



## National Committee for a Human Life Amendment

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### **Partial-Birth Abortion Ban Act**

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### **I. Background**

The Partial-Birth Abortion Ban Act bans a particularly brutal and inhumane abortion method in which the child is removed from the womb feet-first and delivered except for the head. The abortionist thrusts scissors into the base of the child's skull, inserts a catheter through the opening, and suctions out the child's brain. It is never medically necessary. Many recognize partial-birth abortion for what it is: infanticide.

In a survey, Planned Parenthood's Alan Guttmacher Institute reported that from 1996 to 2000 the number of partial-birth abortions (what they call "D & X" abortions), increased threefold from about 650 in 1996 to about 2,200 in 2000. These figures are low. In 1997, Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, said that in the majority of cases the procedure is performed on healthy mothers with healthy babies and he estimated then that 4-5,000 were performed annually.

Congress first considered a partial-birth abortion ban proposal in 1995, bills being approved by the 104<sup>th</sup> and 105<sup>th</sup> Congresses (H.R. 1833 and H.R. 1122, respectively). Each time the bills were vetoed by President Clinton. Efforts to override the vetoes were successful in the House but not in the Senate. Congress was in the process of passing the ban a third time (S. 1692, H.R. 3660) when, on June 28, 2000, the U.S. Supreme Court in a 5-4 opinion declared the Nebraska partial-birth abortion ban law unconstitutional (*Stenberg v. Carhart*, No. 99-830). As a result of the *Carhart* decision, action in Congress stalled.

In 2002, a rewritten bill was introduced in the House, the Partial-Birth Abortion Ban Act of 2002 (H.R. 4965). Responding to the *Carhart* ruling, the measure contained a more precise definition of partial-birth abortion and incorporated Congress's factual findings that partial-birth abortion is never necessary to preserve the health of a woman. (See fuller description of findings and provisions of the bill below.)

On July 24, 2002, the House passed H.R. 4965. Even though the House-passed bill was placed on the Senate calendar in 2002, several Senators objected to a unanimous consent agreement to

proceed.

## **II. Partial-Birth Abortion Ban Act of 2003**

### 1. U.S. House of Representatives

On February 13, 2003, Rep. Steve Chabot (R-OH) introduced the Partial-Birth Abortion Ban Act of 2003 (H.R. 760). This measure had 161 cosponsors and was referred to the Judiciary Committee. H.R. 760 was the same as H.R. 4965, the revised bill passed by the House in 2002.

Highlights in the bill's extensive section on "Findings:"

(1) In *Stenberg v. Carhart*, the U.S. Supreme Court was required to rely on the very questionable factual finding of the district court that partial-birth abortion was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.

(2) Under well-settled Supreme Court jurisprudence, Congress "is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the 'clearly erroneous' standard" (Sec. 2(8)). Congress is entitled to reach its own factual findings "and to enact legislation based on these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence" (Sec. 2 (8)).

(3) Thus, relying on a full range of factual findings, Congress found that "partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned" (Sec. 2 (14) (O)).

To the U.S. Code, Title 18, H.R. 760 added Chapter 74 Partial-Birth Abortions, Sec. 1531, providing that a physician who performs a partial-birth abortion shall be fined or imprisoned not more than two years, or both, except when a partial-birth abortion is necessary to save a mother's life "endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical conditions arising from the pregnancy itself" (1531 (a)).

The term "partial-birth abortion" is defined (1531(b) (1)) as an abortion in which "(A) the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus." Under certain conditions, the father or maternal grandparents may obtain relief in a civil action (1531(c)). A defendant accused under this section may seek a hearing before the State Medical Board (1531 (d)). A woman upon whom a partial-birth abortion

is performed may not be prosecuted (1531(e)).

*On June 4, 2003, the House approved H.R. 760, 282-yes, 139-no, 13-not voting, 1 vacancy (Roll Call 242). “Yes” was a pro-life vote.*

## 2. U.S. Senate

On February 14, 2003, Sen. Rick Santorum (R-PA) introduced the Partial-Birth Abortion Ban Act of 2003 (S. 3), the companion bill to H.R. 760. This measure had 45 cosponsors and was placed directly on the Senate calendar.

Floor: In the course of floor debate on S. 3, five hostile amendments were offered. Four were rejected and one adopted.

