Written by **Steve Byas** on December 14, 2016

Pro-life Law Killed by Oklahoma Supreme Court

In a unanimous 9-0 decision by the Oklahoma Supreme Court, a law enacted by the Oklahoma Legislature in 2014 which would have drastically limited the practice of abortion in the Sooner State was ruled "unconstitutional."

The law would have required an abortion clinic to have a physician present at the clinic who has admitting privileges to a nearby hospital, no more than 30 miles away, in case the woman needed hospitalization after the abortion procedure. Oklahoma's most prolific abortionist, Larry Burns of Norman, challenged the law, arguing that he would have to close down his clinic, the Abortion Surgery Center in Norman, because he had been unable to obtain admitting privileges. Norman is only a few miles from Oklahoma City, where several hospitals are located, and Norman has its own hospital, but apparently none of them wished to be associated with Burns' grisly practice.

Justice Joseph Watt wrote the decision, in which he said, "We … hold the statute unconstitutional because it creates an undue burden on a woman's access to abortion, violating protected rights under our federal Constitution."

Governor Mary Fallin reacted to the decision by saying, "I'm disappointed to see another pro-life law struck down by the courts. Like many bills passed in Oklahoma, this bill was designed to protect the wealth and welfare of the mother along with the life of the unborn, which always should be among our society's priorities."

Sadly, Fallin, a Republican first elected in 2010, ran on a pro-life platform, and even signed the bill overturned by the Oklahoma court, but she herself vetoed another bill this past session which would have essentially outlawed the practice of abortion in Oklahoma. Still, she has a point. It would seem that the Supreme Court of Oklahoma has decided that the right of a woman to have her baby killed in the womb is so important that the health — and even life — of a woman seeking an abortion is secondary. Since any surgical procedure can have complications that may require a woman's hospitalization, it only makes sense to require that a physician who performs any form of surgery, including abortion, be able to admit his patient into a nearby hospital.

Only a few days after the law went into effect, back in 2014, the Oklahoma Supreme Court issued an injunction blocking the law's enforcement until its constitutionality was "fully and finally litigated." An Oklahoma County judge agreed with the Legislature in February that the law was constitutional, ruling,

"this requirement would advance the state's compelling interest in patient care and safety."

One argument made by Justice Watt and his eight fellow judges was that the law violated Oklahoma's constitutional prohibition on a bill covering more than one single subject. State Senator Greg Treat (R-Oklahoma City) was the bill's sponsor, and he complained that the judges had misinterpreted the single-subject rule. In Oklahoma, a bill can only address a "single subject." But, as Senator Treat said, "I think they've used it to do their will and to be almost a quasi-legislative body making policy based off of using that very subjectively. That's a big concern of mine that I'm going to address."

It has become common in recent years for the Oklahoma Supreme Court to cite this provision of the state Constitution in order to thwart laws they do not like. For example, in this case, the entire bill had to do with the subject of abortion, but it covered different aspects of that issue.

But, the principal reason cited by the Supreme Court for overturning the law was that it was "fatally flawed legislation" due to some recent decisions reached by the U.S. Supreme Court. That court had ruled, by 5-3, in June that a 2013 Texas law, similar to that of Oklahoma's, was likewise unconstitutional. The law had reportedly forced the closure of several clinics in the Lone Star State.

Oklahoma's justices said the Oklahoma law would create a constitutionally impermissible hurdle for women seeking abortion. Their reasoning was that if the law forced the closure of the Norman clinic, women would have to travel greater distances, maybe even having to leave the state, in order to obtain an abortion. For several months, the Abortion Surgery Center, located in Norman, where the University of Oklahoma is located, was one of only two facilities in the state that did abortions on a regular basis. Since Governor Fallin vetoed the bill that would have essentially outlawed abortions in Oklahoma, two new facilities have opened for business in Oklahoma City.

Justices were unimpressed by the argument that the law would protect women's health. Justice Watt said, "In fact," the Oklahoma State Medical Association "indicated this bill would have the opposite effect and specifically indicated that it did not protect the patient's best interest."

The Center for Reproductive Rights represented Burns in his litigation against the law. Its president, Nancy Northup, expressed agreement with the action of the Oklahoma High Court, calling it a "victory for Oklahoma women and another rebuke to politicians pushing under-handed laws that attack a woman's constitutionally guaranteed right to safe, legal abortion."

