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Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel

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FEATURE CASE

High Court to Review Federalism Issues in Assisted-Suicide Case

On February 22, the U.S. Supreme Court agreed to hear *Gonzales v. Oregon* (formerly *Oregon v. Ashcroft*), a case that implicates wrenching ethical questions as well as legal issues that go to the heart of our federal system.

The suit involves Oregon's Death With Dignity Act, the only law in the country that allows doctors to help terminally ill patients use drugs to end their lives. In 2001, Attorney General John Ashcroft concluded that the law is invalid because, in his view, suicide is not a "legitimate medical purpose" under the federal Controlled Substances Act (CSA). The State of Oregon seeks declaratory and injunctive relief to prevent enforcement of the Ashcroft Directive.

In a 2-1 ruling, the Ninth Circuit ruled for Oregon, holding that the Justice Department's position contravenes the plain language and express congressional intent of the CSA. But in so ruling, the panel imposed a "clear statement rule" because, in its view, the Ashcroft Directive intrudes into an area of traditional state and local control (medical care). The directive thus must be supported by a clear congressional statement of authority.

Quoting *Lochner*-era authority, the panel stated that "direct control of medical practice in the states is beyond the power of the federal government." Thus, in the panel's view, the CSA must be "unmistakably clear" in authorizing any federal intrusion into state regulation of medical care. The Ninth Circuit relied on *Gregory v. Ashcroft*, which imposed a similar rule on federal regulation of the retirement age for state judges because the regulation "alter[ed] the usual constitutional balance between the States and the Federal Government." The panel also relied on *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (U.S. 2001), a wetlands case that adopted a narrow reading of the federal Clean Water Act to preserve state control over land use issues. The federal petition for *certiorari* asks the Court to correct the Ninth Circuit's "serious misconception of the relative powers of state and federal governments."

As explained in our recent book, *Redefining Federalism*, CRC is a staunch defender of the role of the states as Brandeisian "laboratories" of experimentation in our federal system, and we have urged the adoption of a "clear statement" rule in preemption cases to preserve that role. At the same time, we are concerned about defining entire categories of regulation, such as medical care or land use, as beyond the purview of federal control absent a clear statement, a rule that could improperly jeopardize longstanding federal regulation of human health and the environment. The Court's ruling is sure to shed new light on the respective roles of federal and state governments in our federal system.

ON THE HORIZON

The *San Remo* Case: Let's Put an End to this Nonsense

On March 1, San Francisco will file its merits brief before the U.S. Supreme Court in *San Remo v. San Francisco*, which raises the issue of how preclusion principles under the federal Full Faith and Credit Act intersect with *Williamson County*'s requirement that takings claimants suing local officials seek compensation in state court.

The case is the latest manifestation of a decade-long assault on *Williamson County* by the National Association of Home Builders and its allies. No one in this familiar cast of characters provides any compelling argument as to why the Court should disregard the plain requirements of the Full Faith and Credit Act, one of the oldest provisions in the U.S. Code and a bulwark of our federal system. Several *amici* supporting San Remo evidently recognize this, arguing instead that the Court should overrule *Williamson County*, an issue not before the Court.

Oral argument is March 28. One hopes this unpleasant walk down memory lane will be the last one local officials need to take. CRC is filing an *amicus* brief for California municipalities and the American Planning Association.

QUOTE OF THE MONTH

"Isn't that changing the test for 'public use' to 'efficient public use'? You want us to sit here and evaluate the prospects of each condemnation, one by one?"

Justice Antonin Scalia at the oral argument in *Kelo v. New London*, questioning counsel for the landowners about their proposed heightened scrutiny for eminent domain use to promote economic development.

OUTRAGE OF THE MONTH

He's Back!

Last year, extreme views of property rights and fierce antipathy to environmental protection kept grazing lobbyist and former Interior Solicitor William Myers from taking a lifetime seat on the Ninth Circuit court of appeals. Or did they? Like a bad movie villain who keeps popping up to fight another day, Myers was renominated to the Ninth Circuit this month.

Despite his radical view that property rights have the same Constitutional status as freedom of speech, remarks comparing federal land management to the tyrannical rule of King George over the American colonies, and accusations that environmentalists are "bent on stopping human activity wherever it might promote health, safety and welfare," Myers has been deemed the best of the bad bunch of Bush's second-term judicial nominees. New Senate Judiciary Committee Chairman Arlen Specter has scheduled his hearing for March 1st—the very first hearing for any of Bush's second-term nominees.

Yet Myers' record, which was troubling the first time around, is even more disturbing today. He "specifically authorized" a deputy to enter into a disastrous settlement with Frank Robbins, a rancher who repeatedly violated federal grazing laws. Recently, more has come to light about the Robbins settlement, and the new information raises troubling questions about the fact that Myers did not ensure that his deputy followed federal law and department procedures in negotiating this settlement.

Myers also committed the Department of the Interior to supporting a giveaway of valuable federal lands, after lamenting that Interior couldn't hand over the land on its own. The land contains rock and salt that the Bureau of Land Management says could be worth hundreds of millions of dollars for construction projects. On the basis of Myers' recommendation, two California Congressmen introduced legislation that would have given the land to a private company. BLM employers were highly critical of this decision, with one telling a reporter, "There is 1.3 million tons of rock and 200,000 tons of sand [on the land in question] * * * Why in the world would we give it up? I'm not here to give away public resources." The Department of the Interior reversed Myers' position and withdrew its support for the giveaway after the facts came to light.

Myers seems unable to put aside his own agenda when it conflicts with the law. The country does not need judges who will ask "What's good for the grazing and mining industries?" but rather who ask "What do the law and the Constitution require?"

EYE ON WASHINGTON

Oral Arguments in *Kelo* and *Lingle*

On February 22, the Supreme Court heard arguments in two of the three major property rights cases it will decide this term.

In *Kelo v. New London*, the Court pressed counsel for both parties regarding the scope of the "public use" provision as applied to condemnations of property designed to promote economic development. It is virtually certain the Court will reject the landowners' primary argument, which attempts to take economic development off the table altogether as a justification for eminent domain. Some Justices expressed more sympathy for the idea of a greater judicial role in reviewing these condemnations, but even here they expressed deep concerns about judicial competence and democratic decision-making. Led by Justice Kennedy, several Members of the Court explored whether unfairness issues might be addressed by adjusting the Court's rulings on just compensation, an issue not before the Court in *Kelo.*

The argument in *Lingle v. Chevron* was a snoozer, which is good news for the government. Hawaii Attorney General Mark Bennett did a masterful job in explaining why the Court's oft-repeated but rarely applied "substantially advance" test is not a freestanding test of regulatory takings liability. The Court seemed so persuaded by his argument that it asked few questions, with Justice Scalia observing that the Court might be forced to "eat crow" and admit it has been confusing due process and takings analysis.

In contrast, the Court peppered Chevron's attorney with difficult questions. He ultimately fell back on the language in *Dolan* asserting that the Takings Clause is not a "poor relation" as compared to the rest of the Bill of Rights. This makes for a fine rhetorical flourish in the closing minutes of an argument, but when you go to it too early, it's a sign of trouble.

The Court will decide these cases this spring. CRC filed amicus briefs in both. For two CRC op-eds supporting New London, go to http://www.communityrights.org/PDFs/LADJ2-22-05.pdf (*Give Eminent Domain a Chance*) and http://www.communityrights.org/PDFs/LT2-21-05.pdf (*Saving a City*).