

The Right to Assist: The Legality of Physician-Assisted Suicide

APA

A note to the reader: This is a real policy paper written by a first year student for Politics 262, American Politics. It is “a model paper” in the sense that it is exceptionally good. It articulates a clear policy recommendation to the relevant governmental actor or agency [coded yellow in the paper]. It articulates clear contentions in support of the recommended policy. In this case there are two primary contentions [coded green and blue in the paper]. It supports those contentions with clear and convincing evidence drawn from credible sources and carefully documented. It is well organized and well written. It is not “the model paper.” First, it is not perfect; there is still plenty of room for improvement. Second, it could be different in many ways and still be as good as it is. There are many correct ways to construct a great policy paper, not just one.

--- Craig Allin

Abstract

In 2006, the Supreme Court ruled that the Oregon Death with Dignity Act (DWDA) was not in violation of federal law, specifically the federal Controlled Substances Act (CSA). If the Supreme Court hears a case similar to *Gonzales v Oregon* in the future, the Court's decision should remain consistent with the ruling handed down in *Gonzales v Oregon*. The DWDA is not in violation of CSA for two reasons. First, when Congress passed the CSA, it was intended to address drug trafficking on a national level not physician-assisted suicide. Second, even if Congress had intended to prohibit physician-assisted suicide in the CSA, that is beyond the scope of Congress' powers. Consequently, the DWDA is not in violation of federal law and can remain in place.

When Oregon citizens approved Ballot Measure 16, the Oregon Death with Dignity Act (ODWDA) in 1994, the state and federal governments developed vastly differing views about physician-assisted suicide (Fallek 2000, p.1741). Oregon's Death with Dignity Act permits physician-assisted suicide under specific circumstances, namely when a patient is suffering from a terminal illness and has less than six months to live (Department of Human Services 1994, p.2). Opponents of the DWDA have fought hard to prove that the DWDA conflicts with Schedule II of the Federal Controlled Substances Act (CSA). In 2001, newly appointed Attorney General John Ashcroft issued a directive, without any warning to the Oregon Department of Justice, stating that any physician prescribing medication in accordance with the DWDA was in violation of Schedule II of the CSA and would lose his/her license to prescribe medication (Ludwig 2006, p.333). Ashcroft went on to state in his Interpretive Rule that physician-assisted suicide was not a "legitimate medical purpose" (United States FDA 2004). The CSA mandates that controlled substances will only be prescribed for a "legitimate medical purpose" and in the best interest of the public (United States FDA 2004). Consequently, Ashcroft stated that any physician using prescription medication with the intent to assist in a suicide was "subject to prosecution by the Drug Enforcement Agency (DEA)" (Hughes 2006, p.209). After the state of Oregon learned of the Ashcroft directive, the state filed a lawsuit "seeking declaratory and injunctive relief" (United States Court of Appeals 2004). In *Oregon v Ashcroft*, presiding District Court Judge Robert Jones issued his ruling on April 17, 2002 (United States Court of Appeals 2004). Judge Jones entered a permanent injunction against "enforcing, applying, or otherwise giving any legal effect to the directive issued by Attorney General John Ashcroft" (United States Court of Appeals 2004). After the United States Court of Appeals for the Ninth Circuit upheld the original decision in *Oregon v Ashcroft*, the Supreme Court heard *Gonzales v Oregon* after a Petition for Writ of Certiorari (Supreme Court of the United States: *Gonzales v Oregon* 2006). On January 17, 2006, the Supreme Court ruled to uphold the decision of *Oregon v Ashcroft* (Supreme Court of the United States: *Gonzales v Oregon* 2006).

Changing leadership in the Supreme Court may bring up the possibility of further claims on behalf of the federal government that the DWDA is in violation of the CSA. Samuel A Alito, Jr. became an Associate Justice of the United States Supreme Court on January 31, 2006. He replaced Sandra Day O'Connor. As of today, all attempts to amend the CSA have not made it out of Congress. There is, however, nothing prohibiting Congress from further attempting to amend the CSA. **If legislation comes before the Supreme Court, the Court should maintain the previous decision handed down by the Court.** The Supreme Court should not find the DWDA in violation of the CSA for two reasons. **First, when Congress passed the CSA, Schedule II was not meant to address physician-assisted suicide.** **Second, even if Congress did intend to prohibit physician-assisted suicide in Schedule II of the CSA, that is beyond the scope of Congress's powers.**

The Controlled Substances Act was passed by Congress in 1970 (Kapios 2003, p.227). The Act was largely intended to reduce drug abuse and trafficking through federal regulation. The CSA categorizes substances into five schedules which have federally limited manufacturing, distribution, possession, and usage (Kapios 2003, p.227). The CSA mandates that "the Attorney General shall register an applicant to distribute a controlled substance in Schedule I or II unless he determines that the issuance of such registration is inconsistent with the public interest" (United States FDA 2004). The Act further states that to determine public interest, the Attorney

General must, among other factors, comply with applicable state and local law and ensure that the controlled substance will be used for a legitimate medical purpose (United States FDA 2004). The CSA does not, however, further define “legitimate medical purpose” (United States FDA 2004).

