

file assisted suicide

THE WHITE HOUSE

WASHINGTON

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MEMORANDUM TO THE PRESIDENT

FROM:

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SUBJECT:

ASSISTED SUICIDE CASES

Recent decisions of the United States Courts of Appeals for the Ninth and Second Circuits have held that state criminal laws prohibiting "assisted suicide" are unconstitutional. In the Ninth Circuit case, the State of Washington is expected to file a petition for certiorari next month. In the Second Circuit case, the State of New York filed a petition for certiorari on May 16 asking the Supreme Court to overturn the decision. The United States is not a party to either case and has not participated in them. The Department of Justice currently has no plans to weigh in on the certiorari petitions. The purpose of this memorandum is to inform you of their inclination to take no position at this stage and alert you to issues related to their taking that position.

I. The Cases

A. Ninth Circuit Case

In March, the Ninth Circuit struck down a Washington law that prohibited assisted suicide. The majority, acknowledging that the state had some legitimate, countervailing interests that were reflected in its assisted suicide law, concluded that, on balance, the law impermissibly interfered with the constitutionally protected liberty interest of individuals to the extent that it prohibited physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths.

Washington's application to the Supreme Court for a stay of the Ninth Circuit's ruling was granted by Justice O'Connor. The state was also granted an extension of the deadline for filing a petition for certiorari, which is now due on July 5. The plaintiff's response to Washington's petition is due on August 5. The full Court extended the stay of the effect of the Ninth Circuit ruling until the Court either denies certiorari or decides the case on the merits. The Supreme Court will not act on Washington's petition before the end of its current Term. Thus, it will not decide whether to hear the case until at least the beginning of its next Term.

B. Second Circuit Case

In April, a three-judge panel of the Second Circuit struck down a series of New York laws prohibiting assisted suicide. The majority said that New York did not treat similarly situated persons alike in that persons in final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems while those who are in final stages of terminal illness but who are not on life-support systems are not allowed to hasten death by self-administering prescribed drugs.

The plaintiffs' response to New York's petition is due on June 17. As in the Washington case, the Supreme Court will not decide whether to hear the New York case until October, at the earliest.

II. Issues Relating to Possible Justice Department Participation

The United States is not a party to either case and has not been involved in the cases as an amicus curiae. At this point, therefore, the Justice Department has not taken a position on the constitutionality of the state assisted suicide laws in question.

If the Justice Department were to decide to participate in the New York case as an amicus at the certiorari stage, its brief would be due on June 17, at the same time as the plaintiffs' response to New York's petition for certiorari. If Washington files a petition for certiorari on July 5 as expected, the Department must file its amicus brief when the plaintiff's response is due on August 5 in order to participate. Failure to participate in the cases at the certiorari stage does not foreclose the Justice Department from submitting an amicus brief on the merits if the Supreme Court ultimately agrees to decide the cases, and it is not uncommon for the Department to file an amicus brief only after certiorari is granted.

The Justice Department has indicated that, at present, it does not expect to participate in the cases at the certiorari stage. As a general rule, the United States does not file amicus briefs in support or opposition of petitions for certiorari, unless there is a strong and clearly discernible federal interest at stake. The recent amicus briefs in support of the petitions for certiorari in Hopwood v. Texas and Jones v. Clinton were seen to come within this rule -- in Hopwood, in large part, because Education Department programs and guidelines support certain forms of affirmative action in university admissions that are at issue in the case, and in Jones v. Clinton because the institutional interests of the Office of the President are directly implicated. By contrast, the absence of an identifiable federal interest was one of the reasons that the Justice Department stayed out of the recently-decided Romer case (at both the certiorari and merits stages), in which the Supreme Court invalidated Colorado's referendum on gay rights. Although the assisted suicide cases raise important questions of constitutional law, they do not implicate any special federal interest in the Justice Department's view.

In light of your expressed opposition to assisted suicide, and coming on the heels of the Justice Department's highly visible participation at the certiorari stage in the Hopwood and Paula Jones cases, it is possible that a decision by the Department to forgo involvement for now in the assisted suicide cases could attract some attention and criticism. In that regard,

we understand that 40 members of the House of Representatives -- almost all of them Republican -- wrote to the Solicitor General last month urging that the Justice Department file an amicus brief in support of New York's petition for certiorari. The letter specifically referred to your stated opposition to assisted suicide. The charge may be made that it is hypocritical of you to say that you oppose assisted suicide, but then fail to direct the Justice Department to join in seeking to uphold assisted suicide laws. Our response to that charge would be that the decision on participation at the certiorari stage was made by the Justice Department in accordance with its generally established policies, without any Presidential involvement.

If you were to favor Justice Department participation in the assisted suicide cases at the certiorari stage, it would require guidance from you to the Attorney General to that effect. Since the deadline for filing in the New York case is June 17, such guidance would have to be provided immediately. Conceivably, the Justice Department could file a brief in support of certiorari in the Washington case (a brief which would not be due until August 5), even if it forgoes participation in the New York case; however, it is difficult to see why one would distinguish between the two cases at this stage.

If the Justice Department does not file a brief in either case at this stage, there will not be any further opportunity for participation unless and until the Supreme Court grants certiorari. If the Supreme Court does agree to hear one or both of the cases, which seems likely, there will be increased public attention on the issue and undoubtedly greater pressure for United States involvement. If the Supreme Court grants certiorari in one or both of the cases on the first Monday in October, a Justice Department amicus brief in support of assisted suicide laws would be due 45 days thereafter (November 21).

Recommendation

We recommend that you not direct the Justice Department to file a brief supporting certiorari in either of the cases. Rather, we recommend that you allow Justice to follow its prevailing procedure in such state law cases and allow the certiorari decision to be made without the Justice Department's input. If certiorari is granted, we will address with Justice the role they should play in the case.

Decision

- ☐ Approve
- ☐ Disapprove; direct Justice to file in support of certiorari
- ☐ Discuss