The following four were rejected:

· Murray Amendment – Sen. Patty Murray (D-WA) offered an amendment (Senate Amendment 258) that contained four separate bills: the Equity in Prescription Insurance and Contraceptive Coverage Act of 2003; the Emergency Contraception Education Act; the Compassionate Care for Female Sexual Assault Survivors Act; and Improved Coverage of Infants Under Medicaid and S-CHIP. Sen. Santorum raised a point of order against the amendment. Sen. Murray moved to waive the point of order, a motion that required 60 votes to be successful. *On March 11, 2003, the Murray motion failed, 49-yes, 47-no, 4-not voting (Roll Call 45). “No” was a pro-life vote.*

· Durbin Substitute Amendment – Sen. Richard Durbin (D-IL) offered a Substitute Amendment (Senate Amendment 259) that struck the text of the Partial-Birth Abortion Ban Act and inserted in its place the Late Term Abortion Limitation Act. This amendment was virtually identical to the amendment Sen. Durbin offered to the partial-birth abortion ban bill during the 1999 debate. It still contained a health exception that gutted any limitation. *On March 12, 2003, the Senate voted to table the Durbin Amendment, 60-yes, 38-no, 2-not voting (Roll Call 46). “Yes” was a pro-life vote.*

· Boxer Motion to Commit with Instructions – Sen. Barbara Boxer (D-CA) offered a motion to commit S. 3 to committee with instructions to hold at least one day of hearings and to report the bill back after considering the constitutional issues raised in the *Carhart* decision. *On March 12, 2003, the Senate rejected the Boxer motion, 42-yes, 56-no, 2-not voting (Roll Call 47). “No” was a pro-life vote.*

· Feinstein Substitute Amendment – Sen. Dianne Feinstein (D-CA) offered a substitute amendment (Senate Amendment 261) that would strike the Partial-Birth Abortion Ban Act and insert in its place the Post-Viability Abortion Restriction Act. A health exception made the restriction meaningless. *On March 12, 2003, the Senate rejected the Feinstein Amendment, 35-yes, 60-no, 5-not voting (Roll Call 49). “No” was a pro-life vote.*

Note: In the votes on the Durbin, Boxer, and Feinstein Amendments, some Senators who voted “no” (pro-abortion) on final passage of the bill also voted “no” (pro-life) on these amendments. None of these Senators gave an explanation for their votes but presumably there were different views on matters related to strategy, meaning, interpretation, and the like. For more information, see descriptions of these votes at NCHLA’s Vote Track.

One amendment was adopted:

· Harkin Amendment – Sen. Tom Harkin (D-IA) offered a nonbinding “sense of the Senate” resolution that the U.S. Supreme Court’s 1973 *Roe v. Wade* decision “was appropriate,” “secures an important constitutional right,” and “should not be overturned.” *On March 12, 2003, the Senate approved this motion, 52-yes, 46-no, 2-not voting (Roll Call 48).* “No” was a pro-life vote.

*On March 13, 2003, after three days of debate, the U.S. Senate passed the Partial-Birth Abortion Ban Act (S. 3), 64-yes, 33-no, 3-not voting (Roll Call 51).* “Yes” was a pro-life vote. This vote was virtually identical to the last Senate vote on the partial-birth abortion ban act in 1999.

### 3. Conference Committee

The House and Senate-passed bills were identical, except for the nonbinding “sense of the Senate” resolution offered by Sen. Tom Harkin affirming the Supreme Court *Roe v. Wade* decision. The Harkin Amendment was dropped in conference committee. *On Oct. 2, 2003, the House approved the conference report 281-yes, 142-no, 12-not voting (Roll Call 530).* *On Oct. 21, 2003, the Senate approved the conference report 64-yes, 34-no, 2-not voting (Roll Call 402).* “Yes” were pro-life votes.

## III. Executive Action

On November 5, 2003, President Bush signed the Partial-Birth Abortion Ban Act of 2003 into law (PL 108-105). Archbishop Charles Chaput, Chairman of the Bishops’ Committee for Pro-Life Activities, thanked the president for signing the ban into law. He also thanked the millions of Catholics and others of good will “who have worked for years to see this achievement.” For the first time since a right to abortion was created by the Supreme Court in 1973, a federal law limited the performance of abortion.

