Protecting the Ban on Partial-Birth Abortion

A Trial Notebook by Jay Sekulow

There are three trials underway in U.S. District Courts in California, Nebraska, and New York involving a challenge to the national ban on partial-birth abortion, which was approved by Congress last fall and signed into law by President Bush. In the New York case, U.S. District Court Judge Richard Casey is hearing testimony in federal court in Manhattan. The American Civil Liberties Union is representing the National Abortion Federation and individual physicians in the New York case. ACLJ Chief Counsel Jay Sekulow, who is supporting the Department of Justice in its defense of the law, is attending the trial in New York City. Jay will be filing reports regularly concerning the testimony taking place inside the courtroom in this Trial Notebook.

Date: Monday, March 29, 2004
Time: 2:04pm
Southern District Court of New York

The trial in the Partial Birth Abortion case before Judge Richard Casey began today with the opening arguments. The National Abortion Federation lawyer (Plaintiff) began with an admission that the testimony would be "very raw stuff" that would be "discomforting to any of us." He continued "that these graphic and raw procedures are performed on second trimester fetuses is an element of emotion." The argument by Plaintiff included the incredible claim that the ban on partial birth abortion "fails to serve the interests of providing for fetal health of a fetus who could survive outside the womb." The Plaintiff's attorney also carefully avoided any reference to third trimester abortions arguing that the ban applied to second trimester abortions and that third trimester abortions were precluded by state law. This is despite the fact that the creator of the procedure, Dr. Marvin Haskell, invented the procedure to enable third trimester abortions to be performed more easily. Plaintiff's attorney argued that the vast majority of partial birth abortions occurred during wanted pregnancies. Perhaps the most disturbing claim made by Plaintiff's attorney was that a parent would be better able to grieve after a fetus had its brain tissue removed than if the unborn child was dismembered.

Assistant U.S. Attorney Sean Blaine, made three main points:

1. No maternal or fetal conditions made partial birth abortion necessary for the mother's health.
2. There are no safety advantages presented by the procedure.
3. The partial birth abortion procedure "blurs the line between an abortion and a live birth."

He emphasized the evidence would show that when the unborn life was taken inches from birth, it felt real pain that the mother's anesthesia did not dull. He urged the Court to look through the eyes of Congress to uphold its decision based on eight years of detailed factual findings. He said that the findings are reasonable based on "substantial evidence." He also argued that unlike induction, a whole fetus is not available after partial birth abortion because the cranium collapses during the procedure. He responded to the opening arguments of opposing counsel by saying

"while opposing counsel said the terms will be graphic, it is the nature of the procedure itself which creates discomfort." He also discussed the upcoming testimony of medical experts who will testify that "they cannot imagine any hypothetical condition in which partial birth abortion would be medically necessary."

Date: Monday, March 29, 2004
Time: 4:29pm
Southern District Court of New York

At the end of the testimony of the first witness, Judge Casey asked some questions.

Judge Casey: "You said on new procedures, doctors should keep detailed records."

Answer: "Yes."

Question: "Should other doctors evaluate the new procedure so the information can be shared?"

Answer: "Yes."

Question: "To evaluate all the records, you would have to look at them?"

Answer: "Yes."

Judge Casey's questions reveal his interest in the ability to look at the records related to the partial birth abortion procedure.

The American Medical College of Obstetrics and Gynecology has refused to testify live, which made for a rather boring reading of prior testimony in court. The Judge was not pleased with this. The members of AMCOG also refused to be identified individually. The testimony that they read indicated that partial birth abortion is not ever the only procedure available and that there are no circumstances where the D&X procedure is the only available option. There are no studies indicating when D&X is the best choice. There are no case reports justifying D&X as the best procedure. So, there is no data for partial birth abortion according to their own testimony that they read into the record today.

Date: Tuesday, March 30, 2004
Time: 8:39am
Southern District Court of New York

Yesterday following the trial I was interviewed by numerous news organizations including CNN, PBS Newshour, National Public Radio and the Washington Times. I was pleased to be able to report that the first day of the trial went well for the government and their argument that the ban on partial birth abortion is constitutional.

This morning there is some uncertainty as to which witnesses the plaintiffs will call next, because the testimony of their witnesses will depend on an evidentiary ruling to be issued as court begins. I will be there to react to the developments and bring them to you as they happen.

Date: Tuesday, March 30, 2004
Time: 1:32pm
Southern District Court of New York

The horrors of the abortion procedure were put on trial in U.S. District Court here in New York City this morning.

It was not the witnesses of the Government but rather the Plaintiff's witness, who is an abortion doctor, who provided the promised "raw" and "graphic" language. The doctor discussed the difference between an intact dilation and extraction D&E which is their term for partial birth abortion and dismemberment D&E. In a dismemberment D&E, the doctor tears the baby apart by taking its limbs off. He explained that at that point the baby is developed enough to have bones which can be sharp when they are broken, which can injure the woman when the bones are pulled out of her. He testified that the breech delivery of the fetus, with a large portion of the child's body exposed and the insertion of scissors in the base of the skull and the removal of cranial content (brains), according to the doctor, created less risk to the mother.

Later Judge Casey questioned the doctor.

Question: "When you discuss the range of options with a patient, do you describe the dismemberment procedure where the limbs are torn off?"

Answer: "Yes."

Question: "Do you describe the D&X procedure where you put the scissors into the base of the skull and remove the brains?"

Answer: "Yes, I do. And sometimes after hearing the details couples leave."

The doctor's view of ethics in medicine is also a concern. "Ethics, especially in my specialty changes and fluctuates week to week."

Date: Tuesday, March 30, 2004
Time: 4:21pm
Southern District Court of New York

The testimony of the doctor continued and was very disturbing. He discussed live birth. "In live delivery, the well being of the baby is the primary concern. In an abortion, you are not concerned about the well being of the baby." When asked about partial birth abortion, he said, "It involves forcing scissors into and through the skull." Later the doctor testified that abortion done at 20

weeks is less dangerous than 21, 22 or 23 weeks. The doctor continued by claiming that it is "unclear what past the navel means" in the language of the ban itself. The doctor continued to describe D&E's. He said in intact D&E the legs and trunk are pulled through until the head lodges in the cervix. Most of the fetus is outside the mother's body. Then he was asked a question.

Question: "Does an intact D&E involve an overt act that you know will kill the fetus?"

Answer: "Yes, that is the whole point of the abortion - to kill the fetus."

The questioning continued:

Question: "After you have dismembered the fetus can it still be living?"

Answer: "Absolutely. Then I will either dismember more or if the next part I get is intact, I will deliver the rest up to the head and perform a D&E. Just removing an arm or a leg does not necessarily kill the fetus."

The afternoon testimony and the cross examination created tremendous credibility problems for the doctor. The cross examination began with a question involving the curriculum vitae of the doctor that was posted online at a web site he claimed he had never heard of. The CV on that web site identified him as a professor at Columbia. He argued about whether or not he was a professor at Columbia. Then he blamed the incorrect information contained on the web site on the fact that it was a web site until the government's attorney pointed out that the curriculum vitae that he submitted to the Government also included the claim that he was an assistant professor at Columbia from 1987 through now, even though that information is not correct.

Later the doctor continued to make statements that were contradicted by his prior testimony in his deposition. It became apparent that his credibility was suffering when he would say to a yes or no question, emphatically "no" and then have his testimony read from his prior deposition and to the exact same question his answer would be an emphatic "yes."

He described in gruesome detail the first time he witnessed a D&E abortion. The question was asked:

Question: "You thought that what you witnessed was a miracle."

Answer: "Correct."

Question: "You understood that the doctor was trying to remove the fetus intact?"

Answer: "Yes."

Question: "The fetus was not dead when the doctor removed it?"

Answer: "No. It died by removing the skull and part of the brain."

Finally, during a portion of the testimony in which the doctor was describing dismemberment D&E, he said, "You take the forceps, you grasp the fetus and either pull down or rotate it clockwise or counterclockwise and it makes it easier."

Judge Casey questioned the doctor at that point and said, "On whom?"

Date: Wednesday, March 31, 2004
Time: 8:43am
Southern District Court of New York

As I head into court this morning and look back over the final hour of the doctor's testimony several things stand out. This is an extremely important case, although it is hard to listen to some of the details of this gruesome procedure. It is truly historic for this type of frank discussion of what goes on in an abortion procedure to be taking place in a courtroom during live testimony.

The plaintiffs entire case has been based on their claim that partial birth abortion (the D and X procedure) is safe. It was interesting that the doctor while being questioned by the government's attorney, responded to one question about the procedure's risk by telling her, "The whole procedure is a risky procedure."

Another aspect of the case that is extremely important is whether or not these procedures are necessary. The plaintiff's have said that the reason for these abortions is that the fetus suffers from an abnormality that would make it impossible for it to live on its own. Despite their claim, the plaintiff's refuse to turn over the medical records that would indicate that they were telling the truth. The doctor testified while being questioned by the government's attorney that he could not recall the anomaly that the fetus was suffering from the first time he performed a partial birth abortion. When Judge Casey asked the doctor, "If you looked at your records would they show the fetus had an anomaly?" He responded, "All records always reflect an anomaly, well not necessarily an anomaly but the reason for the termination." The original answer is not one that the abortion doctor is comfortable with, and until we look at the records they refuse to turn over, we cannot know how many of these procedures are done for purely elective reasons when the mother is in no danger at all and the fetus is healthy.

This is also indicated by this quote from the doctor later during questioning, " A fetal abnormality is not the reason to perform an abortion, the reason is because a woman chooses to have an abortion done." That freedom of choice, to terminate a pregnancy involving a healthy fetus that is 23 weeks old, is what the plaintiff's seek to protect.

Another argument made by the plaintiffs is that if partial birth abortion were illegal, they could get better genetic information from the body because it would be intact. However the doctor testified that in all the time he has been doing dismemberment abortions, only once can he recall a time when he would have been able to provide better genetic counseling if he would have performed a partial birth abortion instead.

When pressed by the government's attorney about the procedure itself he tried to evade questions but ended up giving some interesting answers.

Question: "There are no credible scientific studies on D and Es (partial birth abortion)?"

