The March for Life, the President, and Executive Branch Developments

The forty-sixth annual March for Life, with hundreds of thousands of participants, took place in Washington, DC, on January 18. During their presidencies, Ronald Reagan, George H. W. Bush, and George W. Bush each spoke to the marchers via telephone or radio hookup from the Oval Office. However, Mike Pence became the first Vice President to address the march in person in 2017. In 2018, President Donald Trump spoke from the Rose Garden. His message was broadcast live to those gathered on the Mall via the jumbotrons.

This year the Vice President was there once again in person to address the marchers, and the President spoke to those gathered by video. The Vice President echoed his theme from two years ago that "life is winning in America," noting in particular ongoing efforts to defund Planned Parenthood (more on that below).[1] The President emphasized that the "right to life" is "the first right in our Declaration of Independence."[2] He pledged to veto any law infringing human life.

In fact, after the Democratic Party took control of the House of Representatives as a result of the November elections, one of the first bills they introduced and passed was H.R. 21, which would have reversed the President's policy (Protecting Life in Global Health Assistance) requiring international nongovernmental organizations (NGOs) that receive global health assistance funds from the United States

1. Emily Ward, "Vice President Mike Pence: 'Life Is Winning in America,'" CNS News, blog, January 18, 2019, https://www.cnsnews.com/.

2. Katharine Jackson, "Trump Tells Anti-abortion Marchers He Will Support Them," Reuters, January 18, 2019, https://www.reuters.com/.

to refrain from performing or promoting abortion. This prompted the President's remarks noted above.[3]

Trump's administration continued, and expanded, the ban on the use of US funds to advance abortion abroad. On March 26, Secretary of State Mike Pompeo reported that two years into the Trump administration, "the vast majority of our implementing partners have agreed to comply with" the President's policy. Now it was time to close any remaining loopholes: "We will refuse to provide assistance to foreign NGOs that give financial support to other foreign groups in the global abortion industry."[4] Pompeo also said the administration would strictly enforce a 1981 rule (the Siljander amendment) prohibiting the use of US funds to lobby for abortion. Thus, in response to a December letter from nine US senators,[5] funds were banned from going to the Inter-American Commission on Human Rights, which is part of the Organization of American States, because of its lobbying for legalization of abortion in Latin America. "The OAS," Pompeo stated, "should be focused on addressing crises in Cuba, Nicaragua, and in Venezuela, not on advocating the pro-abortion cause."[6]

Following upon Pence's remarks at the March for Life about defunding Planned Parenthood, the US Department of Health and Human Services issued a final rule concerning Title X of the Public Health Service Act.[7] The new rule reverses an Obama-era interpretation of Title X. It requires rigorous physical and financial separation of family planning and abortion activities in Title X–funded projects, and it prohibits referral for abortion in any Title X program. (It returns to the interpretation and practice begun under the administration of Reagan.) The rule requires Planned Parenthood (as well as other abortion providers) to disentangle its sixty million dollars of Title X funding from its abortion business.

The Supreme Court and Other Judicial Matters

Ruth Bader Ginsburg returned to the Supreme Court on February 19. She had been away from the Court since December 21 when she had cancer surgery.[8] Given

3. The bill has no chance of passing the Senate.

4. Michael R. Pompeo, remarks to the press, March 26, 2019, https://www.state.gov/secretary/remarks/2019/03/290669.htm.

5. James Lankford et al., letter to Secretary of State Mike Pompeo, December 21, 2018, available at https://www.lankford.senate.gov/news/press-releases/senator-lankford-leads-letter-to-secretary-pompeo. Lankford's cosigners were Senators Thom Tillis (R-NC), Mike Enzi (R-WY), Mike Lee (R-UT), James Inhofe (R-OK), John Kennedy (R-LA), Roy Blunt (R-MO), Ted Cruz (R-TX), and Joni Ernst (R-IA).

6. Pompeo, remarks to the press.

7. US Department of Health and Human Services, "Statutes and Regulations: Title X Notice of Final Rule," accessed April 25, 2019, https://www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/statutes-and-regulations/index.html.