The state of Oregon and the federal government came into conflict over interpretation of the language used in the CSA. Although two attempts to amend the CSA to specifically address physician-assisted suicide have been made, neither attempt was successful. The original CSA does not make any specifications as to the legality of controlled substances used for physician-assisted suicide. It is clear from its origins and content that the CSA was largely intended to address drug issues in the United States. In *Oregon v Ashcroft*, Judge Jones determined that the primary concern of Congress when enacting the CSA was to “address the illegal drug epidemic on the national level” (United States Court of Appeals, 2004). Judge Jones further concluded that “the CSA’s legislative history does not provide evidence of congressional intent to restrict the use of prescriptions for controlled substances to assist patient suicide” (Kapios 2003, p.234).

Looking at the language of the CSA further, it becomes clear that Attorney General Ashcroft may have used the language which would support his position while disregarding the language which would not benefit him. The CSA gives the Attorney General the power to issue registrations to prescribe medication as well as revoke registrations. If the Attorney General determines that the registration is being used to prescribe medication in a way that is inconsistent with the public interest, the registration may be revoked. The CSA requires that the Attorney General consider five factors in determining if an act is “against the public interest” (United States FDA 2004). The Attorney General must consider: (1) “maintenance of effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels”; (2) “compliance with applicable State and local law”; (3) “prior conviction record of applicant”; (4) past experience in the distribution of controlled substances”; and (5) such other factors as may be relevant to and consistent with the public health and safety” (United States FDA 2004). The Ashcroft directive focuses clearly on the fifth factor (Hughes 2006, p.214). It seems to trivialize the fact that in the passage of the CSA, Congress made provisions for “applicable State and local law.” At the time the Ashcroft Directive was issued, physician-assisted suicide, in limited circumstances, was legal in Oregon. It was clearly not Congress’s intent in the CSA to give the Attorney General power to prohibit prescription of controlled substances for the use of physician-assisted suicide in a state prohibiting it (Ludwig 2006, p.1143).

Similarly, the CSA does not define “legitimate medial purpose.” In the state of Oregon, though, legislation has been passed legalizing physician-assisted suicide in limited circumstances. As a result, physician-assisted suicide is considered a legitimate medical practice in Oregon. In keeping with state law and a lack of federal law, physicians in Oregon are permitted to prescribe medication in keeping with the DWDA without fear of prosecution. Should the Supreme Court see a case similar to *Gonzales v Oregon* in the future, it would be imperative to consider the original intentions of Congress when ruling a second time.

A second factor the Supreme Court would need to consider if a similar case would arise is that **even if Congress did intend to prohibit physician-assisted suicide in Schedule II of the CSA, that is beyond the scope of Congress’s powers.**

The CSA was originally enacted through Congress’s power given in the Commerce Clause (Supreme Court of the United States: *Linder v United States* 2007). The Clause, found in Article 1, Section 8 of the Constitution, states that: “Congress shall have the power to regulate

Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Although Congress was given a broad range of powers through the Commerce Clause, the Supreme Court decision in *Linder v. United States* in 1925 set a precedent for interference by the federal government in states’ medical practices. The Supreme Court ruled that regulation of state medical practices “is beyond the power of the federal government” (Supreme Court of the United States: *Linder v United States* 2007). Historically, states have controlled the regulation of medical practices.

United States v Lopez and *Morrison v United States* set a precedent for how far the power of Congress extends in the Commerce Clause. Under *Morrison v United States*, Congress may regulate “activities that substantially affect interstate commerce (Supreme Court of the United States: *Morrison v United States* 2007). *Lopez* and *Morrison* together have defined the four ways in which an activity can be found to substantially affect interstate commerce: “(1) the regulated activity is economic in nature; (2) Congress included a jurisdictional element...; (3) Congress made findings regarding the regulated activity’s effect upon interstate commerce; and (4) Congress is not attempting to regulate in an area in which “states historically have been sovereign” (Supreme Court of the United States: *Morrison v United States* 2007). Although it is unreasonable to expect that the Commerce Clause effectively prevents Congress from having any power to interfere in state medical practices, it does restrict Congress’s power substantially. Although the prescription of controlled substances may involve interstate commerce, the DWDA does not (Hendricks 2001, p.712). Only residents of Oregon may participate in physician-assisted suicide (Hendricks 2001, p.712). Consequently, the involvement of Congress in the DWDA is prohibited, to some extent through the Commerce Clause. *Vacco v Quill* and *Washington v Glucksberg* set a further precedent for federal interference in regulation of physician-assisted suicide. Although the Supreme Court did not state that regulation is specifically within states’ power, the Court did note that the majority of states implemented individual regulations regarding physician-assisted suicide (Hendricks 2001, p.694).

