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September 26, 2008

Thomasenia P. Duncan
Office of General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Advisory Opinion Request

AOR 2008-15

Dear Ms. Duncan,

On behalf of the National Right to Life Committee, Inc. ("NRLC"), I respectfully request an Advisory Opinion from the Federal Election Commission ("FEC"), pursuant to 2 U.S.C. 437f of the Federal Election Campaign Act. NRLC seeks guidance as to whether it is permitted to broadcast two radio advertisements that mention a federal candidate for office.

Facts

NRLC is a non-stock, not-for-profit corporation, exempt from federal tax under 26 U.S.C. § 501(c)(4). NRLC is not a "qualified non-profit" under 11 C.F.R. § 114.10. NRLC has produced two radio advertisements that it intends to immediately begin broadcasting throughout the United States and to continue broadcasting in the coming weeks leading up to the November 2008 general election. NRLC will use general treasury funds to fund the broadcast of both ads.

If broadcast by NRLC, both ads would qualify as electioneering communications under 2 U.S.C. § 434(f)(3). Neither ad has yet been broadcast by NRLC, but the second ad will be broadcast beginning the week of September 29th by National Right to Life Political Action

Committee ("NRLPAC"), which is NRLC's registered political committee.[1] If permitted to broadcast its ads, and if required by law, NRLC will include the mandated "electioneering communication" disclaimer and comply with the relevant disclosure requirements.

Furthermore, the broadcast of these ads are not made in concert or cooperation with, or at the request or suggestion of, any candidate, or their agents, or a political party committee or its agents and are therefore "independent."

The script of both ads that NRLC intends to broadcast are as follows:

Waiting for Obama's Apology # 1
(60 second radio ad)

Male: (**required electioneering communication disclaimer**).

Female 1: In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, and that he later misrepresented the bill's content. When journalist David Brody asked Obama about National Right to Life's charges, Obama replied:

Obama [clip]: "...I hate to say that people are lying, but here's a situation where folks are lying."

Female 1: We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:

Female 2: (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position -- that he opposed merely defining every baby born alive after an abortion as deserving of protection? Will Obama now apologize for calling us liars when we were the ones telling the truth?

Waiting for Obama's Apology # 2

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[1]The NRLPAC version of the ad will contain the required PAC disclaimer.

(60 second radio ad)

Male: (**electioneering communication disclaimer**).

Female 1: In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, and that he later misrepresented the bill's content. When journalist David Brody asked Obama about National Right to Life's charges, Obama replied:

Obama [clip]: "...I hate to say that people are lying, but here's a situation where folks are lying."

Female 1: We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:

Female 2: (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining every baby born alive after an abortion as deserving of protection? Will Obama now apologize for calling us liars when we were the ones telling the truth?

Barack Obama: a candidate whose word you can't believe in.

Finally, NRLC's factual claims in each ad are indisputably true. *See* Exhibit A, National Right to Life White Paper: Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants – and What they Tell Us About His Thinking on Abortion, August 28, 2008; Exhibit B, FactCheck.org, Obama and 'Infanticide,' August 25, 2008.

Questions

NRLC would be prohibited from broadcasting either of these ads (1) if they were deemed to be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007), or (2) if they were deemed to be a prohibited corporate independent expenditure because they were deemed to contain "express advocacy," as defined in 11 C.F.R. § 100.22(b).

NRLC, therefore, respectfully asks:

(1) Is the broadcast of either ad by NRLC a prohibited corporate "electioneering communication" because it **(a)** "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007), or **(b)** is not exempt under 11 C.F.R. § 114.15, which creates an exception to 2 U.S.C. § 441b's corporate prohibition on electioneering communications?

(2) Are the ads prohibited corporate independent expenditures under 2 U.S.C. § 441b(a), because they contain express advocacy as defined by 11 C.F.R. § 100.22(b)?

NRLC requests an immediate response to this Advisory Opinion Request, since it wants to begin to run its ads immediately, or at least a response within the 20 day period provided for in 11 C.F.R. § 112.4(b).

NRLC recognizes that 11 C.F.R. § 112.4(b) only provides for a shorter response period when the requester is a "candidate" and NRLC is not a candidate. But it is inexcusable that this special benefit afforded to politicians should not also be afforded to private citizens and citizen groups.

Please advise if you have any questions about this request. We look forward to you prompt response.