8. Lawrence Hurley, "Justice Ginsburg Keeps Busy as U.S. High Court's Writer-in-Chief," Reuters, March 4, 2019, https://www.reuters.com/.

her position as a staunch liberal and abortion-rights supporter, her absence had triggered much speculation about whether she would return. Of course, if she had not, Trump would have been able to nominate her replacement. Given that the number of Republican senators increased following the elections in November, it seems likely his nominee would be confirmed.

That speculation was influenced, of course, by the furor over the nomination and confirmation of Brett Kavanaugh to replace Anthony Kennedy, as detailed in my previous column. One of the most outspoken defenders of Kavanaugh, Senator Lindsey Graham (R-SC), has now become the chair of the Senate Judiciary Committee.

Fierce Kavanaugh critics and Judiciary Committee members Kamala Harris (D-CA) and Mazie Hirono (D-HI) have attacked subsequent nominees to the federal judiciary's lower courts for belonging to the Knights of Columbus, which the senators suggested is an extremist organization.[9] The person widely considered to be on the short list for the next vacancy on the Court, Amy Comey Barrett, was subjected to hostile questions by Diane Feinstein (D-CA) and others because of her Catholic faith (see my prior columns). In the *Washington Post*, Paul McNulty and John Sparks chronicled the growing hostility among Democratic senators to nominees who have religious faith. As they noted, "An insightful *Harvard Law Review* note on Article VI in 2007 concludes: 'The drafters and proponents of the No Religious Test Clause would be astonished to learn that members of the Senate Judiciary Committee have questioned judicial nominees under oath about their religious beliefs and the extent of those beliefs. . . . Requiring a nominee under oath to profess a religious belief runs afoul of the [Constitution].'"[10] Article VI of the Constitution states, "No religious test shall ever be required as a qualification to any office or public trust under the United States."

As noted in my prior columns, the real underlying issue is whether the nominee will take an "activist" or an "originalist" approach as a judge. The activist takes the constitutional text as a "living" thing that the justice helps bring to life through his or her understanding of the needs of contemporary society; the originalist tries his or her best to understand and apply the text as the framers intended. Democrats have advanced their agenda, for example, abortion, through an activist interpretation, and they fear originalist judges will reverse it. Of course, vacancies on the Supreme Court are to be filled through the nomination and confirmation process. Since the current president, Trump, is a Republican and since he has vowed to nominate only originalists, the Democrats are doing everything possible to prevent the Court from gaining a solid "conservative" (originalist) majority. They are even talking of expanding the number of justices on the Court.[11] This has been tried in the past, perhaps

9. Michael Warren Davis, "Senior Democrats Attack the Knights of Columbus: Is a Culture War Brewing?," *Catholic Herald*, January 11, 2019, https://catholicherald.co.uk/.

10. Paul J. McNulty and John A. Sparks, "Senators Should Stop Asking about Judicial Nominees' Religious Beliefs," *Washington Post*, March 4, 2019, https://www.washingtonpost.com/.

11. Editorial Board, "The Black Robe New Deal," *Wall Street Journal*, March 11, 2019, https://www.wsj.com/.

most notably by President Franklin Roosevelt. The Constitution does not specify the number of justices, and there have been different numbers over the years, but it is hard to believe that the Democrats would be proposing this if they did not feel *Roe v. Wade* were at risk of being overturned.

One of the justices whom the Democrats feared would "swing" the Court "to the right" is Chief Justice John Roberts. He said famously in his confirmation hearings that he would decide cases as an umpire calls "balls and strikes," that is, as he sees them, not as he wishes them to be. Ironically, Roberts, according to some observers, has stepped into the famous "moderate" role of Kennedy.[12] (In reality, it is inaccurate to refer to Kennedy as a "moderate." He is the inventor of the infamous "sweet mystery of life" test, so named by Antonin Scalia. Under this highly activist test, the Court has found a right to same-sex marriage and to abortion in the guarantee of the Fourteenth Amendment that "no state shall … deprive any person of life, liberty, or property, without due process of law.") Roberts, along with—to the surprise of many conservatives as well as liberals—Kavanaugh, has disappointed social conservatives on a couple of cases that concern abortion, but they arguably did so for procedural reasons[13] even though the Court's three "solid conservatives" (Samuel Alito, Neil Gorsuch, and Clarence Thomas) wanted the cases argued before the Court.[14]

In another case that was denied review for procedural reasons, Kavanaugh issued a strong statement in favor of religious liberty: "As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the

12. See, generally, Jimmy Hoover, "Chief Justice Roberts Already Wielding Swing Vote," *Law360*, March 4, 2019, https://www.law360.com/.