The legality of physician-assisted suicide in the United States has been a topic of much debate. Powerful leaders within the federal government have attempted to prove that the DWDA is in violation of federal law and consequently invalid. Thus far, however, they have been unsuccessful. If, in the future, the Supreme Court hears a case similar to *Gonzales v Oregon*, the decision handed down should remain consistent with the ruling in *Gonzales v Oregon*. The DWDA does not conflict with the CSA for two significant reasons. First, when Congress passed the CSA, Schedule II was not intended to prohibit physician-assisted suicide. Second, regulating physician-assisted suicide through the CSA is beyond the scope of Congress’s power. It is unlikely that the near future will bring an end to conflict over physician-assisted suicide in the United States. The Supreme Court should support consistent rulings maintaining that the DWDA is not in violation of federal law.

Works Consulted

- Danino, Annie (2006). *Dodging the Issue of Physician Assisted Suicide: The Supreme Court's Likely Response in Gonzales v. Oregon*. Retrieved April 15, 2007, from Michigan State University College of Law, Journal of Medicine and Law web site: http://web.lexis-nexis.com/universe/document?_m=afdc70a6dc0d865291e20b91d4482ef7&_docnum=3&_wchp=dGLzVzz-zSkVA&_md5=4d7afa0e83517bc75b4d23365124aaf6
- Department of Human Services. (1994). *Legislative Statute: The Oregon Death with Dignity Act*. Retrieved April 14, 2007, from <http://www.oregon.gov/DHS/ph/pas/doc/statutes.pdf>
- Fallek, Joy (2000, August). *The Pain Relief Promotion Act: Will it Spell Death to "Death with Dignity" or is it Unconstitutional*. Retrieved April 15, 2007, from Fordham University School of Law, Fordham Urban Law Journal web site: http://web.lexis-nexis.com/universe/document?_m=ebba0093b63b3b28563b7f585f3f15ef&_docnum=18&_wchp=dGLzVzz-zSkVA&_md5=c3f430cf7593d74db61b4996b54dca38
- Hendricks, Stephanie (2001). *Pain Relief, Death with Dignity and Commerce: The Constitutionality of Congressional Attempts to Regulate Physician-Assisted Suicide in Oregon via the Commerce Clause after Lopez and Morrison*. Retrieved April 15, 2007, from Willamette Law Review web site: http://web.lexis-nexis.com/universe/document?_m=bc74d1f6265b8db4f9ea025318defd32&_docnum=40&_wchp=dGLzVzz-zSkVA&_md5=4e66d1f6be22b455fa81ee9ad8f6b47
- Hughes, Emily (2006). *The Oregon Death with Dignity Act: Relief of Suffering at the End of Medicine's Ability to Heal*. Retrieved April 27, 2007, from Georgetown Law Journal web site: http://web.lexis-nexis.com/universe/document?_m=e4cbe9a23e14c67e291609ed11dd8e95&_docnum=14&_wchp=dGLzVlz-zSkVb&_md5=7b0337ed9c8cdc37dea3f4ed59e8b27e
- Kapios, Patrick J (2003). *Current Event: Oregon v. Ashcroft*. Retrieved April 15, 2007, from American University Journal of Gender, Social Policy & the Law web site: http://web.lexis-nexis.com/universe/document?_m=ebba0093b63b3b28563b7f585f3f15ef&_docnum=16&_wchp=dGLzVzz-zSkVA&_md5=b6856584aef4730bcefc4f2e661f18cd
- Ludwig, Alfred (2006). *Authority with the Force of Law: Statutory Interpretation as Policymaking in Gonzales v Oregon*. Retrieved April 27, 2007, from Missouri Law Review web site: http://web.lexis-nexis.com/universe/document?_m=702e5bacdea93ad2342ef2fbe5d8e698&_docnum=20&_wchp=dGLzVlz-zSkVb&_md5=3f093dfc77b2af807fbef0301dba072c

