U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE

April 18, 2016

TO: Members, Select Investigative Panel

FROM: Panel Majority Staff

RE: Hearing on “The Pricing of Fetal Tissue”

On Wednesday, April 20, at 10:00 a.m. in HVC-210, the Select Investigative Panel will hold a hearing entitled “The Pricing of Fetal Tissue.” The hearing will focus upon the issues raised as a result of information the Select Investigative Panel has learned about the fetal tissue industry. The witnesses will provide testimony relating to the statute 42 U.S.C. §289 g-2, which prohibits profiting from the sale of baby body parts.

Each perspective will help the Panel understand how the statute applies to the materials produced by the Panel’s investigation, as well as whether the statute is adequate.

I. BACKGROUND

On October 7, 2015, the U. S. House of Representatives passed H. Res. 461, which created the Select Investigative Panel and empowered it to conduct a full and complete investigation regarding the medical practices of abortion service providers and the business practices of the procurement organizations that sell fetal tissue. This Panel centralized the investigations that were already being conducted by the Committees on Energy and Commerce, Judiciary, and Oversight and Government Reform by bringing them primarily under one umbrella.

History of the Prohibition of Profiting from Fetal Tissue Sales

On March 10, 1993, the U.S. House of Representatives passed an amendment, offered by Rep. Henry Waxman, to H.R. 4, the National Institutes of Health Revitalization Act of 1993. That amendment includes the provisions codified as 42 U.S.C. §§289 g-2(a) and (e)3:

> **42 USC §289 g-2(a) states "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce."**
>
> **42 USC §289 g-2(e)(3) "The term "valuable consideration" does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue."**

During floor debate it was repeatedly stated by supporters of the Waxman amendment that fetal "tissue may not be sold."[1] Rep. Connie Morella expressed her support for the legislation because "fetal tissue could not be sold."[2] Rep. Waxman himself said:

> This amendment that I am offering as a substitute would enact the most important safeguards, and those are the safeguards to prevent any sale of fetal tissue for any purpose, just not for the purpose of research. It would be abhorrent to allow for a sale of fetal tissue and a market to be created for that sale.[3]

[1] 139 Cong. Rec. 1099 (1993) (statement of Rep. John Edward Porter in support of the Waxman Amendment).
[2] Id. (statement of Rep. Connie Morella in support of HR 4 and the Waxman Amendment).
[3] Id. (statement of Rep. Henry Waxman).

The floor debate corroborates Committee Report language. The Report of the Committee on Energy and Commerce on the National Institutes of Health Revitalization Act of 1993 from stated:

> Section 498B prohibits the purchase of human fetal tissue as well as the solicitation or acceptance of directed fetal tissue donations.[4]

The Committee report described the prohibition on the sale of fetal tissue as making the transfer of fetal tissue parallel with donation of other organs under the Organ Procurement and Transplantation Act.[5] But the Committee report adds, "Indeed the Committee has dealt with fetal tissue more restrictively . . . ."[6] The Committee intent is to disallow payment for procurement of any organs.

The intent of the statute is best understood through a simple contrast between two modes of transferring fetal tissue from one entity to another. With the first, an abortion clinic (AC) or middleman Procurement Business (PB) transfers tissue to a researcher, and the researcher may reimburse the AC or PB for its reasonable costs incurred by the transportation, processing, preservation, and quality control of the tissue. With the second, the payment from the researcher exceeds those reasonable costs, enabling the AC or PB to make a profit and thus violates the statute.

