

## **Supreme Court Allows Use of Federally Controlled Drugs to Assist Suicide**

BY Burke J. Balch, J.D.

On January 17 the United States Supreme Court struck down the Bush Administration position that federally controlled narcotics and other dangerous drugs cannot be used to kill patients. However, in *Gonzales v. Oregon*, the Court merely said the Administration had incorrectly interpreted the Controlled Substance Act, and made clear that if Congress chooses, it has the constitutional authority to act to bar the use of federally controlled drugs to assist suicide.

At present, Oregon is the only U.S. jurisdiction with a law that specifically authorizes assisting suicide. (Although most states prohibit it by statute or, arguably, by case law, seven other states have no laws whatsoever on assisting suicide.) In practice, all the reported cases of legalized assisted suicide in Oregon have used federally controlled drugs.

In 1997, Senator Orrin Hatch (R-Utah) and Representative Henry Hyde (R-Il.), who chaired the Judiciary Committees in the Senate and House, respectively, wrote the Drug Enforcement Administration urging the DEA to prevent the use of federally controlled drugs in Oregon's assisted suicide program. DEA Administrator Thomas Constantine agreed such use would violate federal law.

However, Clinton Administration Attorney General Janet Reno overturned his ruling. She directed that while the DEA might take action against someone using controlled drugs to assist suicide in other states, it could not do so in a state that had specifically legalized the process as a matter of state law.

Subsequently, in 2000, a bill that sought to reinstate the DEA administrator's position passed the House and was reported out of the Senate Judiciary Committee. However, faced with the threat of a filibuster led by Oregon Senator Ron Wyden (D), the measure never came to a Senate floor vote.

Following the election of George W. Bush as President, John Ashcroft, the new attorney general, reinstated the Constantine ruling. His ruling was challenged in the courts and never implemented. It was the appeal of this challenge that the Supreme Court decided in *Gonzales v. Oregon*.

Writing for the majority, Justice Anthony Kennedy recognized that under the federal Controlled Substances Act, a doctor may only prescribe drugs the federal government has designated as particularly dangerous for a "legitimate medical purpose." Justice Antonin Scalia, writing in dissent, pointed out, "If the term 'legitimate' medical purpose has any meaning, it surely excludes the prescription of drugs to produce death." Justice Kennedy did concede, "On its own, this understanding of medicine's boundaries is at least reasonable."

Usually the courts say that government administrators charged with implementing a statute have the ability to issue and enforce reasonable interpretations of the statute, especially when Congress gives them the authority to promulgate regulations applying it. In this case, however, the Supreme Court majority held that the federal drug control law was designed to prevent only drug abuse that leads to "addiction or abnormal effects on the nervous system"—and that former Attorney General John

Ashcroft stretched too far in interpreting the statute as preventing narcotic use to kill patients.

In dissent, Justice Clarence Thomas resorted to irony: “The majority does not expressly address whether the ingestion of a quantity of drugs that is sufficient to cause death has an ‘abnormal effect on the nervous system,’ though it implicitly rejects such a conclusion.”

The Court did not accept Oregon’s broad claim that federal administrators must defer to each state’s own view of what drug-prescribing practices are “legitimate” within its own borders. As Justice Scalia observed, “The Court is perhaps leery of embracing this position because [Oregon] candidly admitted at oral argument that, on its view, a State could exempt ... the use of morphine to achieve euphoria.”

So instead the majority chose to craft the narrow view that the federal statute authorizes the national government to override a state’s assertion of the acceptability of some kinds of what would generally be considered drug misuse (e.g., to achieve euphoria) but not of others (e.g., to bring about death).

This sort of inventive line-drawing supports what many have long believed—that the “swing” Justices on the Court are perhaps more apt to render decisions that fit their policy preferences than those that logically and consistently apply the Constitution and laws. It points up once again how critically important are Supreme Court appointments.

However, contrary to some overblown media reports, the Court did not say the use of federally controlled drugs to assist suicide is a matter the Constitution requires be left to the states. On the contrary, the opinion said, “Even though regulation of health and safety is ‘primarily, and historically, a matter of local concern,’ there is no question that the Federal Government can set uniform national standards in these areas.”

In short, the mere fact that a state like Oregon chooses, under its own law, not to prevent assisting suicide does not give it some constitutional right to hijack federally controlled drugs and commandeer them to ensure the efficient elimination of its vulnerable residents. Congress could constitutionally amend the federal Controlled Substances Act so that the statute says explicitly what the Bush Administration had believed it said implicitly.

At press time, the National Right to Life Committee was in discussion with other organizations and with members of Congress, exploring the prospect of a bill that would do just that.