Answer: No there are not.

The testimony ended with more questions by Judge Casey who asked the doctor to repeat his claim that he disclosed all the details of the procedure when he had patient consultation. He said he did. Then Judge Casey asked him about his testimony that some parents request him to take pictures after the termination to remember the baby. He reiterated it. Finally Judge Casey asked, "They request the picture even though this is the fetus they ordered you to suck the brains out of?" The doctor responded that they do.

Date: Wednesday, March 31, 2004
Time: 12:54pm
Southern District Court of New York

The testimony continued this morning and was particularly gruesome and disturbing. The doctor testifying for the Plaintiffs admitted that there were risks involved in the D and E procedure, and that alternative procedures existed that were safe. The doctor testified that he had performed no D and E's over the last three years. He also testified that he had not had any patients for whom D and E would be a preferable procedure to other procedures he had available.

He was asked, "Is D and E a destructive procedure as you use the term?"

His answer was, "Yes, sir."

The testimony became extremely gruesome when he began to describe the reason for the creation of the D and E procedure. He said that the intact procedure was created to deal with the problem of the free-floating fetal head. He said that the head of the fetus is relatively large and relatively calcified, so it is hard to grasp and sometimes becomes unattached from the fetal body during the dismemberment procedure because it is round and it slips out of the instruments.

When Judge Casey found that the doctor had never performed the procedure, he interrupted Plaintiff's Counsel with his own questions.

Judge Casey asked, "Just a minute. You have never done it?"

Answer: "No sir, I have not."

When the doctor described the procedure he had observed, the testimony became almost surreal.

The doctor said, "What they did, they delivered the fetus intact until the head was lodged in the cervix. Then they reached up and crushed it. They used forceps to crush the skull."

Judge Casey asked about the instruments, "Like a cracker that they use to crack a lobster shell?"

The doctor answered, "Like an end of tongs you use to pick up a salad, except they are thick enough and heavy enough to crush the skull."

Judge Casey responded, "Except in this case you are not picking up a salad, you are crushing a baby's skull."

Then Judge Casey asked, "According to affidavits I have read, the fetus is still alive at this point?"

Answer: "Yes, sir."

Question: "The fingers of the baby opened and closed?"

Answer: "I did not observe the hands when I observed the procedure."

Question: "Were the feet moving?"

Answer: "Yes sir, until the skull was crushed."

Date: Wednesday, March 31, 2004
Time 4:04pm
Southern District Court of New York

The doctor testifying for the Plaintiff was visibly shaken by the questioning of Judge Casey after the conclusion of the cross examination.

Judge Casey began his questioning by asking, "In a dismemberment D and E procedure in the second trimester, does the fetus feel pain?"

Answer: "I have no idea."

Question: "Are you aware that there are studies indicating that the fetus feels pain?"

Answer: "No, I have not seen those studies."

Question: "You have never heard of the studies?"

Answer: "I have not seen the studies."

Question: "Does it ever cross your mind as you are performing the procedures whether or not the fetus feels pain?"

Answer: (He hesitated for a while.) Then he said, "No, not really." (And he mumbled.)
Question: "When you are consulting with a patient prior to the procedure, do you discuss the details that you are going to remove parts of their baby?"

Answer: "Yes I do."

Question: "Do they ever ask if it hurts?"

Answer: "No they do not."

Question: "Although you have never performed an intact D and E (partial birth abortion), do you know whether or not the partially delivered baby feels pain when the scissors are inserted into the base of the skull?"

Answer: "I am sure that the baby feels it, but I am not sure how the fetus registers it."

Question: "When you describe the procedure, do you tell the patient that the baby's brains will be sucked out?"

Answer: "No, I do not describe it in those terms. I think I use other terms like cranial collapse."

Question: "You make it nice and palatable, so that they would not understand what it is all about?"

Answer: "I use medical terminology in order to describe the procedure."

Question: "Can they fully comprehend it? They are not all Rhodes Scholars, correct?"

Answer: "That is true, however, I describe the procedure in medical terminology."

Question: "It is so much nicer to say it that way?"

Answer: "Yes."

Date: Thursday, April 1, 2004
Time 9:23am
Southern District Court of New York

As I look over my trial notes for the last few days I notice a disturbing trend developing. The doctors seem to indicate that most of these procedures are taking place because of a fetal anomaly. A fetal anomaly is any detectable difference from a normal fetus, as one of the abortion doctors testified it is, "any kind of fetal defect...any kind of genetic defect." Because the plaintiff's refuse to turn over the medical records requested by the government and by the judge in this case, there is absolutely no way of knowing if they are telling the truth about why the procedures are taking place.

The other side continues to argue that this horrific procedure is necessary because it can protect the mother's health. However yesterday one of their doctors testifying said, "There are only a few fetal anomalies that can have an adverse effect on the mother's health." It is clear that there is another reason besides the mothers' health that these babies are being aborted. The most discussed fetal anomalies seem to be Down's syndrome and hydrocephalus. One doctor even testified, "Unfortunately some babies are born with anomalies we could not detect prior to birth, but hopefully the ultrasound equipment will continue to improve." The doctor was saying in essence "who would want a handicapped child?"

This argument that the handicapped should be eliminated is being discussed before a judge who is blind. The argument seems especially weak to me because here at the ACLJ we have a young man, Paul Wood, working for us who has hydrocephalus, an abnormality that causes the ventricles of the brain to be enlarged by excess fluid building up, and he does an excellent job for us. In fact, he wrote a letter to President Bush in support of the ban on Partial Birth Abortion. Not only can these babies with fetal abnormalities be delivered, they can have productive lives, and assuming that they cannot is insulting to the handicapped.

Date: Thursday, April 1, 2004
Time 12:12pm
Southern District Court of New York

It seems as if the testimony would become something that you would get used to after a time. But the testimony this morning was extremely unsettling, despite the fact that this is now the fourth day in which we have listened to details on this horrific procedure.

Judge Casey this morning questioned the abortion doctor who was testifying, asking him: "You do not feel any obligation to protect the life of the fetus?"

Answer: "Yes, for my patients who want a fetus."

Question: "Do you feel an obligation to protect the fetus?"

Answer: "No, not when I am doing a termination."

In further testimony, the doctor sought to explain why he feared that the language of the ban might encompass other procedures he engages in besides the intact D-and-E procedure. The Judge asked him for examples. The doctor gave examples in graphic detail.

He said, "Say in a dismemberment D-and-E, I reached inside the uterus, I do not have control of the appendages and I grasp the upper abdomen, and then I begin a dismemberment D-and-E and I pull out some parts of the fetus, I could pull out part of the fetus up and above the fetal navel, which is what the ban covers and be delivering the fetus at that point, and perhaps triggering the ban."

Then he gave another example, "I grasp a lower extremity and I pull until I reach fetal resistance, which is often at the belly button. Then I will often make an incision below the belly button to decompress the fetus... I know the fetus cannot survive the incision in its abdomen."

He said, "Let's say I disarticulate and (tear) the fetus at the pelvis and then I have partially delivered below the waist. And then if I grasp the fetal abdomen and deliver the rest through dismemberment D-and-E, I may have also triggered the ban."

Judge Casey then asked, "Isn't the distinction that you are delivering the fetus in parts and the ban covers delivering a fetus as a whole?"

The doctor replied, "Yes, that's correct."

Date: Thursday, April 1, 2004
Time 6:20pm
Southern District Court of New York

The Assistant U.S. attorney did an excellent job this afternoon in cross-examining the National Abortion Federation's doctor. In fact, the doctor could not point to any specific D-and-E abortion he had performed that was based on the variety of medical conditions he indicated necessitated the procedure. The cross examination has been very effective in exposing the lack of maternal health justifications for the procedure.

The doctor said on cross examination that his review of medical charts had not in any way informed his testimony. He then disagreed with a statement released by his co-plaintiff and the group he is part of -- the National Abortion Federation -- that absent a review of medical charts for D-and-E abortions, doctors cannot make a determination as to whether or not the procedure is necessary.

He was having trouble when he was testifying about the medical records he reviewed in preparation for the trial. He was asked if he found a single instance where the mother's health necessitated a D-and-E procedure, and he answered: "No." He also was unable to find examples of times where pregnant women with heart disease or cancer had late term abortions, although he identified those reasons as part of his justification for the procedure.

At one point Judge Casey became upset with one of the National Abortion Federation attorneys, because they were engaging in direction of their client as he was testifying. This practice is not allowed. The judge said: "I warned your side about this before... a few days ago. Stop telegraphing your client. If this happens again, I will take the appropriate steps."

Date: Friday, April 2, 2004
Time 12:28pm
Southern District Court of New York

In reflecting on this trial, it is helpful to understand the context of the case. The Supreme Court dealt with the issue of partial birth abortion in Stenberg v. Carhart, 530 U.S. 914 (2000). The majority opinion held that a Nebraska statute making partial birth abortion illegal was unconstitutional. One of the main reasons the Court cited was that the Nebraska statute lacked an exception for the preservation of the mother's health. The record in the Carhart case is different than the record in this case, and after more study and more research, the plaintiffs have been thus far unable to provide any research or any records to indicate that the ban would harm the health of the mother. The plaintiffs continue to refuse to turn over the records that they have that would indicate whether or not maternal health is the reason for the abortion, but as the testimony has gone on, it has been clear that maternal health is not the reason. This makes the abortion providers' fear that the records become public understandable. They are not afraid that privacy will be violated, since, as in many medical records cases, the records will be redacted so that no information will be contained within the records that could identify the patients. Rather, they are concerned that the real reason for these abortions will be clear.

The other major reason that the Nebraska ban was ruled unconstitutional was vagueness. As the Assistant U.S. Attorney has argued and discussed other abortion methods, she has in no way suggested that these methods are a good thing. Rather, she is showing that the procedure that is banned -- what the abortion doctors have been referring to as an "intact D-and-E" or "D-and-X" procedure, is clearly different from other methods in which abortion doctors perform late term abortions. In their efforts to paint the statute as vague, the abortion doctors have been left testifying to absurd claims like, "I do not know what above the navel means," and, "I am unsure whether I would have tripped the ban if I removed the fetus by tearing away the lower part of the body and then later tearing away the abdomen." This attempt to blur the lines between the different procedures has been countered by skillful cross examination, which has illustrated that each of these abortion doctors are capable of differentiating between the procedures, and that this specific ban, which targets the partial birth and then killing of a baby, is not vague.