13. The two cases were *Gee v. Planned Parenthood of Gulf Coast Inc.* and *Anderson v. Planned Parenthood of Kansas and Mid-Missouri*. See, generally, Ken Klukowski, "Brett Kavanaugh and John Roberts Reject Two Cases Involving Planned Parenthood," *Breitbart News*, December 10, 2018, https://www.breitbart.com/.

14. The two cases involved the question of who has "standing" to bring a lawsuit to challenge a state's determination of who is a "qualified" Medicaid provider under federal law. The issue arises because several states have attempted to restrict such funds from going to Planned Parenthood, because those states found Planned Parenthood was engaged in the illegal sale of fetal tissue and organs and was involved in fraudulent billing practices. Since the case involves issues of standing, a somewhat technical procedural issue, the justices who did not vote to review the case may have felt that the issue, which is involved in many other kinds of federal lawsuits, was not "ripe" for decision on these particular facts. However, Justice Thomas, writing for Alito and Gorsuch as well and filing an unusual dissent from a decision not to review a case, excoriated those who did not vote for review, suggesting that was due to the fact that Planned Parenthood was involved and that the other justices wanted to avoid anything that touched "the politically fraught issue" of abortion, even when the constitutionality of abortion was not involved. Thomas felt the issue needed to be resolved since, inter alia, different federal courts had reached different conclusions on the standing issue. For Thomas's dissent, see *Gee v. Planned Parenthood of Gulf Coast Inc.*, 586 U.S. ___ (2018) (Thomas J., dissenting).

Free Exercise Clause and the Equal Protection Clause."[15] The Free Exercise Clause of the First Amendment states that government "shall make no law … prohibiting the free exercise [of religion]." The Equal Protection Clause of the Fourteenth Amendment affirms that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Essentially, Kavanaugh was saying that, while the particular issue in the case was not ripe for consideration, when the question of religious liberty arises in a subsequent case, he will take a robust approach.

That subsequent case may very well be pending for decision before the Court as this column is written. It is referred to as the Bladensburg Cross case.[16] It concerns a cross that was erected in a private memorial park after World War I. The land was subsequently acquired by the state of Maryland. The question is whether the state unconstitutionally "establishes" religion[17] by having a memorial park with a large cross in it.

I will not review in detail the test for "establishment" of religion, except to say that the test, and all versions of it, are notoriously difficult, even impossible, to apply in a way that provides guidance for future conflicts.[18] Further, the test privileges, unlike in other areas, an "offended observer." In other areas, one must have "standing" in order to bring a lawsuit; that is, one must have suffered a concrete and particularized injury. Here the only injury is to one's feelings, not to one's person or property; such "injury" is not sufficient in other cases. Justice Gorsuch raised the issue during oral argument.

It is widely expected the Court will jettison the current test (the Lemon test), but there are widespread doubts that five justices (i.e., a majority) will agree on a new test. (The top contenders to replace Lemon are a "coercion" test and a "historical practice" test.) If a new test is not agreed to by a majority, then the decision will fail to provide guidance for governments and citizens in future conflicts. Nonetheless, if the Court were to reject standing for the "offended observer," no one would be able to sue, which would effectively eliminate these cases. As is usually the case with controversial cases, it is expected the Court will not announce its decision until its term ends in late June. Of course, the Court could issue an opinion that is essentially limited to the facts of this case (e.g., the public park with the cross existed for ninety-three years without anyone raising a legal challenge), which would provide no guidance for future disputes.

Readers may be aware of recent reports that the Republicans "broke Senate norms" concerning the confirmation of lower court judges (i.e., district court judges) and noncabinet-level appointees. What happened was that the Republican

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15. *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation*, 586 U.S. ___ (2019) at 2.

16. *The American Legion v. American Humanist Association*, 410 U.S. ___ (2019).