## IV Court Challenges

### 1. Federal District Courts

Abortion advocates challenged the federal law in the three different federal district courts. On November 5, 2003, a federal judge in Nebraska issued a temporary restraining order against the Partial-Birth Abortion Ban Act. His order applied only to the four doctors who filed suit against the law. On November 6, 2003, federal judges in New York and San Francisco issued temporary restraining orders blocking enforcement of the law. These orders were effective for members of

the National Abortion Federation and for Planned Parenthood-affiliated clinics, respectively.

Trials in all three federal cases began March 29, 2004.

In all three courts the Partial-Birth Abortion Ban Act was struck down.

On June 1, 2004, Judge Phyllis Hamilton in California permanently enjoined enforcement of the Act because it posed an undue burden on a woman's ability to choose a second trimester abortion, was unconstitutionally vague, and lacked a health exception as set forth by the U.S. Supreme Court in its *Stenberg v. Carhart* decision on the Nebraska partial-birth abortion ban law.

On August 26, 2004, Judge Richard Casey in New York found that partial-birth abortion "is a gruesome, brutal, barbaric, and uncivilized medical procedure," that partial-birth abortions "subject fetuses to severe pain," that some reasons put forth for partial-birth abortions "are incoherent" or "merely theoretical." Nevertheless, he also found a division of medical opinion exists about the need of partial-birth abortion to preserve women's health. Bound to follow the U.S. Supreme Court's *Carhart* decision, this division of opinion meant "the Constitution requires a health exception" and therefore the Act was unconstitutional.

On September 8, 2004, Judge Richard Kopf in Nebraska also ruled the Act unconstitutional because it lacks a health exception, though he declined to rule on the Act's constitutionality "when the fetus is indisputably viable."

Responding to Judge Casey's ruling, Cathy Cleaver Ruse, spokesperson for the Bishops' Secretariat for Pro-Life Activities, stated, "Because of *Roe*, killing a child in the process of being born is called a constitutional right rather than an act of barbarism." Ruse criticized the fact that medical institutions refused to produce their records. "The crucial question of medical necessity was never answered in this trial . . . In essence, the abortion doctors said 'just trust us,' and no hard evidence was considered." Ruse said that the 'health exception' created by the Supreme Court was a farce. "It's the quintessential exception that swallows the rule – so broad that you could drive a truck, or a fully-formed unborn baby, right through it." Ruse applauded the Justice Department for its defense of the Act. For Ruse's full statement, see:

**[www.usccb.org/comm/archives/2004/04-166.shtml](http://www.usccb.org/comm/archives/2004/04-166.shtml)**. For Ruse's statement on the other two rulings, see: **[www.usccb.org/comm/archives/2004/04-101.shtml](http://www.usccb.org/comm/archives/2004/04-101.shtml)** and **[www.usccb.org/comm/archives/2004/04-172.shtml](http://www.usccb.org/comm/archives/2004/04-172.shtml)**.

The full transcripts of proceedings in all three cases can be found at:

**[www.usccb.org/prolife/issues/pba/pbaban.shtml](http://www.usccb.org/prolife/issues/pba/pbaban.shtml)**.

In 2004, U.S. Attorney General John Ashcroft appealed the California ruling on August 3, the New York and Nebraska rulings on September 27 and September 28, respectively.

## 2. U.S. Courts of Appeals

On April 14, 2005, oral argument was heard in the Nebraska case, and on July 8, 2005, a three-judge panel of the U. S. Court of Appeals for the Eighth District upheld the ruling of the lower court that the Partial-Birth Abortion Ban Act was unconstitutional because it did not contain a “health exception” as required by the *Stenberg v. Carhart* decision. Reaching this judgment, the Court declined to address the district court’s other argument that the law imposes an undue burden on a woman’s right to have an abortion.

On January 31, 2006, the U.S. Court of Appeals for the Ninth Circuit upheld the ruling of the Northern District of California court, presenting three reasons for its ruling: the law lacked a “health” exception, imposed an undue burden on a woman’s right to choose a previability abortion, and was impermissibly vague.

Also on January 31, 2006, the U.S. Court of Appeals for the Second Circuit upheld the ruling of the Southern District of New York court, arguing that the federal partial-birth abortion ban law lacked a “health” exception.

## 3. U.S. Supreme Court

The Nebraska and California cases were appealed to the U.S. Supreme Court. On February 21, 2006, the Court announced that it would hear the Eighth Circuit case from Nebraska (*Gonzales v. Carhart*, Docket No. 05-380). On June 19, 2006, the U.S. Supreme Court announced that it would take up the Ninth Circuit case from California (*Gonzales v. Planned Parenthood*, Docket No. 05-1382).

