

# High court debates assisted suicide law: Oregon law at stake

by [Robert Marus ABP](#) in the [November 1, 2005](#) issue

Epitomizing what is at stake in the battle over a replacement for retiring justice Sandra Day O'Connor, a skeptical Supreme Court heard arguments early last month in a case involving Oregon's assisted-suicide law.

The justices are considering whether the U.S. attorney general can use federal drug-control laws to punish physicians who prescribe death-hastening drugs to patients.

*Gonzales v. Oregon* represented the first contentious social issue before the new Court—only two days after newly appointed Chief Justice John Roberts took the helm October 3. And the case was heard the same day President Bush announced that White House counsel Harriet Miers is his choice to replace retiring O'Connor, often a moderate swing vote on the bench. O'Connor has agreed to stay on until her successor is confirmed and sworn in. That could happen as early as this month.

Without O'Connor's vote, the Court could end up in a 4-4 deadlock on the case. A new justice cannot rule on the case without hearing the October 5 arguments. That would likely mean the case would be reargued before the Court and its new member.

The case does not deal with whether the Constitution provides for "the right to die." Instead, it will determine whether a federal administration that is opposed to a state's policy allowing physician-assisted suicide can effectively override it, even though the legal system historically has given states the authority to regulate the medical professions.

"Certainly the practice of medicine by physicians is an area traditionally regulated by the states, is it not?" O'Connor asked federal Solicitor General Paul Clement, who was arguing on behalf of Attorney General Alberto Gonzales and the Justice Department. Clement replied, "That has to be reconciled with the fact that, for 90 years, the federal government has had a prominent role in controlling" narcotics and

other substances.

Oregon has the nation's first and only law legalizing physician-assisted suicide. Oregon voters approved it in 1994 and reaffirmed in 1997. It allows doctors to prescribe oral medications to hasten death for terminally ill patients who are mentally competent and meet other strict criteria. According to court documents, since the law was enacted, approximately 70 patients have used it to end their lives.

Members of Congress inquired whether the federal Controlled Substances Act would allow the Justice Department to punish Oregon physicians who prescribe suicide drugs. Attorney General Janet Reno determined in 1998 that her Justice Department would not pursue such sanctions.

However, with the advent of President Bush's administration in 2001, then-attorney general John Ashcroft reversed the Justice Department's position. Ashcroft determined that prescribing drugs to hasten death violates a provision in the federal law that says "a prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." After Ashcroft resigned, his successor, Gonzales, maintained that stance.

The state of Oregon asked a federal district court to declare the U.S. policy illegal. That court and the Ninth U.S. Circuit Court of Appeals agreed, saying a 1997 Supreme Court decision suggests that states have the right to experiment with assisted-suicide laws and that the Controlled Substances Act does not give the U.S. attorney general the right to punish physicians who act within state law.

Both Clement and his opponent in the arguments—Oregon assistant attorney general Robert Atkinson—faced tough questions from many members of the court, reflecting the vexing nature of the issue. Justice Anthony Kennedy, himself a moderate on many conflicted issues, told Clement that it is a "tough case."

Roberts and Justice Antonin Scalia peppered Atkinson with questions about whether states have complete authority to determine, independently of the federal government, what sorts of drugs their physicians can legitimately prescribe.

O'Connor likewise had difficult questions for Clement, asking whether a future attorney general could decide that the administration of deadly drugs under state death-penalty laws was not a legitimate medical practice. "Would that be true also for any doctor who prescribed the substances to execute a convict?" she inquired.