

September 30, 1999

(House)

(and one was sent to the House Rules Cttee on Sept. 29th)

H.R. 2436 - Unborn Victims of Violence Act of 1999

(Rep. Graham (R) SC and 66 cosponsors)

The Administration strongly opposes enactment of H.R. 2436, which would make it a separate Federal offense to cause "death or bodily injury" to a "child in utero" in the course of committing certain specified Federal crimes. If H.R. 2436 were presented to the President, his senior advisers would recommend that he veto the bill.

The Administration has made the fight against domestic violence and other violence against women a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, marked a critical turning point in our national effort to address domestic violence and sexual assault. VAWA, for the first time, created Federal domestic violence offenses with strong penalties to hold violent offenders accountable. To date, the Department of Justice has brought 179 VAWA and VAWA-related Federal indictments and awarded over \$700 million in VAWA grants to communities to assist in combating violence against women.

Unfortunately, H.R. 2436 is not designed to respond to violence against women. The Administration has significant public policy concerns with the legislation, as described in the Department of Justice letter to the House Committee on the Judiciary on September 9, 1999. For example, H.R. 2436 would: (1) trigger an excessive increase in the length of the sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant; (2) depart from the traditional rule that criminal punishment should correspond to the knowledge and intent of the defendant; and (3) identify a fetus as a separate and distinct victim of a crime, which is unprecedented as a matter of Federal statute, and unnecessary to achieve the goal of increasing the punishment for violence against pregnant women.

H.R. 2436 is careful to recognize that abortion-related conduct is constitutionally protected; however, this does not remove all doubt about the bill's constitutionality, as explained in the Department of Justice letter to the House Committee on the Judiciary on September 9th.

The Administration understands that Representative Lofgren will offer an alternative that appropriately focuses on increasing the punishment for violence against pregnant women without identifying a fetus as a separate and distinct victim of a crime. The Administration is willing to work with Congress to develop legislation that would strengthen the punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by VAWA.

* * * * *

S 1673/HR 2436 Undermines *Roe v. Wade*

Roe v. Wade established a woman's right to choose to terminate a pregnancy, while also recognizing a state's valid interest in potential life, carefully balancing the two. During the early stages of pregnancy, a woman's right to choose is absolute; however, as the pregnancy progresses, the weight of the state's interest becomes stronger.

S 1673/HR 2436 threatens to upset this carefully crafted balance.

- * Roe holds that a fetus, even when viable, is not a "person" for purposes of the Fourteenth Amendment to the Constitution.
- * Only a "person" recognized by the Constitution can be the victim of a federal or military crime. There is no other example in the federal criminal code in which the victim of a crime resulting in death or bodily injury was not a "person" recognized under the Fourteenth Amendment.
- * S 1673/HR 2436 recognizes a "member of the species homo sapiens at all stages of development" as a victim of a separate criminal offense, regardless of whether harm to the pregnant woman also occurred, and, if it did, regardless of whether the perpetrator is charged with an offense against the woman.
- * By recognizing a zygote, blastocyst, embryo, or fetus as a "person" for purposes of S 1673/HR 2436, the sponsors of the bill embark down a path that threatens to chip away at Roe and the basic right of choice that it established.

OPPOSE THE UNBORN VICTIMS OF VIOLENCE ACT

S 1673/HR 2436 — introduced by Senator Mike DeWine and Rep. Lindsey Graham— is designed to erode the foundation of a woman's right to choose as set forth in *Roe v. Wade* by elevating the legal status of all stages of prenatal development under federal law. This bill would amend the Federal Criminal Code and the Uniform Code of Military Justice to create a separate offense if, during commission of specific federal and military crimes, an individual causes death or injury to what the sponsors call "a member of the species homo sapiens at any stage of development." If enacted, S 1673/HR 2436 would be the first federal law to recognize a zygote (fertilized egg), a blastocyst (preimplantation embryo), an embryo (through week 8 of a pregnancy) or a fetus as a person who can be an independent victim of a crime.

Acts of violence against women, especially pregnant women, are tragic and should be punished. The true aim of this legislation, however, is not to stop violence against women. In fact, protections for women — the principal victims of these crimes — are notably absent from S 1673/HR 2436.