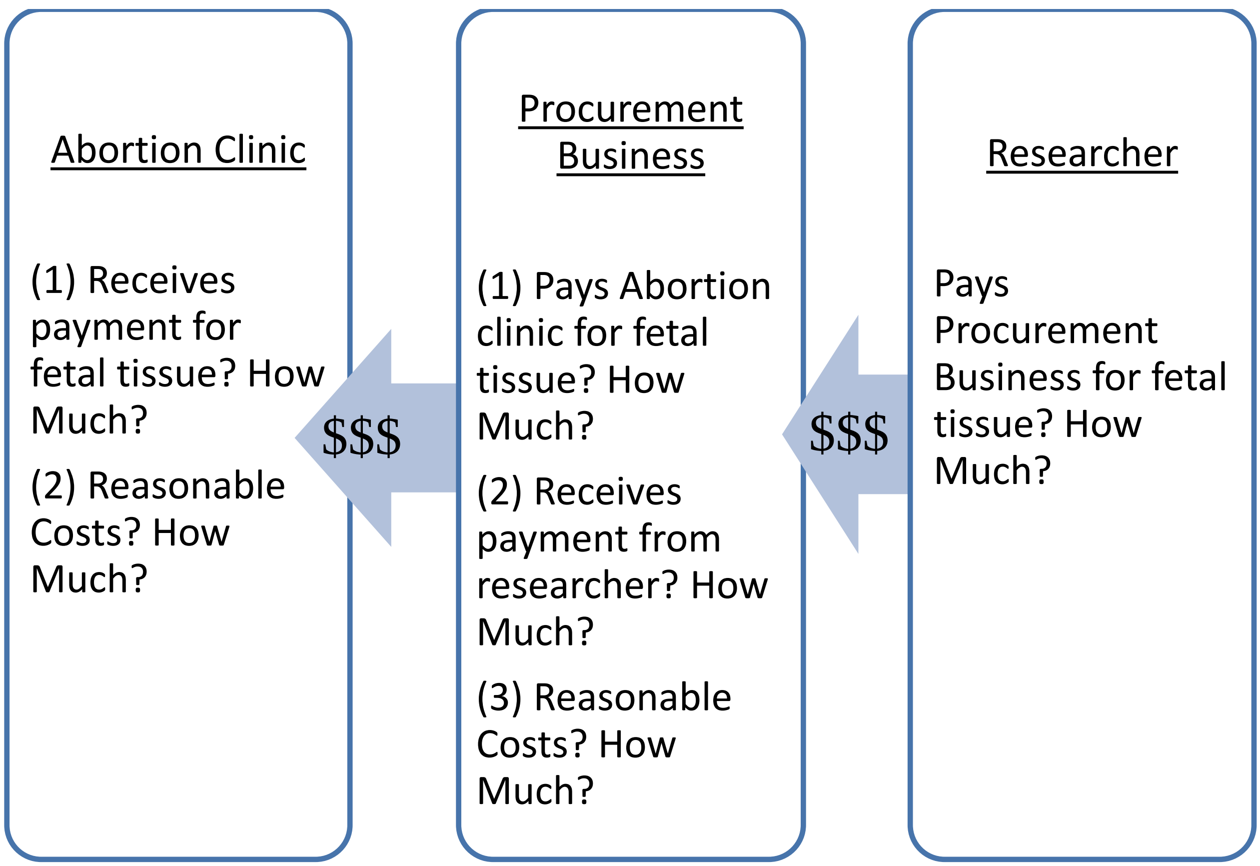
The release of videos last summer raised the question of whether ACs and PBs were profiting from the sale of baby body parts, organs and tissues. To profit from the acquisition or transfer of fetal tissue violates 42 U.S.C. §289 g-2, which prohibits the transfer of any fetal tissue for valuable consideration that exceeds the reasonable costs associated with the procurement.

The hearing will explore fetal tissue transfers facilitated by a for profit, middleman PB through its collaborating relationship with a number of ACs. The

[4] H.R. Rep. No. 103-28 at 76 (1993).
[5] Pub. L. No. 98-507, 98 Stat, 2339 (1984).
[6] H.R. Rep. No. 103-28 at 76 (1993).

PB first performs all of the work necessary to procure, transport, and control the quality of the fetal tissue for the Customer, a researcher. The PB then pays the abortion clinic a per tissue fee for each item it procures. The PB transfers the fetal tissue to the Customer and then receives a per tissue payment from the Customer. The witnesses will be asked whether they believe the current statute is adequate, whether the conduct uncovered by the Panel's investigation may violate the intent of the statute, and whether they have any recommendations.

The graphic below allows a clear understanding of the entities and questions the hearing will explore:



II. WITNESSES

- **The Honorable Ben Sasse**, US Senator from Nebraska.

- **Kenneth Sukhia,** former United States Attorney for the Northern District of Florida, and current senior partner in a law firm.

- **Mike Norton**, Alliance Defending Freedom, and former U.S. Attorney for Colorado.

- **Catherine Glenn Foster**, Charlotte Lozier Institute and Sound Legal.

- **Brian Lennon,** member of a private law firm and Deputy Chief of the Criminal Division for the U.S. Attorney's Office in the Western District of Michigan.

- **Fay Clayton,** member of a private law firm.

- **Robert Raben,** member of a private law firm.

III. ISSUES

The following issues may be examined at the hearing:

- Does the current legislative language adequately prevent profiteering in the sale of fetal tissue?

- Do the payments to abortion clinics for fetal tissue amount to a sale for profit of fetal tissue?

- Do the payments to the middleman Procurement Business from the researcher amount to a sale for profit of fetal tissue?

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact March Bell or Rachel Collins of the Committee staff at (202) 225-2927.