We will be bringing you breaking news from the trial in San Francisco in the next hour or two.

Date: Friday, April 2, 2004
Time 2:46pm
Northern District of California, San Francisco

I have discussed previously the questioning by Judge Casey in New York, who indicated that by using medical terminology doctors are able to make the horrors of the abortion procedures they perform seem less terrible. That is important in understanding the testimony we are about to discuss. I will provide quotations we have just received from the testimony in the San Francisco trial of a "Dr. Doe," and then discuss what Dr. Doe is saying in layman's terms. Dr. Doe is a

perinatologist (maternal-fetal specialist) who is testifying under a pseudonym. It will be clear why Dr. Doe wanted to remain anonymous after you read Dr. Doe's testimony. Dr. Doe is a board-certified ob/gyn, and board-eligible in maternal-fetal medicine.

Question: Doctor, going back to the cases in which you are doing a D-and-E and it proceeds with a partially intact delivery so the calvarium is stuck in the cervix, I think you testified that you slide, you use the forceps to crush the calvarium, right?

Answer: Yes.

Question: Is it fair that you generally slide the Bierer forceps if you are using those, or any form of forceps, under the cervix between the fetus and the uterine cavity -- is that correct?

Answer: I am sorry, can you repeat that part?

Question: Let me just ask you. Can you describe for us how you get the forceps around the calvarium before crushing it?

Answer: In a situation where the fetus is delivered up until the calvarium?

Question: That's right.

Answer: Again, as I testified, I would separate the calvarium from the fetus, so--

Question: Let me stop you right there. How would you separate the calvarium from the fetus?

Answer: Under direct visualization, I would use, seeing outside of the cervix within the vagina that I can see directly, I would use scissors to cut the neck and separate the--I am not in the uterus, I am in the vagina, separating the fetal calvarium from the fetal body.

Question: And after you've done that, the calvarium is still in the cervix?

Answer: Or in the lower uterine segment.

Question: Okay. Then what is the next step that you do?

Answer: The next step I would use is to put the Bierer forceps--is what I would most likely be using in the situation--into the uterus, get around, open them wide, get around the calvarium, and crush the calvarium. Just as if it were higher up and not stuck in the cervix I would be doing it just the same way. However, sometimes the cervix is not dilated enough to allow for the calvarium to pass.

Question: And what do you then do?

Answer: I would separate the calvarium from the body.

Question: When you perform the evacuation in the typical D-and-E, do you ever need to convert the lie of the fetus or the direction of the fetus?

Answer: Sometimes. Sometimes the fetus is, again, what we would call vertex or cephalic. And that is when the head is presenting at the cervix. The head is the difficult--the most difficult portion to deliver in these procedures, and occasionally I will see if I can deliver the cranium initially. Often that doesn't work, and I would need to reach in a little bit higher up with the forceps, grasp the lower extremity and pull down, and that kind of converts the presentation to a breech presentation.

Question: When you are doing your regular procedure, does it ever happen that you bring out the fetus intact or partially intact up to the head?

Answer: Yes, sometimes it does.

Question: Approximately how many times does it happen in your procedures?

Answer: Maybe 15 to 20 percent.

Question: And when this happens, do you consider it to be a different procedure than one which is disarticulated before that point?

Answer: I don't think it is different, and I feel fortunate when it happens in some ways, because I think that I will then have less passes into the uterus, and I think less chance for injury or infection.

In the New York trial, Judge Casey has admonished both sides to have witnesses explain any medical terms they use in layman's terms, but it appears this is not happening in San Francisco.

The term "calvarium" refers to an incomplete skull, and specifically the portion of the skull including the braincase and excluding the lower jaw or lower jaw and facial portion. This part of the baby's head, as the testimony in New York indicated as well, is difficult for the surgeons to remove, because these abortions are occurring so late in the pregnancy that the skulls are fairly calcified. This means that the skulls are fairly developed and hard, and due to their hardness and their round shape, they are the most difficult part of the baby for the abortion doctor to crush and tear. The solution for this particular abortion doctor is to separate the calvarium from the fetus and then grasp it with forceps. What this means in layman's terms is that this doctor cuts the baby's head off at the neck with scissors, and then jabs forceps up into and around the skull to crush it and pull it through the partially dilated cervix. The cervix has been at this point intentionally dilated just enough to allow the surgical instruments the doctor uses to grasp and tear, but not enough for the baby's head to fit through.

The term "disarticulated" in the final question, concerning whether or not the doctor recognizes the difference between the intact D-and-E and the dismemberment D-and-E procedure, means torn. While Dr. Doe denies seeing the difference, the doctor considers it fortunate when the intact D-and-E procedure is the one performed. The doctor feels fortunate to be able to pull down the

baby's body until everything but the head is delivered because of the ability to cut the baby up closer to the vagina, which the doctor claims is safer than cutting it up inside the uterus.

As this case continues, we will hear more disgusting testimony, and we will hear more attempts to characterize the ban as vague and the procedure as necessary for the health of the mother. It is encouraging that even in these grim proceedings, while the plaintiffs are attempting to make their case, they cannot get away from the fact that they have not been able to establish that the procedure is necessary for maternal health, and that they have the ability to recognize the specific procedure banned by the act. Essentially, what you have are abortion doctors who say they want to keep this procedure because it makes it easier and faster to kill a late term baby who is so developed that tearing it apart is difficult. This testimony makes sense, given that Dr. Marvin Haskell, who invented the procedure, gave those reasons to explain why he created it.

Date: Monday, April 5, 2004
Time 9:17am
Southern District Court of New York

As we begin week two of the trial here in New York, the plaintiffs are still putting on their case. The National Abortion Federation is still attempting to prove that Partial Birth Abortion is necessary, and they are using the excuse that maternal health mandates it. In order to understand the health exception, it is helpful to understand more about the context of Supreme Court decisions regarding abortion.

When *Roe. v. Wade* (410 U.S. 113 (1973)) legalized the right to an abortion, there was a companion decision to the case called *Doe v. Bolton* (410 U.S. 179 (1973)), which was meant to be read in conjunction with the Roe opinion. In the Doe case the Court defined the scope of the "health" exception as follows: "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." (Doe, 410 U.S. at 192). This means that if an abortion doctor says that a woman will experience post partum depression (a common diagnosis), the mother can abort the child. When discussing health risks, the abortion doctors never point to this diagnosis, but in the only state where we have records of these procedures available, it is clear that this is the main or only reason why these procedures are performed. Let me provide you with some relevant quotes:

Republican Leader (Dr.) Bill Frist: "...Kansas the only State that requires separate reporting for partial-birth abortions, in 1999 said 182 procedures of partial-birth abortion were performed on viable fetuses. Of interest to all, 182 of those procedures were performed for mental health reasons, but not for physical health reasons--not for physical health reasons…we have an exclusion for life of the mother, but none of those was performed for life of the mother…"

Senator Orrin Hatch: "And in the State of Kansas…we found out that doctors there performed 182 partial-birth abortions in just one year on babies they deemed viable...every one of these reports, by the way, cited 'mental health' as the reason for having this barbaric procedure."

Senator Sam Brownback: "I ask unanimous consent to have printed in the RECORD some statistics of the Kansas Department of Health...on partial-birth abortions… and the reasons they were being done…. all 182 partial-birth abortions done in Kansas… were for mental reasons. Zero...for physical reasons…"

"The notion that...you are jeopardizing the physical health of the mother, the life of the mother by banning a partial-birth abortion procedure is ….not borne out ...in my State... In our instance, in Kansas, ...These were all for mental reasons.... I would hope we could put to rest the debate point about we have to maintain this procedure for the life of the mother, the health of the mother. Our experience in the State is that is simply not the reason."

Senator Rick Santorum: "…I refer the Senator [Hillary Clinton] to the State of Kansas where they have to report the reason for a partial-birth abortion; 182 ...and of those 182, none--zero--were done because of a problem with the child or a physical problem with the mother. They were classified as mental health."

"…we certainly cannot think…of these procedures being performed on little babies, as the Kansas report says, with healthy mothers, healthy children …

Ron Fitzsimmons… the director of the organization of abortion clinics in America, said: I lied through my teeth…We all know that these abortions are performed on healthy mothers and healthy babies...his quote—the 'vast majority'.'

We have better than a vast majority. The State of Kansas, the only State in the Union that tracks these kinds of abortions, requires a reason for the abortion...In Kansas, there were 182 partial-birth abortions in 1 year--in a State the size of Kansas…How many were ...medically necessary? How many? None."

Senator Mike DeWine: "In fact, we have a real-life example of just how this power to define a mother's health would be used. Kansas is currently the only State...that requires partial-birth abortions to be reported...separate from other abortions. In 1999…Every single one of these partial-birth abortions, 182 out of 182, were reported by the abortionist as being performed on viable children for mental as opposed to physical health reasons."

Date: Monday, April 5, 2004
Time 2:33pm
Southern District Court of New York

Testimony this morning was in response to cross examination by the Counsel for the Government. The Government's attorney did an excellent job eliciting responses from the doctor that illustrated the weakness of the Plaintiff's case. The study within the doctor's practice of the D-&-X procedure versus the D-&-E dismemberment procedure had vastly different sample sizes, and did not take into account gestational age. The Government's counsel went over the flaws

one-by-one. The abortion doctor testified to a preference for D-&-E over induction abortion method. However, the abortion doctor did not offer induction abortion in any part of the services offered in private practice or under Directorship.

It is interesting to note that the procedure for which the doctor has a stated preference pays more to the doctor than the alternative procedures. The doctor testified that most of the patients are Medicaid patients, and payment is through New York State Medicaid. The doctor was questioned about the fee schedule for Medicaid. The doctor claimed to be unfamiliar with the schedule. Judge Casey was incredulous on this point. He questioned her:

Question: "You are the head of the service and you primarily deal with this type of patient, but you have never read the fee schedule?"

Answer: "I may have, but I do not recall."

