

Judge Protects White House Documents for Plan B Lawsuit

February 15, 2007 Thursday

The judge overseeing the **Center for Reproductive Rights'** (CRR) lawsuit against the FDA granted the center's request for discovery of additional agency documents, but put a stay on documents the group sought from the White House.

Chief Judge Edward Korman affirmed Judge Viktor Pohorelsky's ruling in the CRR's lawsuit over the FDA's approval of the contraceptive Plan B. However, Korman will review all of the evidence before re-considering the group's request for the White House documents, the CRR said Feb. 13.

Last fall, Pohorelsky of the U.S. District Court for the Eastern District of New York allowed the CRR to subpoena White House documents for its lawsuit (DID, Nov. 9, 2006). The CRR wanted all communications between the White House's Domestic Policy staff and FDA employees regarding Plan B from April 2003 to September 2006.

The White House resisted the subpoena, saying an earlier federally issued stay on all discoveries in the case meant the subpoena was on hold, the Department of Justice said (DID, Dec. 4, 2006). The CRR said it wants the documents because it suspects the White House interfered with the FDA's decisionmaking regarding Plan B.

Barr Pharmaceuticals, maker of Plan B, unsuccessfully tried to get FDA approval for OTC use of the drug in 2003. After several delays, the FDA issued a framework for the drug's OTC approval in July 2006. One of the major changes in the framework was raising the age for OTC purchases of the drug from 16 to 18 (DID, Aug. 25). Barr followed the framework and submitted a revised application, and the FDA announced approval of OTC Plan B last August.

Along with obtaining documents from the FDA, the CRR can also depose Sandra Kweder, deputy director of CDER's Office of New Drugs, Korman said.

In his decision, Pohorelsky accused the FDA of a "strong showing of bad faith" in handling Barr's application. -- Emily Ethridge



The Associated Press State & Local Wire
CENTERPIECE: Doctor says women's rights still at risk

By TIMBERLY ROSS, Associated Press Writer
January 28, 2007 Sunday 11:04 PM GMT

DATELINE: BELLEVUE Neb.

Abortion doctor LeRoy Carhart is entrenched in what he calls a "never-ending battle" one that anti-abortion advocates have strongly urged him to surrender.

For now, his battleground is the U.S. Supreme Court. A victory there would overturn a 2003 congressional ban on what abortion opponents call partial-birth abortion and add to the Nebraska doctor's success in his campaign for women's reproductive rights.

"The only way women come close to achieving equality is if they can control their fertility," said the 65-year-old Carhart, seated in his suburban Omaha clinic. "Abortion rights for men have been available since the beginning of time. When they're unhappy with a pregnancy, they walk away; it doesn't matter whether it's the day after conception or when the child is 10 years old."

The Supreme Court heard arguments in Carhart's case in November and is expected to rule by early summer.

Carhart and the staff at his Bellevue clinic perform abortions as late as the 18th week of pregnancy.

Those procedures are prohibited by the federal Partial-Birth Abortion Ban Act a law Carhart says Congress had no authority to make.

The Bush administration is defending the law as drawing a bright line between abortion and infanticide. The method involves partially extracting an intact fetus from the uterus, then cutting or crushing its skull.

Doctors most often refer to the procedure as a dilation and extraction or an intact dilation and evacuation abortion.

The procedure appears to take place most often in the middle third of pregnancy. There are a few thousand such abortions, according to rough estimates, out of more than 1.25 million abortions in the United States annually. Ninety percent of all abortions occur in the first 12 weeks of pregnancy, and are not at issue.

Six federal courts have already struck down the partial-birth abortion law as an impermissible restriction on a woman's constitutional right to an abortion that the Supreme Court established in its landmark Roe v. Wade ruling in 1973.

"This ban is so broadly and vaguely written, it will criminalize abortion much earlier in pregnancy than people think," said Eve Gartner, an attorney for the Planned Parenthood Federation of America, which has also argued against the ban before the Supreme Court. "It is part of a bigger agenda to chip away at the underpinnings of Roe and ultimately to criminalize all abortions."