- ◆ This bill undermines a woman's right to choose by recognizing — for the first time under federal law — a zygote, blastocyst, embryo, or fetus as a person, with rights separate and equal to that of a woman and worthy of legal protection. The Supreme Court has held that fetuses are not persons within the meaning of the Fourteenth Amendment.
- ◆ If enacted, S 1673/HR 2436 will improperly inject debates about abortion into federal and military criminal prosecutions across the country. This, unfortunately, is precisely what the bill's proponents seek. They have crafted the bill to inflame the national debate about when life begins. The federal criminal and military courts are inappropriate forums for another skirmish in the war on a woman's right to choose.
- ◆ During House committee and floor debate, the bill's sponsors claimed that this is a moderate crime bill that has nothing to do with abortion because it exempts from prosecution legal abortion, medical treatment, and the conduct of the woman. However, when pressed, proponents candidly admitted that their purpose is to recognize the existence of a separate legal "person" where none currently exists.
- ◆ The chief sponsor of the bill in the House, Representative Lindsey Graham, amended his own legislation during House consideration to make explicit that no knowledge of the pregnancy or intent to cause harm is necessary. This would allow courts to impose a punishment normally associated with intentional killing without a finding of intent. In the absence of a conviction for the underlying criminal offense, this is entirely unprecedented in the criminal law. In addition, it punishes the harm to the zygote, embryo or fetus while utterly ignoring the harm to the pregnant woman.
- ◆ S 1673/HR 2436 fails to address the very real need for strong federal legislation to prevent and punish violent crimes against women. Nearly one in every three adult women experiences at least one physical assault by a partner during adulthood. To deter crimes against pregnant women and to punish those who assault or murder pregnant women, Congress should pursue other avenues that focus on the harm to the woman and the promotion of healthy pregnancies.

CONGRESS SHOULD NOT DEPLOY FEDERAL PROSECUTORS ON BEHALF OF THE UNBORN

During its last session, for the first time, Congress considered a “fetal protection” bill, H.R. 2436/S. 1673. The bill, entitled the “Unborn Victims of Violence Act of 1999,” would amend the criminal code and the Uniform Code of Military Justice to create new federal crimes for bodily injury or death of an “unborn child” who is “in utero” at the time the act took place.

Intentional criminal acts that cause a miscarriage or interrupt normal fetal development are tragedies for the woman and her family that are worthy of redress. However, the approach taken by H.R. 2436/S. 1673 is misguided, and threatens women’s rights. Congress should instead reauthorize the Violence Against Women Act, enact the Violence Against Women Act II, and support a range of programs that promote healthy childbearing. In the criminal arena, it should create either an offense that punishes third parties who, in the course of commission of other federal crimes, cause injury to or termination of a pregnancy, or it should enhance the penalties imposed for commission of violent crimes when the crime results in a miscarriage, stillbirth, or other interruption of normal fetal development.

H.R. 2436/S. 1673 is Fundamentally Flawed

The bill defines the phrase “child in utero” to include any “member of the species homo sapiens, at any stage of development, who is carried in the womb.” This definition provides protection for an “unborn child” under federal criminal laws, regardless of the stage of development, from conception to birth. “Bodily injury” similarly is defined by reference to 18 U.S.C. § 1365 in such a sweeping manner that it would encompass even such speculative harms as “fetal pain.”

Although the bill properly includes exceptions for consensual or emergency abortions, medical treatment, and the pregnant woman’s own conduct, it nonetheless forges new ground in attempting to recognize a zygote (fertilized egg), blastocyst (preimplantation embryo), embryo (through week 8 of pregnancy), or fetus as a person with the same legal status as the woman. H.R.

2436/S. 1673 opens the way to litigation over when life begins in the context of criminal prosecutions. It marks a major departure from existing federal law and threatens to erode the foundations of the right to choose as recognized in *Roe v. Wade*, 410 U.S. 113 (1973).

The bill does not require proof that the perpetrator knew of the pregnancy, or intended to harm or cause the death of the “unborn child,” although intentional killing receives an increased sentence. In effect, although the bill creates new federal criminal offenses, it does not require a showing of criminal intent. Instead, it relies on what is known as the doctrine of “transferred intent,” assuming that proof of a violation of the underlying criminal act will include a sufficient showing of intent to support a finding of violation of this new criminal provision. However, the bill does not require a conviction for violating the underlying criminal offense. Thus, it is unclear at best whether intent to commit any criminal act must be shown as a predicate for conviction of violation of the “Unborn Victims of Violence Act.” Criminalization of any act without a required showing of intent — either to commit the act or cause the harm — virtually is unprecedented in federal law.