The Government's attorney then asked if the fee schedule the doctor read from was the same as the current amount of reimbursement.

The doctor replied, "I do not know the current amount."

The Judge again questioned, "The schedule determines how you get paid, and yet you have not seen the latest one?"

Answer: "Yes, the amount for the D-&-X abortion was a third again as much as for the labor induction abortion."

The Judge asked if the doctor was aware of that in 1997.

The doctor indicated, "I am unsure."

The Judge asked, "Did you know the amount since you headed up the service?"

The doctor responded, "I did not know precisely."

The Judge said, "Doctor, this is a simple question. You were the head of the service. Did you know it or not?"

The doctor replied, "No."

Further testimony on the procedure itself illustrated that in this doctor's practice, they measure by sonogram the size of the fetus at the femur and the size of the head. They do this to ensure that they do not dilate the cervix larger than the largest part of the head. Earlier in testimony, the doctor testified that it is safer for the mother to have the cervix dilated as much as possible. In this case, the doctor does not want the cervix dilated, because the concern is not for the mother's health. The concern is that if the cervix is dilated that large, a head-presenting fetus would

deliver. The doctor was questioned whether that would be the case, and indicated it would not be; however, the Government's attorney highlighted deposition testimony from this same doctor indicating that it would be.

The Government's attorney went on to highlight another statement made in deposition testimony, which the doctor initially disagreed with but had testified to, that the decision to undergo a D-&-X abortion as opposed to an induction abortion is "primarily a convenience factor and not a health factor that leads to the decision."

Graphic testimony was elicited on the subject of the procedure itself. The attorney led her through the procedure step by step.

Question: "You like to grab the fetus' foot, if you can? Right?"

Answer: "Yes."

Question: "You take a piece of gauze because the fetus is wet to help you improve your grasp?"

Answer: "Yes."

Question: "You use gentle traction to pull the fetus through the cervix?"

Answer: "Yes."

Question: "The fetus shoulder girdle will not pass through the cervix, in your experience? So, it becomes stuck there?"

Answer: "Yes."

Question: "You flip it so that the back of the fetus is towards you?"

Answer: "Yes."

Question: "You pass a finger up the back to find the fetal arms, which are generally extended into the uterus. And then you pull the arms down and pull out the shoulders until the fetal neck is through the cervix. And the head at that point is in the uterus, but the entire rest of the body is outside of the uterus?"

Answer: "Yes."

Question: "You then place scissors at the base of the fetal skull and make an incision, and either its brains come out or if not you suck them out?"

Answer: "Yes."

The doctor testified to the Plaintiff's attorney that certain medical conditions on the part of the mother made D-&-X the safer procedure in mothers that were treated. When the Government's attorney questioned the doctor, the doctor did not remember any specifics about the cases that were testified about in which the mother's health would be served. The doctor did not remember any specifics of the procedure although the doctor did testify that the specifics would show in the medical records and in the complications log. Both documents which the Government has requested, and both documents which the Plaintiff's abortion providers have refused to turn over to the Government. The doctor also testified that the fetus did not feel pain because anesthesia given to the mother went into the fetus. When the doctor was questioned on cross examination, the doctor had no expertise on fetal pain, had done no research on fetal pain, had done no research on anesthesia, had no expertise in anesthesiology, and did not know the dose of anesthesia that was given in the D-&-X procedure.

Date: Monday, April 5, 2004
Time 5:49pm
Southern District Court of New York

This afternoon, the National Abortion Federation had another doctor take the stand. After going over her credentials, this abortion doctor began her testimony by claiming that intact D-and-E is always safer than other options. When her attorney continued questioning, she revealed that she does not base that opinion on any medical literature because there is not a specific study that compares the health benefits of an intact D-and-E versus a dismemberment D-and-E. She also admitted that there had not been any case studies on the issue.

When Judge Casey began to question her during her direct examination, the exchange that followed was remarkable. Judge Casey began by asking, "Doctor, do you make full disclosure?"

She responded, "I make sure the patient gives informed consent."

Question: When you tell them about the procedure, do you tell them what you are going to do?

Answer: I do.

Question: Do you use simple English words, so they know what they are doing and authorizing?

Answer: I do.

Question: In a dismemberment D-and-E procedure, do you tell them you will tear the limbs off, or do you say, "disarticulate"?

Answer: I tell them that we will try to get it intact, but it may come out in parts.

Question: Do you discuss the killing of the fetus?

Answer: I tell them that when I cut the umbilical cord of the fetus, the fetus exsanguinates.

Question: "Ensanguine" what?

Answer: In layman's terms, it would be drained of blood.

Question: Do you tell them that?

Answer: No.

Question: Do you tell them whether the fetus feels any pain?

Answer: The fetus may have a heartbeat, but I do not think it is alive.

Question: Do you ever tell them it will hurt?

Answer: It does not hurt her.

Question: No not the mother, that it will hurt the fetus?

Answer: The intent of the abortion is that the fetus will be terminated.

Question: Do you ever tell them that if you use an intact D-and-E method you will use scissors and insert them in the base of the skull?

Answer: I have not told them that.

Question: And do you tell them that afterwards you suck the brains out?

Answer: I use my finger to disrupt the central nervous system and collapse the skull. [Yes, this doctor has her own variation of the procedure in which instead of decapitating, like the doctor in San Francisco, or using an instrument that has suction, like the other doctors, she sticks her finger in the hole she made and uses it to crush the skull.]

Question: Do you tell the mother the fetus will feel pain?

Answer: I have never talked to a fetus.

Question: I did not ask you that. Do you ever tell the mother?

At this point in her testimony the doctor became very angry and raised her voice and said: "That is what I tell my patients, I'm sorry! ... I do not believe the fetus feels pain, so I do not tell them that." Then the Judge asked her if she had ever read any of the studies on fetal pain, and she responded that she had not.

Judge Casey ended today by ruling that the testimony of President Clinton's Department of

Justice officials would be excluded from this case, saying: "It is for the courts to determine if the act as passed in its present form is constitutional." We are pleased with this decision.

Date: Tuesday, April 6, 2004
Time 9:14am
Southern District Court of New York

We are preparing for a difficult morning of testimony. We expect another abortion provider to continue the testimony of the horrific nature of these abortion procedures. The courtroom scene was very intense yesterday, as the witness for the National Abortion Federation got really angry at one point with the judge's questioning. Judge Casey has the right and responsibility to ask these very pointed, direct and relevant questions. Here in New York we are really seeing a trial with all of the relevant information being admitted into evidence.

Date: Tuesday, April 6, 2004
Time 1:00pm
Southern District Court of New York

A pathologist, called by the National Abortion Federation to establish the advantages of having an intact fetus for the purposes of identifying fetal abnormalities, provided morning testimony. During the direct questioning by the Plaintiff's attorney, Judge Casey questioned the doctor about diagnoses made in her pathology lab.

Judge Casey asked, "The diagnosis of the abortion is incorrect sometimes?"

Answer: "Well, I am not certain as to what you mean."

Question: "Does it happen that on occasion a diagnosis of specific fetal abnormality is incorrect?"

Answer: "Yes, sometimes."

Question: "So that abortion was performed because of an anomaly that does not exist? They thought that the condition existed, and when you do your report you find that it did not?"

Answer: "Yes, that's right."

Then the doctor resumed her testimony under direct questioning by the Plaintiff and testified that sometimes there are undetected anomalies. Judge Casey then asked, "Can you have an anomaly that you could live with?" And the doctor answered, "Yes that is possible."

On cross examination, Assistant U.S. Attorney Joseph Pantoja did an excellent job illustrating that the pathologist's testimony in no way indicated that intact D-&-E is a preferable procedure. He questioned her regarding diagnosing abnormalities which involved the brain: "If a suction

catheter had been inserted into the opening of the cranium and the contents were evacuated, would it impair your ability to make a diagnosis?" The doctor answered, "No it would not." Joseph Pantoja then read from her deposition in which she had indicated the opposite. Then he illustrated that there were several other methods by which the pathologist could ascertain whether or not an anomaly existed, and that a labor induction abortion would produce a whole fetus that would be more suitable for pathological examination than a fetus that had been killed by the intact D-&-E method.

Date: Tuesday, April 6, 2004
Time 5:49pm
Southern District Court of New York

The afternoon testimony saw the conclusion of both the direct examination and the cross examination of the abortion doctor who had been testifying yesterday. Assistant U.S. Attorney Elizabeth Wolstein was very methodical in undercutting the plaintiff's argument line-by-line and point-by-point.

The doctor testified that she was a plaintiff in several other abortion cases challenging parental notification statutes. This doctor was also on the board of Physicians for Reproductive Choice, which calls itself "the voice of the pro-choice physician," along with fellow board member Dr. Leroy Carhart, the plaintiff in the Supreme Court case Stenberg v. Carhart, which I have discussed previously. The doctor was a co-speaker, along with the attorney who performed her direct examination, at an ACLU discussion the announcement of which hailed her as "a critical medical expert in many of the ACLU's challenges to anti-choice legislation." Clearly, there is a concerted effort being made here to battle any restriction on abortion.

The NAF contention that these procedures are never done on a viable fetus was undercut when the doctor testified that a normal fetus is viable at 24 weeks and has a 50% chance of survival outside the womb, and yet she performs the D-and-E procedure until 23 weeks and 5/7ths. Dr. Carhart looked agitated when Assistant U.S. Attorney Elizabeth Wolstein elicited that the study that she had previously performed and cited in her testimony was never published and had been sent back to her for revision 5 years ago but was never revised. She also testified that the study had serious flaws that limited what she could say about it, that it included a direct comparison between one group of 561 patients and another of 81 patients, and that the 81 patients in the sample group representing induction were patients on whom outdated medicine had been used. The doctor admitted that the risks between D-and-E and induction abortion are similar. This severely undercuts the argument that D-and-E is much safer than induction. On cross examination, the doctor also admitted that she had no studies or medical literature that helped form the basis of her opinion. The entire Department of Justice team defending the statute in New York has done an outstanding job so far.

