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Operation Rescue - Was the Justice Dept. Right to Intervene in Wichita?

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Operation Rescue

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It was a long, hot summer in Wichita, Kan., that began when Operation Rescue attempted to shut down an abortion clinic and culminated when U.S. District Judge Patrick Kelly restrained protesters, relying on a post-Civil War statute formerly used against the Ku Klux Klan.

The Justice Department directed the local U.S. attorney to file an amicus brief on its behalf that disputed use of the federal statute. Later, from a podium on TV's "Nightline," Judge Kelly denounced the department's intervention as politically motivated.

Not so, says Northwestern Law School Professor Gary Lawson, who believes Judge Kelly seriously encroached on both local and federal executive authority.

Planned Parenthood's Celeste Lacy Davis and Eve W. Paul disagree, saying the Justice Department's action is part of a broader policy designed to restrict women's rights.

Yes: An Abuse of Authority

BY GARY LAWSON

Virtually everyone in the legal community knows something of Operation Rescue's recent attempt to shut down abortion clinics in Wichita, Kan. But I doubt whether very many people know much about the legal issues that prompted the Justice Department's involvement in the dispute. That involvement was well-justified, and the department's objections to Judge Kelly's actions were well-taken. The judge exceeded his authority with respect both to the protesters and to the executive branch of the U.S. government.

Start with the protesters. They have been accused of violating 42 U.S.C. § 1985(3), popularly known as the Ku Klux Klan Act of 1871, which prohibits conspiracies "for the purpose of depriving ... any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... ." To prevent the statute from becoming a general federal tort law, the Supreme Court has ruled that it applies only when there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971).

This is bad news for Judge Kelly. Operation Rescue's abortion-clinic blockades are decidedly nondiscriminatory. The protesters hassle everyone—black, white, male, female, vegetarian or steak lover—who tries to enter the clinic. They are willing, and even eager, to violate the legally protected rights of pregnant female clients, non-pregnant female doctors, male file clerks, and anyone else with the slightest connection to the abortion process.

As a result, their actions simply fall outside the compass of this particular statute, which as noted above deals only with conspiracies motivated by "class-based, invidiously discriminatory animus."

Was Operation Rescue's Wichita operation a state-law nuisance, trespass or business tort? No doubt. Would it warrant a slew of civil-damages actions in state court? Surely. Was it a violation of 42 U.S.C. § 1985(3)? Only in Judge Kelly's dreams. That is the essence of the Justice Department's position in the Wichita case (and in a related case soon to be decided by the Supreme Court), and that position is clearly correct.

Judge, Jury and Executioner

Justice's second objection to Judge Kelly's order will probably never make the national news. That is a shame, because it implicates broad issues of constitutional governance that are far more profound than a simple judicial misconstruction of the Ku Klux Klan Act.

Federal judicial orders are enforced by federal marshals, who are agents of the executive branch. Judge Kelly's Aug. 5, 1991, order contains the following remarkable paragraph:

"It is therefore ordered ... [t]hat officers of the U.S. Marshal's Office shall be posted at the gates to the clinics operated by the plaintiffs; that they shall, from time to time, repeat the orders of this court to any persons protesting in the vicinity thereof; that they shall have available the means to videotape any disturbances at such locations and that they so record such disturbances; and that they shall conduct the arrest of any person in violation of this order in a prompt and expeditious manner ... ."

At least he didn't tell the marshals what kind of handcuffs to use in the arrests he ordered them to conduct. It is no wonder that the Justice Department went apoplectic upon reading Judge Kelly's order. To anyone acquainted with the ideas and practice of separation of powers, this kind of judicial administration of executive-branch law enforcement is almost beyond belief. No doubt Judge Kelly has read Articles II and III of the Constitution as carefully as he has read 42 U.S.C. § 1985(3).

I consider myself pro-choice. But tinhorn dictators in robes like Judge Kelly are at least as great a threat to freedom as Operation Rescue. Kelly is wrong, and the Justice Department is right. ■

No: A Case of Partisan Politics

BY CELESTE LACY DAVIS and EVE W. PAUL

For more than a decade, well-organized and lawless bands of anti-abortion protesters have roamed the nation in a desperate campaign to deprive women of their constitutionally protected right of choice.

Through use of various illegal tactics, the outer fringe of the anti-choice movement seeks to turn back the clock of women's progress to an era pre-*Roe v. Wade*.

Thus, between 1977 and 1990, abortion providers reported 829 acts of anti-choice violence, including 34 clinic bombings, 52 clinic arsons, 266 invasions, 64 assaults and batteries, 2 kidnappings, 22 burglaries, 77 death threats and 269 incidents of vandalism. *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (U.S. filed May 13, 1991), cert. granted 111 S.Ct. 1070 (1991); *NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990); *Women's Health Care Services v. Operation Rescue*, No. 91-1303K (D.Ks. Aug. 5, 1991); *Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989); *Cousins v. Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989); *Portland Feminist Women's Center v. Advocates for Life*, 712 F.Supp. 165 (D. Or. 1988).

Particularly in view of the recent arrest of nearly 3,000 persons engaged in abortion clinic blockades in Wichita, Kan., and threats by anti-abortion terrorists to now take their lawless campaign to other cities, it is time for the federal government to send out a strong message that concerted, illegal attempts to deprive women of their constitutionally protected right of choice will not be tolerated.

