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By Richard G. Kopf*

When a trial judge like me gets a high-profile case, the sphincter tightens. Visions of Judge Lance Ito[1] and the O.J. murder case dance in the mind like demented sugar plum fairies on meth. Taking the suggestion of the editors of the *Bulletin*,[2] herewith is a short piece on how great lawyers saved my bacon in a case that made the *New York Times* editorial page[3] and ultimately the Supreme Court. That case is *Gonzales v. Carhart.*[4] While I was ultimately reversed when the Supreme Court changed its mind about whether legislators were required to consider the health of women when regulating abortions, I avoided becoming a punch line for late-night comedians. Here is the short version of how the lawyers from both sides saved me and, far more importantly, how they aided the cause of justice.

One day in late October of 2003, one of my law clerks received a call from a New York lawyer representing Dr. LeRoy Carhart and other physicians. It went something like this: We expect President Bush to sign the "Partial-Birth Abortion Ban Act of 2003,"[5] and we intend to sue the government. We will be seeking an emergency temporary restraining order from Judge Kopf immediately after the President signs the bill, and we would like to give the judge advance warning. The lawyer thought the new case would be assigned to me under our local rules

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* United States District Judge for the District of Nebraska.

[1] *See, e.g.*, *Lance Ito*, WIKIPEDIA, http://en.wikipedia.org/wiki/Lance_Ito (last accessed Jan. 20, 2009). For my money, the judge was treated unfairly by the press and the pundits. With their antics, the lawyers who appeared before Judge Ito didn't help him much either.

[2] The *Bulletin* is a wonderful idea. Everyone will benefit from this new form of scholarship. *See*, *e.g.*, Ian Best, *Judge Richard Kopf (D. Nebraska): Legal Blogs Will Fill the Practicality Gap* (April 18, 2006), http://3lepiphany.typepad.com/3l_epiphany/2006/04/judge_richard_k.html (last accessed Jan. 20, 2009). Incidentally, there is absolutely no ethical reason why judges shouldn't "blog" or contribute to "blogs." *Id.* at question 11.

[3] *Round One for Women's Health*, N.Y. TIMES, Sept. 13, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A00EFD91330F930A2575AC0A9629C8B63 (last accessed Jan. 20, 2009).

[4] 550 U.S. 124 (2007) (holding that the Partial-Birth Abortion Ban Act of 2003 was facially constitutional even though it did not contain a health exception).

[5] 18 U.S.C. § 1531 (2004). The Act provides in part that: "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both."

because it was "related"[6] to an earlier "partial-birth" abortion case that I had handled involving Dr. Carhart.[7] In turn, my chambers advised the United States Attorney's office of the "heads-up" we had received from Dr. Carhart's lawyer.

I hurriedly read the 2003 Act. I was taken aback. It contained numerous findings specifically refuting the factual and legal conclusions I had come to in *Stenberg v. Carhart*.[8] Although I am not the brightest bulb in the pack, the implications were apparent, even to me: Congress had officially certified me as an activist dolt or an activist demon. Either way, it would be both unpleasant and awkward determining whether Congress was right.

On October 31, 2003, the lawsuit was filed in the District of Nebraska.[9] As expected, it was assigned to me. A temporary restraining order was requested in anticipation of the President signing the Act. I immediately contacted counsel by telephone to discuss scheduling. While there were many other good lawyers involved, the lead lawyers were Priscilla J. Smith, then Director of the Domestic Legal Program of the Center for Reproductive Rights in New York, and now a visiting fellow at the Yale Law School, for the plaintiffs, and Anthony J. Coppolino, Special Litigation Counsel, United States Department of Justice, Washington, D.C., for the Attorney General.

Ms. Smith and Mr. Coppolino had very distinguished legal careers before they appeared before me.[10] As you will see, those reputations were burnished to a high gloss by their performance in the case about which I write. From beginning to end, these superb lawyers

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[6] *See* NEGenR 1.4(a)(4)(C)(iii) (West 2008) ("Civil cases are related when they involve some or all of the same issues of fact . . . whether or not any of the cases are closed.").

[7] That case became known in the Supreme Court as *Stenberg v. Carhart*, 530 U.S. 914 (2000) (among other things, holding that a Nebraska statute that banned "partial-birth abortion" was unconstitutional because it lacked a health exception).

[8] *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105 § 2, 117 Stat. 1201 (2003) (codified at 18 U.S.C. § 1531 (2004)).