In 2000, the high court ruled for Carhart in striking down a similar Nebraska law because it lacked an exception to preserve a woman's health and encompassed a more common abortion method.

The cases have put him in the national spotlight and provoked hostility from some abortion opponents.

The clinic, his house and those of his employees have been picketed. So has the equestrian center he owns and his daughter, Janine, runs.

In 1991, Carhart's rural home burned in a fire he believes was started by an abortion foe. The family dog and cat were killed, as were 17 horses trapped in a barn.

Those sacrifices are Carhart's battle scars.

"It's worth it to me," he said. "You have to fight for what you believe in."

Julie Schmit-Albin, executive director of anti-abortion group Nebraska Right to Life, has followed Carhart's legal battles for partial-birth abortion. She said he is a "poster boy" for a procedure her group believes is tantamount to infanticide.

"This man has a vested interest in protecting his industry," she said. "He wants to be able to kill unborn babies in any manner he deems necessary to bring him his profits."

Schmit-Albin was present for Carhart's oral arguments before the Supreme Court in 2000 and before federal courts on the current case. His testimony about the abortion procedures he performs is candid, she said.

"He matter-of-factly just describes what he does," she said. "It's really very grisly to listen to."

Carhart said he's able to champion abortion rights because he doesn't have to rely on his medical practice to pay the bills. The military pension he gets from his 21 years in the Air Force provides enough income to support his family.

The **Center for Reproductive Rights**, a New York-based advocacy group, covers many of his legal costs.

"We have to keep talking about abortion until it doesn't remain a four-letter word," Carhart said.

But in his view, too few supporters are talking about it.

If women are "not willing to stand up for abortion rights in public, then I feel we're eventually doomed to lose Roe v. Wade or the right to abortion," he said.

Although voters in Colorado, Massachusetts, Oregon and South Dakota have rejected total restrictions on the procedure, they are not necessarily speaking out in favor of abortion rights.

"What people say when you talk to them on the streets and you're looking at them face to face and they're on camera may well differ than what they say when they go in the voting booth and close the curtains," Carhart said. "They can vote what they believe and not worry about what their neighbor's thinking."

Until those beliefs are out in the open and represented in Congress, Carhart sees the potential for Roe v. Wade to be overturned and a federal ban enacted restricting all abortions.

That's why he feels compelled to keep fighting.

"No matter what happens, whether you win or lose this round," he said, "there'll be another round tomorrow."

On the Net:

U.S. Supreme Court: <http://www.supremecourtus.gov/>

Center for Reproductive Rights: <http://www.crlp.org/>

Planned Parenthood Federation of America: <http://www.plannedparenthood.org/>

Nebraska Right to Life: <http://nebraskartl.org/>

The Associated Press State & Local Wire

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Abortion doctor LeRoy Carhart has publicly advocated for **abortion** rights for years, and has been a target of animosity from those who oppose **abortion**. Here are some of the notable events involving Carhart:

April 1996: State attorney general announces an investigation into the practices used at Carhart's clinic.

June 1997: Carhart files a federal lawsuit to prevent Nebraska from enforcing a state ban on a procedure called "partial-birth **abortion**." An injunction was ordered, preventing the law from taking effect. The lawsuit ends up before the U.S. Supreme Court, which ruled for Carhart.

May 2000: **Abortion** opponents try to force Carhart out of his clinic by purchasing the property. Carhart filed a lawsuit, and a judge ruled Carhart should have been offered the property by the original owner. Carhart later purchased the property.

September 2000: The University of Nebraska dismisses Carhart from his volunteer faculty position. Carhart filed a lawsuit, and a judge ruled that the dismissal came from criticism of the university over its use of aborted fetuses in research. In August 2001, the university settled with Carhart and reinstated him.

October 2001: Carhart asks President George W. Bush to help battle domestic terrorism directed against **abortion** providers.

January 2002: The FBI investigates more than 20 letters containing white powder that were mailed to **abortion** clinics and family planning agencies nationwide. The return address on the letters was for Carhart's Bellevue clinic.