The doctor also testified that the health concerns she mentioned would be indicated in the medical records. Judge Casey, in discussing documents which he has ordered production of but is still waiting for, said: "I have no comprehension why there is so much resistance from doctors who put at issue the safety of the procedure to produce the records that would validate their

claims." We suspect the reason is that the records, if produced, would not indicate that the mother's health was threatened; rather, they would show that this procedure is unwarranted.

Date: Wednesday, April 7, 2004
Time 1:08pm
Southern District Court of New York

The morning's testimony began with testimony from one of the Plaintiffs. After reading some deposition testimony into the record, the Judge asked why the witnesses testifying by deposition had been unwilling to appear in court. After the deposition testimony was entered, the live testimony began.

The Plaintiff testifying today is an active opponent of any effort to restrict abortion. He has served as an expert witness in several cases attacking abortion restrictions including parental notification for the State of New Jersey and the State Partial Birth Abortion Ban there.

Judge Casey questioned the doctor during his direct testimony. One of the arguments consistently made by the Plaintiffs has been that dismemberment D-and-E is more dangerous than intact D-and-E because it creates a higher risk of uterine perforation.

Judge Casey asked the doctor, "Have you ever perforated the uterus performing this procedure, D-and-E?"

Answer: "I do not start out a procedure saying..."

Question: "I did not ask you that, doctor. It is a simple question: Have you ever perforated the uterus performing a dismemberment D-and-E?"

Answer: "No."

When discussing the safety of the abortion procedure, the doctor testified, "Essentially every provider has had a perforation of the uterus, a small perforation is called a perforation, just as a three inch gash that causes tremendous bleeding is called a perforation. Everyone has had this."

Judge Casey also questioned this doctor about whether or not he gives his patients disclosure of the details of the procedure.

Question: "Doctor, do you make a complete and full disclosure?"

Answer: "I try to."

Question: "Do you explain in simple, clear language that anyone can understand?"

Answer: "I tell them the fetus may be removed in pieces."

Question: "So, you do not make it clear that you are pulling off the parts of the fetus?"

Answer: "No, I do not."

Question: "Do you discuss fetal pain?"

Answer: "No."

Question: "When you discuss an intact D-and-E, as you choose to call partial birth abortion, do you tell them that you will take a pair of scissors and make an incision at the base of the baby's skull?"

Answer: "No. I tell them I evacuate the cranium."

Question: "I did not ask you that. It is a simple question. Do you tell them that you will take a pair of scissors and make an incision at the base of the baby's skull?"

Answer: "No."

Question: "Do you discuss whether the baby will feel pain?"

Answer: "No, I do not."

Question: "Do you discuss that you will suck out the brain?"

Answer: "Not in those words."

The Judge also asked a question which illustrated some of the difficulties the Plaintiffs have had in proving that the intact D-and-E procedure is safer.

Judge Casey asked, "Perforation and infection can occur in an intact procedure?"

Answer: "Yes, they can occur in an intact D-and-E."

The Plaintiff's attorney asked, "Are there any maternal conditions that would require the use of the intact D-and-E?"

The doctor responded, "'Require' is a difficult word. You cannot always do it for technical reasons, so it cannot be required."

The doctor testified that when he performs the intact D-and-E, he sometimes sucks out the brains, and sometimes he crushes the head. He testified, "You can grab the head with one instrument and twist to deflate the head."

Then Judge Casey asked, "So you crush the head?"

Answer: "Yes, crush the head."

We have talked about partial birth abortion and the reality was evident in court today when the doctor testified to the full extent of the visualization he has when performing the procedure. The doctor testified that the cervix is dilated to the extent that the fetal trunk is not only pulled down but also the shoulders, the neck, and part of the fetal skull. When he performs the procedure, he pulls down not just to the neck, but further than the neck, to the point where the skull is exposed.

Date: Wednesday, April 7, 2004
Time 6:33pm
Southern District Court of New York

The doctor continued his testimony this afternoon. The doctor had testified on direct examination that induction was not as safe a method of abortion as dilation and extraction. This is important, because the Plaintiffs are attempting to prove that the procedure is necessary for the health of the mother. On cross examination, the doctor admitted that he had never done an induction abortion. At this point, Judge Casey stopped the questioning.

Question: "Just a minute. You have never done one?"

Answer: "That is correct."

On direct examination the doctor gave some horrific examples of ways in which he could possibly trigger the ban, including one in which he tore off the arm of a fetus and then proceeded with a partial birth abortion. He then continued by saying that in another example, "You would have separated the fetal head from the fetal body, or you would grasp the fetal head and crush or puncture it."

The cross examination by Assistant U.S. Attorney Sean Lane established that many of the opinions by the abortion doctor were not based on extensive experience. The doctor claimed he did only one abortion per year for the last five years. It was also established that the doctor did not have a subspecialty in maternal fetal medicine, which covers high risk obstetrics, and so he had no expertise when it came to the type of women he claimed would be in danger if other abortive techniques besides partial birth abortion were used. He did admit, however, that he "cannot think of a circumstance that would require an intact D-and-E for maternal health conditions."

He testified on direct examination that he had supervised 5000 D-and-E procedures, but on cross examination he admitted that for most of the procedures he "supervised" he was not in the room. He also admitted that he had no training in abortion methods in the last 10 years. That made his testimony on procedures, which use very different methods than they did 10 years ago, fairly unhelpful for the Plaintiff's case.

When he was confronted with a statement from his deposition testimony taken in January that he later realized was not helpful for his case, he said, "I did state that, and I was wrong."

Mr. Lane clarified: "You mean, you did state that in your deposition, and you were wrong?" The doctor responded: "Yes."

Another argument the Plaintiffs have attempted to make is that they are unsure what the ban covers because the terms are "ambiguous." Despite this claim, they continue to discuss the procedure with particularity when they are lauding its health benefits. Although this doctor claimed to be unable to distinguish various abortion procedures, Mr. Lane discussed with him some forms which he had approved for patient consent that specifically listed different abortion procedures. The doctor was not pleased to have to discuss those forms.

Judge Casey, in making an evidentiary motion allowing testimony by witnesses for the Justice Department, said again: "It is important that we have a full and complete hearing. They will be allowed to testify." It is encouraging that Judge Casey wants to allow all of the evidence to be heard in this case. Too often in the abortion controversy, legally relevant evidence has been excluded by Judges who felt uncomfortable delving into the substance of the procedure. This case will not suffer from that defect.

The doctor seemed to be suffering from an interesting memory disorder, which allowed him to remember things that helped his case, but never anything that hurt it. For example:

In 1998, while testifying in another case, the doctor was asked: "Have you ever delivered a live intact fetus during a D-and-E?"

He answered: "I don't know. I have never checked for that."

Then, when asked the same question today, he said: "Yes, I can recall several specific instances."

When asked why he suddenly could remember better, his response was: "That was 6 years ago."

Apparently time enabled him to recall the past more vividly about some subjects.

Perhaps if he testifies in a case in the future, he will be able to recall whether or not he has ever used ultrasound in an abortion procedure. Today the questioning went like this:

Mr. Lane: "You have never used an ultrasound?"

Doctor: "I am not sure."

Judge Casey: "When would that have been?"

Doctor: "A year or two ago."

Judge Casey: "You perform one procedure per year, and you are not sure if it was one or two years ago or if it happened at all?"

Doctor: "I do a lot of things. My day is full."

Judge Casey: "I am sure it is."

The doctor's testimony also took some absurd twists reminiscent of the doctor who was unsure of what "above the navel" meant as he attempted to evade answering Mr. Lane. Mr. Lane was establishing that partial birth abortion can be more dangerous to the mother than other procedures because of the use of scissors to stab the baby.

Mr. Lane: "Doctor, would you agree that a pair of scissors is a more dangerous instrument if there is a mistake than a pair of forceps?"

Doctor: "No, I would not say that. A closed (pair of) scissors is not sharper than a (pair of) forceps."

Mr. Lane: "Doctor, in conducting this procedure, would you expect the scissors to stay closed the whole time?"

Doctor: "No."

Mr. Lane was also able to elicit testimony from the doctor indicating that there are no studies comparing intact D-and-E to other procedures. The doctor said, "That is clearly correct." There were also no studies comparing the risks of cervical laceration, uterine perforation, infection or procedure time between intact D-and-E and other procedures. So all you had was the opinion of a doctor who was on the board of Planned Parenthood, who has no special training in maternal fetal medicine, who has had no training in abortion in ten years, and who has supervised procedures while out of the room. Needless to say, Assistant U.S. Attorney Sean Lane was extremely effective in undermining the Plaintiff's case today.

The doctor also testified that he had removed a fetal head from the body before removing the body, and that he had removed a torso first after tearing off the limbs and head. He testified in accord with the other abortion doctors in response to the question: "You sometimes crush a part of the fetus with your instrument. Does your ability to do that depend on the gestational age?" Answer: "Yes. Over time, as the fetus develops and its bones grow, they become harder and stronger and it increases in bulk and mass, becoming less friable -- meaning less able to be broken up or fractured."

Date: Thursday, April 8, 2004
Time 9:31am
Southern District Court of New York

As we prepare for trial today, we anticipate that this will be the last day that the National Abortion Federation puts up its witnesses to attempt to have the ban on the partial birth abortion practice deemed unconstitutional.

The testimony today is going to focus on the National Abortion Federation's leading doctor on this issue. The testimony will center on a report that he's done concerning the nature and scope of the partial birth abortion procedure.

I also anticipate some tremendous cross examination of this witness by the Department of Justice team. We will provide an update during the lunch break as these proceedings commence.

Date: Thursday, April 8, 2004
Time 11:30am
Southern District Court of New York

This morning the proceedings began with some interesting deposition testimony read into the record by an abortion doctor who performs abortion procedures up to twenty-three weeks and six days into fetal development. When the doctor was questioned as to what he typically does when the fetal head is stuck in the cervix, he indicated that sometimes when that happens he will pull off the fetal head. The doctor continued his horrific testimony by saying: "I have continued to pull the body and the head comes off. I have also used scissors to pierce the base of the skull and suction out the brains, or I have also used an instrument to reach up and crush the skull."

The doctor was asked: "Was there any indication because of the health of the mother, in the maternal health situations you listed, that made D-and-E the procedure you chose?"

He answered: "No."

