LEGAL

COMMENTS ON PARTIAL –BIRTH ABORTION
BY
U.S. Appeals Courts

On January 31, 2006, the U.S. Court of Appeals for both the Ninth and Second Circuits issued decisions in cases dealing with partial-birth abortion. Both affirmed lower court rulings finding the ban on partial-birth abortion unconstitutional for lack of an exception for the mother's health.

Some Quotes of Interest from the Second Circuit's Opinion

The Second Circuit opinion was decided by a three-judge panel (Walker, Newman and Straub. Chief Justice Walker wrote a concurring opinion that is instructive. A few quotes:

> *I can think of no other field of law that has been subject to such sweeping constitutionalization as the field of abortion. Under the Supreme Court's current jurisprudence, the legislature is all but foreclosed from setting policy regulating the practice; instead, federal courts must give their constitutional blessing to nearly every increment of social regulation that touches upon abortion...*
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> *[T]he Court never identified why a statute that altogether forbids D&X creates a significant health risk; it simply noted that, while other methods of abortion are "safe," some doctors believe that "the D&X method [is] significantly safer in circumstances." Of course, this only establishes that a statute that altogether forbids D&X would deny some women a potential health benefit over an objectively "safe" baseline; it does not establish that such a statute would pose a constitutionally significant health risk.*
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> *The Supreme Court needs to inform us how much evidence is required to sustain such challenges. Until it does, the lower courts will continue to labor under a standard that is both unclear and difficult to apply with any certainty, while the legislatures lack sufficient constitutional guidance on the standard that will be used to challenge their enactments.*
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> *In today's case, we are compelled by a precedent to invalidate a statute that bans a morally repugnant practice, not because it poses a significant health risk, but because its application might deny some unproven number of women a marginal health benefit. Is it too much to hope for a better approach to the*

law of abortion...?

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The underlying facts before us...are not materially different from those before the Court in Stenberg; thus it is my duty to follow that precedent no matter how personally distasteful the fulfillment of that duty may be. I join Judge Newman's carefully-crafted opinion accordingly.

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In dissenting, Judge Straub said:

I find the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable.

* * *

Although I acknowledge that no court has held that there is a special constitutional standard of protection for the fetus in the process of being born, a woman's right to terminate a pregnancy has never extended to the destruction of a child during parturition (citing Roe's 1st footnote).

We should consider independently whether providing an unknown number of women a marginal health benefit outweighs both the fetus's emerging right to life and the State's interest in protecting actual and potential life.

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If the intent of the mother controls the scope of her right to destroy her offspring, there is no reason why she should not be able to destroy the child after it has completely been separated from her body.

I disagree with Chief Justice Walker that the fact that the Act is not limited to post-viability abortions necessarily vitiates the compelling interest of the State in preventing the procedure to distinguish abortion from infanticide. Once a fetus is born, its viability ceases to be relevant to determining the constitutional protections to which it is entitled.

Footnote 14

* * *

The trial evidence supports Congress's judgment that no maternal health condition required the use of D&X. Nor is D&X preferable or safer than D&E in any particular circumstance. The alleged safety advantages are wholly unproven and hypothetical, and, to quote the pithy phrase of the District Court, "Intuition does not equate to scientific fact."

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[T]here is no reason that the overarching and fundamental principle of deference to congressional fact finding--both as a matter of respect for the lawmaking power and as a matter of institutional competence--should not apply in the context of regulating the methods of abortion. Congress has a legitimate interest in regulating medical techniques of abortion.

Full texts of these decisions can be found at http://caselaw.lp.findlaw.com/data2/circs/2nd/045201p.pdf and http://caselaw.lp.findlaw.com/data2/circs/9th/0416621p.pdf. Or, if you prefer, the Secretariat will be glad to mail copies to you (the Ninth Circuit decision is 64 pages in length; the Second Circuit's 93 pages).