

MEMORANDUM

**To: Members
COMMITTEE ON THE JUDICIARY**

**From: Lamar Smith
Chairman**

Date: February 7, 2012

**Subject: Full Committee Markup of:
H.R. 3541, the “Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011”**

On Tuesday, February 7, 2012, at 1:45 pm in Room 2141 of the Rayburn House Office Building, the Committee on the Judiciary will meet to mark up the following: **H.R. 3541**, the “Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011”.

H.R. 3541, THE “SUSAN B. ANTHONY AND FREDERICK DOUGLASS PRENATAL NONDISCRIMINATION ACT OF 2011”

I. INTRODUCTION

Chairman Smith and Subcommittee Chairman Franks first introduced PRENDA in the 110th Congress as H.R. 7016. In the 111th Congress, Mr. Smith and Mr. Franks reintroduced PRENDA as H.R. 1822, which garnered 49 cosponsors. In the current Congress, PRENDA has 77 cosponsors, including 13 members of the Judiciary Committee and 4 Democrat Members.

The Subcommittee on the Constitution held a hearing to examine PRENDA on Tuesday, December 6, 2011. Testimony was given by Steve Aden, Senior Legal Counsel for the Alliance Defense Fund; Steve Mosher, President of the Population Research Institute; Edwin Black, historian and investigative journalist; and, Miriam Yeung, Executive Director of the National Asian Pacific American Women’s Forum (NAPAWF).

II. BACKGROUND

Over the past decade, evidence has come to light suggesting that abortion has become a tool of sex and race discrimination in America for both individuals and government.

U.S. census numbers and national vital statistics demonstrate that some Americans are employing sex-selection techniques in their reproductive decisions.¹ Certain communities within

¹ Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, AMERICAN JOURNAL OF APPLIED ECONOMICS. Retrieved December 2, 2011, from <http://www.aeaweb.org/aej-applied/accept.html>

the United States are achieving unnatural sex ratios at birth that are statistically impossible without medical intervention. These unnatural sex ratios are, without exception, strongly favoring the birth of males over females.²

The natural ratio of male to female births is 1.05:1.³ In April 2008, two economists from Columbia University demonstrated that unnatural sex ratios exist - at birth - within the Asian communities within the U.S. population, as reported in the 2000 Census data. For example, in the average Asian-American family where the first two children are female, the sex ratio among third children is 1.51, with males predominating (as opposed to the natural ratio of 1.05, with males predominating). This ratio simply is not possible as a natural outcome.

Even more invidious, a thorough review of the American family planning movement reveals a history of targeting African-Americans for "population control," arguably resulting in the current statistic that a black baby is five times as likely to be aborted as a white baby.⁴ Abortion is the leading cause of death in the black community.⁵ With greater than 450,000 black abortions per year, more blacks Americans are lost to abortion annually than are lost to cancer, heart disease, diabetes, AIDS, and violence combined.⁶

A. Mechanics of PRENDA

PRENDA is a criminal law containing four prohibitions.

First, PRENDA proscribes the performance of an abortion with knowledge that the abortion is sought based on the sex, gender, color or race of the child, or the race of a parent of the child. These abortions are defined in the bill as "sex-selection abortions" or "race-selection abortions."

Second, PRENDA prohibits coercion of either a sex-selection or race-selection abortion.

Third, PRENDA prohibits the solicitation or acceptance of funds for the performance of a sex-selection or race-selection abortion.

Finally, PRENDA prohibits the transportation of a woman into the United States or across state lines for the purpose of obtaining a sex-selection or race-selection abortion.

PRENDA amends title 18 and provides that a violation of the Act is deemed to be a violation of the Civil Rights Act of 1964. Therefore, penalties of the Civil Rights Act of 1964 attach, namely the loss of federal funding for offenders. The Attorney General may prosecute or

² Douglas Almond and Lena Edlund, *Son Biased Sex Ratios in the 2000 United States Census*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, vol. 105, no. 15 (April 2008).

³ Id.

⁴ Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, Guttmacher Institute, GUTTMACHER POLICY REVIEW, vol. 11, no. 3 (Summer 2008).

⁵ National Vital Statistics Reports, Vol. 58, No. 4, October 14, 2009. Table 3. Number and percent distribution of pregnancies, by outcome of pregnancy, by age, and by race and Hispanic origin of women: United States, 2005.