Question: "Have you ever in your career had a surgical abortion where the whole fetus came out without collapsing its skull?"

Answer: "Yes, it has happened five to ten times, during the gestational age of sixteen to twenty-four weeks."

Question: "If a woman was seeking an abortion, would it be a concern that the intact fetus could live?"

Answer: "Yes, especially if the fetus was the gestational age of twenty to twenty-four weeks."

The doctor was also asked: "Would you perform a D-and-E even if you could get the whole fetus out? Would you continue with the abortion?"

The doctor responded: "If the mother wanted the abortion, I would do that procedure."

The doctor's testimony indicated that although the Plaintiffs continue to claim that there are health benefits from moving an intact fetus, and that a more dilated cervix is safer than a less dilated cervix, the doctors intentionally reduce dilation in order to ensure that the fetal head does not come out, because then they would have a live birth instead of a termination.

The doctor testified that it's safer for him to do a dismemberment D-and-E than an intact D-and-E. The doctor also testified that in 99% of cases, the fetus is disarticulated (torn) to some extent, because he said: "Even if just a foot is missing, it is disarticulated."

Date: Thursday, April 8, 2004
Time 12:08pm
Southern District Court of New York

The Plaintiff's star witness testified on the stand this morning, and during the questioning by Judge Casey, the doctor stated that he has performed abortion procedures on fetuses that were completely healthy, and whose mothers were also completely healthy.

The doctor also testified that there were no studies that show fetal pain. This will make the testimony of fetal pain experts next week in defense of the statute extremely interesting. More information will be updated soon.

Date: Thursday, April 8, 2004
Time 3:23pm
Southern District Court of New York

The doctor testified this afternoon that when the condition hydrocephalus is present it can make trying to get forceps around the head of the fetus very difficult. Judge Casey questioned him.

Question: "If a child has that condition, will they die if they are born?"

Answer: "The condition is very often fatal."

Question: "Can the child be treated?"

Answer: "Some of them can be treated."

Question: "Can the child lead a normal life?"

Answer: "There is a possibility, but they have a much higher rate of mental retardation compared to the normal population."

This was of particular interest to me because, as I have mentioned before, I have working for me a young man who was born with hydrocephalus. He does a great job for our organization and is able to lead a productive life.

The doctor was questioned by Judge Casey about the fetal pain issue when he was describing the intact dilation and extraction procedure.

Question: "Does it hurt the baby?"

Answer: "I don't know."

Question: "But you go ahead with the procedure anyway?"

Answer: "Yes."

Question: "You take care of the patients and the baby be damned. Is that it?"

Answer: "I take good care of my patients."

Question: "Do you have any care or concern for the fetus whose head you are crushing?"

Answer: "No."

Later, when describing another aspect of the procedure, Judge Casey again asked: "Does that hurt the baby?"

Answer: "I don't know."

Question: "Do you care?"

Answer: "That is not something I consider."

Question: "Then I take it your answer is you do not care?"

Answer: "At the time I am doing the procedure I do not care."

Date: Thursday, April 8, 2004
Time 4:00pm
Southern District Court of New York

The vaunted study that the Plaintiffs rely on to show that intact dilation and extraction is a preferable procedure to dismemberment dilation and extraction was discussed this afternoon. The Plaintiffs are attempting to rely on this study. However, it has been determined that the doctor who authored the study did not review the medical records involved in the study, and did not have permission to review the medical records for some of the women included in the study. The study itself does not indicate that intact D-and-E is a safer abortion method. In fact, the author testified that the complication rates between the two are comparable. We anticipate as the study is critiqued next week, its other flaws including small sample size will be discussed at length. The author of the study admitted that the higher the number of subjects you have in a study allows you to make statements with more statistical certainty. He said: "We acknowledge that we lack that in this study." Even if the study had been statistically sound, the study itself does not indicate that intact D-and-E is a safer procedure.

Date: Monday, April 12, 2004
Time: 12:04pm
Southern District Court of New York

The plaintiff, National Abortion Federation, has finished putting on their case. As they attempted to defend the procedure, about which the plaintiff doctor on Thursday said, "There is nothing I can do to make the procedure palatable," they were largely unsuccessful. Their experts were often exposed brilliantly by Assistant U.S. Attorney Sheila Gowan on cross examination as contradicting their prior testimony. Despite the plaintiff's claim that the ban is too vague, they have been able to describe the procedure in great detail. They have also been unable to provide evidence indicating that the mother's health is in danger unless this procedure can be performed.

As the Justice Department begins to make their case, they should be able to show, as Assistant U.S. Attorney Sean Lane said in his opening statement, that no maternal or fetal conditions made partial birth abortion necessary for the mother's health, that there are no safety advantages presented by the procedure and that the partial birth abortion procedure "blurs the line between an abortion and a live birth." Evidence on fetal pain and the substantial evidence that Congress relied upon in imposing the ban will be presented to Judge Casey so he can determine the ban's constitutionality.

Date: Tuesday, April 13, 2004
Time: 9:33am
Southern District Court of New York

As we prepare for court today, we realize that this will perhaps be the most significant testimony ever presented in an abortion related trial. Today's evidence will focus on the issue of fetal pain. Both the Congress and the U.S. District Court Judge have delved into this issue of what does the unborn child feel during these partial birth abortion ban procedures. The expert testimony that will be presented this morning and this afternoon will be significant and will be the first evidence has ever been heard on this critically important issue.

We will keep you updated as time permits today. Because of the nature of the testimony, we will probably not be able to update this report until the end of the day.

Date: Tuesday, April 13, 2004
Time: 11:43am
Southern District Court of New York

This morning, the Department of Justice called to the stand Dr. Anand. Dr. Anand is a pediatrician trained at Harvard and Oxford University. He is an expert on the issue of fetal pain. Dr. Anand testified this morning and afternoon that in his opinion the human fetus possesses the ability to experience pain from twenty weeks of gestation. He described the fetal pain as "prolonged and intense." He also said that anesthesia administered to the mother during the partial birth abortion procedure would not be sufficient to reduce the pain in the unborn child.

Date: Tuesday, April 13, 2004
Time: 6:15pm
Southern District Court of New York

The testimony of the fetal pain expert was fascinating. Dr. Anand described in detail the reasons that anesthesia was not able to work on the fetus. According to his testimony, at the second trimester and early in the third, the mother metabolizes most of the drug before it can have any effect. There is also a thick placental barrier that any drug administered to the mother would have to cross, and the medication crosses that barrier inefficiently. He testified that in order for the drug to take effect, the amount administered would be lethal to the mother. He further explained that the natural responses to pain the body develops that help us cope with it are not present until later in fetal development than the receptors of pain themselves. Coupling that lack of "inhibitory mechanisms" (defenses) with the thin, nerve-packed skin of the fetuses who are killed, and the intensity of the pain he described was apparent and deeply disturbing.

The afternoon provided the opportunity to listen to a tape that was sold by the National Abortion Federation to its members, in which Dr. Martin Haskell -- the inventor of the partial birth abortion procedure -- described it at a 1992 meeting of the NAF. Dr. Haskell said that he had done the procedure on third trimester babies, and described it in glowing terms. In explaining the reason he created the procedure, he described finding a dismemberment procedure for a late second trimester or third trimester abortion as making him "sweaty and emotionally drained." He continued: "A few procedures later I pierced the membrane and a foot immediately presented through the cervix. I grasped the foot and pulled down gently on the fetus until the head lodged in the cervix. Then I removed the fetal body and compressed the skull and removed it. I felt years younger and asked myself, 'Why can't they all be this easy?' The point of this presentation is that they can be." It was clear from his testimony that this procedure originated not to protect the mother, but in order for the abortion doctor to have an easier time performing later term abortions.

Date: Wednesday, April 14, 2004
Time: 12:00pm
Southern District Court of New York

This afternoon Dr. Sprang, a professor at the Feinberg School of Medicine at Northwestern University in Chicago, took the stand. Dr. Sprang has served as the President and Chairman of the Board of Trustees of the Chicago Medical Society, and is currently serving as Chairman of the Ethical Relations Committee of the Chicago Medical Society. Dr. Sprang testified that the partial birth abortion procedure is not safer than other abortion methods. Witnesses for the National Abortion Federation have previously testified that the partial birth abortion procedure was safer than other abortion methods. Dr. Sprang disagreed. He stated that the use of the intact D-and-X (partial birth abortion) procedure - which involves the partial extraction of a living fetus - is never medically necessary to preserve the mother's health, and is never the best method.

Dr. Sprang also testified that based on his experience as a teacher and writer, in his view the standard of care in obstetrical medicine is to consider the fetus as a "second patient." Therefore, likely effects on the fetus should be considered in an obstetrician's decision regarding treatment

of the mother. He also testified that beginning at approximately eighteen weeks gestation, medical literature indicates that the fetus has acute stress to any outside stimulus.

Concerning the issue of fetal pain, Dr. Sprang has written that the majority of intact D-and-X procedures are performed on viable fetuses. He also noted that with intact D-and-X (partial birth abortion), pain management is not provided for the fetus, "who is literally within inches of being delivered." In an article published in the August 1998 issue of The Journal of the American Medical Association (JAMA), Dr. Sprang wrote: "Forcibly incising the cranium with the scissors and then suctioning out the intra-cranial contents is certainly excruciatingly painful." He also noted in his article that "[i]t is beyond ironic that the pain management practice for an intact D-and-X on a human fetus would not meet federal standards for the humane care of animals used in medical research."

Dr. Sprang testified at length about his work for AMA's committee on late term abortions, and Judge Casey deemed him an expert witness for the purposes of this trial. Dr. Sprang also reported that the partial birth abortion procedure now includes delivery "at least to the neck of the unborn child or even further." Finally, Dr. Sprang has been testifying that the D-and-X procedure also poses significant risks to women.

Date: Wednesday, April 14, 2004
Time: 6:43pm
Southern District Court of New York

Dr. Sprang's testimony about ethics included a discussion of the partial birth abortion procedure that focused on whether or not the mother's autonomy rights cease when the fetus is partially delivered. The AMA committee he was a part of discussed at length the varying degrees of maternal autonomy, and the fact that the ethical argument for a woman having control over her body seems weak when the fetus is partially outside her body already. He described a situation that is typical in partial birth procedures, where a fetus is delivered up to the skull and part of the skull is even exposed, so that all that is left inside the mother's body is a portion of the skull and the face of the baby.

