

General Background On Abortion Lawsuits

James S. Cole, General Counsel

When reviewing the current status of abortion law, it helps to understand how the federal courts review constitutional questions. This article offers a short review of the power of federal courts to declare statutes to be unconstitutional, then describes how the lawsuits travel through the court system. The description here is designed only for a short introduction to the subject matter. Detailed criticism of the system is well deserved but beyond the scope of this article. Readers should bear in mind that abortion law is the product of judges writing legislation under the guise of construing our Constitution. Judge-made constitutional law is incapable of revision by the people and their representatives except by resort to the cumbersome method of amending the federal constitution itself. Until we develop the political and social strength to amend the Constitution, our robed masters will continue to dictate how little we can do to protect the most vulnerable and helpless human beings in our midst.

Very early in the life of our Republic, controversies arose in which a statute said one thing but the Constitution said another. The courts had to determine whether the Constitution or the statute controlled in order to adjudicate the controversies. In the seminal case, Marbury v. Madison, the Supreme Court stated that in order to preserve the Constitution as the supreme law of the land, the Constitution had to control. The statute would have to be declared unconstitutional, and thus void in the circumstances presented to the Court, or the Constitution would become meaningless. It was the province of the Supreme Court to make such determinations in order to do its job, that is, to decide concrete controversies in which the determination would make an actual difference to the parties.

The nineteenth century witnessed much controversy over whether the Supreme Court's decisions on constitutional law would be binding on non-parties, especially upon the coordinate branches of the federal government: the Executive (President) and the Legislature (Congress). The most compelling example arose from the Dred Scott decision, which declared that no black person had rights that the federal government could recognize under the Constitution. Abraham Lincoln forcefully argued that the Executive and Legislature were not bound by the Dred Scott decision in carrying out their own Constitutional responsibilities. As Lincoln said, "[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal." In other words, each branch of the government has its own co-equal power to determine the requirements of the Constitution until a case is validly decided by the courts to the contrary in a case against the affected government agency.

Lincoln's view on slavery carried the day, but his view of the limited scope of the Supreme Court's authority did not. Suffice it to say that the principle announced in Marbury v. Madison has been vastly expanded in the twentieth century. A decision of the Supreme Court is considered to be binding on everyone, the President and Congress included, whether or not they are parties to the case in which the decision is announced.

In the last third of this century, the rule for instituting constitutional adjudication has become reduced to the following: any party may sue in federal district court for a declaration of unconstitutionality of a statute if the party claims (1) that it is harmed by a statute and (2) the statute is unconstitutional for violating the due process or equal protection clauses of the Constitution. The harm does not have to be much. In abortion cases, because of the

1992 Casey decision, the plaintiff only needs to allege that the statute is "unduly burdensome" upon the right of abortion.

Usually the plaintiffs are abortionists or organizations which perform abortions. Planned Parenthood has been the pro-abortion plaintiff in most well-known abortion cases, asserting the supposed harm the laws cause to women who will be their customers for abortions. Usually, one person cannot assert another person's harm in court, but as an illustration of what some legal scholars call the "abortion distortion" in federal constitutional law, these organizations have been allowed to do so. Typically, the plaintiffs ask for a temporary restraining order and/or a temporary injunction to bar enforcement of the law until the full trial is held on the lawsuit. In abortion cases, plaintiffs are granted temporary restraining orders and temporary injunctions in the vast majority of cases. The ultimate relief plaintiffs seek upon a trial of the case is a permanent injunction barring the defendants from enforcing the ostensibly unconstitutional law.

The defendants are usually the state and local officials who are responsible for enforcing the particular law at issue. For example, Henry Wade, the defendant in Roe v. Wade, was sued as the district attorney of Dallas County, Texas. Sometimes the suit is brought as a class action against all such officials, so that there is no question that the injunction will be effective statewide. It is a matter of legal strategy by plaintiffs' attorneys to select the number of defendants and who they will be.

The trial of these cases occurs in federal district court. Federal courts usually sit in the largest cities in a state, with satellite courthouses in smaller towns where a federal judge visits monthly to hear cases. In Missouri, there are two federal district courts, one headquartered in St. Louis and the other in Kansas City. Citizens should not confuse the federal court system with state courts, such as state district courts in Kansas or Iowa. The federal court system is a completely separate court system from each state's courts.

Once the federal district court issues its ruling, the losing side usually appeals to the federal appellate court, which is called the "United States Court of Appeals for the ___ Circuit." Most federal appellate courts handle appeals from several states. The one that serves Missouri, the U.S. Court of Appeals for the Eighth Circuit (often referred to just as the "Eighth Circuit") handles appeals from seven states in all. Again, citizens should not confuse state courts of appeal, or state circuit courts in Missouri, with the federal circuit courts of appeal.

The Eighth Circuit (or the equivalent in other parts of the country) may do several things with an appeal. If the appeal comes too soon under the law because some parts of the case were not finally disposed of in the district court, the appeal may be dismissed and the case sent back to the district court to be completed. The appellate court may uphold ("affirm") the district court's decision, and sometimes it may affirm for reasons different than the district court relied upon. The appellate court may reverse the district court, either sending the case back for further proceedings ("remand") or entering judgment itself for the other side. It may do a mixture of these things, depending on what has occurred in the case.

After the appellate court issues its ruling, the losing side may petition the United States Supreme Court to hear the case. In all but a very few situations, the Supreme Court does not have to do so. It takes a vote of four of the Justices to agree to hear a case. Most petitions are rejected by the Court. If the Court takes the case and issues a ruling joined by a majority of the Justices, its interpretation of the Constitution will bind all other courts in the country, state and federal.

With this background, the reader is now better able to understand what is going on when the results of lawsuits are reported in the daily news media. You may now want to turn to the summary of contemporary abortion cases to learn

more about what protective laws may be enacted and what may not, under the federal courts' current regulatory scheme.