support would seem logical. However, with the exception of Rep. Mel Watt, D-N.C., the committee has not been rigorously questioning the Act's impact. Others, including committee chairman Henry Hyde, R-Ill., insists that the "bill is not all that complicated." While it potentially may not be complicated, the possibility that the proposed Act's diction could be problematic cannot be ignored.

Federal News Service July 20, 2000, Thursday

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July 20, 2000, Thursday

SECTION: PREPARED TESTIMONY

LENGTH: 462 words

HEADLINE: PREPARED TESTIMONY OF ALLISON BAKER, RN, BSN

BEFORE THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION

SUBJECT - H.R. 4292, THE **BORN-ALIVE INFANTS PROTECTION ACT**

BODY:

In August of 1998 I began working in a high risk labor and delivery unit at Christ Hospital and Medical Center in Oak Lawn, Illinois. When I was hired, I was informed of a procedure called "therapeutic abortion" which was performed in the unit. This procedure was reserved for babies with particular conditions such as Down's Syndrome, Spina Bifida, Potter's Syndrome and many others. It was explained to me that in these cases, the mother would have an induced labor to expel the fetus in order to discontinue growth and life. This was an elective procedure and the patient was to be informed of all the details it involved.

Between August of 1998 and August of 1999, I witnessed three particular cases of therapeutic abortions at Christ Hospital first hand. The first occurred on a day shift. I happened to walk into a "soiled utility room" and saw, lying on the metal counter, a fetus, naked, exposed and breathing, moving its arms and legs. The fetus was visibly alive, and was gasping for breath. I left to find the nurse who was caring for the patient and this fetus. When I asked her about the fetus, she said that she was so busy with the mother that she didn't have time to wrap and place the fetus in the warmer, and she asked if I would do that for her. Later I found out that the fetus was 22 weeks old, and had undergone a therapeutic abortion because it had been diagnosed with Down's Syndrome. I did wrap the fetus and place him in a warmer and for 2 hours he maintained a heartbeat, and then finally expired.

The second case involved a couple who had requested a therapeutic abortion for their 20 week fetus with Spina Bifida. My shift started at 11:00 PM, and the patient delivered her fetus about 10 minutes before I took her as a patient. During the time the fetus was alive, the patient kept asking me when the fetus would die. For an hour and 45 minutes the fetus maintained a heartbeat. The parents were frustrated, and obviously not prepared for this long period of time. Since I was the nurse of both the mother and fetus, I held the fetus in my arms until it finally expired.

The third case occurred when a nurse with whom I was working was taking care of a mother waiting to deliver her 16 week Down's Syndrome fetus. Again, I walked into the soiled utility room and the fetus was fully exposed, lying on the baby scale. I went to find the nurse who was caring

for this mother and fetus, and she asked if I could help her by measuring and weighing the fetus for the charting and death certificate. When I went back into the soiled utility room, the fetus was moving its arms and legs. I then listened for a heartbeat, and found that the fetus still was alive. I wrapped the fetus and in 45 minutes the fetus finally expired.

END

LANGUAGE: ENGLISH

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July 20, 2000, Thursday

SECTION: PREPARED TESTIMONY

LENGTH: 913 words

HEADLINE: PREPARED TESTIMONY OF JILL L. STANEK, RN

BEFORE THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION

SUBJECT - H.R. 4292, THE **BORN-ALIVE INFANTS PROTECTION ACT**

BODY:

I am a Registered Nurse who has worked in the Labor & 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 being 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 deliver a premature baby who dies during the birth process or soon afterward. The way that induced abortion is most often executed at my hospital is by the physician inserting a medication called Cytotec into the birth canal close to the cervix. Cytotec irritates the cervix and stimulates it to open. When this occurs, the small, preterm baby drops out of the uterus, oftentimes alive. It is not uncommon for one of these live aborted babies to linger for an hour or two or even longer. One of them once lived for almost eight hours.