[9] At about the same time, other doctors filed suit in the federal courts in New York and San Francisco. Following decisions on the merits adverse to the government, subsequent unsuccessful appeals to the respective Circuits, and the substitution of the new Attorney General, Alberto R. Gonzales, the Supreme Court granted review of the Nebraska and California cases and consolidated them. *See* Carhart v. Ashcroft, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); Planned Parenthood Fed'n of America v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd sub nom*. Planned Parenthood Fed'n of America, Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007); *see also* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff'd sub nom*. Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2nd Cir. 2006), *vacated*, 224 Fed. App'x. 88 (2nd Cir. 2007) (vacating judgment pursuant to *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

[10] For example, Ms. Smith was counsel for the successful plaintiffs in an important Fourth Amendment case. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (state hospital obstetrics patients were arrested after testing positive for cocaine; Supreme Court held that (1) urine tests were "searches" within meaning of Fourth Amendment, and (2) tests, and reporting of positive test results to police, were unreasonable searches absent patients' consent in view of policy's law-enforcement purpose). In a similar show of expertise, Mr. Coppolino successfully defended the government in a big national security case. *See* American Civil Liberties Union v. U.S. Dep't of Justice, 265 F. Supp. 2d 20 (D.D.C. 2003) (statistical information sought under the Freedom of Information Act regarding use of the Patriot Act could be withheld on national security grounds).

zealously represented their clients while treating each other and everyone else with the highest degree of professionalism, civility, and, against all odds, good humor.

Since the new law would become effective by its terms one day after the President signed it, and since no one knew for sure when the President would put pen to paper, scheduling a hearing on the temporary restraining order in advance was difficult. Keep in mind that the doctors faced criminal liability. More importantly, some abortions could not be delayed awaiting a ruling about whether the banned surgical technique could be used when considering the health of female patients. On the other hand, given the serious question of fetal well-being, the Attorney General could not agree to postpone implementation of the ban while I sorted things out. So, a scheduling compromise on the temporary restraining order was reached.

Counsel for the Attorney General investigated and determined it was probable, although not certain, that the President would sign the bill sometime on November 5, 2003. With that in mind, and with the cooperation of the lawyers, I set a hearing for the morning of November 5, 2003. The lawyers showed up in Lincoln. They were very well prepared. Their respective positions were clearly articulated in rapidly filed affidavits or briefs. At the beginning of the hearing, I was able to give counsel a list of questions that I hoped they would address. I heard their arguments for about three hours. Smith and Coppolino were extremely well versed in the medical and legal aspects of the case. They addressed my questions smoothly and directly.

At the conclusion of the hearing, counsel informed me that the President had still not signed the bill. Accordingly, we adjourned the hearing. One lawyer from each side agreed to wait in Lincoln to be able to advise me if the President acted. Later that day, after the lawyers independently assured themselves that the President signed the bill, they came to my courtroom and jointly represented on the record that the legislation had become law. With that, I temporarily enjoined enforcement of the Act. We had gotten over the first hurdle in a timely, efficient, and fair manner.

In our democracy, no judges (including those who are "activists") lightly restrain, even temporarily, the enforcement of a law passed by Congress and signed by the President. Thus, once I granted the temporary restraining order, I was determined to move the case along very quickly. To accomplish that goal in a manner that would treat the parties fairly while also producing a reasoned result, I would need the sincere assistance of the lawyers.[11] Boy, did I get it!

On November 11, 2003, I held a telephone conference with counsel. Counsel first told me that both sides hoped I would not use court-appointed independent experts. Earlier, I had suggested to counsel that I might seek independent experts selected with the assistance of the American Association for the Advancement of Science's "Court Appointed Scientific Experts" program known by the acronym "CASE."[12] Although agreeing that CASE would likely provide top-notch help, counsel for both sides thought the use of court-appointed experts in this case was

[11] I had decided that I would handle all pretrial matters myself rather then refer those matters to one of our superb magistrate judges.

[12] *See* AAAS, *Court Appointed Scientific Experts*, http://www.aaas.org/spp/case/case.htm (last accessed Jan. 20, 2009).

a bad idea. They expressed various well-considered reasons for their joint opposition. Considering counsels' remarks, I decided not to retain my own experts. After resolving the court-appointed expert question, we quickly agreed that (1) the preliminary injunction hearing and trial on the merits would be collapsed into one proceeding, the restraining order continued until further order, and the trial scheduled within 120 days; and (2) since I was unlikely to resolve this case without a trial (that is, not by summary judgment), the parties agreed they would put together their own progression order and submit it to me for consideration. When I entered an order shortly after our telephone conference, I complimented counsel for their "candor and cooperation." I really meant it.

On December 2, 2003, and with virtually no change, I entered a progression order agreed upon and prepared by counsel. The case then speeded through discovery. Unlike many other "big" cases, the lawyers did not engage in the petty fighting that frequently accompanies discovery. On the contrary, counsel did their pretrial preparation with virtually no input from me. The lawyers' performance proved, once again, how much I prefer dealing with adults rather than the "children" who show up from time to time claiming to be "trial lawyers" while engaging in all manner of unproductive disputes.

The pretrial conference was held March 22, 2004. I conferred with counsel, and we were able to agree on all the major parts of the pretrial order. Thus, on March 26, 2004, the agreed pretrial conference order was entered.

