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Senate

Statement of Senator Dianne Feinstein

"On the Conference Report to S. 3, Banning Late-Term Abortions"

Mrs. FEINSTEIN. I rise in opposition to the conference report accompanying S. 3 which some, I think inaccurately, call the partial-birth abortion bill. In fact, this bill, originally introduced by Senator Santorum, is more accurately called the unconstitutional anti-choice bill, given the fact that it is flagrantly unconstitutional and its primary result will be to chill second-trimester abortion procedures.

I voted against this conference report in the recent House-Senate conference on this bill and also on the floor of the Senate last March.

This is the first bill since *Roe v. Wade* in 1973 that outlaws safe medical procedures and recriminalizes abortion. It is a major step forward in the march to obliterate a woman's right to control her own reproductive system and to eviscerate the entire choice movement in this country.

This bill is unconstitutional, I believe, for two reasons.

First, it uses a vague definition of dilation and extraction abortion, or D&X abortion. This technique is also called intact dilation and evacuation, or intact D&E. It is also sometimes called, inaccurately, partial-birth abortion.

The sponsors of the bill have refused to use a definition of D&X that I suggested and that tracks the medical definition submitted by the American College of Obstetricians and Gynecologists. Why? Why would they refuse to use a definition suggested by the elite medical group of obstetricians and gynecologists who deal with this issue–a definition that would enable those obstetricians and gynecologists to know exactly what this legislation makes a crime?

I believe there is a reason. I believe that this bill deliberately uses a vague definition of D&X in order to affect other kinds of second-trimester abortions and thus impact the right to choose. Because its definition is so loose, the bill would ban and otherwise interfere with perfectly legal, permissible abortion techniques. It will also have a chilling effect on doctors, who will be afraid to perform abortions other than D&X for fear they will be subject to investigation and prosecution. Why? Because the bill does not use an accepted medical definition of D&X.

Second, the bill lacks any health exception. This has been spoken about before, and I will do it again. The Supreme Court ruled in *Stenberg v. Carhart* that any ban must have a health exception. This bill has no health exception.

Why are we bothering to pass a bill that is so clearly unconstitutional?

The only reason I can think of is the proponents of the bill do not believe the health of a mother is sufficient reason to interrupt a pregnancy.

In fact, the supporters of the bill are not trying to remedy its constitutional defects. Rather, they are just making minor alterations to the findings in the bill.

I also oppose the bill because it omits language a majority of the Senate added last March recognizing the importance of *Roe v. Wade* and stating that this important opinion should not be overturned.

Unfortunately, as has been said, this language was stripped out in conference over the strenuous opposition of Senator Boxer, Congressman Nadler, Congresswoman Lofgren, and myself.

As an initial matter, I want to lay one myth to rest; that is, the myth that most Americans support this bill. Supporters of the bill have repeatedly and erroneously argued that a majority of the country supports banning D&X abortion.

For example, in introducing this

bill, Senator Santorum stated on the floor that "the American people clearly believe this is a procedure that should be prohibited."

However, such statements are not borne out by recent polls. For example, last July, ABC News released a nationwide poll which showed 61 percent of Americans oppose bans on so-called partial-birth abortion procedures if a woman's health is threatened. The bill now before us contains no health exception. That means a substantial majority of Americans think this bill is wrong.

I also want to mention a poll taken by Greenberg, Quinlan, Rosner Research, Inc. between June 5, 2003, and June 12, 2003, of 1,200 likely voters. The poll found a majority of Americans -- 56 percent -- believe abortion should be legal in all or most cases.

In addition, this poll found the country does not want the Government involved in a woman's private medical decisions. Eighty percent of voters believe abortion is a decision that should be made between a woman and her doctor.

In fact, even a majority of those who identified themselves as pro-life said a woman and her doctor should make the decision.

In stark contrast, this bill criminalizes safe abortion procedures, and it puts the abortion decision in the hands of the Government and in the hands of politicians, not the woman and her doctor.

I would now like to mention Randall Terry, the founder of Operation Rescue, and the man who the New York Times called "an 'icon' of the pro-life movement." Mr. Terry is one of the staunchest foes of the right to choose in the entire Nation. He is known for harboring views so strong on the abortion issue that he has been jailed dozens of times for blocking clinics and for having a human fetus delivered to former President Bill Clinton. He is also known for speaking his mind. Let me read some quotes from Mr. Terry in a press release issued through the Christian Communication Network, dated just a month ago, September 15, 2003. This press release is entitled: "Randall Terry, Founder of Operation Rescue Says, 'Partial-Birth Abortion Ban is a Political Scam but a Public Relations Goldmine.'"