Sincerely,

BOPP, COLESON & BOSTROM

James Bopp, Jr.
Clayton J. Callen

Exhibit A

National Right to Life White Paper:

Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants – and What They Tell Us About His Thinking on Abortion

By Douglas Johnson, Legislative Director
and Susan T. Muskett, J.D., Legislative Counsel
National Right to Life Committee / Federal Legislation Department

202-626-8820
http://www.nrlc.org
Legfederal@aol.com

August 28, 2008

Senator Barack Obama and his campaign staff have made many conflicting claims in an attempt to "explain" his opposition in 2001, 2002, and 2003, while an Illinois state senator, to the Born-Alive Infants Protection Act, legislation to provide legal protection for babies who are born alive during abortions. The language of the Illinois bills was very similar to the language of the federal Born-Alive Infants Protection Act (BAIPA), which was first introduced in Congress in 2000 and enacted into law in 2002. This document provides short rebuttals to a number of the often-shifting Obama claims. For much more extensive documentation on the Obama record on this issue, see http://www.nrlc.org/ObamaBAIPA/index.html

Assertion: On many occasions beginning in 2004, and as recently as August 13, 2008, Obama and his official spokespersons said that Obama opposed the Illinois Born-Alive Infants Protection Act because it lacked a one-sentence "neutrality clause" that was added to the federal BAIPA before it was enacted, and that he would have voted for the federal bill (if he had been a U.S. senator when it passed) because it contained the "neutrality clause." This "neutrality clause" read as follows: "Nothing in this section [that is, the entire bill] shall 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' as defined in this section." Obama said that such a clause prevented the federal law from conflicting with *Roe v. Wade* (a revealing argument, which is explored in detail below). For example, on August 13, 2008, the *Chicago Tribune* received a "Fact Check" from the Obama campaign that asserted "there are major differences in state and federal bills, including the fact that the federal bill included a 'neutrality clause'."

Response: In the first place, the original federal BAIPA introduced in 2000 was only two sentences long – it merely defined as a legal person any human, "at any stage of development," who achieves "the complete expulsion or extraction from its mother" and then shows signs of life

(heartbeat, breathing, or "definite movement of voluntary muscles"). This bill, which received initial approval from the U.S. House of Representatives 380-15 in late 2000, said nothing in either direction about the legal status of a human prior to birth. Therefore the "neutrality clause," added in 2001, simply made explicit what had originally been clear if implicit– that this bill dealt only with the rights of babies who had already been born alive. Yet, starting during his 2004 race for the U.S. Senate, Obama himself insisted that the purported lack of a "neutrality clause" in the state BAIPA was all-important.

That is why it was of considerable significance when the National Right to Life Committee (NRLC) uncovered, and publicly released on August 11, 2008, three documents that proved that on March 13, 2003, Obama, as chairman of the Illinois Senate Health and Human Services Committee, actually presided over a committee meeting at which the original state Born-Alive Infants Protection Act (SB 1082) was revised to make it virtually identical to the federal law – including the addition of exactly the same "neutrality clause." (To see the exact language of the original bill, next to the final language of the bill that Obama killed, refer to the last page of this document.) Yet, immediately after that change was made, Obama voted against the amended bill, and it was defeated on a party-line vote, 6-4. In other words, Obama led the way in killing a bill that was virtually identical to the federal law – the federal law that, since 2004, he has insisted he would have voted for if he'd had the chance.

Despite the proof released by NRLC, the Obama campaign continued to misrepresent these events. For example, on August 13, 2008, the Obama campaign submitted to the *Chicago Tribune* (among others) a chart that purported to contrast the "2003 Legislation That Obama Opposed" with the "Federal Legislation That Obama Would Have Supported" – and this chart falsely claimed that the "neutrality clause" was a "failed amendment, not included in final [state] legislation." On August 16, 2008, when David Brody of CBN News asked Obama (on camera) about the NRLC charges, Obama said that we were "lying." He repeated his claim that he would have been "fully in support of the federal bill that everybody supported – which was to say – that you should provide assistance to any infant that was born – even if it was as a consequence of an induced abortion. That was not the bill that was presented at the state level."

On August 25, 2008, the independent group FactCheck.org (www.factcheck.org) issued a review of this question that concluded, "Obama's claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act. . . . The documents from the NRLC support the group's claims that Obama is misrepresenting the contents of SB 1082."

Assertion: The BAIPA was unnecessary, because "Illinois law already stated that in the unlikely case that an abortion would cause a live birth, a doctor should 'provide immediate medical care for any child born alive as a result of the abortion.'" (August 19, 2008, Obama campaign document)

Response: Obama explained in 2001, **and has never recanted**, that he opposed the Illinois

BAIPA because it declared a "previable fetus" to be a legal person – even though the bill only did so if the baby had achieved "complete expulsion or extraction from its mother." (Obama's statements are quoted verbatim further on in this white paper.) The old Illinois law in question (720 ILCS 510.6) covered **only situations where an abortionist declares before the abortion that there was "a reasonable likelihood of sustained survival of the fetus outside the womb." Humans are often born alive *a month or more* before they reach the point where such "sustained survival" – that is, long-term survival – is likely or possible (which is often called the point of "viability").** The old Illinois law has no bearing on many of the induced-labor abortions about which the nurses testified before the committees in Congress and the Illinois state legislature, because many of them were performed on unborn humans who were capable of being born alive, and who often were born alive, but who were not old enough to have a "reasonable likelihood of sustained survival . . . outside the womb."