The Second Circuit had requested more briefs in light of the U.S. Supreme Court’s January 18, 2006 parental notice *Ayotte v. Planned Parenthood* decision (Docket No. 04-1144), but suspended all action on its case after the Supreme Court agreed to hear the Nebraska case.

On November 8, 2006, the Court heard oral arguments on the Nebraska and California cases.

On April 18, 2007, the U.S. Supreme Court ruled 5-4 that the federal Partial-Birth Abortion Ban Act of 2003 was constitutional. *Gonzales v. Carhart* (No. 05-380), together with *Gonzales v. Planned Parenthood* (No. 05-1382). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts, and Justices Scalia and Alito joined. Justice Thomas filed a concurring opinion, in which Justice Scalia joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer joined.

A copy of the opinion can be found at: [supremecourtus.gov/opinions/06pdf/05-380.pdf](http://supremecourtus.gov/opinions/06pdf/05-380.pdf).

Reactions to the Decision: Cardinal Justin Rigali, Chairman of the USCCB’s Committee for Pro-Life Activities, welcomed the decision, observing, “This is the first time in 34 years that the Court has upheld a ban of any type of abortion.” The Cardinal stated:

The Court's decision does not affect the legal status of the great majority of abortions, and does not reverse past decisions claiming to find a right to abortion in the Constitution. However, it provides reasons for renewed hope and renewed effort on the part of pro-life Americans. The Court is taking a clearer and more unobstructed look at the tragic reality of abortion, and speaking about that reality more candidly, than it has in many years.

The Cardinal concluded his remarks with the hope that "today's decision marks the beginning of a new dialogue on abortion." For the Cardinal's full remarks, see: [www.usccb.org/comm/archives/2007/07-068.shtml](http://www.usccb.org/comm/archives/2007/07-068.shtml).

In an April 20 *Life Issues Forum* column, "A Court that has Begun to See," Richard Doerflinger, Deputy Director of the Bishops' Secretariat for Pro-Life Activities, stated that "this Court has begun to take off the blinders and see abortion, recognizing its harm to children, women, the medical profession, and all of society." He concludes, "Advocates for the sanctity of human life should take encouragement from this clearer vision." For Mr. Doerflinger's full remarks see: [www.usccb.org/prolife/publicat/lifeissues/042007.shtml](http://www.usccb.org/prolife/publicat/lifeissues/042007.shtml).

Precis of the Decision: In an introductory section, the Court discussed all major abortion methods. According to the Court, most abortions are performed in the first trimester; the remainder occur primarily in the second trimester, partial-birth abortion being one of several abortion methods used typically in the second trimester. The Court noted that what the law calls partial-birth abortion is designated by various other names in the medical community. For purposes of discussion, the Court adopted the term intact D&E (dilation and evacuation), understanding partial-birth abortion as a variation on the general D&E abortion procedure.

The Court acknowledged that the basic partial-birth abortion procedure has variations. As an example of the procedure, the Court quoted an eyewitness account:

Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms – everything but the head. The doctor kept the head right inside the uterus. . . .

The baby's little fingers were claspings and unclaspings, and his little feet were kicking. Then the doctor struck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. . . .

He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.

In its 2000 *Stenberg v. Carhart* decision, the Court declared the Nebraska state partial-

birth abortion ban unconstitutional. Subsequent to that ruling, Congress passed the federal ban at issue in the present cases. In that ban, the Court notes, Congress set forth its own factual findings and used language that differed from the Nebraska law.

The Court argued that the judgments of the Eighth and Ninth Circuit Court of Appeals declaring the federal ban unconstitutional run contrary to a central holding in the Court's *Planned Parenthood v. Casey* (1992) opinion (a ruling on a Pennsylvania abortion statute), namely, "that the government has a legitimate and substantial interest in preserving and promoting fetal life."

According to the Court, in *Casey*, *Roe*'s essential holdings are summarized as threefold: the right of the woman to have an abortion before viability without undue interference from the State; confirmation of the State's power to restrict abortion after viability, if there are exceptions for the woman's life or health; the principle the State has an interest from the outset of the pregnancy in protecting the health of the woman and "the life of the fetus that may become a child." The Court noted that *Casey* rejected both *Roe*'s trimester framework and the interpretation that all previability regulation of abortion is unwarranted.

