

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS.

The meeting was called to order by Chairperson Representative Tony Powell at 1:30 p.m. on January 26, 2000 in Room 313-S of the Capitol.

All members were present.

Committee staff present: Theresa Kiernan, Revisor of Statutes
Russell Mills, Legislative Research
Mary Galligan, Legislative Research
Winnie Crapson, Secretary

Conferees appearing before the committee:

Proponents

Tom Palace, Petroleum Marketers and Convenience Store Association

Written testimony

Circular of Bureau of Alcohol, Tobacco and Firearms

Others attending: See attached list.

Chairman Powell announced two items on agenda: hearing on **HB 2670** and consideration of **HB2581**.

Hearing was opened on

HB 2670, Cigarettes; sales of certain cigarettes restricted.

Tom Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA), testified in support (Attachment #1). PMCA represents over 360 independent petroleum companies and convenience stores. Mr. Palace referred to cigarettes labeled "for export use only" as "gray market cigarettes." They are produced in the U.S. and exported where independent brokers purchase them and re-import them into the U.S., benefitting from the fact that international wholesale prices may be \$10 a carton less. Although Kansas has not had a major influx of gray market cigarettes, several tobacco retailers have been identified by the tobacco companies as sellers of gray market cigarettes. Mr. Palace provided two packages as examples of gray market cigarettes. These packages do have a Nevada tax stamp.

New federal regulations enacted Jan. 1, 2000 make it illegal to import "for export only" cigarettes for resale regardless of whether all applicable taxes have been paid and labeling requirements met. More than twenty states have enacted or are considering state laws against gray market cigarettes. Chairman Powell asked why a parallel state statute was needed. Mr. Palace stated it would reinforce the federal issue. Enforcement is presently by Alcohol, Tobacco and Firearms Agents. A state law would allow state and local law enforcement to assist ATF.

In response to a question by Representative Cox, Mr. Palace said the ABC is powerless if the product has a tax stamp. Dealers put the tax stamp on repackaged products to make them legal.

CONTINUATION SHEET

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In response to Representative Freeborn's question, Mr. Palace said they are sometimes of the same quality but cigarettes sold outside the U.S. may be more or less strong. Representative Freeborn considers it a public health and tax issue. Mr. Palace said some dealers do put the tax stamp on gray market cigarettes.

Representative Klein said the Revisor provided him the definitions of cigarettes and of tobacco products, which does not include cigarettes. He asked if it was intentional that the proposed language refers only to "cigarettes." Mr. Palace knew of no tobacco products on the gray market. Representative Klein asked for clarification of current law and whether there was objection to adding "tobacco products" to the bill, to read "cigarettes and tobacco products." Mr. Palace stated as of January 1 the penalty is five times the export tax per shipment or \$4,000, whichever is greater.

Representative Vickrey asked if sales on tribal lands are involved. Mr. Palace said they purchase cigarettes from the manufacturers in the U.S. The only enforcement powers on the reservations would be the ATF or FBI. The State has no power even if they purchase gray market cigarettes.

In response to a question by Representative Dahl, Mr. Palace stated there were 20 cigarettes to a package and ten packages to a carton and that it would be illegal to possess more than a carton. Representative Dahl asked about Sec. 3 (u) at line 29, page 5. Theresa Kiernan referred to Sec. 3 (a) on page 3, line 39 saying you cannot have more than 200 cigarettes without the tax stamp. Mary Galligan explained that Sec. 3 (u) makes the cigarette made for export illegal even if it has the required State tax stamp.

Legislative Research provided a Bureau of Alcohol, Tobacco and Firearms Circular "Importation of Previously Exported Tobacco Products and Cigarette Papers and Tubes" (Attachment #2).

There being no further testimony in support or in opposition, the hearing was closed.

Chairman Powell opened consideration of **HB2581, Partial birth abortion.**

Chairman Powell proposed a substitute for **HB 2581** (Attachment #3) representing an effort to end the acrimony and find solution all can agree to. From his discussion with many member they believes the bill should be as simple as possible to solve a loophole in the present partial birth abortion statute—the mental health exception, which clearly has allowed for partial birth abortion taking place. The language is word-for-word that offered in the Governor's bill except for the late term abortions. He believes that if the focus is narrowed just to partial birth abortion, agreement can be reached to stop what he considers to be an abhorrent and terrible procedure which is occurring in our state. The substitute bans all partial birth abortions except for the life of the mother.