Our federal government has a strong tradition of sending such messages in comparable circumstances. In the '60s, for example, African-American civil rights activists were aided in their struggle for constitutional liberties by a president who publicly decried acts of racist mob violence, a Congress that passed major civil rights legislation, and a federal judiciary that afforded effective remedies to those who had been constitutionally aggrieved on account of race and denied effective redress in state courts.

A Throwback to the Klan

Moreover, today's rising tide of anti-abortion violence is reminiscent of the organized and violent waves of Ku Klux Klan terror directed against newly freed African-Americans and their supporters.

The 42nd Congress, alarmed by the emergence of conspiracies designed to deprive a class of persons of the equal protection of the laws, or equal privileges and immunities under the law, responded to that illegal campaign by enacting federal protective legislation, 42 U.S.C. § 1985(3). *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 836 (1983).

In sharp contrast, however, American women of reproductive age are now learning that, instead of responding to their cry for relief from blockading anti-abortion terrorists, the U.S. Justice Department, in the cases of *Bray v. Alexandria Women's Health Clinic* and *Women's Health Care Services v. Operation Rescue*, has intervened on the side of the lawless mob.

In both cases, the executive branch has urged the federal judiciary to reverse numerous lower court precedents, including Judge Patrick Kelly's courageous Wichita ruling, which recognized that under 42 U.S.C. § 1985(3), women's protected right to travel for purposes of obtaining medical services, including abortions, should not be defeated by conspiratorial and illegal acts of anti-abortion protesters.

Moreover, the government argues that constitutional rights, sought to be vindicated in "rescue-related" litigation, should now be trivialized as simple trespass offenses under state law. By so doing, the executive branch caters to a dangerous societal element that has invented "constitutional rights" on behalf of embryos and fetuses but that denies the same to women already born. ■

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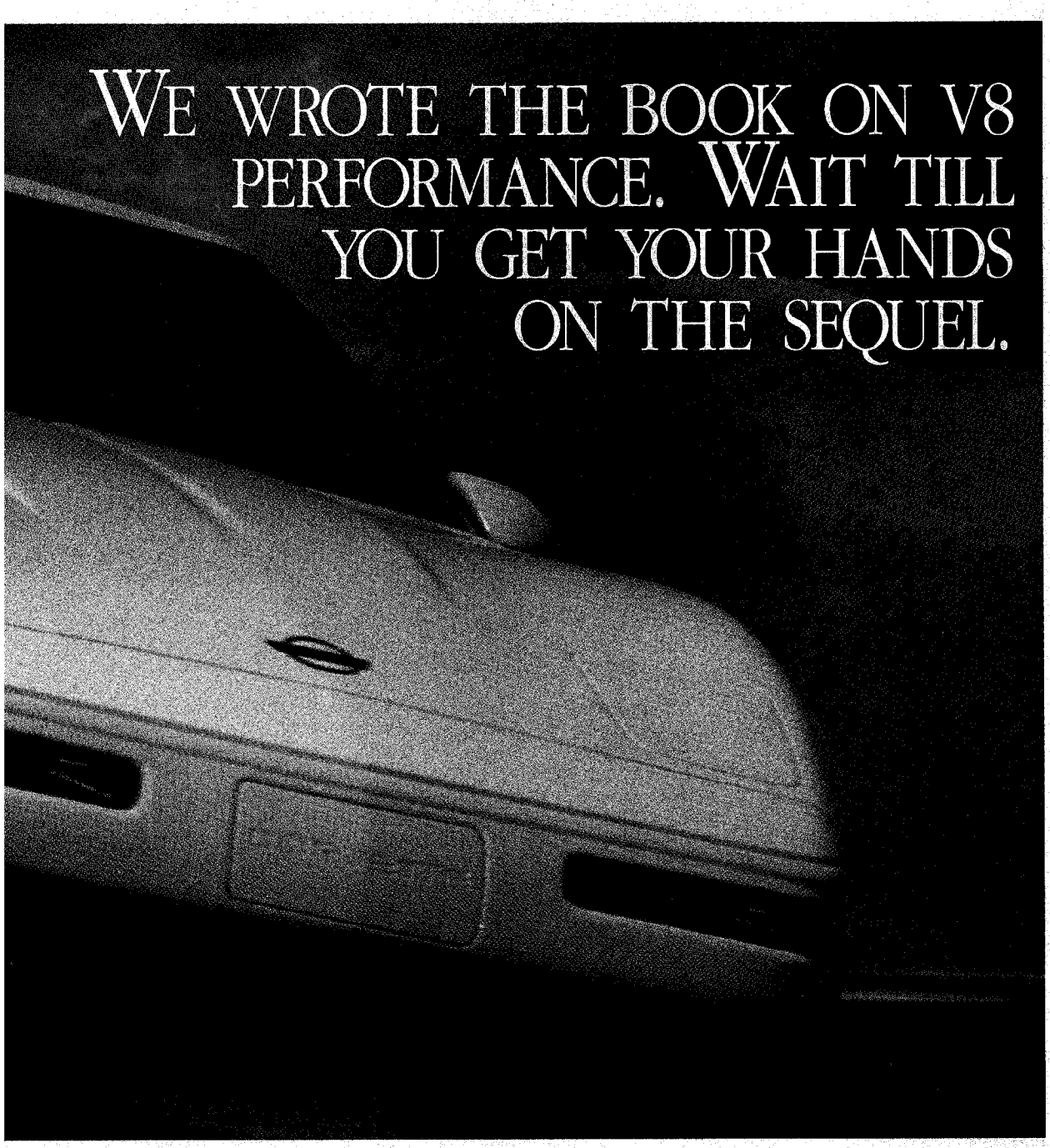

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