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## RULE OF LAW

# Whose Life Is It, Anyway?

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In a little-noticed decision last month, the D.C. Circuit ruled that terminally ill, mentally competent patients have a constitutional right to seek potentially life-saving drugs -- whether or not the Food and Drug Administration has given its final approval for sale.

The case is far from finished, however: On remand, the FDA will try to show that its prohibition is, in the jargon of such things, "narrowly tailored" to serve a "compelling governmental interest." Still, the court's reasoning in the case -- *Abigail Alliance for Better Access to Development Drugs v. Eschenbach* -- is rich with implications for medical freedom and constitutional jurisprudence.

For most of our history, as Judge Judith Rogers explained (joined by Chief Judge Douglas Ginsburg), individuals were free to take whatever medication they wanted without a doctor's prescription. It was only in 1951 that Congress created a category of *prescription* drugs; and, in 1962, it began requiring drug companies to conduct extensive tests to ensure the efficacy of their products. That led to long delays in the release of potentially lifesaving drugs, and to the deaths of countless patients who would gladly have borne the unknown risks for a chance at life.

The Abigail Alliance (named after Abigail Burroughs, a 21-year-old college student who died of cancer) petitioned the FDA on behalf of its terminally ill members, seeking access to drugs that had cleared Phase I of the lengthy testing process. (That's the point at which a new drug is deemed sufficiently safe for more extensive human testing.)

When that effort failed, the alliance sued to stop the FDA from barring the sale of such drugs to its members. (It was joined in its action by the conservative public interest law firm, the **Washington Legal Foundation**.) The district court dismissed the suit, saying that under the Fifth Amendment -- which prohibits government from depriving people of life, liberty or property without due process of law -- it could find no such right as the alliance was claiming.

Not so, said the appeals court. It found the right -- and found it "in" the Constitution. Given the state of constitutional jurisprudence today, that was no mean feat. Here's why.

At the time the Constitution was sent to the states for ratification, several states balked, insisting that a bill of rights be added. But no such bill could list *all* of our rights. The failure to do so, however, raised the implication that only the enumerated rights were meant to be protected.

So the Framers gave us the Ninth Amendment, which states that we have unenumerated rights, too

-- effectively giving the courts authority to fill in the blanks. But that creative power is hardly unique to the Ninth Amendment: Even enumerated rights -- such as speech, property, due process -- require judicial interpretation.

When they authorized judicial review, the Framers assumed that judges would have a grasp of the Constitution's natural rights and common law foundations. Unfortunately, today's judges are far removed from those foundations. The result is confusion, and divisive controversies.

Liberal judges, often hostile toward our founding principles, invent rights by drawing on their own conceptions of evolving social values. Reacting to the perceived judicial activism, conservative judges go overboard the other way, recognizing only those rights expressly "in" the Constitution -- thus ignoring the presumption of individual liberty at the very foundation of the document. Neither side gets it right. The Constitution no more authorizes judges to invent rights from whole cloth than it allows them to ignore rights plainly meant to be protected.

The D.C. circuit got it right in *Abigail*. Recognizing, first, that the Due Process Clause has long protected substantive rights, the court noted two distinct approaches in the Supreme Court's rights jurisprudence. One, based in "personal dignity and autonomy," has led the court (sometimes wrongly) to prohibit state intrusion in "the bedroom, the clinic, and the womb" -- e.g., abortion. The other approach, more restrictive, finds a right only if it is "deeply rooted in the Nation's history and tradition."

Carefully following this more restrictive approach (to avoid the charge of activism), the court noted the precise description of the right the Abigail Alliance claimed, and then traced the history in America of the more generally described rights from which it is derived -- the right to potentially life-saving medication, the right to control one's body, the right to self-preservation and the right to life.

Finding those rights in the centuries-old common law, the court concluded that, in contrast to those ancient principles, it is the FDA's regulation of access that is new. Accordingly, if there is a fundamental right to *refuse* life-sustaining treatment, as the Supreme Court had found in 1990, there is, equally, a right to *seek* life-sustaining medication free from government interference.

That's hardly pulling a right "out of thin air," as the Washington Post charged editorially in its defense of FDA bureaucrats. It is not the freewheeling stuff of *Roe v. Wade*, but rather the careful mining of Locke, Blackstone and Madison.

To the layman, such judicial hermeneutics must seem tedious, for a simple question should settle the matter: *Whose life is it, anyway?* That it doesn't is a mark of how far we've strayed from our founding principles. Statutory schemes today have replaced common law, policy has replaced principle -- and transient majorities tell us what our rights are.

Well, that may be changing. Last year the Canadian Supreme Court struck down two Quebec laws that banned private payment for services covered under its Medicare program (if you live long enough to receive them), as violating constitutional guarantees to life, liberty and security of person. In this country, with often well-to-do baby-boomers aging, access to health care will be a growing issue. Costs aside, demands simply for access -- and for medical freedom -- may yet breathe life into an ailing Constitution.