November 2003: Carhart files a lawsuit challenging the federal Partial-Birth **Abortion** Ban Act. The case ends up before the Supreme Court in November 2006. A decision has not been issued

September 2005: **Abortion** protesters begin picketing horse shows at Phoenix Equestrian Center, a stable owned by Carhart and run by his daughter.

The challenger

Priscilla Smith will ask the US Supreme Court tomorrow to lift the ban on partial-birth abortions

By Joseph P. Kahn, Globe Staff | November 7, 2006

NEW YORK -- Tomorrow morning , Priscilla Smith will dress in all-black, walk into the US Supreme Court in Washington, D.C., and try to persuade the nine justices, also clad in black, that Congress has no business reopening a legal door that the high court already closed.

Smith will have 30 minutes to make her case.

That could prove tough under any circumstances. Yet on it hinges what many see as the future of legalized abortion in America as the court prepares to hear its first pair of abortion-rights cases since Samuel Alito replaced Sandra Day O'Connor on the bench in January . O'Connor, now retired, cast the deciding vote six years ago when a similar challenge to restrictions on abortion, also argued by Smith, was upheld by a 5-to-4 margin.

The case being heard tomorrow, *Gonzales v. Carhart* , is a constitutional test of the Partial-Birth Abortion Ban Act of 2003, passed by Congress in response to the 2000 Supreme Court decision. The petitioner is US Attorney General Alberto Gonzales ; respondent Dr. LeRoy Carhart is a Nebraska physician and abortion provider. (*Gonzales v. Planned Parenthood*, a separate challenge to the 2003 act, will also be argued.)

Several key questions loom, one being whether any limits placed on access to abortion, federal or state, must take into account health risks to the woman. Six years ago, the court held that a Nebraska ban on so-called "partial-birth abortions" failed to include such protections -- and could disallow procedures commonly used in second-trimester abortions. The term "partial-birth abortion" is itself controversial. Abortion-rights activists call it misleading and inflammatory, while US Solicitor General Paul Clement, who will argue the government's side, has likened the procedure to infanticide.

Uppermost in Smith's mind will be a more fundamental issue than women's health or fetal viability: namely, whether this court is prepared to break with precedent as it tilts rightward -- and toward a possible rehearing of *Roe v. Wade*, the 1973 decision that found the US Constitution protects a woman's right to abortion.

"Up until now, I've felt confident because I have a Supreme Court precedent saying I should win," Smith says during an interview at the Center for Reproductive Rights in lower Manhattan, where she serves as director of the center's domestic legal program. "But the court's composition has changed. So, we'll see."

She concedes the odds are stacked against her. "Still, I have faith in the correctness of our position. And in the open-mindedness of the court, which is not writing on a clean slate, after all."

Is she nervous, with so much at stake?

"Some say you can never win a case on oral argument, you can only lose one," Smith ventures after a long pause. "The Supreme Court is a little different. The room itself is daunting, especially your first time there. The justices sit way up high. There are all those people in the gallery watching -- including your dad, who doesn't want those 'mean justices' hurting you."

Her first time before the high court, she was admittedly on edge. "I had doubts like, should they be letting me do this?" she recalls. "It wasn't my best day. But at some point if you don't think, 'Oh my God, I'm going to lose this case,' then you're really not prepared."

If anyone is able to sway this court with the courage of her convictions, says CRR president Nancy Northup, it is Smith, who once argued a landmark case involving drug-abusing pregnant women while she, Smith, was visibly pregnant. Colleagues call her smart, prepared, and unflappable. She'll need to be all of those tomorrow. "Cilla has been on the front lines of this battle for more than a decade," says Northup. "She really understands not just the legal issues but the real-life issues, too."

CRR legislative counsel Katherine Grainger concurs. As political pressure builds around antiabortion measures, Grainger says, most conspicuously in states like South Dakota, which votes on a tough antiabortion statute today, legal pressures mount, too. "If anybody can handle it, Cilla can," says Grainger.

Win or lose, Smith, 43, will draw upon a strong grounding in social justice issues.

