

## The US Supreme Court decision on assisted suicide and the prescription of pain medication: Limit the celebration

Marshall B. Kapp, JD, MPH

Most physicians who prescribe opioid medications to treat patients' severe pain problems, including otherwise intractable pain symptoms experienced by patients in the final stages of life, are chronically nervous about various aspects of the legal environment in which they function professionally. One source of legisogenic, or law-derived, anxiety has been concern about exposure to possible federal criminal prosecution for violation of the Controlled Substances Act (CSA). In the past few years, this particular worry has been understandably exacerbated by action taken by the US Department of Justice (DOJ), through the Office of the Attorney General (AG), in response to an Oregon state statute pertaining to physician-assisted suicide.

By way of background, a 1971 regulation published by the AG required that prescriptions written for substances that fall within the CSA be used "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." In 1994, Oregon voters enacted through the referendum process the Oregon Death With Dignity Act (ODWDA), which explicitly exempts from civil or criminal liability a state-licensed physician who, in compliance with ODWDA's specific safeguards, dispenses or prescribes a lethal dose of drugs upon the request of a terminally ill patient. In 2001, the AG issued an Interpretive Rule to address the implementation and enforcement of the CSA in light of the ODWDA, declaring that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA.

The state of Oregon initiated litigation to challenge the authority of the AG to issue and enforce that Interpretive Rule. After protracted wrangling in the lower federal courts, on January 17, 2006, the US Supreme Court in *Gonzales v Oregon* (126 S.Ct. 904.) invalidated the Interpretive Rule. The announcement of this judicial decision was accompanied by loud celebration on the part of a variety of proponents of effective pain management for suffering patients. Typical, was this jubilant statement in the January 22, 2006, edition of the *Washington Post*:

"Doctors who specialize in pain management and their advocates are hoping that last week's Supreme Court decision upholding Oregon's assisted-suicide law will boost their efforts to defend colleagues accused by the government of illegally prescribing narcotic painkillers to their patients."

The problem, however, is that enthusiastically optimistic assessments of what the Supreme Court did in *Gonzales v Oregon* overwhelmingly have emanated from observers who are responding to the case's particular outcome, but because they have not closely (or actually) read the legal majority and dissenting opinions of the Court in this case, they have not formulated an appreciation of the narrowly confined legal reasoning underlying the majority's decision. A closer reading and appreciation of the majority's opinion in *Gonzales v Oregon*, I believe, may substantially subdue the enthusiasm of pain control advocates about the real impact of this case on the legal environment surrounding pain control clinical practice.

According to Justice Anthony Kennedy, writing for the six-Justice majority in *Gonzales v Oregon*:

[T]he question before us is whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure. . . . The dispute before us is in part a product of . . . political and moral debate, but its resolution requires an inquiry familiar to the courts: *interpreting a federal statute* to determine whether Executive action is authorized by, or otherwise consistent with, [the CSA]. . . . The [AG's] Interpretive Rule's validity under the CSA is the issue before us. (emphasis added)

Under Constitutional principles (the "delegation doctrine") and the federal Administrative Procedure Act, an executive branch agency, such as the DOJ, may promulgate only those administrative rules or regulations that Congress, within a specific statute it has enacted, has

empowered that agency to promulgate. Put differently, a cabinet officer, such as the AG, does not have legal authority to initiate a regulation just because he or she thinks it is desirable as a public policy matter; rather, every regulation must be justified with a specific statutory basis provided by the democratically elected legislative branch of government.

Thus, the legal question decided in *Gonzales v Oregon* was the rather narrow one of statutory interpretation; namely, whether the CSA, as currently written, authorizes the AG to promulgate an administrative rule that defines what is a “legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” The Supreme Court did *not* find that Congress is *precluded* from authorizing the AG to promulgate such a regulation but did find that Congress had *not chosen* to include such administrative law-making authorization in the language of the CSA, as presently written.

The big concern for advocates of effective pain control, including the option for physicians to prescribe opioids when necessary and appropriate, ought to be that Congress still does have the power under the Constitution to statutorily authorize the AG to promulgate

precisely the kind of regulation that was promulgated (without proper statutory authority at the time) in 2001, and that the Supreme Court’s *Gonzales v Oregon* decision may inspire Congress to take exactly that action. Or even worse, Congress could directly use an amended CSA to bypass the DOJ altogether and directly outlaw the prescription of lethal drugs within the physician-assisted suicide context. There have already been significant political rumblings in the halls of Congress proposing these very legislative actions.

Hence, for advocates of effective pain control, celebration of the Supreme Court’s important but limited decision in *Gonzales v Oregon* must be short lived and restrained. Attention must now be shifted from the judicial arena to the legislative arena to preserve physicians’ legal freedom to use their clinical experience and expertise ethically to behave benevolently toward their suffering patients.

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