

AN EDUCATIONAL UPDATE FROM  
THE SOUTHEAST LAW INSTITUTE™, INC.

**To:** SLI Supporters  
**Date:** February 2017  
**From:** A. Eric Johnston  
**Re:** Additional Analysis of the Prospects for Pro-Life Legislation in 2017

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Our January Educational Update was the Alabama Pro-Life Coalition (“APLC”) form of letter sent to pro-life legislators requesting their cooperation in passing bills that would accomplish as much good as possible and hopefully avoid litigation. We have had several ask for some additional information on the status of our efforts and for more explanation on this approach. This Update provides in part recent developments and in part a summary of a lengthy analysis that was provided to the member groups of APLC late last year.

We have had an excellent response from legislators. We are hopeful there will be a joint effort by all pro-life advocates in the state, along with pro-life legislators, to accomplish our goals. We have, however, received one email from a pro-life advocate who will not participate with APLC. This will likely cause some friction and slow down potentially good legislation. He wishes to promote the “heartbeat” bill which would ban abortion from the time a heartbeat can be detected, i.e., about 10 to 12 weeks from conception. This bill is unconstitutional under present law. It would require a reversal of *Roe v. Wade* and *Planned Parenthood v. Casey* and frankly, when the time is right, we might as well pass a “personhood bill” which protects life from conception.

The catalyst for those errant positions is apparently the idea that Donald Trump’s presidency will immediately open the way to reverse *Roe* and *Casey*. We have been trying for 44 years to do that. President Trump has said that he will appoint pro-life justices and judges. It is premature to assume that President Trump will appoint favorable judges in all positions or how long it will take for there to be a change in composition of the courts. Also, remember, two seats on SCOTUS must be filled by prolife justices to make a difference and there is now only one open. One positive indication of Trump’s commitment is his restoration of the “Mexico City Policy,” which cuts off funds for overseas abortions.

Alabama is not a favorable forum for pro-life court decisions. All laws passed by the Legislature are required by law to go to the federal District Court for the Middle District of Alabama and there federal Judge Myron Thompson has enjoined all of them. We have no good explanation why all of the cases go to him. He is only 69 years old and although he has taken senior status, he remains active.

Any case that comes through the Alabama federal courts will go to the Eleventh Circuit Court of Appeals for review. Presently, 78% of the judges on that court are Democrat appointed, with Barack Obama having appointed 45% of them. The chance of getting a pro-life panel is remote. More importantly, *Roe* and *Casey* are the law of the land and the Eleventh Circuit is required to follow those legal precedents. Reversal of those cases can only be by the Supreme Court of the United States (“SCOTUS”).

SCOTUS is a certiorari court, meaning it has discretionary review. It reviews only a low single digit percentage of cases in a year. It only reviews federal statutes or law, including important questions of constitutional law, such as abortion. However, although abortion is an important constitutional question, if a state statute is struck down by a lower court, there is nothing to review. If Thompson strikes down an Alabama law and it is affirmed by the Eleventh Circuit, SCOTUS does not automatically review it.

There must be inconsistent findings among the eleven circuit courts of appeal. No minimum threshold of disagreement is legally required. SCOTUS will usually wait until several appeals courts have ruled inconsistently with each other. It usually takes years. If that happens, the court may review the case. Because abortion is such a significant issue, it is likely there would be such a review. To try to develop a litigation strategy based on present circumstances is very unpredictable, expensive and time consuming for Alabama, which is not the best jurisdiction for pushing such a case. We do not need another bad precedent upholding *Roe* and *Casey*. Maybe by next year we will have better data for a strategic decision.

The Alabama Legislature has many good pro-life members who wish to push the envelope. However, as you understand from the court issues above, we are not the best state for doing that at the present time. We can, however, pass many good laws that will protect women, decrease the number of abortions, and work as stepping stones along the way to finally removing abortion in God’s good time. There is more to the abortion issue than reversal of *Roe* and *Casey*.

That is why we are asking legislators to support the Assisted Suicide Ban Act, the Healthcare Rights of Conscience Act, and the Alabama Child Placing Agency Inclusion Act. These cover different issues all related to the sanctity of life. We are hopeful that with the cooperation and efforts of pro-life advocates all over the state, including legislators, we will end up passing these laws. The likelihood of these going before the courts is low and they accomplish very needed objectives.