Raised in Brookline, where her father was Episcopal chaplain at Boston University, Smith grew up in a household filled with college students and earnest talk about civil rights and the Vietnam War. In 1978, her father left BU to become chaplain at the elite Groton School. It was "a huge culture shock for me," says Smith, who spent her last two high school years at Groton. "I don't think there was even one Republican at Brookline High."

Smith got to Yale just as the feminist and gay-rights movements were gaining traction. She ran the campus women's center in New Haven, interned in local prisons, and engaged in economic-justice issues even more deeply. Moving to Boston after graduation, she worked for the Massachusetts Department of Welfare as a federal relations analyst.

"I was not one of these people -- and I'm embarrassed to admit this now -- who went to law school to *do this work*," says Smith, seated at an office table overflowing with legal briefs. "But I was hoping to use the law for social change, somehow."

With a Yale law degree in hand, Smith moved to San Francisco in 1991 and got a job with a large corporate law firm. It was not an entirely happy fit, she admits today. The pro bono work

was satisfying, yet much of what the firm did was "sometimes distasteful, and even a little morally bankrupt," as Smith puts it.

By this time, Smith, who came out as a lesbian in the mid-'80s, had entered into a relationship with a woman who would become her life partner. The couple now have two young children. She challenges any notion that her lifestyle fails the "family values" test. "I have two kids, a Volvo, and a Brooklyn brownstone," she says. "I really do lead a fairly conventional life."

In 1993, a CRR staff opening brought her to New York. Since then, the bulk of her work has been researching case law, writing appellate briefs, and, in many instances, serving as lead counsel in court cases involving a panoply of reproductive rights issues, from abortion to contraception to sex education. In 2000, she was co-counsel in *Stenberg v. Carhart*, the Supreme Court case whose precedent she hopes to rely upon tomorrow.

At least two high-profile cases argued by Smith have featured defendants evoking little sympathy from the public at large. In *Ferguson v. City of Charleston*, 10 pregnant women were arrested after testing positive for cocaine in the public hospital where they sought prenatal care. Smith challenged their arrests on grounds that involuntary drug-testing violated their Fourth Amendment rights against illegal search and seizure. The Supreme Court ultimately concurred. In another controversial case, argued by Smith before the Florida Supreme Court, a pregnant woman faced murder charges after she shot herself in the stomach, killing her unborn child. Again, Smith's side prevailed. But as she knows all too well from the "partial-birth abortion" debate, public sentiment is not always on her side. Even her mother expressed some discomfort with defending the procedure, Smith says.

Smith's father, now retired, says his own views shifted when a family friend nearly died of a botched illegal abortion in the pre-Roe era. He later joined a clergy-run program counseling women on problem pregnancies. "So-called partial-birth abortion is a terrible decision for women and doctors to make," he says. "But I trust them to make these decisions for themselves, not lawmakers or courts."

Her main task, according to Smith, will be explaining to the justices what the federal ban really means.

Why the all-black ensemble? "Because I don't want them thinking about anything but the case," Smith says. "It's not about me."

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Justices Hear Arguments on Late-Term Abortion



Manuel Balce Ceneta/Associated Press

Demonstrators rallied outside the Supreme Court Wednesday as justices considered challenges to the Partial-Birth Abortion Ban Act of 2003.

By [LINDA GREENHOUSE](#)

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WASHINGTON, Nov. 8 — There were moments on Wednesday, during Supreme Court arguments on a federal law that bans a disputed method of [abortion](#), that the proceedings seemed more like a medical school seminar than an appellate argument.

Such familiar constitutional concepts as the right to privacy were not mentioned during the two hours, but the methods doctors use to dilate a pregnant woman's cervix were discussed in detail, repeatedly.

What exactly was the procedure that the law, the Partial-Birth Abortion Ban Act of 2003, sought to prohibit, the justices wanted to know. When, if ever, was the procedure necessary? What would be the impact of banning it? What alternatives were available to women seeking second-trimester abortions and to doctors performing them?



Among the justices most interested in the medical details was the one whom both sides consider most likely to be in a position to control the outcome, [Anthony M. Kennedy](#).