⁶ National Vital Statistics Reports, Vol. 58, No. 19, May 20, 2010. Table 1. Number of Deaths, Death Rates, and Age Adjusted Death Rates by Race and Sex: United States, 1940, 1950, 1960, 1970, and 1980-2007.

seek injunctive relief. Finally, a private right of action lies for family members or for a woman who is coerced to submit to a sex-selection or race-selection abortion. PRENDA provides damages to reflect the loss of a human life, resembling wrongful death damages.

B. The United States Government’s Stated Position against Sex-Selection Abortion

In 2007, the U.S. delegation to the United Nations Commission on the Status of Women advocated for a resolution condemning sex-selection abortion. The U.S. Congress has passed multiple resolutions condemning the People's Republic of China for its failure to end sex-selection abortion.⁷

III. SECTION-BY-SECTION ANALYSIS

Sec. 1: Short Title

This section states that the short title of this bill is the “Susan B. Anthony and Frederick Douglas Prenatal Nondiscrimination Act of 2011.”

Sec. 2: Findings and Constitutional Authority

Section 2 contains factual findings and the constitutional authority for the Act.

Sec. 3: Discrimination against the Unborn on the Basis of Race or Sex

Section 3 amends Title 18 of the United States Code by adding a new section 250 at the end of Chapter 13. Those sections are described below:

Sec. 250--Discrimination Against the Unborn on the basis of race or sex

Prohibitions. Subsection (a) contains the criminal prohibitions of the bill. Subsection (a)(1) prohibits anyone from performing an abortion knowing that the abortion is sought based on the sex, gender, color or race of the child, or the race of a parent of that child. Subsection (a)(2) prohibits the use force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion. Subsection (a)(3) prohibits the solicitation or acceptance of funds for the performance of a sex-selection abortion or a race-selection abortion. Subsection (a)(4) prohibits the transportation of a woman into the United States or across a State line for the purpose of obtaining a sex-selection abortion or race-selection abortion. A violation or attempted violation of provisions in subsection (a) shall result in a fine under title 18, or imprisonment of not more than 5 years, or both.

Civil Remedies. Subsection (b) provides the civil remedies available under the bill. Subsection (b)(1) provides a civil action for a woman upon whom an abortion has been performed or attempted in violation of subsection (a)(2). Subsection (b)(2) provides a civil action for the father of an unborn child who is the subject of an abortion performed or attempted in violation of subsection (a), or a maternal grandparent of the unborn child

⁷ H. R. Con. Res. 83, 109th Cong. (2005); H. R. Res. 794, 109th Cong. (2006).

if the pregnant woman is an unemancipated minor, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

Damages. Subsection (b)(3) defines "appropriate relief" in a civil action under subsection (b). Subsection (b)(3)(A) provides for objectively verifiable money damages for all injuries, psychological and physical, including loss of companionship and support, occasioned by the violation of section 250. Subsection (b)(3)(B) provides for punitive damages. Subsection (b)(4)(A) provides injunctive relief to a qualified plaintiff in a civil action to prevent an abortion provider from performing or attempting further abortions in violation of section 250.

"Qualified Plaintiff." Subsection (b)(4)(B) defines "qualified plaintiff" as: (i) a woman upon whom a sex-selection or race-selection abortion is performed or attempted; (ii) the spouse of such woman; or (iii) the Attorney General.

Attorney's Fees. Subsection (b)(5) awards attorney's fees to prevailing plaintiffs.

Federal Funding. Subsection (c) provides for a loss of federal funding for those persons or entities found guilty of violating subsection (a).

Reporting Requirement. Subsection (d) provides that a physician, physician's assistant, nurse, counselor, or other medical or mental health professional shall report known or suspected violations of any of this section to appropriate law enforcement authorities. Whoever violates this requirement shall be fined under title 18 or imprisoned not more than 1 year, or both.

Expedited Consideration. Subsection (e) provides that it shall be the duty of the United States district courts, United States courts of appeal, and the Supreme Court of the United States to expedite review of cases brought under the law.

Exception. Subsection (f) provides that a woman who has a sex-selection or race-selection abortion may not be prosecuted or held civilly liable for any violation of the law.

"Abortion" defined. Subsection (g) defines abortion as "the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child, unless the act is done with the intent to--(1) Save the life or preserve the health of the unborn child; (2) Remove a dead unborn child caused by spontaneous abortion; or (3) Remove an ectopic pregnancy."

Severability. Section 4 provides that if any portion of the bill -- on its face *or* as applied to any person or circumstance -- is held invalid, such invalidity shall not affect the remainder of the bill.