Even with respect to "viable" infants, the old law is ridden with loopholes. It does not apply except when the abortionist himself declares that there is "a reasonable likelihood of sustained survival of the fetus outside the womb." This already-weak law was further weakened by a lengthy consent decree issued by a federal court in 1993, which among other things permanently prohibits authorities from enforcing the law's definitions of "born alive," "live born," and "live birth." **On April 4, 2002, Obama spoke on the Illinois Senate floor against a bill (SB 1663 – which was not the BAIPA) that would have more strictly defined the circumstances under which the presence of a second physician (to care for a live-born baby) would be required; Obama argued that this would "burden the original decision of the woman and the physician to induce labor and perform an abortion . . . [I]t's important to understand that this issue ultimately is about abortion and not live births."**

The September 2000 committee report of the U.S. House of Representatives' Judiciary Committee on the federal BAIPA (H. Rept. 106-835) summarized some of the testimony that indicated why such legislation (federal and state) was necessary:

> Two nurses from the hospital's delivery ward, Jill Stanek and Allison Baker (who is no longer employed by the hospital), testified before the Subcommittee on the Constitution that physicians at Christ Hospital have performed numerous 'induced labor' or 'live-birth' abortions, a procedure in which physicians use drugs to induce premature labor and deliver unborn children, many of whom are still alive, and then simply allow those who are born alive to die. . . . According to the testimony of Mrs. Stanek and Mrs. Baker . . . physicians at Christ Hospital have used the procedure to abort healthy infants and infants with non-fatal deformities . . . Many of these babies have lived for hours after birth, with no efforts made to determine if any of them could have survived with appropriate medical assistance. The nurses also witnessed hospital staff taking many of these live-born babies into a 'soiled utility room' where the babies would remain until death. Comfort care, the nurses say, was not provided consistently." (see pages 8-9 of H. Rept. 106-835).

One example given by Mrs. Stanek was that an aborted baby "was left to die on the counter of the Soiled Utility Room wrapped in a disposable towel. This baby was accidentally thrown in the garbage, and when they later were going through the trash to find the baby, the baby fell out of the

towel and on to the floor." (Id. at 9). Mrs. Baker testified that she "happened to walk into a 'soiled utility room' and saw, lying on the metal counter, a fetus, naked, exposed and breathing, moving its arms and legs." (Id. at 10).

In testimony by Stanek before the Illinois Senate Judiciary Committee, on March 27, 2001, she said: "It is not uncommon for a live aborted babies to linger for an hour or two or even longer. At Christ Hospital one of these babies once lived for almost an entire eight-hour shift. Last year alone, of the 13 babies that I am aware of who were aborted at Christ Hospital, at least four lived between 1-1/2 to 3 hours, two boys and two girls."

The House Judiciary Committee members of both parties apparently found the nurses' testimony in 2000 to be compelling (although it should be noted that the committee's report also provides ample additional justifications for enactment of the BAIPA); the bill was approved by the committee 22-1, and by the full House of Representatives 380-15, notwithstanding the vehement objection of the National Abortion Rights Action League. This was the original, two-sentence version of the legislation, and did not contain the "neutrality clause" that Obama later said was so important.

The BAIPAs recognize pre-viable (as well as viable) live-born babies as persons under the law, which is intended to ensure that they are treated humanely and given whatever care (e.g., comfort care of warmth and nutrition, and medical assessment if appropriate) that a similar baby who had not been marked for abortion would have received. Moreover, under the BAIPAs, any overt act of violence against one of these babies would be a crime against a legal "person," not merely the inappropriate handling of medical waste products.

Here is a hypothetical scenario that illustrates the need for the Born-Alive Infants Protection Act and the troubling implications of the rationale that state Senator Obama gave for opposing it. (This is merely a hypothetical for the purpose of illustration, not a description of an actual case.)

