Approved: 4/28/98
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS.

The meeting was called to order by Chairperson Representative Susan Wagle at 1:30 P.M. on March 30, 1999 in Room 313-S of the Capitol.

All members were present except: Reps. Dahl, Edmonds, Mason & Mays, all excused

Committee staff present: Theresa Kiernan, Revisor of Statutes
Mary Galligan, Legislative Research
Russell Mills, Legislative Research
Judy Swanson, Committee Secretary

Conferees appearing before the committee: Natalie Haag, Governor's Chief Legal Counsel

Others attending: See attached list

Rep. Franklin made a motion to introduce a Committee bill to have the University of Kansas Pathology Department investigate remains of any abortion that occurs after 22 weeks of gestation. Rep. Vining seconded the motion. The motion failed by 8 to 7.

Rep. Klein said although he did not support the bill Franklin wanted introduced, he felt Committee members should allow the bill to be introduced.

Representative Ruff moved to reconsider action on Rep. Franklin's proposed introduction. Rep. Peterson seconded the motion. Motion passed.

Another vote was taken on Rep. Franklin's motion to introduce a Committee bill to have the University of Kansas Pathology Department investigate remains of any abortion that occurs after 22 weeks of gestation. The motion carried.

Chair Wagle announced she had invited all Representatives to today's Committee meeting.

Natalie Haag, Chief Legal Counsel for Governor Graves, testified on the Governor's proposal on late-term abortion ban. (Attachment #1) The Governor supports a ban on late-term abortions. She urged the Committee to support the Governor's proposed amendment to the abortion statutes. She cited various court cases upon which his amendments were based.

Committee questions followed.

Haag said a c-section cannot be a forced alternative to an abortion, but it can be offered as an alternative. She said most doctors would have documentation of their mental health determination in their patients' files to cover their decisions. The public, however, does not have access to file information. A mental health decision has to be made by two licensed physicians both coming to the same conclusion, and this should be documented in the file.

Several committee members voiced a great concern that almost half of all abortions performed in Kansas in 1998 were on out-of-state residents. They found the influx from other areas to be quite distressing. Concern over the enforcement of the abortion law was expressed.

Haag testified that post viability is different than 22 weeks plus. Post viable is usually over 26 weeks. She said one reason Kansas might have so many abortions is that abortion providers located in Kansas prior to the abortion reporting law, and continue to reside here. Haag said she takes the position that the current abortion law is constitutional. She said that she is willing to fix the current law, but wants to fix it

right. The real issue is the constitutionality of the mental health exceptions. The law is vague in some areas, and she recommended fixing the law according to already upheld case law rather than creating new case law. She said the 6th Circuit is not binding in Kansas, and she did not think the 10th Circuit was binding. The U.S. Supreme Court has ruled that the definition of health must include mental health.

Haag said if the Committee wanted to ban partial birth abortions it must clarify mental health. Guest Representative Carmody said the current law is not being enforced.. He said there have been no investigations by any law enforcement agents. Rep. Wagle said this is a really touch issue. She said Dr. Tiller in Wichita said he does not perform partial birth abortions in the way we think he does. Haag said she was not familiar with different methods of performing of abortions.

Chair Wagle thanked Ms. Haag for appearing before the Committee, and said the goal is to be constitutional bu not to allow the mental health loophole to be used.

The meeting adjourned at 3:50 P.M.

HOUSE FEDERAL & STATE AFFAIRS
GUEST LIST

DATE: 03-30-99

NAME	REPRESENTING
Glenn Thompson	SOFK
Mary Ellen Diederich	KFL

Testimony before the House Federal and State Affairs Committee
Natalie G. Haag, Chief Legal Counsel
Office of the Governor
March 30, 1999

Thanks for the opportunity to address the committee regarding the Governor's proposed abortion bill. As I am sure you all know, the Governor has consistently supported a ban on partial birth abortion. Yesterday, you heard that 58 partial birth abortions were performed in Kansas during 1998 as compared to no partial birth abortions during 1997. The history of the abortion law in Kansas created the scenario where physicians opted to perform partial birth abortions to avoid the uncertainties created by the 1998 bill. Understanding these uncertainties is critical to correcting the problem. Thus, I will quickly cover the history of the 1998 bill.

