The Burger Court Opinion Writing Database

Doe v. Bolton

410 U.S. 179 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

December 20, 1971

CHAMBERS OF
THE CHIEF JUSTICE

No. 70-40 -- Roe v. Bolton

Dear Bill:

I have your note on the above.

At the close of discussion of this case, I remarked to the Conference that there were, literally, not enough columns to mark up an accurate reflection of the voting in either the Georgia or the Texas cases. I therefore marked down no votes and said this was a case that would have to stand or fall on the writing when it was done.

That is still my view of how to handle these two (also No. 70-18-- Roe v. Wade) sensitive cases, which, I might add, are quite probable candidates for reargument.

However, I have no desire to restrain anyone's writing even though I do not have the same impression of views.

Regards,

WEB

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 18, 1971

Dear Chief:

Re: No. 70-40 - Doe v. Bolton

As respects your assignment in this case, my notes show there were four votes to hold parts of the Georgia Act unconstitutional and to remand for further findings, e.g., on equal protection. Those four were Bill Brennan, Potter Stewart, Thurgood Marshall and me.

There were three to sustain the law as written -- you, Byron White, and Harry Blackmun.

I would think, therefore, that to save future time and trouble, one of the four, rather than one of the three, should write the opinion.

William O. Douglas

The Chief Justice

CC: The Conference

December 22, 1971

Dear Bill:

I enclose herewith a rough draft of my memo in No. 70-40 - Doe v. Bolton, the Georgia abortion case.

Let me have any of your suggestions, criticisms, ideas, etc. and I will incorporate them, and then we can talk later as to strategy.

W. O. D.

Mr. Justice Brennan

W. Douglas Admin File
O-171

For Justice Brennan — not circulated draft

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-40

Mary Doe et al., Appellants, *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January —, 1972]

Memorandum from MR. JUSTICE DOUGLAS.

This is an appeal from a three-judge District Court which was asked by plaintiff-appellants to declare Georgia's abortion law[1] unconstitutional. Originally, the plaintiffs included doctors, nurses, social workers, ministers, and counsellors, but they were dismissed by the District Court. The lower court, however, permitted a class action by its representative, Mary Doe, and proceeded to hold that portions of the Georgia statute were invalid. 319 F. Supp. 1048, 1057. Believing that they were entitled to broader relief, Mary Doe, as well as the other original plaintiffs, have taken a direct appeal, 28 U. S. C. § 1253, and we postponed the question of jurisdiction until consideration of the merits. 402 U. S. 941.

I

Mary Doe was 22 years old and was about 11 weeks pregnant at the time the complaint was filed. She and her husband were unemployed; their marriage had been unstable; during the pendency of the suit, her husband abandoned her. She desired an abortion because she was emotionally and economically unable to care for and support another child. She and her husband have three

[1] Ga. Code Ann. § 26-1201 *et seq.* Set forth in the Appendix.

Mr. Brennan Oct 71 — appears to be a circ.

WM

For Justice Marshall - not circulated Stewart

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–40

Mary Doe et al., Appellants, *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

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B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 25, 1972

Dear Harry:

In No. 70-40 - Doe v. Bolton, I think you have done a fine job. Please join me in your memo, which I hope will be the Court's opinion.

I may possibly file a separate opinion, indicating of course that I join you.

W. O. D.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1972

RE: No. 70-40 - Doe v. Bolton

Dear Harry:

I've just finished reading your very fine opinion in the above. I am going to be happy to join it. I'll take the liberty of sending you a few suggestions for your consideration.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 30, 1972

70-40 - Doe v. Bolton

Dear Harry,

Confirming our telephone conversation of yesterday, I am in basic agreement with your memorandum in this case, subject to modifications which I understand you intend to make.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 25, 1972

Re: No. 70-40 - Mary Doe v. Bolton

Dear Harry:

Please join me in your opinion.

I have several ideas which I will suggest to you when I get them into more concrete form, but with or without any suggestions I might make I wholeheartedly join your opinion.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1972

Dear Bill:

I very much appreciate your permitting me to work along with your draft of some weeks ago in No. 70-40, Doe v. Bolton. It was very helpful. You may or may not agree with what I have come up with, but I suspect we are really not very far apart.

Sincerely,

HAB.

Mr. Justice Douglas

Wm. Doyle
Oct 12

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 25, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-40 - Doe v. Bolton

Here, for your consideration, is a memorandum on the second abortion case. What this would accomplish is the striking of the Georgia statutory requirements as to (1) residence, (2) confirmation by two physicians, (3) advance approval by the hospital abortion committee, and (4) performance of the procedure only in a JCAH accredited hospital. Thus, at this point (pending determination of the appeal in the Fifth Circuit) the District Court has stricken certain provisions of the Georgia statute and we would strike additional ones.

What essentially remains is that an abortion may be performed only if the attending physician deems it necessary "based upon his best clinical judgment," if his judgment is reduced to writing, and if the abortion is performed in a hospital licensed by the State through its Board of Health. This, I should point out, does not mean that it may be performed in a facility that is not a hospital. Some of you may wish to take that step, too.

I might say that this was not the easiest conclusion for me to reach. I have worked closely with supervisory hospital committees set up by the medical profession itself, and I have seen them operate over extensive periods. I can state with complete conviction that they serve a high purpose in maintaining standards and in keeping the overzealous surgeon's knife sheathed. There is a lot of unnecessary surgery

done in this country, and intraprofessional restraints of this kind have accomplished much that is unnoticed and certainly is unappreciated by people generally.

I have also seen abortion mills in operation and the general misery they have caused despite their being run by otherwise "competent" technicians.

I should observe that, according to information contained in some of the briefs, knocking out the Texas statute in Roe v. Wade will invalidate the abortion laws in a majority of our States. Most States focus only on the preservation of the life of the mother. Vuitch, of course, is on the books, and I had assumed that the Conference, at this point, has no intention to overrule it. It is because of Vuitch's vagueness emphasis and a hope, perhaps forlorn, that we might have a unanimous court in the Texas case, that I took the vagueness route.

Sincerely,

H. A. B.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–40

Mary Doe et al., Appellants, *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al. | On Appeal from the United States District Court for the Northern District of Georgia.

[May —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

In this appeal the Georgia criminal abortion statutes are under constitutional attack. The statutes, §§ 26–1201 to 26–1203 of the State's Criminal Code, formulated by Georgia Laws 1968, 1249, 1277, are set forth in the Appendix.[1] They have not been tested constitutionally in the Georgia courts.

Section 26–1201 defines criminal abortion. Section 26–1202, however, removes from that definition abortions "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because"

"(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health," or

"(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect," or

"(3) The pregnancy resulted from forcible or statutory rape."

[1] The italicized portions of the statutes in the Appendix are those held unconstitutional by the District Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 26, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-40 - Doe v. Bolton

It occurs to me that it might be well, at the very end of the memorandum, on page 21, after I specify what is stricken, to specify what remains. I have in mind something about as follows:

> "What remains in the Georgia statute, and what we uphold as constitutional today, are the provisions (a) that an abortion is a crime except an abortion performed in a licensed hospital by a licensed physician 'based upon his best clinical judgment that an abortion is necessary'; (b) that the physician reduce his judgment to writing; (c) that the writing be timely filed for confidential record-keeping with the hospital and with the Director of the State Department of Public Health; and (d) that the hospital may refuse an abortion patient and a physician, a hospital staff member, or a hospital employee may refuse, on moral or religious grounds, to participate in the abortion procedure."

This would appear just before the final sentence of the memorandum.

Sincerely,

HAB.