At one point the plaintiff's attorney was trying to say that Dr. Sprang could not speak about partial birth abortion because he had not performed or observed one. After he admitted he had not personally observed a partial birth abortion procedure firsthand, he was asked, "You would not want to observe an intact D-and-E procedure because you would find it upsetting, is that right?" To which he responded, "I would be upset at watching the brains of a 23-week-old fetus being sucked out. It would not be a pleasant experience." When Dr. Sprang was challenged as an expert because of his lack of experience in performing the procedure, Judge Casey recognized him as an expert and said to the plaintiff's attorney, "Under your rationale, only an abortionist would be recognized as an expert in this procedure to opine upon it."

Dr. Sprang was quite effective at pointing out that not only was the study relied on by the plaintiff flawed in many ways, but inasmuch as any conclusion could be drawn from the data in the study, it would point to partial birth abortion being less safe than dismemberment D-and-E. First, he pointed out that the study was underpowered. This means that the study did not have

enough people in it, so the statistical conclusions are unreliable. He said that if you look at the numbers that are very different between the two procedures, the fact that in this study there is an almost 3-to-1 difference in the rate of patients who subsequently suffered premature births would indicate a trend that partial birth abortion is actually more dangerous than dismemberment. This is the main study that the plaintiffs relied on, so it is remarkable to note that it does not support their position. This is the study we have discussed previously, a study done by one of the plaintiff doctors; and the study not only seems to not support their position, but it also seems to contradict it.

Date: Thursday, April 15, 2004
Time: 12:16pm
Southern District Court of New York

This morning's testimony came from Dr. Stephen Clark, who is an expert in maternal fetal medicine and critical care for mothers with health risks. Dr. Clark possesses impeccable credentials as the author of approximately 175 published works. He has also served as the editor of textbooks on obstetrics. He has been recognized in the top ten percent of all referees for obstetrics and gynecology in terms of the scientific accuracy, and has been recognized from 1992 to the present as among the best doctors in America. Dr. Clark's reason for testifying as an unpaid expert witness for the Government was made clear when he said: "I try to bring some scientific rationale into this debate. It is a big issue, and there may be reasons on both sides, but do not give me this 'health of the mother' nonsense. That is pure hype and spin. I hate to see the scientific data compromised for politics."

He then went on to testify that he was familiar with the partial birth abortion procedure through his study of the work of Dr. Haskell and the declarations he read of the Plaintiffs in the case and the Plaintiff's experts. When he was discussing the gestational age at which the procedure occurs, he said: "In reviewing the work of Dr. Haskell, there was a fetus at up to thirty-two weeks, which seems unbelievable, but as I recall, that was when the procedure was done. But it is certainly performed up to the twenty-seventh and twenty-eighth week." Sheila Gowan asked if he had formed an expert opinion as to whether or not maternal health ever necessitates a D-and-X procedure. The doctor responded: "My opinion is two-fold: 1. Under no circumstances is partial birth abortion necessary to preserve the life or health of the mother, and an abolition of the procedure would not put any women at medical risk. 2. There are grave concerns over the long term health consequences of the procedure. There is no published data concerning the long term health consequences, but the data coming out regarding this procedure is so disturbing. It confirms the problems of pre-term birth after this procedure has been used." Further testifying, the doctor said: "I tried to think of a hypothetical situation, as someone who has spent his whole life caring for critically ill mothers, where this procedure would be beneficial, and I could not think of a reason for the procedure." Dr. Clark's testimony has been particularly helpful because he wrote the report on cardiac conditions in pregnancy for ACOG (The American College of Obstetrics and Gynecology).

Date: Thursday, April 15, 2004
Time: 6:23pm
Southern District Court of New York

Dr. Clark's testimony was incredibly effective. It is hard to convey how thoroughly he repudiated every single claim about maternal health made by the plaintiffs. While many doctors have given their opinions on different aspects of maternal health, some have not been specialized in critical care of mothers. None have been as familiar with each and every condition as Dr. Clark was today. Assistant U.S. Attorney Sheila Gowan masterfully created a direct examination of the doctor that felt like a cross examination of the plaintiff abortion doctors' entire case.

One of the main arguments the plaintiffs made through each of their abortion doctors was that the procedure was necessary to preserve the health of the mother. At the time, their argument sounded somewhat convincing, but it was left blown apart after Dr. Clark was through.

The most common maternal health indication that could lead to a recommendation that the pregnancy be terminated is cardiac conditions. Dr. Clark wrote a report for ACOG concerning the procedure. He testified that there is not any reason a woman with cardiac conditions would benefit from having a partial birth abortion as opposed to a different procedure.

It became apparent that in attempting to characterize the procedure as necessary, some of the other abortion doctors had suggested things that were implausible or impossible. When he was asked whether peripartum cardiomyopathy would be an indication for partial birth abortion in the second trimester, as suggested by one of the abortion doctors, he responded: "By definition a woman could not develop peripartum cardiomyopathy in the second trimester, because it is a rare cardiac condition that develops either a few weeks prior to term delivery or in the first few months after."

He also addressed another argument made by plaintiff abortion doctors that leukemia and various syndromes they named, all of which involve low platelets, would indicate that partial birth abortion should be performed. He responded: "This is probably the worst example I have heard this morning, to claim that a woman needs a surgical procedure because she has low platelets." He went on to explain that if the woman had low platelets between a normal range and an extremely low range, either dismemberment D-and-E or induction would be fine, but that if she had extremely low platelets the only medically indicated option would be induction and not the partial birth abortion procedure.

One of the main afflictions the abortion doctors made sound like it mandated partial birth abortion was a condition called placenta previa. When asked about that disorder, he was asked as he was often asked during the questioning.

Question: Are you familiar with this procedure?

Answer: Yes.

Question: Have you written about this procedure?

Answer: Yes, I have. (As I have mentioned previously, he has written about many of these procedures.)

Question: Were you given an award from the American College of Obstetrics and Gynecology for your writing in this area?

Answer: I think so.

After it was pointed out where the writing appeared in his curriculum vitae, the doctor explained that he had indeed been given the national award from ACOG for his writing on placenta previa. He then proceeded to explain that "placenta previa is not an indication for termination." He had delivered many babies to healthy mothers despite placenta previa. He also similarly explained that contrary to the plaintiff's argument that a kidney disorder would lead to an indication of partial birth abortion, kidney function is actually improved by pregnancy.

Another argument that an abortion doctor had made was that induction was not possible for certain women because they had asthmatic conditions, and that therefore certain medications could not be used. He explained that while that was true, there were other equally safe medications, routinely used in that case.

Dr. Clark was extremely honest and candid. He agreed that there were certain conditions where surgery would be recommended. He also agreed that there were certain conditions where for the life of the mother, abortion was necessary. He was asked: "Can you envision any circumstance at all where intact D-and-E would be necessary to preserve the health of the mother?" He replied: "No, I read all of the plaintiff reports and testimony, and 99% of it does not even address the issue. Sometimes medical conditions suggest abortion, and that is true; sometimes dismemberment is preferred to induction, and that is also true. But they do not address the issue I am here to address. There remain no medical conditions in which a mother's health will benefit by her undergoing intact dilation and extraction. There are always equally if not more safe options that do not involve intact D-and-E."

He also discussed the study that has been much discussed previously, the study that purported to show that partial birth abortion is a safer procedure than dismemberment D-and-E. He testified prior to ever seeing the study that one concern he had about the partial birth abortion procedure was that, due to the increased amount of dilation the doctors create in the cervix as they prepare for the procedure, he thought that there could be a risk for subsequent premature birth. When he saw the study, he said the fact that there is a 3-to-1 incidence of premature birth in the women who had partial birth abortion as opposed to dismemberment D-and-E is "dynamite waiting to go off as soon as it is published."

Judge Casey had an interesting conversation with Dr. Clark when he was discussing the dismemberment D-and-E procedure. The doctor was describing taking the fetus out in pieces, and the Judge said: "The fetus is not in pieces in the uterus, you tear it apart?" He answered: "Yes, that is an absolute fact that the baby is torn limb from limb." The Judge responded: "Okay, that is what I want this record to be clear on."

Judge Casey also discussed with Dr. Clark the fetal pain issue. Dr. Clark had testified that it really would not make a difference in terms of fetal pain which type of abortion procedure was used.

Question: Do you believe in fetal pain?

Answer: Sure.

Question: Then it could make a difference.

Answer: I guess it could make a difference whether a hole was poked in my head and my brains were sucked out or my limbs were torn off, but they both sound pretty brutal.

Dr. Clark's testimony could be summarized by this one quote: "Show me the data. Show me the data... Before you claim that this is a safer procedure, I want to see some data. The data that exists suggests it is just not so." He is a scientist who is concerned with truth, and his ability to explain the truth about the maternal health conditions involved as justifications for partial birth abortion was a great asset to the government's defense of the ban.

Date: Friday, April 16, 2004
Time: 1:08pm
Southern District Court of New York

The expert witness on the stand today testifying on behalf of the ban on partial birth abortion, Dr. Curtis Cook, is a maternal fetal specialist. This is the type of doctor who does in utero surgery on unborn children, so he is a well-qualified expert. He's spent about an hour and a half on the stand so far, but in that time there was a very significant development. Asked about the necessity of this procedure, he said: "It is never medically necessary, and potentially poses health and safety risks to the women, including their future ability to carry children to term." He also has reviewed the evidence that was submitted by the abortion providers -- this is Dr. Haskell and Dr. McMahon, who originated this procedure -- and he testified that their methods were "fatally flawed," that many times these procedures were performed on children who were perfectly healthy and viable; and in fact, many of the so-called "fetal anomalies" actually correct themselves in utero, without the need for interventional surgery. He also said most of the others can, in fact, be corrected with interventional surgery, which he performs. He said -- and he repeated a couple of times -- that after viewing all of the testimony and all of the exhibits, this procedure is never medically necessary, and, again, poses health and safety risks to women. So dynamic and important is this critical testimony from a surgeon who does in utero surgery.

