CHOICE Voice

News from Planned Parenthood of New York City
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THE SUPREME COURT:

Constitutional Protections for Privacy and Civil Liberties

Past Supreme Court decisions have defined the scope of reproductive freedom within ever-shifting boundaries. Two new anti-choice justices, appointed by President George W. Bush, sit on the court today. While we can't predict how they will vote on upcoming cases, both Justice Roberts and Justice Alito have anti-choice records. Justice Alito replaced Justice O'Connor, who had an overall pro-choice voting record. This is a critical juncture for reproductive rights in the Supreme Court and across the nation. We need Supreme Court justices who will uphold our constitutional right to privacy and other basic civil liberties.

The United States Supreme Court

The Supreme Court is established by Article 3 of the United States Constitution. There are nine justices who are appointed for life by the President of the United States and confirmed by majority vote in the Senate (for more on the confirmation process, see inside). One of these nine serves as Chief Justice; the remaining members are designated Associate Justices. The Court is in session from the first Monday in October through late June/early July.

How does a case get to the U.S. Supreme Court?

The Supreme Court hears appeals from cases decided by the lower federal appellate courts and the highest court in each state's court system. An individual, a group of individuals with a similar characteristic (known as a "class"), or an organization or corporation that loses in a federal court of appeals or in the highest court of a state may file a petition for a "writ of certiorari," asking the Supreme Court to review the case. However, the Supreme Court has discretion over which appeals it will hear and, in fact, the Supreme Court hears very few cases: the Court grants and hears arguments in only about 1% of the cases that request review each term. The Court typically will agree to hear a case only when it involves an especially important constitutional principle, or when two or more federal appellate courts have interpreted a law differently.

Did you know?

Before 2005, the most recent nomination and confirmation process was in 1994, when President Clinton nominated Stephen G. Breyer, and the last nominee rejected by the Senate was Robert H. Bork in 1987, nominated by President Reagan.

The Current Members of the Supreme Court and Their Positions on Reproductive Choice

John G. Roberts Jr., Chief Justice: Appointed by President George W. Bush, 2005. Likely anti-choice vote

John Paul Stevens, Associate Justice: Appointed by President Ford, 1975. Pro-choice vote

Samuel Anthony Alito, Jr., Associate Justice: Appointed by President George W. Bush, 2006. Likely anti-choice vote

Antonin Scalia, Associate Justice: Appointed by President Reagan, 1986. Anti-choice vote

Anthony M. Kennedy, Associate Justice: Appointed by President Reagan, 1988. Swing vote (has swung between pro-choice and anti-choice votes)

David Hackett Souter, Associate Justice: Appointed by President George H.W. Bush, 1990. Pro-choice vote

Clarence Thomas, Associate Justice: Appointed by President George H.W. Bush, 1991. Anti-choice vote

Ruth Bader Ginsburg, Associate Justice: Appointed by President Clinton, 1993. Pro-choice vote

Stephen G. Breyer, Associate Justice: Appointed by President Clinton, 1994. Pro-choice vote

A vacancy on the Court: The confirmation process

When there is a vacancy on the Supreme Court, both the President and the Congress determine who will be the next Justice. The confirmation process follows the steps below.

The President nominates a replacement judge.

The nominee appears before the Senate Judiciary Committee to answer questions.

Once the hearings are complete, the Judiciary Committee votes on the nominee. The Committee can send a nomination to the full Senate with a favorable recommendation, with an unfavorable recommendation, or even with no recommendation at all. The Committee may also decline to send a nomination to the full Senate.

If the nominee is sent to the full Senate, the Senate debates and votes on the nominee.

Once the nomination comes to the Senate floor for a vote, it takes a simple majority (51 votes) to approve or disapprove the nomination. It is at this point that opponents can use a range of tactics to delay the vote, including the filibuster. (See article on right.)

If the majority of the Senators vote "yes," the nominee is confirmed. If not, the President nominates a new judge and the process starts again from the beginning.

Take Action!

If your Senator is on the Senate Judiciary Committee,* you can urge your Senator to probe fully into the nominee's record and beliefs and to vote against an anti-choice nominee.

* Senator Charles Schumer of New York is on the Judiciary Committee.

Take Action!

Contact your Senators and say no to an anti-choice nominee, and encourage your friends to do the same!