Justice Kennedy's questioning suggested that he had not made up his mind, despite his strongly worded dissenting opinion when the court struck down Nebraska's version of the federal law six years ago, and

despite his obvious distaste for the procedure at issue. Instead, his questions suggested that he remained open to persuasion that the law placed doctors in legal jeopardy and imposed an unconstitutional burden on their patients' right to terminate their pregnancies.

One example was his response to the assertion by Solicitor General Paul D. Clement that it was never necessary for doctors to use the banned procedure because a more common procedure, Chris Greenberg/Bloomberg News one not covered by the statute, "has been well tested and Jen Brummett of Kansas City, Mo., works every single time as a way to terminate the outside the Supreme Court. pregnancy."

Justice Kennedy responded: "Well, but there is a risk if the uterine wall is compromised by cancer or some forms of pre-eclampsia and it's very thin. There's a risk of being punctured."

His comment reflected arguments that the doctors challenging the law have made. They say that "partial-birth abortion" — known medically as both "intact dilation and evacuation" and "D and X," for dilation and extraction — is often safer because the removal of an intact fetus avoids injury to the uterus. The more common method of second-trimester abortion, in which the fetus is dismembered, can leave behind bone fragments.

Whether Justice Kennedy was eventually persuaded remained unclear. In some respects, the arguments were as interesting for what did not occur as for what did.

For example, no member of the court appeared particularly interested in the plaintiffs' effort to depict the federal law as a violation of the separation of powers and a threat to the "independence of the judiciary," as Priscilla Smith, a lawyer for the Center for Reproductive Rights, described it. Ms. Smith's point was that, since the court held in the Nebraska decision that a ban on the procedure must include a health exception, Congress should not be permitted to defy the court by failing to provide such an exception.

Ms. Smith represented doctors who successfully challenged the law in Federal District Court in Nebraska and before the United States Court of Appeals for the Eighth Circuit, in St. Louis. That case is *Gonzales v. Carhart*, No. 05-380. Eve C. Gartner, a senior staff attorney at [Planned Parenthood](#), represented the clinics that successfully challenged the law in the federal courts in California. That case is *Gonzales v. Planned Parenthood*, No. 05-1382. The Bush administration appealed the two rulings to the Supreme Court.

Justice [Samuel A. Alito Jr.](#) did not ask any questions during the arguments. As the successor to Justice Sandra Day O'Connor, who voted with the 5-to-4 majority in the Nebraska case, Justice Alito is obviously in a position to play a central role. Justice [Antonin Scalia](#), who can usually be counted on to

carry the anti-abortion side of the argument, appeared unusually disengaged, limiting his intervention to a few comments.

Chief Justice [John G. Roberts](#) Jr., on the other hand, was active throughout the arguments. At times, he appeared to be trying to bolster the defense of the statute by the solicitor general. At other times, the chief justice appeared eager to find differences between the federal law and the Nebraska law. Differences in the way the state and federal laws defined the procedure could be the basis for a decision that upholds the federal law without disavowing a recent precedent.

Solicitor General Clement urged the justices to defer to the findings Congress made when it passed the law, including that the procedure is never medically necessary. “Those determinations should be upheld as long as they represent reasonable inferences based on substantial evidence in the Congressional record,” Mr. Clement said, adding that “that standard is amply satisfied here.”

Justice [John Paul Stevens](#) challenged the solicitor general. “Are not some of the findings by Congress clearly erroneous?” he asked. Justice Stevens gave the example of a finding that no medical schools provide instruction in the procedure, while in fact, a number of medical schools do teach it.

“I think the district court could effectively undermine that one finding,” Mr. Clement conceded.

With the court’s precedents requiring that abortion restrictions include an exception for medical necessity, the outcome of these cases may depend on how the majority defines necessity. There was considerable discussion of whether the procedure’s safety advantage was “significant” or only “marginal” and there was a constitutional difference between the two.

Justice [Stephen G. Breyer](#), who wrote the court’s decision in the Nebraska case, asked whether the court might rule that the procedure could be used “only where appropriate medical opinion finds it necessary.” Justice Breyer added: “Now, if Congress is right, there will be no such case, so it’s no problem. But if Congress is wrong, then the doctor will be able to perform the procedure and Congress couldn’t object.”