Let me repeat that: "Partial-Birth Abortion is a Political Scam but a Public Relations Goldmine."

Mr. Terry says the bill before us is a "Political Scam." Specifically, he states: "This bill, if it becomes law, may not save one child's life. The Federal courts are likely to strike it down....The bill provides political cover in an election season to cowardly "pro-life" political leaders who have done little for the pro-life cause."

That is not me. I am quoting Randall Terry, the founder of Operation Rescue.

Let me repeat: "This bill, if it becomes law, may not save one child's life. The Federal courts are likely to strike it down...."

And he is right.

Mr. Terry then goes on to say: "If the President and Congress want to accomplish a small, but real, step they should outlaw all abortions after 20 weeks -- the age when a baby can live outside the womb."

Interestingly enough, his suggestion is similar to an amendment I offered on the floor of the Senate and in the joint House-Senate conference on this bill. This amendment would have banned all post-viability abortions except and unless a doctor determines such an abortion is necessary to protect the life and health of the woman.

This is the way to go. If someone truly believes these abortions, which are not medically defined in the bill, should not take place, and if one believes the child is capable of life, then ban post-viability abortions. I was prepared to see that enacted into law. But it was voted down twice, on the floor and in the conference committee.

I would like to take a moment to explain in detail why I think this bill is poorly drafted and is virtually certain to be struck down by the courts.

The conference report bill is unconstitutional for two reasons.

First, it attempts to ban the specific medical procedure it calls "partial-birth abortion," but it fails to use the accepted medical definition of what surgical procedure constitutes partial-birth abortion. The refusal of the sponsors of the bill to accept the medical definition of intact D&E is revealing. It makes it clear they are not really intent or interested in banning intact D&E or D&X, but, rather, they seek to muddy the waters to make it harder for women to get legal abortion using other legal and acceptable techniques. That, in my view, is the underlying purpose of the bill.

The Supreme Court ruled in *Stenberg v. Carhart* that any ban must have a health exception. This bill clearly, despite many attempts by this senator and others to put one in, has no health exception. The other side has repeatedly opposed a health exception.

Here is what Justice O'Connor said in her deciding opinion in *Stenberg v. Carhart*: "[B]ecause even a post-viability proscription of abortion would be invalid absent a health exception, Nebraska's ban on pre-viability partial birth abortions, under the circumstances presented here, must include a health exception as well....The statute at issue here, however, only excepts those procedures necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness or physical injury. This lack of a health exception necessarily renders the statute unconstitutional."

Now, I must ask you, why would anybody, after this case, with the swing judge making that statement, draft a bill that so clearly violates the Supreme Court's decision? Justice O'Connor has very clearly said the "lack of a health exception necessarily renders the statute unconstitutional."

The fact the sponsors are ignoring the clear words of the Supreme Court is suspect to me. It is even more suspect given the fact that just last year the U.S. Government took the position in court that any ban on D&X must include a health exception. The Santorum bill, then, not only contravenes the Supreme Court but also flies in the face of the position taken by the U.S. Department of Justice.

Let me read from a brief filed by the United States in February of 2002 in Women's Medical Professional Corporation v. Bob Taft, a case in the Sixth Circuit involving an Ohio statute prohibiting late-term abortion including D&X.

According to this brief: "the Court [in *Carhart*] stressed that the Nebraska statute prohibited the partial birth method of abortion except where that procedure was 'necessary to save the life of the mother,'...in violation of the Court's prior holdings in *Roe v. Wade*...and *Planned Parenthood of Southeastern Pennsylvania v. Casey*...that a State must permit abortions, 'necessary in appropriate medical judgment, for the preservation of the life or health of the mother...'"

The original brief even has the words "or health" underlined.

In other words, according to a brief filed by the United States Government last year, under *Carhart*, *Roe*, and *Planned Parenthood*, a State "must" provide a health exception for the woman. Yet we fly merrily in the face of that. It is ridiculous.

Supporters of the Santorum bill argue that they can ignore this language by throwing into the bill some questionable factual findings that a health exception is unnecessary. Baloney. They argue that these so-called findings make irrelevant the Supreme Court's constitutional determination in *Carhart* that a health exception is necessary.

The Framers of the Constitution did not intend that Congress be able to evade Supreme Court precedent and effectively amend the Constitution just by holding a hearing and generating questionable testimony from handpicked witnesses. In fact, the Supreme Court has made crystal clear that Congress cannot simply ignore a constitutional ruling they dislike by adopting a contrary legislative finding and telling the Court that they have to defer to it. That is just what is being done here.