The "Nuclear Option," the Filibuster Compromise, and "Extraordinary Circumstances"

A filibuster is a way of preventing a vote on a nominee by extending debate. Senate rules provide that a vote can only occur when debate ends. A filibuster can be overcome if a parliamentary rule known as cloture is invoked. Cloture ends debate and prompts a vote. However, the vote to invoke cloture requires approval by three-fifths of the Senate, which is 60 votes. If the current 55 Republican Senators would want to break a filibuster, they would need help from Democrats to invoke cloture.

In 2005, after a threat by Senate Republicans to change the rules (the "nuclear option") so as to cut off debate on judicial nominees with a simple majority (51) rather than the 60 votes needed for cloture, a group of 7 Republicans and 7 Democrats came up with a compromise to avoid the "nuclear option." These 14 Senators vowed to filibuster judicial nominees only "under extraordinary circumstances, where each signatory must use his or her own discretion and judgment in determining whether such circumstances exist." The paragraph retaining the right to filibuster—considered the pact's most difficult question—states: "In light of the spirit and continuing commitments made in this agreement, we commit to oppose the rules changes in the 109th Congress," which extends through 2006.

What are some of the major U.S. Supreme Court rulings on reproductive rights?

1965—***Griswold v. Connecticut***—Challenge to a Connecticut law prohibiting the use of contraceptives. The Supreme Court decided it was unconstitutional because the constitutional right to privacy includes the decision of married couples to use contraception.

1972—***Eisenstadt v. Baird***—Challenge to a Massachusetts law allowing the sale or distribution of contraception only to married persons. The law was deemed unconstitutional because the right to privacy applies to both married and unmarried persons.

1973—***Roe v. Wade***—Challenge to a Texas law prohibiting abortions except to save the woman's life. The law was found to be unconstitutional because the right to privacy extends to the decision of a woman, in consultation with her physician, to terminate her pregnancy. (To learn more about this case, see page 4.)

1979—***Bellotti v. Baird (Bellotti II)***—Challenge to a Massachusetts law that would require that (a) a minor must first attempt to obtain her parents' consent and be refused before approaching a court for permission for her abortion and that parents be notified when a minor files a petition for judicial waiver; and (b) that the judge hearing the minor's petition may deny the petition if the judge finds that an abortion would be against the minor's best interests. The Supreme Court decided the law was unconstitutional because a minor must have an opportunity to approach a judge without first consulting her parents, and the proceedings must be confidential.

1992—***Planned Parenthood of Southeastern Pennsylvania v. Casey***—Challenge to Pennsylvania's 1989 Abortion Control Act, which, except in medical emergencies, required: (a) a 24-hour waiting period (b) state-mandated counseling including state-authored materials on fetal development; (c) parental notification; and (d) a married woman must inform her husband of her intent to have an abortion. The Court reaffirmed the validity of a woman's right to choose abortion under *Roe v. Wade*, but announced a new standard of review that allows restrictions on abortion prior to fetal viability so long as they do not constitute an "undue burden" to the woman. A restriction is an "undue burden" when it places a substantial obstacle in the path of a woman seeking an abortion. Under this standard, only the husband notification provision was considered an undue burden and therefore found to be unconstitutional. All the other provisions were upheld as not "unduly burdensome."

2000—***Stenberg v. Carhart***—The case challenged Nebraska's abortion ban. The law was found to be unconstitutional because it contained no exception for the health of a woman. Also, the ban created an "undue burden" on a woman's right to abortion.

2007—***Gonzales v. Planned Parenthood Federation of America & Gonzales v. Carhart***—Challenge to a federal law banning a second trimester abortion procedure without an exception if the pregnant woman's health was in danger. This decision has unraveled more than 30 years of precedent protecting women's health and jeopardized the future of reproductive rights in this country.

What was the most recent Supreme Court ruling about reproductive rights?

On November 2006, the Supreme Court heard arguments in two cases, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, both of which challenge the Federal Abortion Ban. The Ban, passed by Congress and signed by President Bush in early 2003, outlaws a second trimester abortion procedure even if the pregnant woman's health is in jeopardy. Major medical groups, including the American College of Obstetricians and Gynecologists, the American Nurses Association, and many other medical and health care associations, opposed the Ban.