It includes a severability clause. If any part of Sec. 1 is struck down by the Court, the whole will be. If subsequent sections are struck down, the language would be severable. Chairman Powell moved the substitute bill (Attachment #3). Representative Vining seconded..

Representative Benlon said she had planned to ask if this discussion could be held over a day. She intends to offer an amendment. Chairman Powell said amendments can be taken up after the substitute has been considered..

Representative Benlon said the substitute continues to use language in lines 14 through 16 which is a possible weakness in the bill.

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Chairman Powell said a term can be defined in the statute. That was done in 1998 and the substitute will not change that in any respect. Ultimately, in the law the definition says what it is considered to mean. He is confident it is a clear definition because it has withstood constitutional scrutiny. The 6th Circuit and the 8th Circuit struck down partial birth abortion laws which inadvertently banned D&E. This bill specifically exempts that from the definition of partial birth abortion, and he believes it will meet constitutional muster.

Chairman Powell said in response to question by Representative Burroughs, that he believes the definition used should be that in current law and that the courts will be comfortable with that.

Representative Burroughs asked if it was possible to include the term "D&X" to strengthen the bill. Chairman Powell said the decision to be made was whether or not to ban partial birth abortion. The substitute bill will do that. He would like to avoid having a discussion as to how you define partial birth abortion and strongly believes after having reviewed the case law that this substitute would do that. If you perform an abortion that is prohibited by the language in the statute as we define partial birth abortion, it doesn't matter what you call it.

Vote was taken on the substitute for **HB2581**. The motion carried.

Representative Klein thanked Chairman Powell for having given him the proposed substitute earlier. He believes a problem with the bill is that it is completely getting rid of a health exception and a mental health exception and limiting exception under the partial birth abortion law only to the life of the pregnant woman. From his review of some 6th Circuit cases he believes it will not be constitutional. He is not a big fan of this procedure but believes this bill is not going to work. The only specific mental health exception is here. While he wants to fix the inadvertent error that has allowed an acceleration of the partial birth abortions performed in Kansas, he believes it cannot be fixed outside the mental health exception. Those things are going to be decided by the U.S. Supreme Court in July. He proposes an amendment that to put a mental health exception back in the post viability section of the statute.

Rep. Klein moved an amendment to move the mental health exception being deleted over into the post viability exception. (Attachment #4). Rep. Ruff seconded.

Chairman Powell said he believes there are differences in Circuits with regard to mental health exceptions. The 7th Circuit noted in the record that partial birth abortion is never medically necessary. This specifically excepts the D&E procedure. Therefore when any mental health issue is involved, another abortion procedure could easily be used. He said he understands the concerns of Representative Klein but this bill deals with only one abortion procedure that is not medically necessary and is not a frontal assault on a woman's right to an abortion. All other abortions on first and second trimesters would be totally unregulated.

Representative Dahl asked if there are facts to establish that there has been an escalation in partial birth abortions. Representative Klein referred to the report in committee last year from the Kansas Department of Health and Environment from statistics they are required to keep that it is an escalating number. He agreed H&E has not always been required to report partial birth abortions, but there is more history than was thought and there was an understanding that there was a clear mental health exception.

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Representative Benlon said she had an amendment that is similar to that offered by Representative Klein. She agrees that we are not going to shut the door on partial birth abortions unless we look at the entire issue. She does not believe that as a legislator she has the right to tell a woman who finds herself pregnant that she may or may not have an abortion, that a woman should have the right to make a decision to terminate that pregnancy when it does in fact affect her mental health.

Representative Klein said he was concerned about unintended consequences, that there was some discussion about section (a). If for the sake of argument it is overturned, and in a couple of years there are partial birth abortions done in the State, the standard applied would be a post-viability standard and the door is wide open again. He cannot see the future well enough to say whether this is good or bad. He applauds the efforts of those trying to ban this procedure, but every other abortion law is implicated and it will be litigated. He believes if the mental health exception is put back into the bill there would not be much controversy and it would pass.

Rep. Klein moved the amendment.

The motion failed 9-12.