In the event that a baby is aborted alive, he or she receives no medical assessments or care but is only given what my hospital calls "comfort care." "Comfort care" is defined as keeping the baby warm in a blanket until he or she dies, although even this minimal 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's 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 21 to 22 weeks old, weighed about 1/2 pound, and was about 10 inches long. He was too weak to move very much, expending any energy he had trying to breathe. Toward the end 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 heart was still beating through his chest wall. After he was pronounced dead, we folded his little arms across his chest, wrapped him in a tiny shroud, and carried him to the hospital morgue where all of our dead patients are taken.

Other co-workers have told me many 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 medical help. A Support Associate told me about a live aborted baby who was left to die on the counter of the Soiled Utility Room wrapped in a disposable towel. This baby was accidentally thrown into the garbage, and when they later were going through the trash 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+ weeks pregnant, and it did not look as if her baby would be able to continue to live inside of her. The baby was healthy and had up to a 39% chance of survival, according to national statistics. But the patient chose to abort. The baby was born alive. If the mother had wanted everything done for her baby, there would have been a neonatologist, pediatric resident, neonatal nurse, and 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-worker. After delivery the baby, who showed early signs of thriving, was merely wrapped in a blanket and kept in the Labor & Delivery Department until she died 2-1/2 hours later.

Something is very wrong with a legal system that says doctors are mandated to pronounce babies dead but are not mandated to assess babies for life and chances of survival. In other words, our laws currently say that babies have no rights to medical oversight until they are dead. We look the other way and pretend that these babies aren't human while they're alive but human only after they are dead. We issue these babies both birth and death certificates, but it is really only the death certificate that matters. No other children in America are medically abandoned like this.

Abortion is a cancer that is literally killing America. It is killing our children while it is killing our consciences. It began when we took God out of our decision-making and proclaimed that the little beings growing inside of women were "products of conception" and not little girls and little boys. Who should be surprised that we keep pushing the envelope so that now we are aborting these "products of conception" alive? I even work at a hospital named "Christ" that does this very thing! It is beyond me to comprehend that we're doing what we're doing now, and so I can't even imagine what horrible ways we will think of next to torture our children. Please help put an end to this by proclaiming infants as American human being homo sapiens with the same legal and medical rights that you and I big people have. Thank you.

END

LANGUAGE: ENGLISH

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July 20, 2000, Thursday

SECTION: PREPARED TESTIMONY

LENGTH: 1665 words

HEADLINE: PREPARED TESTIMONY OF MATTHEW G. HILE, PH.D.

BEFORE THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION

SUBJECT - H.R. 4292, THE **BORN-ALIVE INFANTS PROTECTION ACT**

BODY:

Mr. Chairman, Honorable Representatives, Staff and visitors:

My name is Matthew Hile. I hold a Ph.D. in Clinical Psychology and am a Research Associate Professor at the University of Missouri-Columbia Medical School. I sit on the Executive Committee of the American Psychological Association's Division of Mental Retardation and Developmental Disabilities and am a member of the Medical Ethics Committee of the St. Louis Children's Hospital.

However, today I come to offer testimony concerning the **Born Alive Infants Protection Act** (H.R. 4292) as the father of Amelia Meliss Hile.

Fourteen years ago, during a sweltering June and July very much like we are having today, I kept a very personal journal. A journal of the brief days of our daughter's life. A time of suffering for our daughter, Amelia, as well as suffering for her parents, grandparents and all that knew them.

My wife and I very much wanted a baby. We were, and still are, very much in love, were out of school, had been married 10 years and had bought our first home. This baby received ideal prenatal care. My wife lost 10 pounds before she conceived, ate two vegetables every night for dinner, drank absolutely no alcohol, very little caffeine, and we went to the obstetrician regularly.

We had readied the nursery with curtains and crib, read books on parenting, received gifts from friends and family, and dreamed about our child's future. The grandparents to be called regularly and made plans to come visit the new arrival, who would be the first grandchild on either side of the family.

The following has been excerpted from my journal:

June 17th: Last Thursday 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 - 2 hours under the scan. We thought that there was just some difficulty in getting the precise measurements...

