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Justice Dept. Seeks Hospitals' Records of Some Abortions

By ERIC LICHTBLAU

WASHINGTON, Feb. 11 — The Justice Department is demanding that at least six hospitals in New York City, Philadelphia and elsewhere turn over hundreds of patient medical records on certain abortions performed there.

Lawyers for the department say they need the records to defend a new law that prohibits what opponents call partial-birth abortions. A group of doctors at hospitals nationwide have challenged the law, enacted last November, arguing that it bars them from performing medically needed abortions.

The department wants to examine the medical histories for what could amount to dozens of the doctors' patients in the last three years to determine, in part, whether the procedure, known medically as intact dilation and extraction, was in fact medically necessary, government lawyers said.

But hospital administrators are balking because they say the highly unusual demand would violate the privacy rights of their patients, and the standoff has resulted in clashing interpretations from federal judges in recent days about whether the Justice Department has a right to see the files.

A federal judge in Manhattan last week allowed the subpoenas to go forward and threatened to impose penalties, and perhaps even lift a temporary ban he had imposed on the government's new abortion restrictions, if the records were not turned over.

But, also last week, the chief federal judge in Chicago threw out the subpoena against the Northwestern University Medical Center because he said it was a "significant intrusion" on the patients' privacy.

A woman's relationship with her doctor and her decision on whether to get an abortion "are issues indisputably of the most sensitive stripe," and they should remain confidential "without the fear of public disclosure," the judge, Charles P. Kocoras, wrote in a decision first reported by Crain's business journal in Chicago.

The Justice Department is considering an appeal.

The department's demands for the records are still pending against Columbia Presbyterian Medical Center, Weill Cornell Medical Center and St. Luke's-Roosevelt Hospital Center, all in New York City; the University of Michigan medical center in Ann Arbor; and Hahnemann University Hospital in Philadelphia. At least one undisclosed hospital also appears to have been served with a subpoena, officials said.

Judge Richard Conway Casey of Federal District Court in Manhattan, who issued an order in December enforcing the government subpoenas, said at a hearing last week that the department had good reason to want the records, and he threatened to sanction the opposing lawyers in the case unless the hospitals turned them over.

"I will not let the doctors hide behind the shield of the hospital," Judge Casey said, according to a transcript of the hearing. "Is that clear? I am fed up with stalls and delays."

Judge Casey issued a temporary injunction in November preventing the government

from enforcing the Partial-Birth Abortion Ban Act. He said last week that he was prepared to lift that injunction and possibly clear the way for the government to enforce the law if the records were not produced.

Sheila M. Gowan, a Justice Department lawyer, told Judge Casey that the demand for the records was intended in part to find out whether the doctors now suing the government had actually performed procedures prohibited under the new law, and whether the procedures were medically necessary "or if it was just the doctor's preference to perform the procedure."

The department said in its unsuccessful effort to enforce the Northwestern subpoena that the demand for records did not "intrude on any significant privacy interest of the hospital's patients" because the names and other identifiable information would be deleted.

Citing federal case law, the department said in a brief that "there is no federal common law" protecting physician-patient privilege. In light of "modern medical practice" and the growth of third-party insurers, it said, "individuals no longer possess a reasonable expectation that their histories will remain completely confidential."

It is still unclear exactly how many patients would be affected by the subpoenas — if they are enforced — because the affected hospitals are still reviewing their case files.

Officials said several dozen women who have obtained abortions could be affected.

A lawyer for the National Abortion Federation, a plaintiff in the lawsuit before Judge Casey, told him that, over all, "many hundreds" of medical documents would be covered. The federation is a trade organization that represents abortion providers.

The University of Michigan, which initially refused to turn over the subpoenaed records because of privacy concerns, said it was discussing ways of deleting enough identifying information to comply with the subpoena. Other hospitals said they remained concerned.

Under the department's subpoena, "there still is enough identifiable information in these records to identify these people," said Kelly Sullivan, a spokeswoman for Northwestern.

Advocates for abortion rights said they were particularly troubled by the subpoenas because of Attorney General John Ashcroft's history as an outspoken opponent of abortion in his days in the Senate.

"This notion of John Ashcroft poring over medical records in a fairly unprecedented type of fishing expedition is exactly the type of privacy invasion that worries people," said David Seldin, a spokesman for Naral Pro-Choice America, an abortion rights organization. "The government just shouldn't be involving itself in private medical decisions and second-guessing doctors' ability to advise their patients properly."

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