Northup added, "We will continue to stand with Oklahoma women in beating back these relentless political schemes designed to make the right to safe, legal abortion a right that only exists on paper."

When contacted by *The New American*, Tony Lauinger of Oklahomans for Life was disappointed with the ruling, but not surprised. He said the problem was the procedure Oklahoma uses to select its appellate court judges, including those of the Oklahoma Supreme Court. "The best way to insure the values of Oklahomans are represented in our state court system, is to select our Supreme Court justices in partisan elections." Lauinger added that about one-half of the states do it that way presently.

Conservative Oklahomans routinely decry the liberal decisions often handed down by the Oklahoma Supreme Court. While the Oklahoma Legislature is overwhelmingly Republican, and often passes very good pieces of legislation, and the entire executive branch, including the office of governor, is controlled by a Republican, the appellate courts are dominated by Democrats and more liberal Republicans.

Oklahoma's present system of selecting judges by what is called the Judicial Nominating Commission

(JNC) was created in the 1960s, after multiple members of the Supreme Court were removed from office for taking bribes. The judges were elected at that time, so advocates of a new system argued that the solution was to remove their selection from the voters of the state, and even from the legislative branch. In its place was created the JNC, composed of various individuals, most of whom are lawyers. This commission takes applicants for open positions on the Supreme Court, the Court of Civil Appeals, and the Court of Criminal Appeals, and sends three names to the governor for an appointment to a six-year term, whenever one of those three courts has a vacancy.

At the end of the six years, the judge can file for another six-year term, and place himself before the voters in a simple retention ballot. No one "runs" against the judge seeking re-election, but if more voters vote no to his retention, he is removed from office. But in the 50 years since this system was put into place, not one single judge has ever been removed in this manner. In other words, this provision is simply a "scarecrow." This would seem to be an example to other states to not adopt the system used in Oklahoma.

These liberal judges, mostly hand-picked by liberal lawyers, exercise what former Supreme Court Justice Byron "Whizzer" White called "raw, judicial power" to strike down laws they simply do not like. Interestingly, White made this comment in reference to U.S. Supreme Court justices after *Roe v. Wade*, when that 1973 decision "legalized" abortion nationally. White was one of two court members who voted against *Roe*.

Lauinger, who has led the pro-life forces in Oklahoma for almost as long as the JNC has been in effect, has witnessed the appellate courts exercise hostility against pro-life bills. According to Lauinger,

> The Oklahoma Supreme Court has become so hostile to the right to life that, when the abortion industry challenges Oklahoma's pro-life laws, they no longer file suit in federal court, where they would most likely lose, but rather in state court, to give the Oklahoma Supreme Court the opportunity to strike down the laws. A primary reason that the Oklahoma Supreme Court's rulings are so pro-abortion is that the Judicial Nominating Commission, which is responsible for nominating Supreme Court justices, is dominated by the Oklahoma Bar Association, the lawyers' special interest group, which is a member of the pro-abortion American Bar Association.

As noted above, the proponents of the present system argue that we had corruption at the Supreme Court under the old system. Maybe so, but what's the point? Oklahoma's Governor David Hall was indicted less than a week after leaving office in 1975, and eventually convicted of asking for a bribe. The state has had two other governors impeached and removed from office. All three were elected by the people of the state. Should Oklahoma replace popular election of the governor with a Governor Nominating Commission, made up of lawyers to select governors? And, the state has had multiple legislators run afoul of the law, but no one seriously contends that the right of the people to choose their legislators should be abolished.

It is clear that the people of Oklahoma want laws restricting the grisly practice of abortion. They have given control of both the legislative and executive branch to the political party which has included it in its state party platform since the 1980s. And, while it was a state appellate court that ruled against this abortion-restricting law, it should be noted that they argued that they were only following the rulings of the U.S. Supreme Court, going back to *Roe v. Wade* of 1973.

Furthermore, the men who wrote the U.S. Constitution and the states that ratified it in the 1780s never intended for federal judges to control state regulation of such topics as abortion and marriage. If the

principle of federalism were truly respected, the Oklahoma Supreme Court would no longer be able to hide their radical social views by saying they were just following the U.S. Supreme Court —- because the U.S. Supreme Court would have nothing to say on abortion or marriage.