June 18th: Friday morning a call from the OB, get in for a feta scope now. That afternoon we have another sonogram with the head of the genetics department. He came into the room with a tech and our pediatrician. He begins talking and showing us things on the monitor. He is concerned about the baby's presentation, why was it in this position. He goes on to show the curved spine, the splayed hips, the twisted legs and feet, the oddly bent hands and the 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 involvement. 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 is performed. The operating room filled with Drs, nurses and technicians. At 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 is a girl. I watch them try to start an IV in her little twisted hand, 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 3 am I take a long walk through corridors that will soon be familiar. Up to the 5th 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 goodnight and gently kiss her. I feel strangely better for having wished her good night.

June 26th: I visit Amelia a couple of 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 so sorry for her, for us, but mostly for Amelia. As I hold her I feel a great warmth; a feeling washes over me that was unexpected. 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 these 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 had hoped to be celebrating. The 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 music or recognize her mother. More tests. We do have brain involvement. The geneticist was right.

June 28th: My wife is home and my daughter is not. That is not the way it is supposed to be. 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 hear rate stopping, but she is doing great!" This is getting more and more ludicrous. We feel something must be done but we are trapped. She cannot be released to another unit because she is not stable, she cannot die because they keep saving her life, we cannot stop treatment because they won't let us, we have to pay because we are

responsible, and we cannot do anything because we are not responsible. We are told it is a medical decision. I wonder about the increased brain damage through these increasing periods of anoxia.

- More tests -- brain stem abnormalities with higher cortical function areas also having irregularities. No gag response. Nothing is getting better. 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 needed a transfusion in the night. The following day she is better and worse. She moved a little but was much slower to recover from her heart rate drops. At those times she dies and technology brings her back.

July 18th: We have 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, that would not be in her best interest. We are given good advice, not to wish away our time with her as it may be very brief in the grand scheme of things. Another week goes by. Another meeting. The decision is made by them to begin to push Amelia to see how much she can do. Since she cannot swallow they decide to suction her only every four hours and not every hour. When I return at 9pm she is laying on her side. She had spittle on her towel and it was apparent that she had not been suctioned. With the assistance of the nurse I got her up and rested her upright on my chest. I started reading Winnie the Pooh and the alarms went off. Her respiration dropped and her heart rate plummeted. She was gray, grayer than I had ever seen her before. A nurse came by to check her. Other nurses walked by, obviously concerned -- some wore anti-abortion red roses on their nametags. Amelia was suctioned, and oxygen passed by her face. The nurses say they were never taught how to NOT treat someone.

July 25th: We become angry in a meeting with the medical staff. What are you doing 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 cannot 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, and 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, to let her go. My wife holds her baby to her 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 pm feeding Amelia is looking blue. Amelia lay silently in my wife's arms. After 5 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.

Today I am here to suggest that you have the power to make the journals of others in our position have a very different and even 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.

END

LANGUAGE: ENGLISH

LOAD-DATE: July 25, 2000

Federal News Service July 20, 2000, Thursday

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July 20, 2000, Thursday

SECTION: PREPARED TESTIMONY

LENGTH: 834 words

HEADLINE: PREPARED TESTIMONY OF F. SESSIONS COLE, M.D.

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

SUBJECT - H.R. 4292, THE **BORN ALIVE INFANTS PROTECTION ACT**

BODY:

TRANSMITTED BY: FEDERAL NEWS SERVICE 620 NATIONAL PRESS BUILDING WASHINGTON, DC 20045

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 prematurity, 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 indicia 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 everyday. 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% 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. 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.

END

LANGUAGE: ENGLISH

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SECTION: PREPARED TESTIMONY

LENGTH: 1968 words

HEADLINE: PREPARED TESTIMONY OF KEN THOMAS CONGRESSIONAL RESEARCH SERVICE

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

BODY:

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 to discuss H.R. 4292, the "**Born-Alive Infants Protection Act** of 2000." Specifically, we have been asked by the subcommittee to describe the statutory impact of this bill if it becomes law.