The primary question before the Court in the current cases was whether the federal ban "furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."

In concert with *Casey*, the Court held that regulations may not place a substantial obstacle to a woman seeking an abortion before viability, but also regulations "which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."

In the present case, the Court applied the standards of *Casey* to the federal law. Summarizing its holdings, the Courts argued that the federal partial-birth abortion ban "is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."

*Not Void-for-Vagueness*: The Court carefully examined the language in the federal ban and concluded that the Act "provides doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited.'" Thus the Act is not subject to the void-for-vagueness doctrine.

*Not Overbroad*: The ban prohibits intact D&E partial-birth abortion but not the general D&E abortion procedure. Thus the Act does not impose an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad.

*Not Facially Invalid*: The Act would be unconstitutional if it placed a substantial obstacle in the path of the woman seeking an abortion before viability. It is clear the Act's regulations apply both previability and postviability. The Court argued at some length that the Act "does not on its face impose a substantial obstacle, and we reject this further facial challenge to its

validity.”

In the Act, Congress was concerned with promoting respect for the dignity of human life. It was also concerned with the effects the partial-birth abortion procedure would have on the medical profession. The Court reaffirmed these objectives, again emphasizing that the three premises of *Casey* must coexist:

“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”

To further these objectives, Congress can draw “a bright line that clearly distinguishes abortion and infanticide.” It has reasons to proscribe intact D&E while it continues to allow the regular D&E procedure.

Congress also can acknowledge that respect for human life “finds an ultimate expression in the bond of love the mother has for her child.” For the woman, an abortion requires “a difficult and painful moral decision.” To the Court it was “unexceptional” that some women come to regret their choice “to abort the infant life they once created and sustained.” Lack of information about the way “the fetus will be killed” is a matter for legitimate State concern:

“It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming a human form.”

The State’s concern here with well-informed choices has a comprehensive character:

“The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.”

The Court conceded that the federal ban would be unconstitutional if it subjected women to significant health risks. (The ban allows an exception for the life, but not health, of the mother.) The Court, however, saw a measure of uncertainty in the evidence presented, reviewing evidence not only in the Eighth and Ninth Circuit cases but also in a Second Circuit case. In this circumstance of uncertainty, the Act survives the facial challenge, because legislatures have “wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”

Abortion doctors are not above standard medical practice. In general, regulations can direct physicians to use reasonable alternative procedures. “The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.” The Court concluded:

“Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. . . . The medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”

The Court rejected the argument that medical opinion must be unanimous:

“A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power. . . . Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. . . . [I]f some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.”

The Court then argued that the various facial attacks on the Act should not have been entertained in the first place. “In these circumstances, the proper means to consider exceptions is by as-applied challenges. . . . This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.” Medical risk can be better quantified and balanced than in a facial attack. In light of these reflections, the Court stated: “The Act is open to a proper as-applied challenge in a discrete case.”

For these reasons, the Court concluded, the judgments of the Courts of Appeals are reversed.

Concurring Opinion: In a short concurring opinion, Justice Thomas stated that he joins the Court’s opinion because it accurately applies current jurisprudence, including *Casey*. “I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973), has no basis in the Constitution.” He also noted that whether the Act constitutes a permissible exercise of the Commerce Clause was not before the Court.

Dissent: In her dissent, Justice Ginsburg in one place called the Court’s decision “alarming,” and in another “irrational.” She saw the Partial-Birth Abortion Ban Act, and the Court’s defense of it, as nothing other than “an effort to chip away” at the abortion right established by the Court.

Commentaries on the Decision: See excellent commentaries in *Life Insight* (Vol. 18, No.1, March-April 2007) at:  
[www.usccb.org/prolife/publicat/lifeinsight/LifeInsight042507.pdf](http://www.usccb.org/prolife/publicat/lifeinsight/LifeInsight042507.pdf).

Also see Hadley Arkes, “Good May Yet Come.” *National Review Online* (4/24/07). At:  
[article.nationalreview.com/?q=YjI2OTFINTQ4OGIxMTM0ZmNINTVhNjZjN2VIMzZIYT](http://article.nationalreview.com/?q=YjI2OTFINTQ4OGIxMTM0ZmNINTVhNjZjN2VIMzZIYT)  
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