> ***Hypothetical: In an induced-labor abortion, at 21 weeks gestation, a human is born alive. In this particular case, it appears unlikely that the newborn will survive for more than six hours. However, after one hour the abortion doctor, who has another appointment, simply picks up a hammer and brings it down on the baby's skull.***

Question: Has this hypothetical abortionist violated the Illinois abortion-survivor law (720 ILCS 510.6), the law that Obama is now trying to hide behind? ***Answer:*** He certainly has not violated that law. That law comes into play only when the abortionist declares that the entity being aborted enjoys "a reasonable likelihood of sustained survival . . . outside the womb." No physician -- pro-life or pro-abortion -- would affirm that a 21-week fetus has "a reasonable likelihood of sustained survival" outside the womb -- the lungs are insufficiently developed.

Question: In such a scenario, what are the implications of state Senator Obama's stated reason, in 2001, for opposing the Born-Alive Infants Protection Act -- this being that *Roe v. Wade* forbids defining an aborted "previable fetus" (even after live birth) as a legal person? ***Answer:*** Under Obama's legal theory, the hypothetical doctor would not be committing a crime against a person, because there is no "person" under that theory. It appears that under this theory, the hypothetical

abortionist would merely be completing the abortion, outside the womb, still operating under the protection of *Roe v. Wade*.

Most people, however, and most lawmakers, would have no trouble affirming that the baby in the hypothetical scenario is indeed a human child and that the hammer blow was a crime against a person. When Congress passed the federal Born-Alive Infants Protection Act in 2002, without a dissenting vote, it clearly affirmed the concept that all live-born humans enjoy legal protection, and implicitly repudiated the notion that anything in the Constitution or U.S. Supreme Court rulings dictates a different policy. Yet, in 2003, Obama killed a virtually identical bill in the committee that he chaired.

Assertion: "Obama voted against these laws in Illinois because they were clear attempts to undermine *Roe v. Wade*." (August 19, 2008, Obama campaign document)

Response: Many of the Obama defenders who repeat such statements evidently have never read the bills in question. Even some critics of Obama's position have seemingly picked up the notion that there was something in the federal and state BAIPA bills, at least initially, that spoke directly or indirectly to the legal status of *unborn* children. **But this is false.** These were all very short and simple bills. The original (2001 and 2002) version of the Illinois state Born-Alive Infants Protection legislation consisted of just three operative sentences. The first two sentences tracked the federal bill – they merely recognized as a legal person any human, "at any stage of development," who achieves "the complete expulsion or extraction from its mother" and then shows signs of life (heartbeat, breathing, or "definite movement of voluntary muscles"). **The 2001-2002 Illinois bills also contained a third sentence that was not found in the federal version, sometimes called the "immediate protection clause." In a document issued August 19, 2008, the Obama campaign specifically objected to this clause, which read as follows: "(c) A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law." In a revealing statement, discussed further below, the August 19 Obama document labeled that third sentence as "Language Clearly Threatening Roe."**

At the March 2003 meeting chaired by Obama, this "immediate protection clause" was removed and replaced with the language of the federal "neutrality clause," which is quoted in full in the second paragraph of this white paper. At that point, the federal law and the state bill were virtually identical. To see the original and amended Illinois BAIPAs side by side, go to the last page of this white paper.

We are critics of *Roe v. Wade* – but even among persons who defend *Roe v. Wade*, we think that most consider that ruling to confer a right to terminate the lives of unborn humans inside the womb, and do not believe that it diminishes the legal status of a baby who is fully born. However, there really are some people who believe that *Roe v. Wade* goes further, and requires that a "previable fetus" (Obama's term) who is the subject of an abortion must remain classified as a non-person no matter where that "previable fetus" is located. In this vision, the so-called "previable fetus" who happens to be outside the mother is still in the process of being aborted, and that entire process (which Obama regards as constitutionally protected) will end only with the death of the newborn.

By his actions and his explanations of those actions, Barack Obama showed himself to be among those who hold this expansive vision of the "right to abortion." In Obama's view, to declare the fully born and living but "previable" human to be a legal person **does indeed interfere with "abortion"** and **does indeed conflict** with the full and proper application of "Roe v. Wade."

The first time the BAIPA reached the Illinois Senate floor, on March 30, 2001, Obama was the only senator to speak against it, and his remarks clearly reflect that he holds the most expansive view on the scope of *Roe v. Wade* and the "right to abortion." He said that "whenever we define a previable fetus as a person that is protected by the equal protection clause or the other elements in the Constitution, what we're really saying is, in fact, that they are persons that are entitled to the kinds of protections that would be provided to a – a child, a nine-month-old -- child that was delivered to term."