Among other things, the order allowed me to consider the evidence that would be presented in the New York and California cases even though those cases were scheduled for trial at about the same time. In essence, I was to be given transcripts of testimony and related documentary evidence from the other trials. This was very important. Unlike the New York and California cases, I would have the benefit of evidence produced in my trial and also in the other two trials. Scheduling witnesses to be in New York, Nebraska, and California at about the same time for trial would have been a nightmare. Counsel resolved this problem practically while assuring that the record made in the Nebraska case would be as complete as humanly possible.[13]

I have conducted a lot of pretrial conferences since 1987 when I came to our court. Despite the magnitude of this case, the pretrial conference here was both relaxed and productive. In short, the lawyers had their act together.

On March 31, 2004, the two-week bench trial began. Smith and Coppolino's performance during that trial was of the highest caliber. That five-star performance was all the more praiseworthy given the national attention that focused on the case. An example illustrates the grace of these fine lawyers while under pressure.

One of the most important non-party witnesses was a physician who resided in a foreign country. The doctor had been brutally attacked on several occasions because the doctor performed abortions. One such attack nearly killed this gentle physician. The doctor had largely

[13] One of the Congressional criticisms of my earlier opinion in *Stenberg v. Carhart* was that the record upon which I based my conclusions was slim. *See, e.g.,* § 2, 117 Stat. at 1201 (decrying the "very questionable findings issued by the district court judge"). As a result of that criticism, I wanted a record based upon *all* the available evidence and regardless of where it was being presented. The lawyers from both sides accepted that gargantuan task with aplomb.

withdrawn from public life as a result. The good doctor was understandably worried about appearing at trial. While the doctor was willing to testify, the doctor's security personnel were concerned that any public appearance would truly endanger the doctor's life. So, the lawyers helped me work out a unique solution. That solution allowed counsel to thoroughly examine the witness during the actual trial as opposed to taking a deposition. It also allowed me to see and hear the doctor in person. Importantly, the solution did not put the doctor's life in danger.

With bodyguards, the doctor and the doctor's spouse flew to Lincoln. The doctor arrived on the first day of trial. Without a public announcement, the trial began with the doctor's testimony being taken at the Roman Hruska Bar Center rather than at the courthouse. The testimony was given in a conference room that had been reserved by the lawyers and checked by the United States Marshals. The lawyers agreed that the testimony would be transcribed, redacted, and indexed as the testimony of "Dr. Doe." The only persons present when the testimony was given were the witness, the doctor's spouse, the lawyers for the parties, court personnel, the doctor's security detail, and United States Marshals. The testimony went off without a hitch, the doctor came and went without notice, and no explanation was given why the trial "started late." Counsel had confronted a knotty problem and, working together, arrived at a practical way to resolve it while preserving the interests of their respective clients. They did so while rabid partisans carped from the sidelines.[14]

On September 8, 2004, and after the receipt of wonderfully written briefs, I issued a very long opinion declaring the Partial-Birth Abortion Ban Act of 2003 unconstitutional.[15] The opinion began with an apology:

> ***AN APOLOGY***
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> In advance, I apologize for the length of this opinion. I am well aware that appellate judges have plenty to do and that long-winded opinions from district judges are seldom helpful. That admitted, this case is unique.
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> As might be expected, the two-week trial presented numerous live witnesses and hundreds of exhibits. That evidence includes a record developed by Congress over many years. Because the parties have also submitted the testimony and evidence presented in two other similar cases, this record is bloated by that additional information. Lastly, and most importantly, since I decide the constitutionality of an Act of Congress that explicitly found a prior decision of this court to be factually unsound, and that law addresses one of the most contentious issues confronting this nation, respect for our national legislature

[14] Iowa Congressman Steve King came to Lincoln to attend the trial. After listening to a bit of testimony, he held a press conference on the courthouse steps to criticize "activist judges." *See, e.g.*, American Judicature Society, *Judges Under Fire—Nebraska*, http://www.ajs.org/cji/cji_fire.asp#NEBRASKA (last accessed Jan. 20, 2009) (summarizing press coverage by the Omaha World-Herald, the Associated Press, and CBS News between April 9, 2004, and June 3, 2004).

[15] The manuscript was 474 pages long and the printed version droned on for 241 pages.

> requires more than the usual attention to detail. Nonetheless, I pity the poor appellate judge who has to slog through this thing. I am truly sorry.[16]

The opinion ended with high praise for the lawyers. Those words bear repeating in this inaugural edition of the *Bulletin*: "The lawyers for both sides were magnificent. They are smart, fair-minded, candid, civil, professional, ethical, good writers, excellent speakers, and accomplished trial lawyers. They represent the very best the legal profession has to offer, and I sincerely thank them for their work in this case."[17]

Judges like me frequently fail to acknowledge the debt owed to the great lawyers who appear before them. Those lawyers zealously represent their clients but also understand that they are engaged in a process that is more important than the outcome. Lawyers like Priscilla J. Smith and Anthony J. Coppolino make the American legal system a marvel. For that, they deserve recognition and our thanks.

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[16] Carhart v. Ashcroft, 331 F. Supp. 2d 805, 809-810 (D. Neb. 2004).

[17] *Id.* at 1048.