

# Courts Strike ‘Partial-Birth’ Abortion Ban; Decisions Presage Future Debates

By Cynthia Dailard

In November 2003, President Bush signed into law the Partial-Birth Abortion Ban Act, handing a major political victory to abortion opponents seeking to chip away at the foundations of *Roe v. Wade*. By the time the president put his pen to paper, however, abortion providers had filed suit in three states to block the law from taking effect, arguing that it shared the same constitutional flaws that prompted the Supreme Court to invalidate a virtually identical Nebraska law three years earlier.

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Within a year, district court judges in all three cases had found the law to be unconstitutional. Their decisions—spanning a combined 700 pages and recounting exhaustive medical testimony regarding the range of abortion procedures—are notable not only for their similarity of reasoning, but also because they so pointedly condemn Congress for its biased “fact-finding” process and conclusions. At the same time, a recent federal appeals court decision upholding a state ban on “partial-birth” abortions that contains a narrow health exception, and the discussion of fetal pain contained in one of the federal “partial-birth”

abortion decisions, hint at what the future may hold on the state and federal legislative fronts in the years to come.

## The History of the Federal Ban

The federal Partial-Birth Abortion Ban Act is the first federal law aimed at criminalizing an abortion procedure since *Roe v. Wade* legalized abortion nationwide more than 30 years ago. The law prohibits a physician from “knowingly perform[ing] a partial-birth abortion and thereby kill[ing] a human fetus,” except when the abortion “is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”

Although the law contains an extensive description of what constitutes a “partial-birth” abortion,\* it does not use medical terminology and fails to track the medical definition of the procedure its sponsors claim to target (an intact dilation and extraction, or D&X). Criminal penalties for doctors who violate the law include fines or a maximum two-year prison term.

Enactment of the ban was a decade in the making. Between 1995, when substantially similar legislation was first introduced in Congress, and the ban’s enactment in 2003, the issue saw major legislative action every year save one. Congress passed legislation in 1996 and again in 1997, but failed by the slimmest of margins to override President Clinton’s

veto on both occasions. By the time George W. Bush, a staunch antiabortion advocate, was elected president in 2000, 29 states had enacted laws virtually identical to the one then pending before Congress, and legal challenges attacking the constitutionality of these state bans were well underway.

These first-generation legal challenges to the state bans were resolved on a nationwide basis in June 2000 when the Supreme Court, by a 5–4 majority, struck down Nebraska’s “partial-birth” abortion ban. The opinion, written by Justice Stephen Breyer in *Stenberg v. Carhart*, cited two distinct flaws that rendered the law unconstitutional, under the legal framework of *Roe v. Wade* as reaffirmed by *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992 (that women have a constitutional right to choose an abortion, that states may not impose an undue burden on that right before the fetus reaches viability, and that after viability, states may restrict or even prohibit abortion except when necessary to protect a woman’s life or health). First, the Court held, the language in the Nebraska statute used to define a “partial-birth” abortion was so broad as to potentially outlaw a range of abortion procedures, including the most common form of second-trimester abortions performed prior to viability (known as a dilation and evacuation, or D&E); in so doing, the statute impermissibly created an undue burden on women seeking previability abortions. Second, the Court found that

\*It is defined as a procedure in which “the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breach presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.”

the law impermissibly lacked an exception that allowed physicians to use the banned procedures when necessary to protect the health of the pregnant woman.

### District-Court Hat Trick

Although the *Stenberg* decision momentarily stalled the legislation pending before Congress, within two years its congressional champions had introduced a new version that purportedly addressed these problems. First, they claimed to have eliminated any possibility that the ban would place an undue burden on women's ability to obtain previability abortions by including what they argued to be a more precise definition of "partial-birth" abortion (requiring, among other things, the performance of an "overt act" intended to kill the partially delivered fetus). They further said they had addressed the health issue by including in the legislation extensive

congressional "findings" that "partial-birth" abortion is never necessary to preserve a woman's health, that it poses serious risks to women's health and that it lies outside the standard of medical care. The "findings," moreover, asserted a complicated legal theory explaining why the Supreme Court's recent decision did not bar Congress's efforts and why Congress's factual conclusions were superior to the courts' and entitled to judicial deference. The legislation passed both the House and Senate by overwhelming margins.