Reject the Agenda of the Bill’s Sponsors

So-called “fetal protection” bills are inconsistent with a woman’s right to choose. In *Roe v. Wade*, the U.S. Supreme Court rejected the suggestion that “by adopting one theory of life” -- that is, by granting personhood to the fetus -- “[a state] may override the rights of the pregnant woman that are at stake.” 410 U.S. at 162. It noted that, except in narrowly defined situations, and except when the rights are contingent upon live birth, “the unborn have never been recognized in the law as persons in the whole sense.” *Id.* Thus, the Court concluded, a fetus is not a “person” for purposes of the Fourteenth Amendment to the U.S. Constitution. *Id.* at 159. Despite these clear pronouncements, states have tried to grant the fetus legal recognition as a full person. H.R. 2436/S. 1673 is a federal manifestation of this effort to endow fetuses, and even zygotes and embryos in this case, with rights — such as recognition as a victim of a crime — and, thus, to erode the foundational premise of *Roe v. Wade*.

At a rhetorical level, H.R. 2436/S.1673 reveals its intent to endow fetuses with rights by calling a zygote, blastocyst, embryo, or fetus an “unborn child.” It, thus, elevates even a two-week old embryo to the status of a person. The original draft of the bill did not contain a

definition of the phrase “child in utero.” In response to criticism that the bill was vague, the sponsors attempted to address the vagueness of the original proposal by defining that term to mean any “member of the species homo sapiens, at any stage of development, who is carried in the womb.” However, by doing so, the sponsors also clarified their intent to equate harm to a zygote with harm to a person who has been born, and who has constitutional rights. This unacceptable result is nothing less than a frontal attack on *Roe*.

In states that have enacted “fetal protection” legislation by affording legal rights to fetuses, women’s rights and health have been infringed upon significantly. Due to this track record in the states, we can predict that H.R. 2436/S. 1673 is only a first step down a slope we already know to be slippery.

For instance, South Carolina now prosecutes women whose babies are found to have drugs in their system. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998). According to a June 1990 General Accounting Office (GAO) report, such prosecutions discourage women from seeking both prenatal care and care during delivery. Women using drugs fear that medical professionals will discover their drug use and turn them over to the authorities for prosecution. Lack of prenatal care or assistance in delivery dramatically increases the dangers for both the mother and the baby, and increases the costs to society of providing poor mothers and babies with economic and medical support.

Both criminal and civil “fetal protection” laws often result in trimming pregnant women’s liberty. For example, if an airline feared that it would be subject to a civil or criminal liability for allowing a pregnant woman who miscarried to travel, airlines might be reluctant to sell tickets to pregnant women. Similarly, gyms might refuse to allow pregnant women to work out, fearing that any miscarriage would be attributable to them. Very quickly, pregnant women could become “protected” in a cage of restrictive rules fashioned in response to so-called “fetal protection” laws, turning back the clock to the days not so long ago when women were not permitted to work in industrial settings because their employers were afraid to incur liability for harm to their fertility. *See, e.g., Int’l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

The situation only worsens if the law is broadened further so that the woman herself can be sued for harm to a fetus. In such a case, all of the woman’s conduct during and perhaps even before pregnancy becomes subject to judicial scrutiny. Whether she works or stays in bed, exercises or doesn’t exercise, takes medicine or toughs out an illness — all her conduct could be second-guessed in a court of law when such civil actions arising from harms or death of a fetus are recognized.

**Intentional Harms Against A Pregnant Woman that Result in Harm
to or Death of a Fetus are a Proper Subject of Punishment,
but the Focus must be on the Harm to the Woman**

Society properly is concerned with assaults and murders, and this is reflected in our criminal code. These crimes are particularly offensive when they are committed upon a pregnant woman, causing miscarriage, stillbirth, or other injury. To address this problem, Congress should focus on the fact that the principal harm arising from such acts is to the woman who was pregnant. Instead, by creating a new criminal statute such as in H.R. 2436/S. 1673, it makes the government the protector of "unborn children," while ignoring the harm women suffer when they lose a pregnancy as a result of a violent act of which they are the primary victim.

Violence Against Women. To deter crimes against pregnant women and provide punishment for those who commit assaults or murders upon pregnant women, thereby causing the death of or injury to a fetus, Congress should pursue other avenues that focus on the harm to the woman. One limited step Congress commendably has taken already was enacting the Violence Against Women Act (VAWA), 18 U.S.C. § 2261. Domestic abuse often escalates when a woman is pregnant. "Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 889 (1992) (citing expert witness testimony).

Congress should follow up on this 1994 law both by reauthorizing VAWA during this congressional session, and by enacting VAWA II, H.R. 357/S. 51, which, among other things, would provide grants for law enforcement and prosecutors to combat violent crimes against women and expand victims' services. In fact, co-sponsoring VAWA II would be an important first step by the sponsors of H.R. 2436/S. 1673 to take.