H.R. 4292, the **Born-Alive Infants Protection Act** of 2000, would amend the United States Code to clarify the definition of the words "person," "human being," "child," and "individual" as they are used in any act of Congress or any administrative ruling, regulation, or interpretation. This memorandum responds to your request for information on the impact the Act would have on the Code. Time constraints have prevented us from conducting a complete analysis of the use of the identified words either in the Code or in relevant administrative rulings, regulations, or interpretations.(1) However, after a cursory review of the Code, it appears that the addition of this new language would have minimal effect on the prospective application of federal statutes.

Under the Act, the words "person," "human being," "child," and "individual" are defined 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. . . ."(2) The interests of those who are "born alive" are recognized most commonly in the areas of tort law, trusts and estates law, and criminal law.

State tort claims brought on behalf of those who are "born alive," but later die as a result of injuries sustained during pregnancy, are common. For example, the estate of a dead infant who was "born alive" may generally bring a state claim for wrongful death against a mother's tortfeasor.(3) However, federal tort claims are principally brought under the Federal Tort Claims Act ("FTCA"), which authorizes tort suits to be brought against the United States.(4) As drafted, the proposed Act does not affect the operation of the FTCA, as the relevant portions of that Act do not use the terms "person," "human being," "child," and "individual" in establishing damage claims.(5) Further, the FTCA allows such suits only "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."(6) Because the law to be applied in a claim involving the FTCA is really state law, changing these federal definitions would have little effect on the administration of the claim. Thus, if a state has not

established a similar definition for the words "person," "human being," "child," and "individual," those contemplated by H.R. 4292's new definition would appear to remain with little recourse.

In trusts and estates law, those who are "born alive" at the time of a decedent's death may become beneficiaries of a trust or may obtain an interest in real and personal property. However, because state law and the will or trust instrument determine whether those "born alive" may be deemed a beneficiary of a trust or estate, the addition of H.R. 4292's new definitions with respect to federal law would probably have little impact on these determinations.(7)

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 the harmed fetus does not survive until birth, most state courts have found that common law homicide or statutes based on them do not apply.(8) The "born alive" requirement is generally seen as a 16th century rule of medical jurisprudence related to the evidentiary difficulties in establishing fetal demise.(9) While the standard is still used in most states which use a common law definition of homicide, some states have acted to eliminate the "live birth" requirement statutorily.(10) Thus, the particular definition of "born alive" might in some cases determine whether or not a criminal charge can be brought for harm caused in utero.(11) It is not clear, however, that the proposed Act would significantly impact federal criminal law. For instance, the principal federal statutes which would appear to be affected by this language would be the relatively narrow prohibitions against murder and manslaughter in the special maritime and territorial jurisdiction of the United States.(12) Currently, infliction of injuries on a fetus, who was born alive but died as result of those injuries, would constitute homicide under these provisions.(13) A review of relevant case law, however, would appear to indicate that the definition of "born alive" as it relates to these statutes has not been the subject of reported federal litigation.

It does seem likely, however, that the "born alive" requirement for the federal homicide statutes would be interpreted consistent with prevailing interpretations of common law. Thus, the phrase "born alive" would apply to a child with an "independent life of its own for some period, even momentarily, after birth, as evidenced by respiration or other indications of life, such as beating of heart and pulsation of arteries or heart tones in response to artificial respiration, or pulsation of umbilical cord after being severed."(14) The proposed Act, on the other hand, provides that "born alive" would mean a child that "has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." These definitions seem to be substantially similar, although there do appear to be some differences.

For instance, the proposed Act extends its definition to "every infant member of the species homo sapiens who is born alive at any stage of development." Thus, the concept of born alive would appear to be intended to apply to fetuses expelled prior to viability. This definition is broader than the common law definition, which applied to women "quick"with child (between the 16th and 18th week of pregnancy).(15) It would appear, however, that states vary as to whether or not their definitions of a "live birth" are limited to viable fetuses.(16)

Further, the proposed Act's definition applies where fetal expulsion is the result of natural or induced labor, cesarean section, or induced abortion. It would appear that this is also broader than the common law definition, which generally applied to non-consensual fetal demise, and not abortion.(17) Consequently, it is not clear if the statute would be limited to the situation where the cause of death was inflicted after the fetal expulsion, or whether it could be interpreted to cover injury inflicted in utero during an abortion. Application of the homicide statutes for damage incurred during an abortion would raise constitutional issues based on a woman's liberty interests under the 14th Amendment. While the canon of constitutional doubt would lean against the application of a statutory ambiguity in a way that may violate the Constitution, it is not clear how this statute would be applied.

