

Hospitals oppose US government effort to obtain abortion patients' records

David Walsh
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Administrators at several US hospitals are refusing demands by the federal Justice Department to hand over medical records of hundreds of abortion patients. This crude attempt to violate patients' privacy is the latest assault on democratic rights by the Bush administration, part of its effort to defend the Partial Birth Abortion Ban Act (PBABA).

In a letter to the Justice Department on behalf of San Francisco General Hospital dated February 17, San Francisco City Attorney Dennis Herrera stated he would not comply with a subpoena for the records, calling it "a gross violation of our patients' privacy rights."

The PBABA, passed by Congress in October 2003 and signed into law by George W. Bush November 5, outlaws the procedure known as dilation and extraction (D&X), a rarely performed operation (only several thousand are performed in the US annually), usually resorted to in the last trimester of pregnancy as an emergency measure when a woman's health or life is in danger.

"Partial birth abortion" is a term invented by the right-wing. From the point of view of the religious right and its political agents, the passage of the PBABA is simply one step in the direction of abolishing the right to abortion altogether. Kate Michaelman, president of the National Abortion and Reproduction Rights Action League, told an interviewer that the law "is the first time a president has criminalized a medical procedure in our country."

Numerous organizations, the American Civil Liberties Union, Planned Parenthood, the National Abortion Federation and others, including the San Francisco Health Department, filed suit against the PBABA. The suit charges that the act is unconstitutional because it permits no exception to

protect the health of the mother. At the state level such sweeping bans have been declared unconstitutional 21 times. Several restraining orders have been obtained, in California, New York and Nebraska, blocking enforcement of the PBABA.

In response to the suit, Attorney General John Ashcroft and the Justice Department issued subpoenas to six or more hospitals, seeking the records of patients who underwent the D&X procedure—at the time entirely legal—over the past several years. The hospitals include Northwestern Memorial Hospital in Chicago, the University of Michigan Medical Center, Hahnemann University Hospital in Philadelphia, New York-Presbyterian, St. Luke's-Roosevelt Hospital Center in New York and San Francisco General Hospital.

Ashcroft and his minions insist that the government needs the information to prove its case, that D&X procedures are not medically necessary, but simply, in the words of Sheila Gowan, a Justice Department lawyer, a matter of "the doctor's preference to perform the procedure."

Ashcroft, a fundamentalist Christian zealot and longtime opponent of abortion rights, told a Washington press conference, "The Congress has enacted a law with the president's signature that outlaws this terrible practice. We sought from the judge authority to get medical records to find out whether indeed the allegation by the plaintiffs, that it's medically necessary, is really a fact."

Aside from rejecting the violation of patients' rights involved in Ashcroft's demand, San Francisco's Herrera disputed the notion that such records could play any role in a court case determining the constitutionality of the PBABA. In his February 17 letter, Herrera wrote, "Put simply, the city does not believe that these lines of inquiry are calculated to lead

to the discovery of admissible evidence. The act's constitutionality will ultimately turn on the testimony of medical experts, not on the anecdotal experiences of this or that physician or this or that patient."

It may indeed be irrelevant to the outcome of the court case, but the move to subpoena the medical records reveals yet again how the Bush administration responds to all opposition: with attempts to intimidate or terrorize its critics and opponents.

Wendy Chavkin of Physicians for Reproductive Health Choice told the media that the subpoenas were cause for real concern. "Not only is this Justice Department and this attorney general profoundly anti-abortion, but they have a questionable commitment to civil liberties," Chavkin commented. She described the issuing of subpoenas to the hospitals as a tactic of intimidation similar to the recent attempt by the Justice Department to obtain the names of antiwar activists at Drake University in Iowa.

In addition to the San Francisco General Hospital's refusal to comply with the subpoena, University of Michigan Medical Center officials also indicated they would not hand over the records. Kallie Michels, director of public relations for the hospital, told a *Washington Post* reporter that the facility "has never seen this happen before, to have patient records subpoenaed in this manner....We have refused to comply because it violates both state and federal privacy laws." New York-Presbyterian, St. Luke's-Roosevelt and Hahnemann University Hospital have also reportedly rejected the government's effort to obtain records.

Chicago's Northwestern Memorial Hospital went to court seeking to block the order and US Chief District Judge Charles P. Kocoras of the Northern District of Illinois quashed the government's subpoena, calling the order "a significant intrusion" of patients' privacy that would provide "little, if any, probative value" to the government case. Kocoras ruled that Illinois's privacy restrictions outweighed disclosures permitted by federal law.

Kocoras wrote that government effort would "require Northwestern to disclose medical history information" that might be used to identify patients. He further commented: "American history discloses that the abortion decision is one of the most controversial decisions in modern life. An emotionally charged

decision will be rendered more so if the confidential medical records are released to the public, however redacted, for use in public litigation in which the patient is not even a party."

However, US District Judge Richard Conway Casey of the Southern District of New York has allowed the federal subpoenas to go ahead and even threatened to lift the temporary ban on the enforcement of the PBABA if the records were not turned over. A hearing on March 29 will review the ban.

Justice Department lawyers are breaking new antidemocratic ground in the present conflict, arguing that patients have no legally protected right to privacy. The department said in a brief that "there is no federal common law" protecting physician-patient privilege. The brief argues that "individuals no longer possess a reasonable expectation that their histories will remain completely confidential" in today's world.

If that is the case, the undemocratic and intrusive policies of successive administrations in Washington are chiefly responsible, which have led to the passage of bills like the Health Insurance Portability and Accountability Act, passed in 1996. The measure, according to Daniel Solove, an information privacy expert at Seton Hall Law School cited by the *Washington Post*, "basically allows the government to obtain medical records with a subpoena or court order in quite a number of circumstances."



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