17. The First Amendment states that government "shall make no law respecting an establishment of religion."

18. The three prongs of the Lemon test are (1) Does the action have a secular purpose? (2) Does it neither inhibit nor advance religion? (3) Does it excessively entangle government with religion?

majority of the Senate interpreted an existing rule to permit a majority to change the requirements (Senate rules) for bringing debate on a nominee to a conclusion (invoke cloture). Before that vote occurred, the Democrats were insisting on thirty hours of debate on the Senate floor for each nominee. This was contrary to Senate practice and part of the Democrats' effort to prevent originalists from being confirmed to the lower courts (and to stop as many nominations for noncabinet posts as possible). The Republicans changed the rule to allow for two hours of debate.[19]

State Developments

Sophisticated readers know that America has one of the most permissive abortion regimes in the world. Abortion is available in the United States at any time for any reason. (While *Roe* instituted the trimester framework and recognized state interests in the mother's health and in "fetal life," *Roe* stated that those interests would be overridden when the mother's health was at risk. *Roe*'s companion case, *Doe v. Bolton*, defined *health* as any factor found by the abortionist to be significant.)

Thus, readers might ask, what was the point of passing a law recently in New York to permit abortion until birth? The point is to prepare for the day when a "conservative" (i.e., originalist) Supreme Court reverses *Roe* and *Doe*. On that day, it will be state law that governs. That is why they passed the law in New York.

It was grotesquely ironical that Governor Andrew Cuomo ordered the 9/11 Memorial to light up in "celebration" of this great victory for "women's rights." The rail surrounding the memorial pool lists the names of those who died in the attacks of 9/11. Several times a woman's name is given … "and her unborn child." In any context except abortion, everyone realizes (and deplores) that the death of the unborn is the death of an innocent human being.

The law, passed on the forty-sixth anniversary of *Roe*, was condemned by, among others, Archbishop Joseph Naumann, chair of the United States Conference of Catholic Bishops' pro-life committee.[20] The furor over the New York bill, and a similar one in Virginia, caused a rise in pro-life sentiment among Americans.[21]

Other Developments: Human Rights and Abortion

In November, the UN Human Rights Committee published Comment 36 to guide the understanding and implementation of article 6 of the International Covenant on Civil and Political Rights (ICCPR). In doing so, the HRC attempted to make abortion an accepted part of every nation's law and practice. First, it is important to

19. Thomas Jipping, "Mitch McConnell Didn't Break Filibuster Norms," *National Review*, March 12, 2019, https://www.nationalreview.com/; and Kelsey Snell, "Senate Rewrites Rules to Speed Confirmations for Some Trump Nominees," NPR, April 3, 2019, https://www.npr.org/.

20. Jordan Bloom, "An Archbishop's Warning to Catholic Politicians," *Catholic Herald*, March 7, 2019, https://catholidherald.co.uk/.

21. Alayna Treene, "New Poll Finds 'Dramatic Shift' on Abortion Attitudes," Axios, February 24, 2019, https://www.axios.com/.

note that, other than a regional protocol in Africa, no binding international document mentions abortion. Abortion advocates have, thus, long sought to shoehorn abortion into the provisions of binding international documents. This is precisely what the HRC is trying to do with Comment 36.

The ICCPR is a treaty; that is, it contains legally binding obligations for any nation that ratifies the treaty. Most nations have ratified it, but those that have not are not bound by its terms. The ICCPR is one of the two major treaties designed to implement the provisions of the Universal Declaration of Human Rights, which was issued by the United Nations after World War II.[22] It is worthwhile to pause and consider the preamble to the Declaration in order to understand how far off-line the HRC went with Comment 36.

World War II was the most devastating armed conflict in history, with at least fifty million civilian noncombatants killed. In order to avoid the scourge of a possible World War III, the United Nations issued the Declaration. The preamble of the Declaration states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace. … [But] disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. … [Therefore,] the peoples of the United Nations have in the [Charter of the United Nations] reaffirmed their faith in fundamental human rights [and] in the dignity and worth of the human person."[23] To summarize, the Declaration recognizes the dignity and human rights of the individual human person and believes this is necessary for international peace and justice.

The Declaration was not (and is not) binding international law. Rather, as it states itself, it enunciates a "common standard of achievement" for all nations. As noted above, it required the creation and ratification of treaties, such as the ICCPR, in order to make the "rights" recognized in the Declaration binding upon nations.

