

## What Will Become of the Born-Alive Infants Protection Act?

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In 2002, President George W. Bush signed into law the Born-Alive Infants Protection Act (BAIPA),<sup>1</sup> after little congressional debate and negligible political opposition. Widely understood to be anti-abortion legislation, the Act altered the definition of the words, “person,” “human being,” “child,” and “individual” in United States law to include all “born alive” infants.<sup>2</sup> It also comprehensively defined the term “born alive.”<sup>3</sup> The intent of the law was to “repudiate the flawed notion that a child’s entitlement to the protections of the law is dependent upon whether the child’s mother or others want him or her.”<sup>4</sup>

After the Act’s passage, legal and medical commentators speculated how the law would affect daily, normative medical practice. The American Academy of Pediatrics assured the neonatal medical community that the law would not alter standards of care.<sup>5</sup> However, in 2005, the Department of Health and Human Services (DHHS) indicated a willingness to enforce regulations impacted by the law through the Emergency Medical Treatment and Labor Act (EMTALA) and the Child Abuse Prevention and Treatment Act (CAPTA).<sup>6</sup> Seven years since its enactment, BAIPA remains in place as federal law, but its affect on daily practice is largely unknown and it is unclear whether, under a new presidential administration and Congressional majority, it will remain on the books.

### History and Purpose of BAIPA

To some degree, the passage of BAIPA was a legislative response to the United States Supreme Court’s decision in *Steinberg v. Carhart*,<sup>7</sup> which struck down a Nebraska law that made a particular abortion procedure illegal except to save the life of the mother.<sup>8</sup> The particular procedure, known as intact dilation and extraction, is a type of late-term abortion method that certain members of Congress found to be brutal and horrific. As a result, BAIPA supporters wanted to protect all infants born alive, even if birth occurred in the process of an abortion.<sup>9</sup> Additionally, some members of Congress worried that

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<sup>1</sup> Pub. L. No. 107-207, 116 Stat. 926 (2002) (codified at 1 U.S.C. § 8).

<sup>2</sup> 1 U.S.C. § 8(a) (2008).

<sup>3</sup> See 1 U.S.C. § 8(b) (2008).

<sup>4</sup> *Born-Alive Infants Protection Act of 2001, Report together with additional and dissenting views of the House Committee on the Judiciary*, 107th Cong., 1st Sess. (Aug. 2, 2001): 1-38, at 3. (Purpose and Summary).

<sup>5</sup> See Am. Acad. of Ped. Neonatal Resuscitation Prog. Steering Comm., *Born-Alive Infants Protection Act of 2001*, Public Law No. 107-207, 111:3 PEDIATRICS 680 (Mar. 2003).

<sup>6</sup> See Sadath A. Sayeed, *Baby Doe Redux? The Department of Health and Human Services and the Born-Alive Infants Protection Act of 2002: A Cautionary Note on Normative Neonatal Practice*, 116:4 PEDIATRICS e576, e576 (Oct. 2005).

<sup>7</sup> 530 U.S. 914, 120 S.Ct. 2597, 147 Led.2d 743 (2000).

<sup>8</sup> *Id.* at 938-39.

<sup>9</sup> See Laura Hermer, *The “Born-Alive Infants Protection Act” and Its Potential Impact on Medical Care and Practice*, HEALTH L. PERSP., Sept. 27, 2006, [https://www.law.uh.edu/healthlaw/perspectives/2006/\(LH\)BAIPA.pdf](https://www.law.uh.edu/healthlaw/perspectives/2006/(LH)BAIPA.pdf).

physicians were not doing everything they could to preserve the lives of infants who survived abortion attempts, but instead were merely letting them die.<sup>10</sup> The Act defines “born alive” to mean:

...the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.<sup>11</sup>

Thus, according to BAIPA’s statutory language, an 18-week miscarried fetus with a detectable heart beat after delivery is entitled to full protection under the law even though long-term survival is highly unlikely.<sup>12</sup>

At the time of its passage, the few legislators who opposed the Act noted that it “does nothing” and “does not change existing law.”<sup>13</sup> Advocates of BAIPA as well as its congressional sponsors admitted that the legislation would not impose a new standard of medical care upon physicians nor change existing law.<sup>14</sup> However, the law unequivocally alters the physician norm of deferring to parental discretion regarding the initiation or discontinuation of medical treatment for extremely premature newborns. In fact, the bill’s stated purpose was to repudiate the notion that parents should have decision-making power in those circumstances.<sup>15</sup>

After President George W. Bush signed BAIPA into law, the American Academy of Pediatrics (AAP) Neonatal Resuscitation Program (NRP) Steering Committee issued an opinion stating that the law’s reach would not affect day-to-day neonatal medical practice and standards.