Moreover, Obama's insistence that the "immediate protection clause" was "Clearly Threatening [to] Roe," reiterated in the August 19, 2008, Obama campaign document, can only be understood as another expression of the same underlying concept: **To Obama, *Roe v. Wade* stands for the proposition that prior to viability, a human "fetus" or infant must not be regarded as a legal person or as a "child," whether inside or outside of the mother – at least, not in any context remotely related to abortion. Obama knows that this proposition does not appeal to a wide audience, so since 2004 he has actively misrepresented his record on this issue, and attacked those who try to draw attention to it.**

[There are other areas, as well, in which Obama has pushed for "abortion rights" beyond those that the U.S. Supreme Court has imposed under *Roe v. Wade*. The Supreme Court has upheld as not inconsistent with *Roe v. Wade* several types of limitations on abortion, including parental notification laws (with certain judicial bypass provisions), restrictions on government funding of abortion, and a federal ban on partial-birth abortions, but all of those laws (and many others) would be invalidated by the proposed "Freedom of Choice Act" (S. 1173), of which Obama is a cosponsor. In a speech to the Planned Parenthood Action Fund on July 17, 2007, Obama said, "Well, the first thing I'd do as president is sign the Freedom of Choice Act. That's the first thing that I'd do." For more information on the "Freedom of Choice Act," including statements by its chief sponsors and advocates, see http://www.nrlc.org/FOCA/index.html]

Assertion: Those who have sharply disputed Obama's conflicting accounts of his actions on this issue, or criticized the ideological or policy premises on which his actions were based, are being "deeply offensive and insulting," are engaging in "distortions and lies," are "an example of the kind of politics that we have to get beyond," and so forth.

Response: As Ramesh Ponnuru with *National Review* observed (August 20, 2008), "Bereft of an argument, the Obama campaign is pounding the table." This sort of manufactured indignation is yet another attempt to deflect attention away from uncomfortable questions: What expansive vision of "abortion rights" and *Roe v. Wade* caused Obama to perceive as especially dangerous the sentence in the original state bill that said, "A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law"? Why did he kill the bill in his committee in 2003 even after that sentence was removed and replaced with the

"neutrality clause" from the federal bill/law? Why, beginning with his Senate race in 2004, did Obama insist that the state bill he had opposed was very different from the federal law, because only the federal law contained the "neutrality clause," and that he therefore would have voted for the federal bill if he had been a U.S. Senator when it was passed? Five days after National Right to Life released documents (on August 11, 2008) proving that Obama had in fact killed a bill virtually identical to the federal law, including the neutrality clause, why did Obama say we were "lying"?

When will Obama apologize to National Right to Life, to Bill Bennett, and to others who he and his campaign repeatedly accused of propagating lies or distortions, for saying things that are now proven as true? [On August 25, 2008, the independent group FactCheck.org (www.factcheck.org) issued a review of this question that concluded, "Obama's claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act. . . . The documents from the NRLC support the group's claims that Obama is misrepresenting the contents of SB 1082."]

Obama's words and action support this conclusion: His commitment to defend the practice of abortion without qualification was so absolute that it led him to reflexively view the issue of babies born alive during abortions through the prism of his concept of *Roe v. Wade*, and worse, to conclude that a breathing, squirming, fully born pre-viable human baby is still covered by *Roe v. Wade*. Once he realized how difficult his position was to defend in the world outside the halls of the Illinois Senate, he began to misrepresent his record.

Assertion: Obama would have voted for the federal BAIPA, because "Federal law does not regulate abortion practice," but he could not vote for a virtually identical state bill because it would "undermine *Roe v. Wade* or pre-existing Illinois state law regulating reproductive healthcare . . ." (8/19/08 Obama campaign document)

Response: This is really nonsense. There are about two dozen federal laws that regulate abortion in various programs and contexts. Moreover, the Supreme Court's abortion-related constitutional doctrines, on which Obama based his opposition to the BAIPA, apply with equal force to both federal and state laws. Thus, for anyone who thought that it was wrong to define a live-born human as a "person" prior to the point of "viability," the federal bill would have been just as unacceptable as the Illinois state bills, because they did exactly the same thing.

The original two-sentence federal bill, the enacted three-sentence federal bill, the original 2001-2002 Illinois bills, and the amended 2003 Illinois bill, all have this in common: None of them spoke in any way to the legal status or legal rights of a human entity prior to being "born alive," which was defined in every version as requiring "complete expulsion or extraction" from the mother. Thus, no version of the Born-Alive Infants Protection Act ever limited "abortion" in any way – *except in the eyes of those who believe that the "right to abortion" can be extended outside the mother, in certain cases.*

Assertion: The Illinois Born-Alive Infants Protection Act was tied together with, or was linked

to, or was an amendment to, other bills, such as the "Induced Birth Infant Liability Act," which would have made various controversial changes to Illinois laws dealing with late abortions.