- Mathes, Michele (2006, June). Ethics, Law and Policy: Gonzales v. Oregon and the Legitimate Purposes of Medicine: Who Gets to Decide? *MEDSURG Nursing*. Retrieved April 14, 2007, from <http://web.ebscohost.com/ehost/pdf?vid=5&hid=106&sid=97f7cab8-cc0d-4bb3-9d0c-5f1cb3c21680%40sessionmgr106>
- Mehlman, Maxwell J & Zaremski, Miles J (2003). *Brief of the American College of Legal Medicine in Oregon v. Ashcroft*. Retrieved April 15, 2007, from University of Houston Law Center, Houston Journal of Health Law and Policy web site: http://web.lexis-nexis.com/universe/document?_m=564a4153c97f124d2dca30765b80d5f1&_docnum=22&wchp=dGLzVzz-zSkVA&_md5=b65c02cb16a1c6d440afd88b43d20d05
- Nelson, Roxanne (2004, June). *Oregon Court Upholds Assisted-Suicide Law*. *Lancet*. Retrieved April 14, 2007, from <http://web.ebscohost.com/ehost/detail?vid=6&hid=106&sid=97f7cab8-cc0d-4bb3-9d0c-5f1cb3c21680%40sessionmgr106>
- Oregon Department of Justice (2005, July). *State of Oregon Brief*. Retrieved April 14, 2007, from <http://www.doj.state.or.us/asisteddying/9282005.shtml>
- Oregon Department of Justice (2005, May). *United States Brief*. Retrieved April 14, 2007, from <http://www.doj.state.or.us/assisteddying/pdf/usdoj.pdf>
- Paust, Jordan J. (1995). The Human Right to Die With Dignity: A Policy-Oriented Essay. *Human Rights Quarterly*. Retrieved April 14, 2007, from http://muse.jhu.edu/journals/human_rights_quarterly/v017/17.3paust.html
- Spindelman, Marc (2003). *A Dissent from the Many Dissents from Attorney General Ashcroft's Interpretation of the Controlled Substances Act*. Retrieved April 15, 2007, from National Legal Center for Medically Dependent and Disabled, Inc., Issues in Law and Medicine web site: http://web.lexis-nexis.com/universe/document?_m=ebba0093b63b3b28563b7f585f3f15ef&_docnum=2&wchp=dGLzVzz-zSkVA&_md5=dce26e5050f8a1217db1ea5527e08bb2
- Supreme Court of the United States (2006, January). *Gonzales v. Oregon*. Retrieved April 27, 2007, from http://web.lexis-nexis.com/universe/document?_m=6da376f2d3287d97f28ec74e63497b0d&_docnum=1&wchp=dGLbVzb-zSkVb&_md5=878c8bf588bd754a5ad9f17b4739fdcf
- Supreme Court of the United States (2007, March). *Morrison v. United States*. Retrieved May 1, 2007, from http://web.lexis-nexis.com/universe/document?_m=f1bb7de5b9e5457c80c64ec95b8ac04f&_docnum=1&wchp=dGLbVtz-zSkVA&_md5=c8503e91dd1ba785f7aff2edff66bf7e
- Supreme Court of the United States (2007, April). *Linder v. United States*. Retrieved April 30, 2007, from <http://web.lexis->

nexus.com/universe/document?_m=970e3bbf171f40aead93265e01c7c598&_docnum=1&wchp=dGLbVlz-zSkVb&_md5=4cfc80576919234f9b334d1aa821b476

United States Court of Appeals for the Ninth Circuit (2004, May). *State of Oregon v. John Ashcroft*. Retrieved April 14, 2007, from [http://www.ca9.uscourts.gov/coa/newopinions.nsf/F63C3857EBE8263588256E9F007CAC71/\\$file/0235587.pdf?openelement](http://www.ca9.uscourts.gov/coa/newopinions.nsf/F63C3857EBE8263588256E9F007CAC71/$file/0235587.pdf?openelement)

United States Food and Drug Administration (2004, January). *Controlled Substances Act*. Retrieved April 14, 2007, from <http://www.fda.gov/opacom/laws/cntrlsub/ctlsbtoc.htm>

United States Senate Committee on the Judiciary (2006, May). *Testimony of Ms. Rita Marker: Suicide and Public Policy*. Retrieved April 14, 2007, from http://judiciary.senate.gov/testimony.cfm?id=1916&wit_id=5377

Werth, James L. & Wineberg, Howard (2005). A Critical Analysis of Criticisms of the Oregon Death with Dignity Act. *Death Studies*. Retrieved April 14, 2007, from <http://web.ebscohost.com/ehost/detail?vid=5&hid=6&sid=97f7cab8-cc0d-4bb3-9d0c-5f1cb3c21680%40sessionmgr106>

Werth, James L. & Wineberg, Howard (2003). Physician-Assisted Suicide in Oregon: What are the Key Factors? *Death Studies*. Retrieved April 14, 2007, from <http://web.ebscohost.com/ehost/detail?vid=6&hid=106&sid=97f7cab8-cc0d-4bb3-9d0c-5f1cb3c21680%40sessionmgr106>