Chicago Tribune
September 25, 1996 Wednesday

COMMENTARY; Pg. 13
LENGTH: 824 words

UNDER INTENSE SCRUTINY
CONGRESSIONAL MALPRACTICE MAY BE COMMITTED ON 'PARTIAL-ABORTION' ACT

By David J. Garrow.; David J. Garrow is the author of "Liberty and Sexuality: The Right to Privacy and the Making of Roe vs. Wade," and won a 1987 Pulitzer Prize for "Bearing the Cross."

Thursday's upcoming Senate vote on whether to override President Clinton's veto of the Partial-Birth Abortion Ban Act offers senators a decisive opportunity to affirm the president's judgment and reject a dangerously radical effort to impose Congress' medical ideas in place of the best professional conclusions of accredited physicians.

The proposed statute would impose stiff criminal penalties--two years in prison and up to $250,000 in fines--on any doctor who "partially vaginally delivers a living fetus" during the course of a second or third trimester abortion. Both medical and constitutional experts warn about the imprecision of that crucial phrase, and both attorneys and physicians also challenge the wording of the sole exception, which eschews punishment if an abortion is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness or injury." Critics wonder whether a pregnancy that itself endangered a woman's life might in some courtroom not qualify as a "disorder, illness or injury."

In vetoing the bill last April, President Clinton highlighted how Congress' failure to adopt a second exception, allowing such procedures in cases where a late-term pregnancy posed a serious threat to a woman's health, was a further conclusive defect. Alternative surgery, the president noted, carries a significant risk of impairing a woman's subsequent ability to have children.

Supporters of the measure contend that most uses of the targeted procedure are discretionary or "elective" rather than medically necessary. The two sides cite differing statistics and use disparate terms (medical professionals generally call the procedure "intact dilation and evacuation," or "D&E"), but abortion opponents, including Republican presidential nominee Bob Dole, have torpedoed efforts to add a health exception on the grounds that such an amendment would "gut" the statute.

Abortion opponents seem unwilling to trust American doctors' definition of health, and they appear worried that careful review of cases where D&E is employed might demonstrate that most, if not all, do indeed involve serious maternal risk.

One critic of the bill, Georgetown University law professor Louis Michael Seidman, apprised the Senate Judiciary Committee last fall that the proposed law "does nothing to discourage abortion per se. It does nothing to protect the rights of fetuses, nothing to protect potential life and noting to protect actual life. . . . So long as other abortion techniques remain legal," the bill's

only effect is to force women ". . . to choose a more risky abortion procedure over a less risky one," he said.

While constitutional scholars like Seidman assuredly predict that the federal courts would invalidate the measure should it become law, medical foes of the bill are less sanguine about the message it sends to America's doctors. Dr. J. Courtland Robinson of the Johns Hopkins University School of Medicine told the Senate committee that perhaps the act's "vagueness is intentional . . . Because the law itself is so vague . . . it would leave doctors wondering if they were open to prosecution or not, each time they perform a later abortion."

Even nowadays only a relatively few courageous physicians are willing to stand up to the terror tactics employed by some gun- and bomb-wielding abortion opponents; the threat of federal prosecution and stiff criminal penalties would further reduce their number.

But Robinson also sought to impress another point upon the Senate: "Telling a physician that it is illegal for him or her to adapt his or her surgical method for the safety of the patient is, in effect, legislating malpractice, and it flies in the face of standards for quality medical care." Congress, he said, "is not qualified to stand over my shoulder in the operating room and tell me how to treat my patients."

Many other voices from within the medical profession echo Robinson's warning. The 37,000-member American College of Obstetricians and Gynecologists, noting how the bill would codify "terminology that is not even recognized in the medical community," protests that the measure is a "very disturbing" demonstration of why "congressional opinion should never be substituted for professional medical judgment."

Outlawing a professionally-approved medical procedure represents a dangerous legislative precedent. Abortion opponents may be deluging Congress with postcards; abortion rights defenders may be showcasing emotionally powerful stories of women with medically tragic pregnancies whose future childbearing hopes have been preserved by D&Es. Senators, however, should realize that their vote to sustain or override the president's veto involves more than just another abortion battle; it also concerns the larger issue of to what extent should legislators regulate the clinical practice of medicine.

GRAPHIC: Illustration by Paul Lachine.