#### Response of the American Academy of Pediatrics

In March 2003, the AAP NRP Steering Committee issued an opinion regarding BAIPA’s effects on daily medical practice.<sup>16</sup> The Committee stated that although the Act

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<sup>10</sup> *Id.* (citing *Born-Alive Infants Protection Act of 2000: Hearing on H.R. 4292 Before the H. Comm. On the Judiciary*, 106th Cong. 6 (2000) (testimony of Hadley Arkes, Prof., Amherst College)).

<sup>11</sup> 1 U.S.C. § 8(b) (2008).

<sup>12</sup> See Sayeed, *supra* note 6, at e577.

<sup>13</sup> *Born-Alive Infants Protection Act of 2001, supra* note 4, at 28 (statement of Rep. Melvin Watt at a meeting of the Committee on the Judiciary).

<sup>14</sup> See Sadath A. Sayeed, *The Marginally Viable Newborn: Legal Challenges, Conceptual Inadequacies, and Reasonableness*, 34 J.L. MED. & ETHICS 600, 601 (2006).

<sup>15</sup> See Sayeed, *supra* note 6, at e577.

<sup>16</sup> Am. Acad. of Ped. Neonatal Resuscitation Prog. Steering Comm., *Born-Alive Infants Protection Act of 2001, Public Law No. 107-207*, 111 PEDIATRICS 680 (Mar. 2003).

contained a “lot of rhetoric,” the “law does not proscribe medical care for newly born infants delivered at the limits of viability.”<sup>17</sup> More specifically, the committee noted:

[t]he debate regarding the efficacy of providing medical care to premature infants below a certain weight or gestational age is clearly not relevant in the context of this law...[BAIPA] should not in any way affect the approach that physicians currently follow with respect to the extremely premature infant. Physicians should discuss treatment options with parents, preferably before the birth of the infant.<sup>18</sup>

The Committee essentially dismissed the intent and purpose of the law with its statements and further noted.<sup>19</sup>

...decisions about withholding or discontinuing medical treatment that is considered futile may be considered by the medical care providers in conjunction with the parents...Those newly born infants who are deemed appropriate to not resuscitate or to have medical support withdrawn should be treated with dignity and respect, and provided with “comfort care” measures.<sup>20</sup>

Thus, the medical community most affected by the law discounted BAIPA as symbolic, rather than substantive law. However, the Bush Administration soon began taking steps to promote BAIPA enforcement through EMTALA and CAPTA.

#### Using EMTALA and CAPTA to Enforce BAIPA as Substantive Law

In April 2005, DHHS announced that it would begin enforcing regulations impacted by BAIPA through EMTALA<sup>21</sup> and CAPTA<sup>22</sup> laws.<sup>23</sup> A Centers for Medicare and Medicaid Services (CMS) memorandum to state agency directors detailed the relationship between EMTALA and BAIPA set forth the agency’s position:

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 680-81.

<sup>21</sup> 42 U.S.C. § 1395dd(a) & (h) (West 2009); In general, EMTALA provides that anyone who presents to the emergency department of a hospital must be given a medical screening examination, without regard to his or her ability to pay. If the examination reveals an emergency medical condition, the hospital must stabilize the condition.

<sup>22</sup> Pub. L. No. 93-247 (1974); 42 U.S.C. § 5101 et seq. (West 2009); 42 U.S.C. § 5116 et seq. (West 2009); The Child Abuse Prevention and Treatment Act was originally enacted in 1974 and was later amended by the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978. The law was completely rewritten in the Child Abuse Prevention, Adoption and Family Services Act of 1988 and further amended by the Child Abuse Prevention Challenge Grants Reauthorization Act of 1989 and the Drug Free School Amendments of 1989.

<sup>23</sup> See Sayeed, *supra* note 6, at e576.

[i]t has recently come to the agency's attention that there may be occasions where, in hospitals, an infant may be born alive within the meaning of the definition added to the U.S. Code by [BAIPA], but where hospitals have failed to comply with the requirements of EMTALA.<sup>24</sup>

Under BAIPA, the agency interpreted EMTALA to protect all "born-alive" infants and stated it would actively investigate allegations of suspected violations whenever it found evidence that a newborn was not provided with at least a medical screening examination under circumstances in which a "prudent layperson observer" could conclude from the infant's "appearance or behavior" that it was "suffering from an emergency medical condition."<sup>25</sup> Thus, a family member could trigger an EMTALA investigation after observing the delivery of a twenty-week fetus who maintained a heartbeat for an hour before its death.<sup>26</sup> When faced with such a scenario, most neonatologists would not consider it an emergency medical condition, but rather a medical situation requiring comfort care to be given to the infant and support given to the family.<sup>27</sup> There is no flexibility under the Act's provisions for physician discretion, however; there is also no clear guidance whether screening examinations are required for all newborns regardless of survivability.<sup>28</sup>