The government is close to wrapping up its part of the case. Now, the other side gets to go again, and I expect that's going to start Monday. But let me tell you this also. Remember that a lot of the questions are about a medical necessity to protect the health of the mother. The fact of the matter is, their own evidence shows that less than ten percent of the abortions utilizing the partial birth abortion procedure were for medical necessity to protect the mother's health. The rest were completely elective. And of course, as this doctor testified, there are other procedures besides the partial birth abortion procedure that could have been utilized and are much safer for the mother.

The testimony here is becoming very clear. Dr. Cook also said: "These are not justifiable for medical necessity, but rather are elective abortions on viable fetuses." This is a very dynamic testimony, and it's a good way to kind of sum up the day here. It's very significant, but again, underscoring, this doctor is an expert. This is a doctor that does surgery on unborn children, testifying that "it is never medically necessary," and also saying that it is not justifiable for preserving the mother's health.

This has been a tremendous effort here by the Department of Justice. I'm with the senior Justice Department personnel from Washington. I will tell you that the team both from Washington, DC, and the Assistant US Attorney's office here in the Southern District of New York, has done a sound and convincing job putting this case forward in defending the ban of this procedure.

As the government wraps up its portion of the case, attention next week will focus on a hearing in the US Court of Appeals for the Second District to determine whether an order issued by Judge Casey, compelling several NY hospitals to release their medical records on partial birth abortion, should be complied with.

Date: Monday, April 19, 2004
Time: 9:43am
Southern District Court of New York

As this week begins the lawyers for the National Abortion Federation are putting on a rebuttal witness. This witness is going to attempt to prove that in some cases data is not needed for doctors to perform a procedure, because when the procedure is new, its performance will show whether or not it is safe. It will be interesting to see if the plaintiffs come any closer to meeting their burden of showing that the partial birth abortion act is necessary to preserve the health of the mother. I will keep you posted.

Date: Monday, April 19, 2004
Time: 6:53pm
Southern District Court of New York

The witness for the plaintiffs did very little to help their case. The lecturer had been originally heralded as an expert on the history of medicine who would show that medical techniques did not need a great deal of data supporting their safety. Instead, the lawyers sought to have him testify in such a way as to bolster the study relied on by the plaintiffs that Dr. Clark had critiqued. Clearly concerned about the effect of the critique, they sought to rebut the criticisms offered by Dr. Clark with their doctor's testimony today.

They were largely unsuccessful, as evidenced by a comment from Judge Casey during the debate over whether or not the doctor was even a proper witness. Judge Casey said: "I don't know if a statistician is going to rehabilitate the Chasin study."

After the witness was done testifying on direct, Assistant U.S. Attorney Sean Lane cross examined him.

Question: You said that in order for a study to be valid, the groups being compared would have to be equal?

Answer: No, I said they would have to be comparable, not equal.

Question: Well, the two groups in this study are not comparable, are they doctor?

Answer: No, they are not.

Question: And there is a statistically significant difference between the dilation of the group undergoing the intact D-and-E procedure and the group undergoing dismemberment D-and-E, isn't there doctor?

Answer: Yes, there is.

The cross examination eliminated any positive effect the doctor's testimony could have had for the plaintiffs.

Date: Tuesday, April 20, 2004
Time: 9:28am
Southern District Court of New York

This morning I will be heading to a different courtroom than Judge Casey's chambers, where a panel of judges from the Second Circuit will decide whether or not to enforce Judge Casey's order for the hospitals to produce their redacted medical records. I will update as soon as we know what the ruling is on this issue.

The privacy concerns that supposedly provide the basis for objecting to the records being released, seem rather far fetched given that the Justice Department has stipulated that all personally identifiable information will be removed, but it is difficult to predict what will happen today.

Date: Thursday, April 22, 2004
Time: 5:13pm
Southern District Court of New York

We are still awaiting word from the Second Circuit Court of Appeals on whether it will uphold the ruling by Judge Casey, ordering access to redacted medical records that would prove the government's assertion that partial birth abortion is never medically necessary to preserve the health or life of the mother. Until the appeals court rules, the lower court case is on hold. As I said previously, I will update as soon as the Second Circuit issues its decision.

Date: Monday, April 26, 2004
Time: 4:04pm
Southern District Court of New York

The Second Circuit Court of Appeals on Friday issued a stay of Judge Casey's contempt order, and this morning Judge Casey held a hearing to determine the schedule for the resolution of the case. Assistant U.S. Attorney Sheila Gowan did an excellent job explaining that although the Justice Department considers relevant the withholding of records by the New York-Presbyterian Hospital, the Justice Department elected to withdraw their request that the records be produced.

The reason for the withdrawal is the timing of the case. The Justice Department knew that the case could go on indefinitely as the Second Circuit considered various things, and that regardless of their ruling it could be appealed further. Seeking to avoid a lengthy process in which the status of the statute is uncertain, the Justice Department asked Judge Casey to rule on the merits of the case. We expect him to do so within a little more than 30 days from the time that final arguments are held. The case is certainly much closer to its conclusion now that the appeal regarding the medical records has been withdrawn.

Date: Tuesday, April 27, 2004
Time: 11:48am
Southern District Court of New York

At the ACLJ we have a young man, Paul Wood, working for us who has hydrocephalus, an abnormality that causes the ventricles of the brain to be enlarged by excess fluid building up. On April 12, 2004, Paul flew to New York to attend two days of testimony. Here is his account:

A Fight for Life:
My trip to New York to witness the Partial Birth Abortion trial.

Last spring, as Congress was debating what would become known as the Partial Birth Abortion Ban Act of 2003, I wrote a letter to President Bush. In my letter, I thanked him for his "unwavering determination to protect the unborn," and shared with him a bit of my life story. One of the stories I shared concerned a conversation between my dad and one of the doctors overseeing my care.

As they were discussing the many surgeries I would need because of my Spina Bifida in order to have some semblance of a "normal" life, the doctor said: "Mr. Wood, you never have to worry about this happening again."

Dad asked him to elaborate.

"We can now detect these children in the womb."

"And repair the problem?" asked my dad.

"No," the doctor replied. "Terminate the pregnancy."

As I wrote in my letter, "This elicited a strong but calm response from Dad: 'Why don't we just go in and kill him right now? It would avoid a lot of pain and suffering for all of us.' My dad then made sure that this doctor was no longer assigned to care for me, because as he puts it, I would be better off in the care of someone who didn't think I'd be better off dead."

Of course, the partial birth abortion ban was finally passed last fall, and President Bush signed it into law in November. It was immediately halted in the courts, and over the past few weeks three federal trials have been going on as judges hear challenges to the ban.

On April 12, 2004, I flew to New York City to attend two days of testimony in one of those cases, *National Abortion Federation v. Ashcroft*. While to many the prospect of sitting and listening to several hours of lawyers' questions and witnesses' answers would seem tedious -- and I have to admit that at times that was how I felt -- for the most part I found the experience to be quite fascinating.

After clearing security, I went upstairs to the 14th floor of the Daniel Patrick Moynihan United States Courthouse to the courtroom of Judge Richard C. Casey. Testimony began at approximately 9:30AM. The first witness to take the stand was Dr. Kanwaljeet Anand, a Harvard- and Oxford-trained pediatrician born in India, who currently practices in Arkansas and testified in this trial as an expert in fetal pain. Dr. Anand spoke eloquently and convincingly about a belief shared by many in that field that the human fetus can feel pain as early as twenty weeks gestation. He also testified that anesthesia given to the mother would not reduce the amount of pain felt by the fetus, and explained the physiological reasons for this. According to his testimony, it would take levels of anesthesia that would be highly toxic to the mother in order for the drugs to have a sufficient effect on the fetus.

On Wednesday, Dr. M. LeRoy Sprang from Chicago's Northwestern University, an expert in medical ethics, provided testimony on that aspect of partial birth abortion. During a break in the proceedings, I met Dr. Sprang in the men's room, and told him that I had a question I wanted to ask him. However, for obvious reasons, I told him I would wait until after his testimony to pose my question.

As we stood outside the courtroom following his testimony, I told him that I had read in his expert report an example that he used in expressing his opinion that partial birth abortion is never medically necessary to preserve the health of a pregnant woman. The example he used pertained to hydrocephalus, also known as "water on the brain," and he wrote that one option, called cephalocentesis, would allow the doctor to remove enough cerebrospinal fluid from the baby's skull to deliver the baby normally. I did not see any mention of his personal experience with patients who have neural tube defects in his expert report, so I asked him about that. He mentioned procedures that can be performed in utero, including insertion of a shunt between something like twenty-eight to thirty weeks gestation in order to reduce the pressure on the brain. (I myself have a shunt, inserted one week after my birth.)

I left the courthouse, and on my way back to my lodgings I stopped by Ground Zero. I didn't think of it then, but as I sit here writing this I am pondering a startling statistic: The number of people who died on September 11th is roughly 3,000; yet the number of abortions performed daily in the United States alone, depending on who you ask, is either slightly above or slightly below 4,000. I say this not to demean or belittle in any way the enormous loss of those who died in the terrorist attacks. I'm simply saying that it is staggering to think of the number of unborn children who are killed each and every day in this country.

It is my earnest prayer that one day this nation will come to recognize all life, including that of the unborn, as valuable and worthy of protection. But until then, I believe we should be doing all we can, no matter how small, to protect those who can't protect themselves.

Date: Thursday, April 29, 2004
Time: 1:50pm
Southern District Court of New York

We are in the final stages of the trial in New York City. The Department of Justice has done an exceptional job with the presentation of witnesses and evidence to clearly show that partial-birth abortion is never medically necessary. All of the evidence has been presented and we are now waiting for U.S. District Court Judge Richard Casey to set a schedule for closing arguments and a schedule for the submission of briefs. At the ACLJ, we will be filing an amicus brief with the court on behalf of members of Congress who played a key role in the passage of the ban on partial-birth abortion. Once closing arguments take place and briefs are submitted, the case will then go to Judge Casey for his consideration. We are hopeful that when a decision is made in the case, the ban on this horrific procedure will be declared constitutional.

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