1. A definitive statutory analysis of the effect of the proposed Act would require a review and evaluation of the use of the terms "person", "human being", "child", and "individual" as they appear in all federal statutes and in all agency rulings, regulations, or interpretations. 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, an evaluation of the statutory and regulatory impact of the Act is beyond the resources of our office.

2. The proposed Act provides the following:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child," and "individual," shall include every infant member of the species homo sapiens who is born alive at any stage of development.

As used in this section, the term born alive', with respect to a member of the species homo sapiens, means the complete expulsion or extraction from its mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

3. Civil liability for injury to a fetus is now well-established legally, and today virtually all jurisdictions recognize tort claims for prenatal injuries if the child is subsequently born alive. Dawn Johnsen, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 Yale L.J. 577, 599 (1986). In addition, some states have now expanded their wrongful death statutes to include damages to the fetus even if it is not subsequently born alive.

4. 28 U.S.C. Sections 1346(b), 2671-2680. See also Henry Cohen, Federal Tort Claims Act: Current Legislative and Judicial Issues, CRS Report 95-717A (1996).

5. The section of the FTCA which establishes the liability of the United States, 28 U.S.C. Section 2674, provides that "(t)he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

6. 28 U.S.C. Section 1346(b).

7. Time constraints have prevented us from considering the tax implications arising from the receipt of proceeds by those who are "born alive."

8. Mary Lynn Kim, Hughes v. State: The "Born Alive" Rule Dies a Timely Death, 30 Tulsa L.J. 539, 553-554 (1995). However, some state courts have provided that damage inflicted on a fetus in utero is sufficient to support a homicide charge even without a live birth. See, e.g., Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994).

9. Mary Lynn Kim, supra note 8, at 540.

10. See, e.g., Iowa Code Ann. Section 707.7 (1993).

11. See, e.g,. Hughes v. State, 868 P.2d 730, 737 (Okla. Crim. App. 1994)(J. Lumpkin, dissenting)(fetus born brain dead, but with an extremely low heart beat),

12. See 18 U.S.C. Section 1111 (murder of a "human being") and 18 U.S.C. Section 1112 (manslaughter of a "human being.") These prohibitions only apply on the high seas, the waters of the United States (excluding state waters), in any vessel belonging in whole or in part to the United States or any citizen or United States corporation, on lands where the United States has

exclusive or concurrent jurisdiction thereof (e.g., Indian tribal lands), certain guano islands, in aircraft operating over United States waters and the high seas and belonging to the United States or to United States citizens or corporations, space vehicles, places outside the jurisdiction of any nation with respect to an offense by or against a national of the United States and certain foreign vessels. 18 U.S.C. Section 7.

13. United States v. Spencer, 839 F.2d 1341 (9th Cir., 1988), cert. den., 487 U.S. 1238 (1988).

14. Black's Law Dictionary 74 (6th ed. 1990).

15. Stephanie McCavitt, The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology, 36 N.Y.L. Sch. L. Rev. 609, 611 (1991).

16. Id. at 614-34.

17. Id. at 611.

END

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July 20, 2000, Thursday

SECTION: PREPARED TESTIMONY

LENGTH: 1324 words

HEADLINE: PREPARED TESTIMONY OF ROBERT P. GEORGE MCCORMICK PROFESSOR OF JURISPRUDENCE PRINCETON UNIVERSITY

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

SUBJECT - H.R. 4292, THE **BORN ALIVE INFANTS PROTECTION ACT**

BODY:

My name is Robert P. George. I am McCormick Professor of Jurisprudence in the Department of Politics at Princeton University. At Princeton, I teach courses in constitutional interpretation, civil liberties, and philosophy of law. I am author of two books in the field of moral and political philosophy and editor of several others. I have published numerous articles and review essays in journals of law, philosophy, and political science. From 1993 to 1998, I served on the United States Commission on Civil Rights, and in that capacity I previously had the honor of testifying before this Committee.

