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The Legal and Political Future of Physician-Assisted Suicide

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IN 1997, THE US SUPREME COURT RULED THAT THERE IS NO federal constitutional right to physician-assisted suicide (PAS) but implied that individual states could nevertheless enact statutes permitting its practice.[1] The lower federal courts promptly upheld the constitutionality of the Oregon Death With Dignity Act,[2] the only US state statute authorizing PAS. Many observers of the court's opinions thought that state legislatures would determine the future of PAS.[3] Instead, the legal consequences for physicians and pharmacists in Oregon who assist in the deaths of terminally ill patients will be determined by litigation concerning the scope of federal drug laws now working its way through the federal appellate courts. The debate over PAS has thus been transformed into a fundamental question: Which level of government should be the primary regulator of drugs in this country—federal or state?

In November 2001, the US attorney general stated that physicians legally prescribing lethal doses of drugs to terminally ill patients under Oregon's state law would nonetheless be violating federal drugs laws.[5] He did not, however, threaten criminal prosecution of physicians who used the Oregon statute to assist the death of terminally ill patients. Rather, he instructed Drug Enforcement Agency officials to revoke the permission of these physicians to prescribe medications.[4] This interpretation of the federal statute took account specifically of the need of health care professionals to prescribe drugs to alleviate pain, especially of terminally ill patients. The attorney general has stated that the use of controlled substances to control pain, even if it could lead to the death of a patient, was not prohibited under the statute.[4,5] In addition, he described how federal officials could enforce the federal drug laws without examining the medical records of individual patients. Federal officials were instructed instead to gather their information about violations from the state registry of physician-assisted deaths that was established under the requirements of the Oregon Death With Dignity Act. Critics have argued that this interpretation will hamper efforts to provide aggressive palliative care in Oregon.[6] The state of Oregon and some Oregon physicians promptly filed a lawsuit seeking to block the implementation of the attorney general's ruling, thereby once again shifting the debate back to the federal courts.[7] (In the current round of litigation, the state of Oregon has so far prevailed in the district court.) The district court judge ruled that state legislatures, not federal officials, can define the meaning of dispensing controlled substances "in the course of professional practice," and determine when the use of a controlled substance is used for "a medical purpose." The district court judge reasoned that the regulation of medical practice in the United States has traditionally been the province of the states rather than the federal government—and should remain so. As such, he concluded that Oregon's legislative declaration that prescribing a lethal dosage of drugs to terminally ill patients is legitimate professional practice[8] should prevail over the federal government's interest in a particular drug enforcement policy.

The federal government is currently appealing the district court's ruling to the federal appeals court, arguing that the federal government can define "medical purpose" without reference to specific state statutes. The federal government's argument is that no single state legislature can unilaterally change the definition of "medical purpose," as this definition provides guidelines for federal officials and prosecutors.

It is unclear how the US Supreme Court will decide the issue of access to barbiturates in Oregon for PAS. The court has previously allowed the federal government to limit access to marijuana for pain relief even when a state has declared such use legal.[9] If the federal government is ultimately successful in its suit to use federal regulation to discourage, if not halt, the practice of PAS in Oregon, this will essentially end the political debate over legalizing PAS at the state level.

Proponents of legalizing PAS could then try to persuade Congress to modify the federal Controlled Substances Act. It is not clear that Congress would be willing to assist Oregon's attempt to be the only US state to allow PAS. In 1997, for instance, Congress enacted a statute prohibiting the use of federal Medicare and Medicaid funds for PAS.[10] No state has in fact followed Oregon's lead in enacting PAS statutes. At least 2 states, Maine and Michigan, have defeated ballot measures that would have allowed PAS. If these votes represent the current political sentiment on this issue, any new initiative to legalize assisted suicide seems unlikely to succeed.

REFERENCES

1. *Washington v Glucksberg*, 521 US 702 (1997).
2. Oregon Death With Dignity Act, Or Rev Stat §127.800-127.897 (1994).
3. Quill TE, Lo B, Brock DW. Palliative options of last resort. *JAMA*. 1997;278:2099-2104.
4. Dispensing of Controlled Substances to Assist Suicide. 66 Federal Register 56.607 (November 9, 2001).
5. Letter from Attorney General John Ashcroft to Hugh C. Stelson, MD, President, Oregon Medical Association, November 6, 2001. Available at: http://www.ormedassoc.org/oma/news/pas_ashcroft.pdf. Accessed November 21, 2002.
6. Steinbrook, R. Physician-assisted death in Oregon—an uncertain future. *N Engl J Med*. 2002;346:460-464.
7. *State of Oregon v John Ashcroft*, 192 F. Supp. 1077 (D. Ore 2002). Appeal pending United States Court of Appeals for the Ninth Circuit, No. 02-35587.
8. Ganzini L, Nelson HD, Lee MA, Kraemer DF, et al. Oregon physicians' attitudes about and experiences with end-of-life care since passage of the Oregon Death With Dignity Act. *JAMA*. 2001;285:2363-2369.
9. *United States v Oakland Cannabis Buyers' Cooperative*, 532 US 483 (2001).
10. Assisted Suicide Funding Restriction, 42 USC §§14401-14408 (1997).