Prior to 1998 post-viability abortions were illegal in Kansas except to save the life of the mother or in cases of severe fetal abnormality. As introduced on the floor of the Senate, the 1998 bill modified these exceptions to allow post-viability abortion when necessary to preserve the life of the mother or when the continuation of the pregnancy will cause substantial and irreversible impairment of a major bodily function. The partial birth abortion amendment, also offered and adopted on the floor, banned partial birth abortions except when necessary to preserve the life of the mother or when the continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the pregnant woman.

The Governor spent a significant amount of time reviewing the bill in an attempt to determine whether the use of different language in these two sections was intentional or merely the result of not having the opportunity for the revisor to clean up inconsistent language. Because the bill had no hearings, the legislative history was limited. Both the drafters of the legislation indicated in writing their intent to include mental health in the post-viability section of the bill. Additionally, the tape of the house floor debate reflects Rep. Carmody's comments that the abortion law adopted in 1992 was unconstitutional because it did not include an exception for mental or physical health of the mother. He then supported the passage of the 1998 Senate abortion bill. Not a single legislator on the floor of the House stated that the bill would not include the constitutionally required mental health exception. Based upon this legislative history, encouragement from many legislators in this room, and the expectation that the house would not sign pass an unconstitutional bill, the Governor signed the 1998 abortion bill.

Shortly after the bill was signed several legislators began disputing the legislative intent to include mental health in the post-viability provision of the bill. This action created controversy and confusion about the meaning of the term "major bodily function" in the post-viability section of the 1998 abortion bill. The confusion was further complicated by the refusal of the Kansas Supreme Court to accept a case and resolve this dispute. Thus, physicians were left with the alternative of facing potential criminal or disciplinary action or performing partial birth abortions. They chose to perform partial birth abortions.

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Attachment #1-1

The Governor's proposal will address these issues and ban partial birth abortion. The Governor's proposal strikes the exception for substantial and irreversible impairment of a major mental and physical function from the partial birth abortion statute. Additionally, the post-viability section is amended to clarify the mental health exception. Due to the controversy over the intent of the language, this clarification is necessary to make the bill constitutional. Because the case law clearly and unambiguously requires a mental health exception, failure to address the mental health issue will substantially increase the possibility the entire act, including the partial birth abortion sections, will be found unconstitutional.

Specifically, the proposed changes have been made at several places in K.S.A. 65-6703(b) and (c) to clarify the constitutional requirement of a mental and physical health exception. The United States Supreme Court has clearly stated that a mental health exception is necessary for post-viability abortion restrictions to withstand constitutional scrutiny.

In *Roe v. Wade*, 410 U.S. 113, 163-164 (1973), the United States Supreme Court stated:

> If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, **except when it is necessary to preserve the life or health of the mother.** (Emphasis added).

In *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), the United States Supreme Court reviewed a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine". Both the District Court and the United States Court of Appeals construed **the statute to permit abortions "for mental health reasons whether or not the patient had a previous history of mental defects."** *Id.* at 71-72. (Emphasis added.) The United Supreme Court stated:

> We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

Id. at 72.

Following the decision of *Vuitch*, the United States Supreme Court in *Doe v. Bolton*, , 410 U.S.179, 192 (1973), stated:

> We agree with the District Court, 319 F.Supp., at 1058, that the **medical judgment may be exercised in the light of all factors- physical, emotional, psychological, familial, and the woman's age- relevant to the well-being of the patient**. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. (emphasis added).

