

Abortion pills by mail – not so fast

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A recent Justice Department opinion allowing “abortion pills” by mail has no foundation, a legal commentator says.

The OLC opinion on abortion pills by mail

Ed Whelan, the Antonin Scalia Chairman for Constitutional Studies at the Ethics and Public Policy Center, weighed in on this issue less than two weeks ago. He produced a three-part series, which itself followed up on an opinion he wrote in June of last year. Whelan wrote that last opinion shortly after the Supreme Court issued its landmark *Roe reversal*. (*Dobbs v. Jackson Women’s Health Organization*, Docket No. 19-1392, 597 U.S. ____, 2022.)

On December 23, 2022, Assistant Attorney General Christopher Schroeder, writing for the Office of Legal Council (OLC), delivered this opinion.

In it he writes:

We conclude that section 1461 does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone or misoprostol where the sender lacks the intent that the recipient of the drugs will use them unlawfully. This conclusion is based upon a longstanding judicial construction of the Comstock Act, which Congress ratified and USPS itself accepted. Federal law does not prohibit the use of mifepristone and misoprostol. Indeed, the U.S. Food and Drug Administration (“FDA”) has determined the use of mifepristone in a regimen with misoprostol to be safe and effective for the medical termination of early pregnancy. Moreover, there are manifold ways in which recipients in every state may use these drugs, including to produce an abortion, without violating state law. Therefore, the mere mailing of such drugs to a particular jurisdiction is an insufficient basis for concluding that the sender intends them to be used unlawfully.

The Comstock Act – from contraceptives to abortion pills

The Comstock Act as amended ([18 USC § 1461](#)) forbids mailing *anything* “designed, adapted, or intended for producing abortion, or for any indecent or immoral use.” (By “immoral use” it means contraception.) That *includes* “every ... drug” that one *advertises or describes* in a way to use it to cause abortion. Furthermore, the Comstock Act forbids any “junk mail” or targeted mail:

- Telling someone where to *get* abortion pills, or what can serve for abortion pills, or
- Inducing or inciting someone to use abortion pills.

The penalties for violations start at less than five years for the first offense, and less than ten years for each subsequent offense. Furthermore, [Section 1462](#) extends the same prohibitions to private express companies (FedEx, UPS, Airborne, DHL, *et al.*).

But this opinion plays fast and loose with that law. Assistant AG Schroeder reminds everyone that federal laws don’t forbid abortion pills. These include:

- Mifepristone, formerly called Roussel-UCLAF Lot 486, that actually kills the unborn child, and
- Misoprostol, a prostaglandin analogue that induces labor to expel the now-dead unborn child.

Then he says that mifepristone and misoprostol have uses *other than* as abortion pills. Specifically, an OB-GYN might use mifepristone and misoprostol to treat a miscarriage. Also, a gastroenterologist might use misoprostol to prevent or treat stomach ulcers.

So merely sending the pills in the mail is not enough to prosecute someone under the Comstock Act.

The Biden DOJ decides not to enforce the law

Mr. Whelan said, three days after *Dobbs* came down, that of course *Roe* constrained the enforcement of the Comstock Act. Now that *Roe* is gone, the prohibitions against sending abortion pills become fully enforceable. (The prohibitions against sending junk or targeted mail telling people to use them, and how, where to get them, etc., might fall before the First Amendment. As to contraceptives, those might fall before *Griswold v. Connecticut*, until Justice Thomas has a chance to overrule it. See his concurrence in *Dobbs*, in which he objects to “substantive due process” as a valid consideration of Constitutionality.) Whelan also said that even if the Justice Department declines to prosecute, the next administration could go back and prosecute any violation that happened five years before any change of administration.

The Justice Department has obviously determined not to enforce the Comstock Act. More than that, now they’ve given an opinion that there’s nothing illegal about sending abortion pills through the mail. Evidently as long as the one ordering them declares no intent, the Justice Department *couldn’t* prosecute. In other words: don’t ask, don’t tell.

| Ask me no questions, and I’ll tell you no lies.