Enact a Criminal Law that Focuses on the Harm to the Pregnancy In addition to enacting VAWA II, Congress could criminalize conduct that results in injury to or termination of a pregnancy without elevating a two-week old embryo to the legal status of a person. A criminal law that recognizes the pregnant woman as the primary victim of crime could punish harm to or termination of a pregnancy without recognizing a zygote as a potential victim of crime, affording it legal rights equal to and separate from those of the woman. The difference is more than symbolic. H.R. 2436/S. 1673 challenges our basic constitutional framework by affording legal protection to a "member of the species homo

sapiens, at any stage of development,” whereas a bill that focuses on the harm incurred when a pregnancy is injured or terminated could have precisely the same result in terms of the penalty assessed against a wrongdoer without turning the last 25 years of constitutional law on its head.

Furthermore, an addition to the criminal code that focuses on the harm to the pregnant woman would provide a deterrent against violence against women, and especially pregnant women. Such a bill also should include the requirement that the perpetrator be convicted of the underlying criminal offense, thereby requiring proof of intent to commit the underlying offense in order to punish the offender. This would bring the bill in line with the rest of the federal criminal code.

Augment Sentences in the Event of Miscarriage or Interruption of Normal Fetal Development. Another option available to Congress is to bolster its efforts on behalf of pregnant women by enhancing the penalties provided for the underlying crime against the woman if she suffers miscarriage, stillbirth, or other injury to a pregnancy. Enhancing the penalty would recognize that the harm that results from the underlying offense indeed was greater as a result of the injury to or death of the fetus.

A sentencing enhancement also could direct a sentencing judge to increase the penalty based upon the gestational stage of the pregnancy. In contrast, under the anti-choice bill, the punishment can be the same regardless of whether the pregnancy is visible and known — or hidden and unknown — to the perpetrator. Defendants inevitably will raise constitutional challenges to this scheme in the courts as a defense to a prosecution under this bill. They will claim that, if they did not know that the woman was pregnant, they cannot be punished for harm to the so-called “unborn child” pursuant to the due process clause of the U.S. Constitution. Instead of creating yet another quagmire in the courts, judges could and should be empowered to enhance the penalty as the pregnancy progresses.

In fact, if protecting the woman’s interest in her developing fetus is accomplished through sentencing enhancements rather than by creating a new criminal offense, prosecutors actually would be more likely to bring such matters to justice and to prevail. If a separate crime was created, as is proposed in H.R. 2436/S. 1673, it would have to be presented to a grand jury or otherwise indicted and charged separately, and each element of the offense would have to be proven beyond a reasonable doubt. If, instead, the penalty was enhanced, there would be no separate offense to plead and indict, prosecutors could prove the

death of or injury to the fetus under a preponderance of the evidence standard at a sentencing hearing, and any pertinent facts would be easier to prove because hearsay evidence could be admitted. Indeed, prosecutors might well shy away from prosecutions under H.R. 2436/S. 1673 as currently drafted, because complicated — and sometimes constitutional — issues of what an “unborn child” is, for instance, could muddle the central issues in the case. Jurors could get tangled up in questions of whether the defendant knew the woman was pregnant, whereas a sentencing judge would be able to consider the scope of harms to the woman and enhance the sentence accordingly.

If Congress Wants to Protect the “Unborn,” it Should Focus on Giving Babies a Healthy Start by Protecting Women’s Health

Other policies that do not break new ground in recognizing “fetal rights” surely would benefit the health of pregnant women and the fetuses they carry. Pregnancies are safer and babies are healthier when pregnancies are planned and women have access to prenatal care.

Congress should do everything in its power to ensure access to contraception by enacting the Equity in Prescription Contraceptive Coverage Act (EPICC), to require equitable treatment by insurers of women’s contraceptive needs.

Congress should ensure that all Americans have health insurance. Approximately 43 million Americans are uninsured; of these, women of childbearing age and their fetuses are at risk because they cannot pay for prenatal care and delivery.

Congress should increase funding for Title X, the federal program that is dedicated to providing family planning services in the U.S. The program not only funds family planning, including contraception, but it also provides funding for a range of reproductive health services, including prenatal care. This program could serve far more low-income women with better funding.

There is a dearth of programs for pregnant women who are drug and alcohol addicted. Congress should ensure sufficient funding for voluntary drug and alcohol addiction treatment for pregnant women, as well as programs to assist pregnant women to locate treatment facilities.

In sum, in addition to reauthorizing VAWA and enacting VAWA II, Congress could take a range of steps to promote women’s reproductive health, thereby helping to ensure a healthy start for millions of babies.