In *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S.Ct. 1347, 140 L.Ed.2d 496, ___ U.S. ___ (March 23, 1998), the Sixth Circuit Court of Appeals struck down as unconstitutional Ohio's post-viability ban on abortion, which provided that an abortion could be performed in order to avert the death of the pregnant woman, or to avoid a "serious risk of the substantial and irreversible impairment of a major bodily function." 130 F.3d at 206. The Act defined "serious risk of the substantial and irreversible impairment of a major bodily function" as follows:

> [A]ny medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:
>
> (1) Pre-eclampsia:
> (2) Inevitable abortion;
> (3) Prematurely ruptured membrane;
> (4) Diabetes;
> (5) Multiple sclerosis.

Ohio Rev. Code Ann. §2919.16(J); 130 F.3d at 206.

The Sixth Circuit Court of Appeals noted its belief the United States Supreme Court would hold that a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause **severe non-temporary mental and emotional harm**. 130 F.3d at 209.

Further, the Sixth Circuit relied upon the United States Supreme Court decisions of *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) and *Doe v. Bolton*, 410 U.S. 179 (1973), which found it **"critical" that, in deciding whether an abortion was necessary, the physician's judgment "may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"**. *Voinovich,* 130 F.3d at 209. (Emphasis added.)

> **[T]he constitution requires that if the State chooses to proscribe post-viability abortions, it must provide a health exception that includes situations where a woman is faced with the risk of severe psychological or emotional injury which may be irreversible.**

130 F.3d at 210 (emphasis added). The Sixth Circuit found the Ohio Act impermissibly limited the physician's discretion to determine whether an abortion is necessary to preserve the woman's health, because it limits the physician's consideration to physical health conditions. 130 F.3d at 209. Consequently, the restrictive medical necessity exception was declared unconstitutional. 130 F.3d at 210. On March 23, 1998, the United States Supreme Court denied the petition for a writ of certiorari, thereby declining to review or overturn the Ohio case.

As you can see from even a few of the cases on this issue, the United States Supreme Court clearly requires that post-viability abortion restrictions provide an exception for both the mental and physical health of the mother.

Quite simply, if the mental health exception is removed from the partial birth section and not clarified in the post-viability section, a woman's health will not be adequately protected and the entire act will be unconstitutional. A number of courts have issued injunctions against the enforcement of partial birth abortion bans that do not include a mental health exception. To minimize the risk of such an injunction in Kansas, woman must be provided with a safe and medically reasonable alternative to partial birth abortion. If a medically reasonable and safe alternative exist, the courts are more likely to uphold the banning of a specific procedure. Failure to clarify that the post-viability provision section includes a mental health exception creates significant risk, almost a guarantee, that the entire act, including the partial birth abortion section will be found unconstitutional.

The drafting of a bill on the floor of the Senate resulted in a number of other inconsistencies in the language and standards in the bill. The Governor's proposal addresses several of these clean up issues. For example, the current abortion law in Kansas contains multiple and inconsistent definitions of "viable". Thus, under existing law, one standard of viability applies to partial birth abortion and emergency abortions but a different definition of viability applies to post-viability abortion.

For purposes of a partial-birth abortion procedure, viable is defined as follows: "Viable" means that stage of gestation when, in the best medical judgment of the attending physician, the fetus is capable of sustained survival outside the uterus without the application of extraordinary medical means. K.S.A. 65-6701(k).

For purposes of other abortion procedures under the post-viability abortion provisions viable is defined as follows: As used in this section, "viable" means that stage of fetal development when it is the physician's judgment according to accepted obstetrical or neonatal standards of care and practice applied by physicians in the same or similar circumstances that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures. K.S.A. 65-6703(e).

This issue has been addressed in the Governor's proposal by eliminating the inconsistent definitions and substituting a definition consistent with those adopted by the United States Supreme Court.

In *Roe v. Wade, supra* at 163, the United States Supreme Court stated: "With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."