Let me quote Chief Justice Burger on this point: "A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."

So make no mistake about it. You can say anything you want in the findings, and it isn't going to be dispositive as to whether the statute meets the test of the Constitution of the United States.

I also want to quote from *U.S. v. Morrison*, 529 U.S. 598 (2000), a decision that struck down part of the Violence Against Women Act. I personally disagree with this decision, but it is controlling law. In that case, the Supreme Court held that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of the challenged provision of the Violence Against Women Act. That is on page 614.

So why are these findings in the bill? I believe the other side is well aware of *U.S. v. Morrison* and other cases. Why are they doing it this way then? There has to be a reason.

Here the sponsors of S. 3 are trying to do exactly what the Supreme Court said the Congress cannot do: Use congressional findings to do something that is clearly unconstitutional. The sponsors of this bill are effectively trying to overturn binding Supreme Court precedent and rewrite the Constitution by enacting a bill that on its face violates *Stenberg v. Carhart*. They have clearly overstepped their bounds.

Mr. President, one of the most disappointing aspects of this debate is that a majority of the House-Senate conference on this bill decided to thwart the will of the Senate and strip out language recognizing the importance of *Roe v. Wade*. This decision clearly unmasked the sponsor's clear intention in introducing this bill: to strike at *Roe*. The provision

stripped out of the bill was a simple sense-of-the-Senate resolution. Let me read its exact language:

"One, the decision of the Supreme Court in Roe v. Wade, 410 U.S. 113, 1973, was appropriate and secures an important constitutional right.

Two, such decision should not be overturned."

They struck this language out. Why? Because they want *Roe* overturned. That is the reason.

I am pleased that the *Roe v. Wade* amendment was added to the bill last March on a bipartisan vote of 52 to 46. Unfortunately, the House-passed late-term abortion bill lacked the language. The House refused to agree to it.

While I oppose the criminalization of safe abortion techniques in S. 3, I strongly support the *Roe v. Wade* language we added to that legislation.

In the past 30 years, since the Supreme Court upheld a woman's right to choose, a great deal has changed for women in America. But now, in 2003, we are about to push women back to where they were in the 1950s, a generation that I remember well, a generation of passing the plate to raise money for abortions in Mexico, a generation of back alley abortions, a generation of tremendous mortality and morbidity for women, a generation of fear. It makes no sense.

The fact that a majority of the House-Senate conference stripped out sense-of-the-Senate language that merely summarized Federal abortion law should be exhibit "A" for anyone who doubts that this bill is really a frontal political attack on choice in America.

I am also disappointed that the conference refused to accept a commonsense amendment I offered to the bill before us today. That amendment, as I said, would have banned all post-viability abortions except if determined by the doctor that such an abortion was necessary to protect the life and health of the woman.

With that amendment, the sponsors of this bill could have gotten what they wanted legally. Why didn't they take it? The reason they didn't take it is because if you have an anti-choice bill with a nebulous, vague definition, you can chill all legal second- trimester abortions.

Let me tell you one more thing about the amendment I offered. To ensure compliance with the amendment, we even provided that a doctor who would perform a post-viability abortion on a woman whose health or life is not at risk could be fined up to $100,000.

That amendment would have put medical decisions back into the hands of doctors but, at the same time, prevented abuses. In my view, if a doctor believes such a procedure is necessary to protect a woman's life or health, then he or she should be able to perform that procedure.

Why do some Senators believe that the Federal Government even needs to be involved in this issue? Why is this legislation even necessary? *Roe v. Wade* clearly allows States to ban all post-viability abortions unless it is necessary to protect a woman's life or health, and 41 States already have bans on the books. All States are free today to do so if their State legislatures so choose.

The fact is, abortions this late in the pregnancy are rare and usually performed under tragic circumstances, such as a brain outside of a child's skull or vital inner workings outside of the body that cannot be connected.

Mr. President, the whole focus of many in this Congress and in the conservative movement has been to give power and control back to the States and eliminate the Federal Government from people's lives. So anyone who believes in States' rights must now question the logic of imposing a new Federal regulation on States in a case such as this, where States already have the authority to ban post-viability abortions and where a dominant majority of States -- 41 -- have already enacted such a law.

Is Federal legislation really necessary? No. I say to my colleagues that this clearly is a political bill designed to fan the flames and invade *Roe v. Wade* and weaken it substantially. It attempts to ban a medical procedure without properly identifying that procedure in medical terms.

Mr. President, I ask unanimous consent that a number of letters demonstrating that this legislation poses a serious threat to women's health be printed in the Record directly following my remarks.

I yield the floor.