



Written by [Jack Kenny](#) on May 12, 2010

Kagan Memo Recalls Partial-birth-abortion Debate

Could it be that Solicitor General Elena Kagan, President Obama's nominee for the Supreme Court, is something less than thoroughly committed to the legal doctrine that abortion is an option guaranteed to women by the U.S. Constitution? A memo written by Kagan when she was a policy advisor to President Bill Clinton urged the President to support a compromise ban on partial birth abortions, referred to in news reports simply as "late-term abortions." News of the memo, reported May 10 by the Associated Press, and the dearth of other information about Kagan relating to the issue, has some "pro-choice" activists looking for a clearer picture of how Kagan might rule on efforts to place any limits on the option to abort by whatever procedure is agreed upon by a woman and her physician.



Nancy Keenan, president of NARAL Pro-Choice America, issued a cautious statement about the nomination. "We call on the Senate to give Solicitor General Kagan a fair hearing and look forward to learning more about her views on the right to privacy and the landmark *Roe v. Wade* decision," Keenan wrote shortly after Obama announced his choice.

But the memorandum of May 13, 1997 sheds no real light on the subject, since Kagan was a domestic policy advisor to the President at the time and her message was a political statement rather than a legal opinion. The legislation she urged Clinton to back was a bill offered by then-Senate Minority Leader Tom Daschle (D-S.D.) as an alternative to the ban backed by the Republican majority. The Republican bill, H.R. 122, said the ban "shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder illness or injury." The bill also included a provision, requested by the American Medical Association, that anyone accused of performing a partial-birth abortion be granted a hearing before his or her state medical board to determine if the abortion was necessary to save the mother's life.

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The Daschle bill included a broader exception, covering any circumstance that would pose a threat not only to the life of the mother, but to her overall health as well. The bill lent political support to Clinton's promise to veto the Republican version, since it contained no "health of the mother" exception. The memo, written by Kagan and her boss, Bruce Reed, urged Clinton to support the compromise bill for that reason.

"We urge that you endorse the Daschle amendment in order to sustain your credibility on HR 122 and prevent Congress from overriding your veto," they wrote. The Daschle bill died in the Senate, as expected, and the Republican Congress was unable to muster the two-thirds majority vote needed in



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each house to override the President's veto of H.R. 122. It was the second time in two years that Clinton vetoed a ban of the procedure.

While the "health of the mother" issue gave Clinton a cover for opposing a ban on a "medical procedure" most Americans found morally repugnant, it was, in fact, a hollow argument, since a health exemption would be the exception that swallowed the rule. "Health," according to federal court rulings, covered every aspect of a woman's well being—mental and emotional, as well as physical. Thus if a woman wants an abortion because she is not married, that's a health issue. If giving birth would interfere with her schooling or career, that, too, could qualify as a health issue. The health exception would in effect guarantee a right to the kind of late-term abortion the legislation was intended to ban.

Pro-life organizations were successful in mobilizing public opinion against the partial-birth method, also known by its medical term, dilation and extraction. The infant is drawn through the birth canal until only her head remains in the womb. The skull is then surgically pierced and the brain sucked out until the skull collapses. Descriptions and drawings of the procedure were effective in turning the tide of public opinion against it. An act prohibiting partial-birth abortion was later signed into law by President George W. Bush and upheld by the Supreme Court.

But the strategy of focusing attention on one particular method of killing pre-born babies had its limitations. In an interview with *The New Republic* in 1996, Douglas Johnson of the National Right to Life Committee expressed the hope that "as the public learns what a 'partial birth abortion' is, they might also learn something about other abortion methods, and that this would foster a growing opposition to abortion."

Perhaps it has, though we have yet to see evidence of a serious threat to the legal status of abortion as a constitutional "right." The effort to ban partial birth abortion did manage for a time to focus public attention on the killing of the baby and away from the "choice" of the mother. But it also turned the debate away from whether a civilized society should permit the deliberate planned killing of innocent human beings into a fight over the *method* by which they should be killed. And other means of abortion — tearing an infant limb from limb in his mother's womb, or burning her to death with saline poisoning — are just as brutal as the partial birth method.

And the ban has also given some "pro-choice" politicians cover by giving them the chance to vote against one form of feticide while defending all the others. It is often said that there is no such thing as being a little bit pregnant. "Pro-choice" politicians who think they have washed the blood off their hands by opposing the partial birth "procedure" need to be reminded that there is no such thing as being partially pro-abortion.



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