Representative Burroughs asked why the civil penalty was removed. Chairman Powell said he supported the idea of civil penalties but believed this bill should be focused squarely on one issue and to avoid additional issues, the civil remedy section was deleted. He is sure that issue will be debated sometime in the future.

Representative Burroughs said with reference to the statement of the American Medical Association he would offer a substitute motion adding the D&X definition in the bill. Representative offered for his use the motion she had prepared.

Representative Burroughs moved the amendment (Attachment 5). Representative Benlon seconded.

Representative Gilbert asked if we knew for sure the D&X procedure will not be done. Chairman Powell referred to the language in the amendment. Representative Benlon said the Revisor provided her the definition which was what Representative Vining had used in her testimony. It came from the 7th Circuit and she believes it is very clear. Representative Burroughs explained it would include "D&X" and would strike the word "living" before "fetus".

Chairman Powell said this is the AMA definition but part of the problem is that we are dealing with Dr. Tiller in Wichita and that affects his community so much. He can see where if he simply does not do one of these things, then it no longer merits the definition of partial birth abortion. Current law is a bit broader but still is within the term of what partial birth abortion is commonly understood which he thinks is necessary for the bill to be constitutional.

Representative Burroughs withdrew the amendment. Representative Benlon did not agree as seconder and moved the amendment. Rep. Gilbert seconded.

Motion failed 9-12.

Representative Benlon offered another amendment, providing an exception in the case of rape or incest. Representative Benlon moved the amendment (Attachment #6). Representative Peterson seconded.

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Chairman Powell said he appreciated the proposed amendment, but the substitute bill bans only partial birth abortion and it is his understanding these exceptions can easily be dealt with in the first two trimesters.

In response to question of Representative Freeborn, Representative Benlon said there was no reference to a definition of severe fetal abnormalities. She would hope a physician doing a sonogram or other tests would be able to help with that. Representative Freeborn said spina bifida is considered a severe abnormality but she has friends who raised that child who went through computer school and is earning a good income although he was never out of a wheelchair, never walked. This would give the mother the right to choose a perfectly formed child.

Representative Benlon said she was shocked that in discussion on the House floor in 1999 a Representative insinuated someone might encourage abortion if they found out their unborn child had a cleft palate. She definitely believe in the right to choose but can't imagine there would be very many women who would consider using it for those purposes. She said she did not access to any list of "severe fetal abnormalities" that she considered was proper use of this exception but firmly believes that is a decision to be made by the mother and the doctor.

Representative Freeborn said she would oppose this amendment because she believes it is too broad a loophole and she would have to see a definition of what would be considered.

Representative Peterson said she, too, resented the comments made on the floor. If there was the possibility of life beyond two or three months, she did not feel she as a legislator has any right to come between a mother and father and doctor to make such a decision.

Rep. Mayans said a lot of people are very passionate about this issue which he respects. He will oppose the amendment. There can be debate on the floor of the House. He had certain questions about rape and incest and shared the explanation given him by a Roman Catholic Bishop that rape is a terrible crime with a perpetrator and a victim, but the woman again to victimizes herself by having an abortion and creates other victims. Those with severe fetal abnormality born and become citizens and partakers of our great nation. A Roman Catholic sister expressed to him that is a gift from God and an opportunity to love someone who is perhaps not able to love you back. You need that person more than that person needs you because of what you learn from the person with disabilities. We have to keep in mind the ramifications of our decisions when we make exceptions.

Representative Morrison said she was concerned that a sonogram is just a tool and not 100% accurate. Many women were told their child would have a severe abnormality and when they were born they were perfectly fine.

Representative Benlon said in response to Representative Ruff that she liked the idea of using the term "fatal" fetal abnormality (not able to survive outside the womb), butt thinks there might be a problem with parameters. She referred to the Statutory language "threatened with severe or life threatening abnormality." The concern with the word "fatal" is, fatal at what point

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Chairman Powell said we have a viability standard that is already covered by current law.

Representative Benlon moved the amendment. It failed 9-12.

Representative Klein said he appreciated the way that this discussion took place on both sides with the major passions kept out of the debate. He urged an open mind and awareness of unintended consequences.

Rep. Freeborn moved Substitute HB 2581. Rep. Vining: seconded. Substitute HB 2581 passed.

The Committee adjourned at 3:18 p.m. The next scheduled meeting is January 27.