Response: This is an obvious attempt to change the subject and avoid prolonged scrutiny of Obama's record on the sole bill that has been the focus of the national debate, that being the bill that was based on the federal bill, the Born-Alive Infants Protection Act. In Illinois, the BAIPA was never attached to any other bill, or offered as an amendment to any other bill. Each of the bills had separate numbers, were each subject to separate amending processes, and each was (of course) voted on separately. The BAIPA could have been enacted without any of the others.

Assertion: Obama was not alone in opposing the Illinois BAIPA bills.

Response: The Illinois BAIPA was initially closely patterned after the original federal bill which passed the U.S. House 380-15 in 2000. In 2003 the Illinois bill was revised, in the committee Obama chaired, to be virtually identical to the final federal bill, which had passed into law the previous year without any dissenting votes in Congress.

So why was the Illinois bill so much more controversial in the Illinois legislature? **Obama himself deserves much of the credit, or blame.** Obama was a rising political star (soon to successfully run for a U.S. Senate seat). He was an articulate law school instructor, who sat on the committees that debated the bill. In 2001, he was the only senator to speak against the bill on the floor. By 2003, he was the chairman of the committee to which the bill was referred, he presided over the meeting at which it was amended to be virtually identical to the federal law, and then led the other Democrats on the committee in killing it. Certainly, Obama influenced other senators to oppose the bill, even after the counterpart bill was enacted by Congress without dissenting vote. **It is unseemly for him to now try to melt into the crowd.**

ADDITIONAL RESOURCES

The NRLC website (http://www.nrlc.org) has an archive of key documents on Barack Obama and the Born-Alive Infants Protection Act, at http://www.nrlc.org/ObamaBAIPA/index.html

This archive includes the complete text of each version of the federal and state bills, the official Illinois documents that proved that Obama opposed a state BAIPA virtually identical to the federal BAIPA, a side-by-side comparison of the state and federal bills, a side-by-side comparison of the two versions of the state bill (both of which Obama opposed), documents issued by the Obama campaign, NRLC white papers that narrate the chronology of the federal and state Born-Alive Infant Protection bills and Obama's statements on the issue, and documents dating from the period of congressional consideration of the federal BAIPA.

The original Illinois Born-Alive Infants Protection Act of 2001-2002
(opposed by state Senator Barack Obama):

SB1095 / SB 1662
AN ACT concerning infants who are born alive.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Statute on Statutes is amended by adding Section 1.36 as follows:

(5 ILCS 70/1.36 new)

Sec. 1.36. Born-alive infant.

(a) In determining the meaning of any statute or of any rule, regulation, or interpretation of the various administrative agencies of this State, the words "person", "human being", "child", and "individual" include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this Section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from its mother of that member, at any stage of development, who after that expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(c) A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law.

Section 99. Effective date. This Act takes effect upon becoming law.

The Illinois Born-Alive Infants Protection Act as amended and then voted down at a meeting of the Illinois state Senate Health and Human Services Committee on March 13, 2003 (Obama voted against this amended bill):

SB 1082
AN ACT concerning infants who are born alive.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Statute on Statutes is amended by adding Section 1.36 as follows:

(5 ILCS 70/1.36 new)

Sec. 1.36. Born-alive infant.

(a) In determining the meaning of any statute or of any rule, regulation, or interpretation of the various administrative agencies of this State, the words "person", "human being", "child", and "individual" include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this Section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from its mother of that member, at any stage of development, who after that expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

~~(c) A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law.~~

(c) Nothing in this Section shall 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 as defined in this Section.

Section 99. Effective date. This Act takes effect upon becoming law.

Obama and 'Infanticide'

August 25, 2008

The facts about Obama's votes against 'Born Alive' bills in Illinois.

Summary

Anti-abortion activists accuse Obama of "supporting infanticide," and the National Right to Life Committee says he's conducted a "four-year effort to cover up his full role in killing legislation to protect born-alive survivors of abortions." Obama says they're "lying."

At issue is Obama's opposition to Illinois legislation in 2001, 2002 and 2003 that would have defined any aborted fetus that showed signs of life as a "born alive infant" entitled to legal protection, even if doctors believe it could not survive.

Obama opposed the 2001 and 2002 "born alive" bills as backdoor attacks on a woman's legal right to abortion, but he says he would have been "fully in support" of a similar federal bill that President Bush had signed in 2002, because it contained protections for Roe v. Wade.

We find that, as the NRLC said in a recent statement, Obama voted in committee against the 2003 state bill that was nearly identical to the federal act he says he would have supported. Both contained identical clauses saying that nothing in the bills could be construed to affect legal rights of an unborn fetus, according to an undisputed summary written immediately after the committee's 2003 mark-up session.

