Additional Views to H.R. 2175
The "Born-Alive Infants Protection Act"

We write as members who supported the passage of H.R. 2175 in order to clarify our understanding of this legislation based on a plain reading of the bill's language and the record made by the sponsors as to its meaning.

The bill amends Title 1, U.S. Code, to add at the end a definition of the terms "person," "human being," "child," and "individual" to include "any infant member of the species homo sapiens who is born alive at any stage of development."[1] The term "born alive" is defined to require that a fetus is entirely expelled or extracted from the mother and shows breathing, "a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles." The definition applies regardless of whether the umbilical cord has been cut or whether the expulsion or extraction occurs through natural or induced labor, cesarean section, or induced abortion. The viability of the fetus outside the womb is not an element of the definition.

A rule of construction in a new subsection (c), absent from the version of the bill passed by the House in the 106th Congress, states that the bill is neutral with respect to abortion rights, providing that the section shall not be construed to "affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive.'" We believe that this clarification further resolves concerns that this legislation may have been intended as a back-door effort to affect abortion and reproductive rights rather than applying solely to the status of an infant following birth. It is also consistent with current law. As a general matter, the Supreme Court has held that "the unborn have never been recognized in the law as persons in the whole sense," and the law has been reluctant to afford any legal rights to nonviable fetuses "except in narrowly defined situations and except when the rights are contingent upon live birth."[2]

We would note that the full implications of H.R. 2175 are unknown. A complete analysis of the bill would require enormous resources. According to the CRS Memorandum prepared in the 106th Congress, the terms "person," "human being," "child," and "individual" appear in at least 15,000 sections of the U.S. Code and are found in over 57,000 sections of the Code of Federal Regulations. There is no evidence to suggest that the sponsors of this bill have examined these federal laws and

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[1]While the proposed Act does not include a specific extension of the "born alive" definition to the term "infant," the title and definition of the Act suggest the intent to do so.

[2]*Roe v. Wade*, 410 U.S. 113, 161-62 (1973). The Supreme Court held in *Roe* that a fetus, even when viable, is not a person under the Fourteenth Amendment. *Id.* at 152-53. Although the Court found that the state has a compelling interest in the "potentiality of human life" of the fetus after it reaches viability, it concluded that this interest could not justify prohibiting an abortion even after the point of viability if the abortion is necessary to preserve the life or health of the woman. *Id.* at 162-63.

regulations to identify all of the bill's potential consequences, and the CRS researchers stated that "an evaluation of the statutory and regulatory impact of the Act is beyond the resources of [their] office."[3]

One concern which has been raised is that the bill might affect decisions with regard to the standard of care owed to a previable fetus which has been expelled as a result of spontaneous or induced labor, or to a fetus which is afflicted with massive fetal anomalies. Dr. Gordon Avery, an expert in the field of neonatology, wrote a letter to the Committee arguing that H.R. 2175's definition of "born alive" was too broad, as non-living entities may show involuntary movements such a heartbeat or twitching muscles. He expressed the concern that the definition of "born alive," which would apply to severely premature neonates with "a single gasp, a muscle twitch, any pulsation of the umbilical cord" but no chance of life outside the womb, would cloud the waters for medical professionals and families making decisions as to the appropriate standard of care.[4]

If, however -- as we have been assured by the Majority -- the bill does not change existing law, it should not affect the decisions of families and neonatologists. Furthermore, according to the Majority report filed in the 106th Congress, the "bright line" of complete extraction would not constrain or in any way chill medical care given to a woman or to her offspring:

> [H.R. 4292] would not mandate medical treatment where none is currently indicated. While there is debate about whether or not to aggressively treat premature infants below a certain birth weight, this is a dispute about medical efficacy, not regarding the legal status of the patient. That is, the standard of medical care applicable in a given situation involving a premature infant is not determined by asking whether that infant is a person.... H.R. 4292 would not affect the applicable standard of care, but would only insure that all born-alive infants – regardless of their age and regardless of the circumstances of their birth – are treated as persons for purposes of Federal law.[5]

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[3]Kenneth Thomas & Jon O. Shimabukuro, "The Born Alive Infant Protection Act of 2000," Congressional Research Service Memorandum, at 2, (July 18, 2000).

[4]Letter of Dr. Gordon B. Avery to Rep. Nadler, June 21, 2001. These are not merely the isolated concerns of an academic neonatologist. In testimony before the Subcommittee in the 106th Congress, Dr. Francis Sessions Cole of Children's Hospital in St. Louis stated that the imposition of this universal definition might "significantly interfere with the agonizing, painful and personal decisions that must be left to parents in consultation with their physicians." In debate on the legislation in the 106th Congress, Rep. Nancy Johnson (R-CT) spoke against the bill on these grounds, saying that it would "deny parents and deny doctors the right to make decisions about premature infants. An infant born at 3 ½ , 4 ½ , 5 ½ months is a tragedy, and parents in a free society in America deserve the right to determine what medical care they will have, recognizing that the law requires [that] newborns receive all medically indicated treatment." 146 CONG. REC. H8160 (Sept. 26, 2000).

[5]H. Rep. No. 835, 106th Cong., 2d Sess. 13 (Sept. 11, 2000).

This accords with the testimony received by the Subcommittee on the Constitution from Majority witnesses. Dr. Watson A. Bowes, Jr., a former Chairman of the Committee on Ethics of the American College of Obstetricians and Gynecologists, stated,

> "[T]his definition of live birth does not restrict a physician's prerogative to recommend that medical care regarded as futile be withdrawn or withheld. It is important to keep in mind that this bill deals solely with the criteria that define whether an infant is alive at the time of birth. It does not legislate how physicians and parents may deal with the decision about withholding or discontinuing medical or surgical treatment that is considered futile in the care of an infant."[6]

In addition, even in the situations described by Majority witness nurse Jill Stanik, Dr. Bowes stated that "I don't think this [legislation] changes medical care for those babies."[7]

In light of the fact that H.R. 2175 does not apply to abortion or other pre-birth decisions concerning human reproduction, and that it is clear that the bill does not substitute the judgement of Congress for the judgement of a qualified health care provider, we remain puzzled about the ultimate purpose of this legislation. Insofar as it prohibits the killing of an infant following a live birth, or the denial of treatment where it would be medically indicated and legally required under current law and practice, it reflects the laws of all 50 states, the District of Columbia and the territories of the United States. It is unfortunate that the bill provides a platform for the overheated rhetoric of a few who wish to suggest that viable healthy infants are being permitted to die in our nation's hospitals, even though the sponsors have never been able to point to so much as one prosecution connected with these alleged activities.

With these understandings and clarifications from the sponsors and their witnesses, we are able to support this legislation.

John Conyers, Jr.
Barney Frank
Howard L. Berman
Jerrold Nadler
Zoe Lofgren
Sheila Jackson Lee

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[6] *Hearing on H.R. 2175, The Born-Alive Infants Protection Act of 2001 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 107th Cong., 1st Sess. 33 (July 12, 2001) (testimony of Dr. Watson A. Bowes, Jr.).

[7] *Id.* at 42.

Maxine Waters
Martin T. Meehan
William D. Delahunt
Tammy Baldwin