

SENATE BILL REPORT

ESHB 2395

As Reported By Senate Committee On:
Law & Justice, February 25, 1998

Title: An act relating to limiting partial-birth abortions.

Brief Description: Limiting partial-birth abortions.

Sponsors: House Committee on Law & Justice (originally sponsored by Representatives Sterk, Mulliken, D. Schmidt, Johnson, D. Sommers, Koster, Sherstad, Sheahan, Thompson, Mielke, Smith, Dunn, Boldt and Backlund).

Brief History:

Committee Activity: Law & Justice: 2/25/98 [DPA, DNPA].

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended.

Signed by Senators Roach, Chair; Johnson, Vice Chair; Hargrove, Long, McCaslin, Stevens and Zarelli.

Minority Report: Do not pass as amended.

Signed by Senators Fairley and Kline.

Staff: Harry Steinmetz (786-7421)

Background: Abortion has been the subject of great debate and considerable legislative and judicial activity over the past few decades. Since 1973, both the United States and Washington State Supreme Courts have spoken on the subject, as have the federal Congress, the state Legislature, and the people of the state through the initiative process.

Particular attention has been paid in recent years to abortions performed by a procedure involving partial delivery of the fetus.

FEDERAL COURT DECISIONS. The U.S. Supreme Court held in *Roe v. Wade*, that a woman could choose, in consultation with her doctor, whether or not to have an abortion during the first trimester of her pregnancy. State interference with such a decision was not allowed. The court held, however, that during the second trimester of a pregnancy, state regulation was permissible at least to the extent of protecting the health of the pregnant woman. The court further held that during the third trimester, or after "viability," state prohibition of an abortion was permissible, except to the extent that an abortion was necessary to preserve the health or life of the woman.

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the court significantly altered its holding in *Roe*. The court did not overturn the basic premise of *Roe* that a woman has a constitutionally protected right to choose whether or not to have an

abortion, although four of the court's justices would have done so. The court also retained "viability" as the critical point beyond which a state can prohibit abortions. However, the court significantly expanded the authority of states to regulate abortions prior to viability. Under *Casey*, the test to be employed in judging the constitutionality of a state law is whether or not the law is an "undue burden" on a woman's right.

This test prohibits state legislation that has the primary purpose of placing a substantial obstacle in the way of a woman seeking an abortion of a nonviable fetus. Permissible purposes include protection of a woman's health and expressing a preference for childbirth over abortion. The undue burden test prohibits interference with a woman's right to make the ultimate decision about abortion. The test does not prohibit laws that have incidental effects on the expense or difficulty of obtaining an abortion.

The court has dealt, to a limited extent, with the issue of legislative attempts to proscribe particular abortion procedures. In 1976, *Planned Parenthood of Central Missouri v. Danforth*, the court declared unconstitutional a state law banning a certain abortion procedure (saline amniocentesis after the 12th week of pregnancy). The court declared the law arbitrary in light of the fact that the method banned was in fact the most commonly used procedure and its ban would require the use of potentially more dangerous procedures in its place.

FEDERAL LEGISLATION. Recently, Congress passed legislation to generally prohibit "partial-birth" abortions. However, this legislation was vetoed by the President.

STATE COURT DECISIONS. Following *Roe v. Wade*, the state Supreme Court declared a parental consent requirement in Washington law unconstitutional. In *State v. Koome*, the court expressly relied on federal constitutional provisions in striking down the parental consent statute. The court has not addressed the question of whether, or to what extent, independent state constitutional provisions might be used to analyze various issues related to abortion. To date, the court has not considered a case related to regulation or prohibition of particular methods of performing abortions.

STATE LEGISLATION. In 1991, the voters of the state, by a vote of 756,653 to 752,354, approved Initiative 120 which codified the basic holding of *Roe v. Wade*. The initiative provides that "every woman has the fundamental right to choose or refuse to have an abortion," except as specifically limited by the terms of the initiative. The initiative further declares that, except as specifically permitted by the initiative, "the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion prior to viability of the fetus."

The initiative also prohibits interference with a woman's right to choose an abortion "to protect her life or health." It is a class C felony to perform an abortion on a viable fetus for any reason other than the protection of a woman's life or health.

Summary of Amended Bill: It is a class C felony for a physician to perform a partial-birth abortion.

A partial-birth abortion is defined as intentionally delivering a fetus or a substantial portion of a fetus into or partially through the birth canal for the purpose of terminating the life of

the fetus, and then terminating the life of the fetus before the complete removal of the fetus from the birth canal.

The crime does not apply to a fetus that has not reached viability, or to a procedure done to preserve the life or physical health of the mother. The exception for preserving the physical health of the mother requires the presence of a threat to the mother's health that necessitates immediate termination of the pregnancy to avoid serious risk of substantial and irreversible impairment of a major bodily function of the mother.

Initiative 120 is specifically amended to make this act an exception to the declared fundamental right to choose or refuse to have an abortion.

A referendum clause is included.

Amended Bill Compared to Substitute Bill: A referendum clause was added to the amended bill.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: None.

Testimony Against: None.

Testified: No one.