Whether opposing "born alive" legislation is the same as supporting "infanticide," however, is entirely a matter of interpretation. That could be true only for those, such as Obama's 2004 Republican opponent, Alan Keyes, who believe a fetus that doctors give no chance of surviving is an "infant." It is worth noting that Illinois law already provided that physicians must protect the life of a fetus when there is "a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support."

Analysis

Republican Senate candidate Alan Keyes attacked Barack Obama over this legislation during their 2004 race for the U.S. Senate, repeatedly accusing him of favoring "infanticide." Because of this, Keyes said, "Christ would not vote for Barack Obama." Nevertheless, 70 percent of Illinois voters did vote for Obama, but now the issue has bubbled up again.

The National Right to Life Committee released a statement Aug. 11 saying it

had obtained proof that Obama was misrepresenting his 2003 vote by stating that the Illinois "born alive" bill that he voted against in committee lacked a provision, contained in the 2002 federal law, that foreclosed any effect on abortion rights. Obama, in an Aug. 16 interview, then said critics of his "born alive" stance were "not telling the truth" and "lying." On Aug. 18, the NRLC updated its white paper and continued to accuse Obama of dissembling.

As originally proposed, the 2003 state bill, SB 1082, sought to define the term "born-alive infant" as any infant, even one born as the result of an unsuccessful abortion, that shows vital signs separate from its mother. The bill would have established that infants thus defined were humans with legal rights. It never made it to the floor; it was voted down by the Health and Human Services Committee, which Obama chaired.

Earlier versions of the bill, in 2001 and 2002, had met with opposition from abortion-rights groups, which contended that they would be used to challenge Roe v. Wade. Because the bills accorded human rights to pre-viable fetuses (that is, fetuses that could not live outside the womb) as long as they showed some vital signs outside the mother, abortion-rights groups saw them as the thin edge of a wedge that could be used to pry apart legal rights to abortion. Obama stated this objection on the Senate floor in discussion of both bills.

However, Obama has said several times that he would have supported the federal version of the bill, which passed by unanimous consent and which President Bush signed into law Aug. 5, 2002, because it could not be used to challenge the Supreme Court's Roe v. Wade decision granting a legal right to abortion. On Aug. 16, the candidate repeated that again to David Brody of the Christian Broadcasting Network. He also prefaced his remarks with an attack on those who said he had misrepresented his position on the state bills, saying they were "lying."

> **CBN Correspondent David Brody:** Real quick, the born alive infant protection act. I gotta tell you that's the one thing I get a lot of emails about and it's just not just from Evangelicals, it about Catholics, Protestants, main – they're trying to understand it because there was some literature put out by the National Right to Life Committee. And **they're basically saying they felt like you misrepresented your position on that bill.**
>
> **Obama:** Let me clarify this right now.
>
> **Brody:** Because it's getting a lot of play.
>
> **Obama:** Well and because **they have not been telling the truth. And I hate to say that people are lying, but here's a situation where folks are lying.** I have said repeatedly that I would have been completely in, fully in support of the federal bill that everybody supported – which was to say – that you should provide assistance to any infant that was born – even if it was as a consequence of an induced abortion. That was not the bill that was presented at the state level. What that bill also was doing was trying to undermine Roe vs. Wade.

Who's "Lying?"

NRLC objects. They point to evidence that SB 1082, the bill Obama voted against in committee, was amended to contain a "neutrality clause" that is identical to one contained in the federal law. (The Illinois government's legislative information Web site shows the proposed amendment, but doesn't

give results for votes in committee. NRLC's documents show that the amendment was adopted.) Since he voted against the state bill, NRLC says, his claimed worry about Roe v. Wade is a smokescreen, intended to cover up his unconcern with the protection of infant lives.
In the NRLC white paper, Legislative Director Douglas Johnson writes that Obama "really did object to a bill merely because it defended the proposition, 'A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law.' And it is that reality that he now desperately wants to conceal from the eyes of the public."

NRLC posted documents – which are so far undisputed – showing that Amendment 001 was adopted in committee and added the following text: "Nothing in this Section shall 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 as defined in this Section." That wording matches exactly the comparable provision in the federal law.

The documents NRLC put out are a "Senate Republican's staff analysis" and a handwritten roll call confirming that the amendment was adopted. We contacted Patty Schuh, spokesperson for the Illinois Senate Republicans, who stated that both documents are genuine. We also contacted Brock Willeford, who was the staff aide whose name appears on the "staff analysis." He stated that he wrote the document immediately after the committee meeting and that he was in the room at the time of the votes. We asked Cindy Davidsmeyer, spokesperson for the Illinois Senate Democrats, about this. She declined to answer our questions but did not dispute Willeford's firsthand account.