On November 5, 2003, President Bush signed the ban into law. Within 48 hours, abortion providers had obtained temporary restraining orders from federal district courts in San Francisco, New York and Nebraska preventing the law from taking effect (see box). Litigation seeking to permanently block the law's enforcement ensued, involving exhaustive testimony from numerous medical experts about the range of abortion procedures and their relative safety, as well as the potential scope of the federal law.

By September 2004, all three courts had rendered their decisions, finding the federal law unconstitutional. First and foremost, all three judges cited the lack of a health exception, rejecting Congress's findings that the banned procedure was never necessary to protect a woman's health. According to Judge Richard G. Kopf in the Nebraska decision, "the overwhelming weight of the trial evidence proves that the banned procedure is safe and medically necessary in order to preserve the health of women under certain circumstances. In the absence of an exception for the health of a woman, banning the procedure constitutes a significant health hazard to women." In the New York decision, Judge Richard Conway Casey, who was critical of the arguments presented by both sides, elaborated on the meaning of

the health exception and its implications for the legislative process. "The Supreme Court in *Stenberg* implicitly rejected deference to the institutional competency of legislatures, at least when abortion regulations are concerned," he wrote. "The evidentiary standard established by the Supreme Court does not permit the government to legislate in the face of medical uncertainty....*Stenberg*'s holding would not permit a ban without a health exception in the face of a 'significant body of medical opinion' articulating the reasons why an abortion procedure has safety advantages."

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Additionally, Judges Phyllis Hamilton (in the San Francisco decision) and Kopf also found the law to be unconstitutional because it would impose an undue burden on women's ability to choose certain previability abortions. (Judge Casey, having found the ban unconstitutional due to the lack of a health exception, did not address the undue burden question.) According to Judge Hamilton, "Like the Nebraska statute in *Stenberg*, the Act bans abortions performed at any time during a pregnancy, regardless of gestational age or fetal viability....[T]he definition of 'partial-birth abortion' contained in the Act encompasses several second trimester abortion procedures *in addition* to [D&X]...[T]he Act [therefore] creates a risk of criminal liability during virtually all abortions performed after the first trimester, and 'has the effect of placing a substantial obstacle in the path of a women seeking an abortion of a non-viable fetus.'"

## CONSTITUTIONAL CHALLENGES TO THE FEDERAL PARTIAL-BIRTH ABORTION BAN ACT OF 2003

### *Planned Parenthood Federation of America v. Ashcroft*

Brought by Planned Parenthood Federation of America on behalf of its affiliates. Decided by Judge Phyllis Hamilton, United States District Court for the Northern District of California, on June 1, 2004. <<http://news.findlaw.com/hdocs/docs/abortion/ppash60104ord.pdf>>

### *National Abortion Federation v. Ashcroft*

Brought by the American Civil Liberties Union on behalf of physicians who are members of the National Abortion Federation and seven individual physicians. Decided by Judge Richard Conway Casey, United States District Court for the Southern District of New York, on August 26, 2004. <<http://news.findlaw.com/hdocs/docs/abortion/nafash82604opn.pdf>>

### *Carhart v. Ashcroft*

Brought by the Center for Reproductive Rights on behalf of Dr. LeRoy Carhart and three other abortion providers. Decided by Richard G. Kopf, United States District Court for the District of Nebraska, on September 8, 2004. Judge Kopf had also presided over *Stenberg v. Carhart* at the district court level in 1998, finding Nebraska's "partial-birth" abortion ban to be unconstitutional. <<http://news.findlaw.com/hdocs/docs/abortion/carhartash90804opn.pdf>>

What is perhaps most striking about the decisions, however, is the degree to which they condemn Congress for its biased fact-finding process. Wrote Judge Hamilton, “The oral testimony before Congress was heavily weighted in favor of the Act....It is apparent to this court...that the oral testimony before Congress was not only unbalanced, but intentionally polemic.” Similarly, Judge Casey, in a particularly scathing critique, found that “Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings....This Court heard more evidence during its trial than Congress heard over the span of eight years. This Court also heard the testimony of more physicians regarding the safety of D&X than Congress did. Even the Government’s own experts [in this case] disagreed with almost all of Congress’s factual findings.” All three judges not only disagreed that Congress’s findings were entitled to the level of deference that Congress wanted, but found them, time and time again, to be unsupported by the evidence presented to Congress and patently unreasonable.