In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 63 (1976), the United States Supreme Court upheld as constitutional the definition of "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

In *Colautti v. Franklin*, 439 U.S. 388, 99 S.Ct. 675, 682 (1972), the United States Supreme Court stated: "[v]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."

This case law supports the conclusion that the definition contained in the Governor's proposal would withstand constitutional scrutiny. Striking the inconsistent definitions will make the law cleaner and more enforceable.

The 1998 bill also included multiple standards of care for physicians. In a medical emergency, a physician is required to make a decision based upon "the physician's good faith clinical judgment". When determining gestational age of the fetus, the physician must use "accepted obstetrical and neonatal practice and standards applied by physicians in the same or similar circumstances." If the fetus has a gestational age of 22 weeks or more the physician must determine whether the fetus is viable "by using and exercising that degree or care skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances." Further, no standard is set in the partial birth abortion section.

Confusing standards make a law too vague to withstand constitutional scrutiny. Further, the standard requiring all physicians to use accepted obstetrical and neonatal practice and standards attempts to hold a physician to a different standard than the legal and medical community use to assess the physicians standard of care. Basically, this provision is similar to holding all dentist to the medical standard of an oral surgeon. The general rule of law is that physicians will be held to the standard of care in their specific field of practice in their community. Accordingly, this standard creates a means of challenging the entire act.

The Governor proposes the standard be consistent with throughout the bill.

The Governor's proposals also amend the criminal provisions to clarify that a person must intentionally, knowingly, or willfully violate the act before the person can be guilty of a crime. Scienter is required for the conviction of any crime. This amendment makes clear that the laws passed can be enforced. Without this change the person violating the section can assert the law is unenforceable.

Under current law, a doctor can be convicted of a crime if his/her secretary unintentionally fails to mail in the reports required by statute.

The term "scienter" means "knowingly" and is used to signify a defendant's guilty knowledge. It requires that a defendant have some degree of guilty knowledge or culpability in order to be found criminally liable for some conduct. *Voinovich*, 130 F.3d at 203.

The Sixth Circuit Court of Appeals in *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied ___ U.S. ___ (March 23, 1998), concluded that the medical necessity and medical emergency provisions of the Ohio Abortion Act were unconstitutionally vague, because they lacked scienter requirements. 130 F.3d at 203.

The Ohio Act's "medical emergency" definition required the physician to determine "in good faith and in the exercise of reasonable medical judgment" whether an emergency exists. Ohio Rev. Code Ann. §2919.16(F). Similarly, the medical necessity exception to the post-viability ban required that the physician determine "in good faith and in the exercise of reasonable medical judgment" that the abortion is necessary. *See, id.* § 2919.17(A)(1); 130 F.3d at 204.

The court noted both of these provisions contain subjective and objective elements in that a physician must believe the abortion is necessary and his belief must be objectively reasonable to other physicians. The court concluded:

> This dual standard as written contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable. In other words, a physician need not act wilfully or recklessly in determining whether a medical emergency or medical necessity exists in order to be held criminally or civilly liable; rather, under the Act, physicians face liability even if they act in good faith according to their own best medical judgment.

130 F.3d at 204.

The court also noted that given the controversial nature of abortion the State would almost always be able to find one doctor who disagreed with the decision of the physician performing the abortion. Thus, the lack of a scienter would have a chilling effect on the willingness of physicians to perform abortions and was therefore declared unconstitutional.

The final modification in the Governor's proposal strikes vague language from the criminal section of the woman's right to know provisions. This language probably makes the provision unconstitutional and unenforceable. It is virtually impossible to tell when doctors are required to distribute the right to know materials and to whom. Thus, a doctor can potentially lose his/her license to practice medicine without committing any negligent or intentional act. As the case law cited above points out, vague statutes are unenforceable.

Modifying these inconsistencies will improve enforcement and make the law more likely to withstand constitutional challenge. The changes were made to reflect what appears to be the intent of the legislature in 1998. I urge you to support the Governor's proposed amendments to the abortion statutes.