A June 30 Obama campaign statement responding to similar claims by conservative commentator William J. Bennett says that SB 1082 did not contain the same language as the federal BAIPA.

> **Obama campaign statement, June 30:** Illinois And Federal Born Alive Infant Protection Acts Did Not Include Exactly The Same Language. The Illinois legislation read, "A live child born as a result of an abortion shall be fully recognized as a human person and accorded immediate protection under the law." The Born Alive Infant Protections Act read, "Nothing in this section shall 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' as defined in this section." [SB 1082, Held in Health and Human Services, 3/13/03; Session Sine Die, 1/11/05; BAIPA, Public Law 107-207]

The statement was still on Obama's Web site as of this writing, Aug. 25, long after Obama had accused his detractors of "lying." But Obama's claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act.

Same Words, Different Effect?

Obama's campaign now has a different explanation for his vote against the 2003 Illinois bill. Even with the same wording as the federal law, the Obama camp says, the state bill would have a different effect than the BAIPA would have at the federal level. It's state law, not federal law, that actually regulates the practice of abortion. So a bill defining a pre-viable fetus born as the result of abortion as a human could directly affect the practice of abortion at the state level, but not at the federal level, the campaign argues.

And in fact, the 2005 version of the Illinois bill, which passed the Senate 52 to 0

(with four voting "present") after Obama had gone on to Washington, included an additional protective clause not included in the federal legislation: "Nothing in this Section shall be construed to affect existing federal or State law regarding abortion." Obama campaign spokesman Tommy Vietor says that Obama would have voted for that bill if he had been in state office at the time.

But whether or not one accepts those arguments, it is not the reason Obama had been giving for his 2003 opposition. He told Brody that the federal bill "was not the bill that was presented at the state level." That's technically true; though the "neutrality clause" was identical in the federal and state bills, there were other minor wording differences elsewhere. But the Obama campaign statement says that "Illinois And Federal Born Alive Infant Protection Acts Did Not Include Exactly The Same Language." That's true for the earlier versions that Obama voted against. In the case of SB 1082, as it was amended just before being killed, it's false.

A Matter of Definition

The documents from the NRLC support the group's claims that Obama is misrepresenting the contents of SB 1082. But does this mean – as some, like anti-abortion crusader Jill Stanek, have claimed – that he supports infanticide?

In discussions of abortion rights, definitions are critically important. The main bills under discussion, SB 1082 and the federal BAIPA, are both definition bills. They are not about what can and should be done to babies; they are about how one defines "baby" in the first place. Those who believe that human life begins at conception or soon after can argue that even a fetus with no chance of surviving outside the womb is an "infant." We won't try to settle that one.

What we can say is that many other people – perhaps most – think of "infanticide" as the killing of an infant that would otherwise live. And there are already laws in Illinois, which Obama has said he supports, that protect these children even when they are born as the result of an abortion. Illinois compiled statute 720 ILCS 510/6 states that physicians performing abortions when the fetus is viable must use the procedure most likely to preserve the fetus' life; must be attended by another physician who can care for a born-alive infant; and must "exercise the same degree of professional skill, care and diligence to preserve the life and health of the child as would be required of a physician providing immediate medical care to a child born alive in the course of a pregnancy termination which was not an abortion." Failure to do any of the above is considered a felony. NRLC calls this law "loophole-ridden."

On the Record

While we don't have a record of Obama's 2003 comments on SB 1082, he did express his objection to the 2001 and 2002 bills.

> **Obama, Senate floor, 2002:** [A]dding a – an additional doctor who then has to be called in an emergency situation to come in and make these assessments is really designed simply to burden the original decision of the woman and the physician to induce labor and perform an abortion. ... **I think it's important to understand that this issue ultimately is about abortion and not live births.**
>
> **Obama, Senate floor, 2001:** Number one, whenever we define a previable fetus as a person that is protected by the equal protection clause or the other elements in the Constitution, what we're really saying is, in fact, that they

> are persons that are entitled to the kinds of protections that would be provided to a – a child, a nine-month-old – child that was delivered to term. **That determination then, essentially, if it was accepted by a court, would forbid abortions to take place.** I mean, it – it would essentially bar abortions, because the equal protection clause does not allow somebody to kill a child, and if this is a child, then this would be an antiabortion statute.

Obama's critics are free to speculate on his motives for voting against the bills, and postulate a lack of concern for babies' welfare. But his stated reasons for opposing "born-alive" bills have to do with preserving abortion rights, a position he is known to support and has never hidden.

-by Jess Henig

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