### What the Future Holds

Attorney General John Ashcroft has appealed all three decisions. Proponents of the federal law are hopeful that if and when one of the cases reaches the Supreme Court, at least one new justice will have been appointed who could tip the balance in their favor, given the narrowness of the *Stenberg* decision. In the meantime, the fate of *Roe*’s legal framework hangs in the balance.

While these three cases wind their way through the courts, another “partial-birth” abortion case demands a watchful eye. In December 2003, the Sixth Circuit Court of Appeals, in *Women’s Medical Professional Corporation v. Taft*, upheld the constitutionality of an Ohio “partial-birth” abortion ban

that differed from the Nebraska statute invalidated by *Stenberg* in two important respects: It specifically excludes the D&E procedure from its reach, and it contains a health exception, albeit a very narrow one. To some extent, Justice Sandra Day O’Connor appeared to invite such an approach in her concurring opinion in *Stenberg*, when she said that “a ban on partial birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.”

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However, the Ohio law only squarely addresses O’Connor’s constitutional concern about the scope of the ban. While it does indeed contain a health exception, that exception is extremely narrow, raising another constitutional question that also strikes at a key tenet of *Roe*. The exception permits an otherwise banned procedure—before as well as after viability—only when necessary “in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother’s life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.”

Notwithstanding the Sixth Circuit’s decision to uphold the Ohio law, the health exception appears contrary to over 30 years of abortion jurisprudence that, since 1973, has required “health” to be broadly defined. Additionally, *Stenberg* made clear that the health exception is constitutionally required not just to protect a woman from being forced to carry

to term a pregnancy that threatens her health; it also means that government cannot subject women’s health to significant risks by regulating abortion procedures in a way that forces them from a safer procedure to a riskier one. The Ohio law appears to fail under this second prong of the health-exception test. Nonetheless, it remains an open question whether the Ohio law will provide a model for other states seeking to advance “partial-birth” abortion legislation in the future, or for a renewed effort by Congress. It is also unknown how the Supreme Court—whatever its composition—would rule on the constitutionality of such a law if the question were presented to it.

Meanwhile, judicial utterances about the extent to which fetuses may experience and perceive pain during abortion procedures are likely to have significant political repercussions beyond the “partial-birth” abortion debate. Judge Casey, who called the D&X procedure “gruesome, brutal, barbaric, and uncivilized,” asserts that the expert testimony presented by government witnesses before his court leads to the conclusion that abortion procedures “subject fetuses to severe pain.” In contrast, Judge Hamilton, hearing similar testimony, wrote that “much of the debate on this issue is based on speculation and inference” and that “the issue of whether fetuses feel pain is unsettled in the scientific community.”

Despite their differing interpretations of essentially the same facts, Judge Casey’s assertion is likely to provide a major impetus for a new initiative pending before Congress, the Unborn Child Pain Awareness Act, introduced by Sen. Sam Brownback (R-KS) and Rep. Chris Smith (R-NJ). The legislation requires physicians performing abortions on fetuses after 20 weeks after

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fertilization to read an almost 200-word script to the pregnant woman stating that "the Congress of the United States has determined" that her "unborn child" can feel pain and that the abortion will cause it pain, and that by law she has the option of choosing to have anesthesia or other pain-reducing drugs administered directly to the "pain-capable unborn child." The bill would require the pregnant woman to accept or reject the pain medication for the fetus in writing.

Certainly, the issue of whether and at what point fetuses experience pain is an important one that should inform best medical practice and is currently the subject of active discussion within the medical community. Given the uncertainty, proponents of the legislation once again aim to dictate medical practice from the position of ideology, rather than science. Whether they will heed the admonishments of the three judges in this latest round of "partial-birth" abortion cases, and conduct balanced fact finding before acting, remains to be seen. ☸

### *Embryonic Stem Cell Research...*

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initiative in November to establish a similar state-funded research effort; the initiative would authorize the state to issue \$3 billion in bonds to finance research over a 10-year period. The campaign in support of the California initiative has received critical financial backing from a wide array of supporters, including businessman and philanthropist Bill Gates, Sen. Jon S. Corzine (D-NJ), actor and Parkinson's patient Michael J. Fox and George P. Schultz, secretary of state in the Reagan administration. Because of its potential to rejuvenate the state's lagging high-tech sector, it is also supported by the California Chamber of Commerce. ☸

*This article was supported in part by a grant from the David and Lucile Packard Foundation. The conclusions and opinions expressed in this article, however, are those of the author and The Alan Guttmacher Institute.*



*October 2004*

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