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. 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, etc.--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 source. 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; it is not something that comes or goes with age, size, stage of development, or condition of disability or dependency; 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 her 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 to extend the right to abortion into the post-natal phase.

In an article entitled "Killing Babies Isn't Always Wrong" (The Spectator, 16 September 1995, pp. 20-22), 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:

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 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, nonpersons.

Is Professor Singer alone 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. ("Abortion and Infanticide," Philosophy and Public Affairs, Vol. 2.) Writing even before legal prohibitions of abortion were swept away by the Supreme Court's decisions in Roe v. Wade and Doe v. Bolton, Professor Tooley bluntly declared that human fetuses and infants "do not have a right to life." Only "persons" have a right to life, and fetuses and infants are not, he insisted, "persons." 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 the right to life--until well after we are born. According to Professor Tooley, a human being (or other organism) "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." 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. (Critical Moral Liberalism: Theory and Practice (Lanham, Md: Rowman and Littlefield, 1997), ch. 8, "Abortion and Infanticide.") While he offers some reasons why people might nevertheless think it generally wrong to kill newborn babies, he promoted the view that infants, unlike more mature human beings, do not "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 "there will be permissible exceptions to the rule against killing infants that will not apply to the rule against killing adults and children."

I could go on with examples. For now, though, suffice it to say that people who wish to destroy an "unwanted" child 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--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 "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 this threat. I therefore respectfully urge passage of H.R. 4292, the **Born Alive Infants Protection Act.**

END

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Federal News Service July 20, 2000, Thursday

July 20, 2000, Thursday

SECTION: PREPARED TESTIMONY

LENGTH: 806 words

HEADLINE: PREPARED TESTIMONY OF GIANNA JESSEN

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

SUBJECT - H.R. 4292, THE **BORN ALIVE INFANTS PROTECTION ACT**

BODY:

My name is Gianna Jessen. 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. I am 23 years old. I was aborted and I did not die. My biological mother was 7 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 solution of salt saline that is injected into the mothers womb. The baby then gulps the solution, it burns the baby inside and out and then the mother is to deliver a dead baby within 24 hours.

This happened to me! I remained in the solution for approximately 18 hours and was delivered ALIVE on April 6, 1977 at 6:00 am in a California abortion clinic. There were young women in the room who had already been given their injections and were waiting to deliver dead babies. When they saw me they experienced the horror of murder. A nurse called an ambulance, while the abortionist was not yet on duty, and had me transferred to the hospital. I weighed a mere two pounds. I was saved by the sheer power of Jesus Christ.

Ladies and gentleman I should be blind, burned.....I should be dead! And yet, I 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 lie there. "They" said that was all I would ever do! Through prayer and hard work by my foster mother, I was walking at age 31/2 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 depend on Jesus for everything.

When the freedoms of one group of helpless citizens are infringed upon, such as the unborn, the newborn, the disabled and so called "imperfect," what we do not realize is that our freedoms as a

NATION and Individuals are 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 (within our own century) said: " 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 a nation without examining her soul? A murderous spirit will stop at nothing until it has devoured a nation. Psalm 53:1-3 says: "The fool has said 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, to see if there are any who understand, 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." Today's slogans are: "a woman's right to choose" and "freedom of choice," etcetera.

There was once a man speaking from hell (recorded in Luke 16) who said "I am tormented in this flame." Hell is real. So is Satan, and the same hatred that crucified Jesus 2000 years ago, still resides in the hearts of sinful people today. Why do you think this whole room trembles when I mention the name Jesus Christ? It is because He is REAL! He is able to give grace for repentance and forgiveness to you and to America. We are under the judgement of God - but we can be saved through Christ. Romans 5:8-10 "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....and I am so Thankful!!

END

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