



To: Lt. Governor McNally, Republican Members of the Senate Judiciary Committee, and Republican Caucus Leadership

FROM: David Fowler, Esq.

DATE: April 4, 2019

RE: Fetal Heartbeat Legislation testimony

As you may know, I did not and still do not support the so-called fetal heartbeat legislation as *passed by the House*, but I do support it with Sen. Pody's amendment *or any others that are like it*. You may also know that I support the so-called "trigger bill."

I think these bills are constitutionally compatible with each other and urge support for both.

However, please do *not* see this legislation in the narrow view as *being only about abortion*.

Rather, as you will see from my testimony, the larger issue is the one framed by Justice Scalia, who said in one of his last dissenting opinions:

"I care greatly who rules me" and "the Ruler of 320 million Americans coast-to-coast [is now] a majority of nine lawyers on the Supreme Court."

I do, too, and I think you do as well. The trend and the projectory of the U.S. Supreme Court's constitutional jurisprudence has been to suppress the rights secured to all human beings, born and unborn, and ***protected by the Ninth Amendment*** and reflected in the history and traditions of this country found in the common law. Tennessee is a common law state.

This bill gives you an opportunity to use the Constitutional law and common law heritage we've been given to defend that Constitution and the rights it was intended to protect.

While no one can assure the outcome of a legal argument, *I think the argument made in the attached is **worth asserting and defending**, because it is premised on a constitutional argument that relates to all of you, particularly gun owners, parents, and property owners.*

This bill gives you the opportunity to defend the promise of the Ninth Amendment to our "national covenant" (SCOTUS' words used in *Casey to describe the Constitution*) that (i) not all rights come from positive law, (ii) that some rights are inalienable without due process of law, and (iii) that the most basic right of them all is life, without which any notions of liberty are meaningless.

I admit that lawyers, who think as they've been trained to think—that law is only that which emanates from the pen of a legislator or judge or from "penumbras" in the text of the Constitution (*Roe*)—will look askance at my argument. And it is *precisely* for that reason I believe this argument needs to be made ***before we give up all our rights to the pronouncements of the U.S. Supreme Court***. That, as much as abortion, is what is here at stake.