Hold the phone!

To arrive at that conclusion, says Whelan, Schroeder misread the case of *Bours v. United States* (7 Cir. 1915). This case involved the law as it stood *before* the Comstock Act. Anthony Comstock propounded his earliest versions of his Acts in 1873. *Bours* applies to that version of the Comstock Act then in force.

The opinion of the Seventh Circuit in *Bours* says in relevant part:

In applying the national statute to an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded. So the word “abortion” in the national statute must be taken in its general medical sense. Its inclusion in the statute governing the use of the mails indicates a national policy of discountenancing abortion as inimical to the national life. Though the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of the national life. Therefore a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position.

So that precedent specifically excludes abortions one might do to save the lives of the mothers. *Other than that, this case still leaves intact the prohibition against mailing anything to cause abortion.*

Further criticism of the abortion pills opinion

In Part 2 of his series, Whelan covered *Bours* again, and three more cases Schroeder cited to hold that a prosecutor must show intent to cause abortion to prosecute someone for shipping abortion pills. Wrong, says Whelan. Some of those opinions merely *speculated*, in *obiter dicta* (“by-the-way sayings”), something to that effect. Any actual holdings in those cases say that a *positive showing of lawful* intent would be an adequate *defense* against a charge under the Comstock Act.

Whelan says more. Apart from any other consideration, these are *not* Supreme Court cases at all, but *Circuit Appeals* cases. Furthermore, the cases on which Schroeder relies, represent a *minority* of circuits.

In his Part 3, Whelan sums up: you *cannot* reasonably infer that Section 1461 offenses are not prosecutable unless the prosecution can show intent. Furthermore, of all the cases Schroeder cited, only *one* – the *Bours* case – even mentions abortion.

Katie Yoder, writing in LifeNews, gives more history. The FDA allowed people to ship abortion pills through the mail in December 2021. They did this in the face of warnings against prescribing such powerful drugs sight-unseen. Shortly before that decision came down, the Charlotte Lozier Institute produced evidence that these “chemical abortions” were bringing women to the emergency room more than six times more often than they ever came before.

Analysis

This abortion pills tangle results from a common misconception of American law. Contrary to popular belief, *American law does not have a Koran-style abrogation principle*. That is to say, one law *does not* automatically repeal all contradictory laws that came before it. Instead, the drafters of a new law must explicitly say, “Such-a-title of the United States Code, in such-a-section, is amended to read ...” They then must give the changes in the law.

Congress, as Whelan pointed out, *did* try once before to change the Comstock Act, in 1978, five years after *Roe*. *And they did not*. In fact, Congress last amended Title 18 USC §§ 1461 and 1462 in 1994. Congress did so *before* the famous Midterms that broke decades of Democratic control of the House of Representatives.

So the only way to make those shippers of abortion pills absolutely safe is to *repeal* those sections of Title 18 *in their entirety*.

Paul Begala, who once served as Counselor to President Bill Clinton, coined this infamous aphorism:

| Stroke of the pen. Law of the land. Kinda cool.

Christopher Schroeder seems to think he has a similar power. But the law doesn't work that way.

Another weapon

Mr. Whelan did not mention one other weapon open to pro-life activists in this regard: the *citizen's complaint*. Any citizen may file a complaint with the Justice Department to force a review of any given matter. This is how Alfred "Freddy" Kassab famously forced the eventually successful prosecution of Captain Jeffrey R. MacDonald, U.S. Army Medical Corps, for the murders of his wife and children in his quarters at Fort Bragg, North Carolina, in February 1970. (In September 17, 2021, Capt. MacDonald withdrew his last bid for release from prison. See also *Fatal Vision*, by Joel McGinnis, which covers that case.)

Of course, the citizen's complaint process offers no guarantees. Not every investigation moves from citizen's complaint to prosecution. But Jesus' parable of the widow who pestered a lazy judge to get justice, should serve as an instructive reminder. (Luke 18: 1-8.)