In order to enforce its policies, the DHHS/CMS memorandum called on "individuals within health care facilities" to notify authorities when they suspected physicians were exceeding their authority by withholding medical treatment from newborns.<sup>29</sup> Additionally, the DHHS sent other instructions to state child protection agencies responsible for implementing CAPTA regulations. Amendments to the federal CAPTA law in 1984,<sup>30</sup> required "states to establish policies and procedures for the reporting of and responding to medical neglect and by defining medical neglect to include the withholding of medically indicated treatment for a disabled infant with life-threatening conditions."<sup>31</sup> The DHHS memorandum reiterated the limited situations in which physicians could withhold medical treatment from infants and reemphasized the role of individuals to notify authorities of suspected infractions.<sup>32</sup>

Thus, according to DHHS, all infants who are "born alive" and "medically neglected" must be reported to proper authorities. Additionally, each state must give its Child Protection Services agency the authority to take legal steps to ensure that medical care or

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<sup>24</sup> Centers for Medicaid and State Operations/Survey and Certification Group, Letter from Director, Survey and Certification Group to State Survey Agency Directors, *Interaction of the Emergency Medical Treatment and Labor Act (EMTALA) and the Born-Alive Infants Protection Act of 2002* (Apr. 22, 2005), available at <http://www.ashrm.org/ashrm/advocacy/advisories/files/2005infants.pdf>.

<sup>25</sup> *Id.*; see also Sayeed, *supra* note 6, at e576.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Pub. L. No. 98-457, 98 Stat. 1749 (1984).

<sup>31</sup> *Id.*

<sup>32</sup> Sayeed, *supra* note 6.

treatment “necessary to prevent or remedy serious harm to the child” is provided, and to prevent such treatment from being withheld.<sup>33</sup>

### Conclusion

Under President Obama’s administration, it remains unclear how he and a Democratic majority of Congress will handle the possible long-term medical practice implications imposed by BAIPA. Many legal and lay commentators have analyzed the federal BAIPA to similar versions passed or considered by state legislatures, including Illinois, when then state Senator Obama was presented with two similar bills. As a result of his actions, or inaction, some individuals and groups have gone as far as accusing President Obama of supporting infanticide.<sup>34</sup>

In 2001, a proposed Illinois state version of the federal BAIPA was debated. The most well-publicized portion of the law would have required that any “viable” fetus surviving a late-term abortion receive sustaining medical care—something opponents of the bill said was already required by a 1975 state law.<sup>35</sup> However, because Obama voted “no” in committee and “present” on the Senate floor, certain individuals claimed he is pro-infanticide.<sup>36</sup> Other significant details in the state legislation further separated it from its federal counterpart.

In 2002, Senator Obama voted against the Illinois Induced Birth Infant Liability Act (the Liability Act).<sup>37</sup> Although the state legislation had a similar intent as the federal BAIPA law, namely to protect the interests of those who are born alive as a result of an abortion, the Liability Act was ambiguous in substance and did not define its terms as comprehensively as was done in the BAIPA legislation.<sup>38</sup>

Although it is unclear where President Obama currently stands on the federal version of BAIPA, it is clear that there was widespread support for the legislation from both Republican and Democratic members of Congress when it passed. Thus, should President Obama desire to alter the current language of the law or eliminate it completely, he will first need considerable congressional support.

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<sup>33</sup> *Id.*

<sup>34</sup> See generally, e.g. Seth Colter Walls, *The Next Smear Against Obama: “Infanticide,”* HUFFINGTON POST, Aug. 4, 2008, [http://www.huffingtonpost.com/2008/08/04/the-next-smear-against-ob\\_n\\_116891.html](http://www.huffingtonpost.com/2008/08/04/the-next-smear-against-ob_n_116891.html) (discussing the accusation of Obama’s support of infanticide by Deal Hudson); Douglas Johnson, *Obama Cover-up on Born-Alive Abortion Survivors Continues to Unravel After Sen. Obama Says NRLC is “Lying,”* NAT. RIGHT TO LIFE, Aug. 18, 2008, <http://www.nrlc.org/ObamaBAIPA/Obamacoveruponbornalive.htm> (discussing Alan Keyes accusation against Obama of supporting infanticide in 2004); Jill Stanek, *Obama’s 10 Reasons for Supporting Infanticide,* WORLDNETDAILY, Jan. 16, 2008, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=45553>.

<sup>35</sup> Seth Colter Walls, *The Next Smear Against Obama: “Infanticide,”* HUFFINGTON POST, Aug. 4, 2008, [http://www.huffingtonpost.com/2008/08/04/the-next-smear-against-ob\\_n\\_116891.html](http://www.huffingtonpost.com/2008/08/04/the-next-smear-against-ob_n_116891.html).

<sup>36</sup> *Id.*

<sup>37</sup> S.B. 1661, 92nd Gen. Assem., Reg. Sess. (Ill. 2002).

<sup>38</sup> See Sherry F. Colb, *Is Obama “Pro-Infanticide”? Analyzing a Vote in the Illinois Senate,* FINDLAW.COM, Aug. 13, 2008, <http://writ.news.findlaw.com/colb/20080813.html>.

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