ICCPR: Implementing the Declaration

Let us take a close look at article 6 of the ICCPR. Subpart 1 provides, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The subparts that follow deal with the death penalty and with genocide. Subpart 5 states, "Sentence of death … shall not be carried out on pregnant women."[24]

By its plain terms, "every human being has the inherent right to life." That logically includes persons born or unborn. And what is abortion if not the arbitrary "deprivation" of the life of an innocent person at the whim of another? Article 6

22. The other treaty is the International Covenant on Economic, Social and Cultural Rights.

23. UN General Assembly, Declaration of Human Rights, December 10, 1948, preamble.

24. UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, §3(6)(1) and (5).

forbids that, too. Finally, why would subpart 5 prohibit the execution of pregnant women who are guilty of capital crimes? The reason must be because it would violate the right to life of the innocent unborn. How does Comment 36 "interpret" article 6?

Comment 36

Comment 36 acknowledges that "article 6 recognizes and protects the right to life of all human beings. It is the supreme right … whose effective protection is the prerequisite for the enjoyment of all other human rights." It goes on to say the right "should not be interpreted narrowly. … Article 6 guarantees this right for all human beings, without distinction of any kind."[25]

In paragraph 12, the HRC recognizes that "a deprivation of life may … be authorized by domestic law and still be arbitrary." That applies squarely to *Roe* and *Doe*, which authorize an abortion for any reason whatsoever, at any time during pregnancy, as explained above. Paragraph 24 states that "persons with disabilities, including psychosocial and intellectual disabilities, are also entitled to special measures of protection." Paragraph 61 states, "Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life." As readers know, abortion often targets unborn girls as well as the disabled.

Therefore, it is startling to read paragraph 8, which purports to "protect" the "right" to abortion:

> States parties[26] must provide safe, legal and effective access to abortion where the life and health[27] of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering,[28] most notably where the pregnancy is the result of rape or incest or is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions,[29] and they should revise their abortion laws accordingly. For example they should not take measures such as criminalizing pregnancies by unmarried women or apply criminal sanctions against women and girls undergoing abortion or

25. UN Human Rights Committee (HRC), *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, October 30, 2018, §1(2) and (3).

26. *States parties* means those nations who have ratified the treaty.

27. The reader should bear in mind that the definition of *health* is, as discussed in the text, endlessly elastic.

28. Here *suffering* encompasses mental and emotional suffering and is, again, endlessly elastic.

29. This is an absurd statement. It assumes there is a right to abortion. (Thus, it must not be unsafe.) But there is no general, overall human right to abortion. At some international conferences—which are not themselves binding law—it has been stated that "where abortion is not against the law, such abortion should be safe" (UN Population Fund, *Programme of Action*, September 1994, 8.25, https://www.unfpa.org/). That is the opposite of what Comment 36 is asserting.

> against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion.[30] States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers.

Paragraph 8 is stunning, even bizarre, in its assertions about abortion. As noted, there is no international treaty giving a right to abortion, and as we reviewed above, no provision of article 6 of the ICCPR can be fairly interpreted as providing one. It is astounding that in a document about the "fundamental" right to life "of every human being," there is not a single mention of the right to life of the unborn, even of girls, minorities, or persons with disabilities. In so failing, Comment 36 undermines the very premises of its first paragraphs: The right to life is "for all human beings, without distinction of any kind." It is "the supreme right … whose effective protection is the prerequisite for the enjoyment of all other human rights."[31]

But the fact is that no one is obligated to take Comment 36 as definitive or binding. The HRC, whose only authority is provided by the terms of the ICCPR, was not provided with the authority to interpret the meaning of the ICCPR so as to bind states parties. Its comments regarding abortion rights are, at best, "advisory." And, as this review of the texts of article 6 and Comment 36 has demonstrated, Comment 36, in failing to recognize the right to life of the innocent unborn, is hardly worth the paper it is written on.

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30. To the best of my knowledge, this claim is unsupported by social science data. Even if it were the case, however, no binding treaty prohibits such laws. Therefore, it is within the legal power and jurisdiction of individual states to decide how to address this.

31. HRC, *General Comment No. 36*, §1(2) and (3).