As soon as President Bush signed the Ban, Planned Parenthood Federation of America, the Center for Reproductive Rights (on behalf of individual doctors), and the American Civil Liberties Union (on behalf of the National Abortion Federation) each filed lawsuits challenging the Ban in federal trial courts (in California, Nebraska and New York, respectively). In each trial court case, the judges ruled that the Ban was unconstitutional because, among other things, it contains no exception to preserve a woman's health. Each case was appealed to its federal appellate court (9th Circuit, 8th Circuit, and 2nd Circuit, respectively) and each appellate court affirmed (agreed with) the trial court's ruling. The ACLU case was held at the appellate court for procedural reasons, but the Planned Parenthood and Center for Reproductive Rights cases were appealed to the Supreme Court, which agreed to hear both. Oral arguments were heard on November 8, 2006.

On April 18, 2007, the Supreme Court issued an unprecedented decision and upheld this dangerous ban. This ban is the first ever federal ban on abortion without a health exception.

For more information visit ppnyc.org.

What do we mean when we say "Roe is at risk?"

1) Roe could be overturned and we could lose Roe's main principle—that women have a constitutionally protected right to abortion. Given the current makeup of the Court, this will likely take one new Justice. However, if there are more vacancies on the Court and the Court changes in the direction that the current administration favors, *Roe* could be overturned. If the U.S. Supreme Court were to overturn *Roe*, abortion would not become immediately illegal in the United States, but women would lose federal constitutional protection for the right to choose abortion and states would have the power to set abortion law (i.e., each state would pass its own law regarding abortion). According to a recent study from the Center for Reproductive Rights, if *Roe* were overturned today, only 20 states have laws that would likely protect a woman's right to abortion. The rest of the states could outlaw abortion. To learn more, visit www.crlp.org.

2) Roe could be rendered essentially meaningless. This has actually been happening since *Planned Parenthood of Southeast Pennsylvania v. Casey* was decided in 1992. While upholding *Roe's* main principle, *Casey* changed the *Roe* decision to allow states to chip away at the right to abortion.

The original *Roe* decision held:

1) the right to privacy is a fundamental right with the highest level of protection;
2) the government has to stay neutral: legislatures cannot enact laws that push women to make one decision or another;
3) in the period before the fetus is viable ("can live outside a woman's body"), the government may restrict abortion only to protect a woman's health;
4) after viability, the government may prohibit abortion, but laws must make exceptions that permit abortion when necessary to protect a woman's health or life.

In 1992, the *Casey* decision undercut all but one of these—that laws limiting abortion must have an exception to protect a woman's health or life. The Court ruled that states could restrict abortion so long as the restrictions did not pose an "undue burden." This decision opened the door for states to limit access to abortion with waiting periods, state-mandated counseling, onerous clinic requirements, and other barriers.

So, what is at risk today?

The Court now has four pro-choice votes (Stevens, Souter, Ginsberg, Breyer), four anti-choice votes (Thomas, Scalia, Roberts, Alito), and 1 swing vote (Kennedy). Justice Kennedy has consistently supported increased restrictions on abortion, even if he might not vote to outlaw abortion entirely.

As PPNYC CEO Joan Malin wrote in a letter to the *New York Times Magazine*: "If *Roe* is overturned—or eviscerated—by the new Court, we will return to the days of local control of women's health. That's fine if you're a wealthy woman in an anti-choice state, who can fly to New York or Los Angeles or Chicago for an abortion. If you're not, you face the non-choice of a dangerous, illegal procedure or a forced pregnancy. Simply put, abortion would be criminalized, except for the privileged, educated, and mobile."

What can I do?

- Share this newsletter with five close friends and find out what questions they have.
- Join PPNYC's action network to be kept up-to-date with the latest news regarding the War on Choice, and receive invitations to attend PPNYC's events.
- Sign up for the "Now What" blog at www.saveroe.com
- Make a donation to help us continue the fight!

How can I talk about what's at stake with my friends?

When talking to your friends about what's at stake, remember a few key points:

1. In the current court *Roe v. Wade* hangs on a slim 5-4 majority.
2. The court now has four pro-choice votes, four likely anti-choice votes, and one swing vote. Cases will likely be decided by one vote.
3. If *Roe* is overturned, abortion will not become illegal in the United States as a whole, but instead each individual state will be able to permit or outlaw abortion.