Oregon BENCHMARKS
THE U.S. DISTRICT COURT OF OREGON HISTORICAL SOCIETY NEWSLETTER

Upcoming Famous Case: United States v. Gozales

Oregon's Latest Supreme Court Decision

By John Stephens

On **May 11** at 4:00 in the Mark O. Hatfield Federal Courthouse, the U.S. District Court Society will hold its next presentation in its Famous Cases series on the Oregon Death With Dignity Act case, *United States v. Gonzales*, 126 S.Ct. 904 (2006). The speakers will be U.S. District Judge Robert E. Jones; Portland lawyer, Eli Stutsman; Oregon Assistant Attorneys General Stephen Bushong and Robert Atkinson; and Deputy Assistant U.S. Attorney General Gregory Katsas. This article provides background information for that presentation.

In 1994, a measure to enact the Oregon Death with Dignity Act (ODWDA) was placed on the November general election ballot by citizens' initiative. Despite opposition from so-called opinion leaders, including elected leaders from both parties, religious organizations, medical organizations, and newspaper editorial boards, the measure passed 51% to 49%. ODWDA was codified as ORS 127.800 to 127.897.

Oregon Death With Dignity Act

The Act provides that a qualified patient may request and an attending physician may write prescriptions for medication to enable the patient to end his or her life "in a humane and dignified manner." To qualify, a patient must be an adult (18 years of age or older), a resident of Oregon, capable of making and communicating health care decisions, and diagnosed with a terminal disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months. Both the attending physician and a consulting physician must have determined that the patient is suffering from a terminal disease. The patient must make two oral requests and one written request. A prescription cannot be written until 15 days have passed from the initial oral request and 48 hours have passed from the written request. The attending physician has a number of other responsibilities including counseling the patient and verifying that the patient is making an informed decision. If the attending physician or the consulting physician believes a patient may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment, then the physician must refer the patient for counseling. No medication can be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.

The attending physician may dispense the medications directly, provided, among other things, the attending physician has a current Drug Enforcement Administration certificate and complies with any applicable administrative rule.

The ODWDA does not authorize a physician or any other person to end a patient's life by lethal injection, mercy killing, or active euthanasia. (Although ODWDA provides that actions taken in accordance with the Act, do not constitute suicide or assisted suicide under the law, the Oregon Department of Human Services and the courts quite consistently refer to the actions as "physician-assisted suicide.") Among other procedures, ODWDA requires that upon dispensing medication, a health care provider must file a copy of the dispensing record with the Oregon Department of Human Ser-

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Oregon Assistant Attorneys General Robert Atkinson (left) and Stephen Bushong will be two of the speakers on Oregon Death with Dignity Act.

President's Message

I never imagined, when I attended the *Sohappy* Famous Cases presentation in 2001, that a few years later I would be President of the Society. Like many who have attended the series, I was fascinated by the behind-the-scenes perspective offered by the attorneys and judges involved in a historical event. I enjoyed hearing how Judge Belloni called Judge Panner, then an attorney representing the tribes, back from a camping trip on a Sunday (along with other litigants) and instructing the parties to resolve a state court injunction before Monday.

We have been taping the series since 2002 and receiving CLE credit for those presentations. We are now able to offer 7 different programs for sale, listed in the insert in your newsletter.

I am happy to welcome our new officers: **Kerry Shepherd**, vice president/president-elect; **Karen Saul**, treasurer; and **John Kreutzer**, corporate/executive secretary. I am lucky to have them working with me as officers.

I want to welcome our new board members: **Michelle Barton**, **Amity Clausen, Jack Collins, Kari Furnanz, Matthew Kalmanson, Susan Marmaduke** and **Greg Miner**. I want to thank them in advance for the contributions they will be making in those areas.

I have to extend a heartfelt thank you to **Judge Owen Panner** and his many years of service and friendship to the District Court Historical Society. As one of our organization's founding fathers, he has helped to steer the organization and helped corral many of our stalwart members. As he moves south to take up his duties as Medford's first Article III judge, we will miss his physical presence, but he will always have a place at our meetings. I hope Medford is ready for things to change! Fortunately, Judge Panner recruited **Judge Anna Brown** several years ago to join the Society. Judge Brown has agreed to step into the role of adviser and supporter for the group.

Thanks to *Benchmarks* chair **Heather Van Meter**, the society web page has debuted. Please log onto *www.usdchs.org*. The web site should make past *Benchmarks* and orals histories more accessible.

–Jenifer Johnston, President

The USDCHS Oral History Program

By Steve Brischetto and Donna Sinclair

Since 1984, the District Court Historical Society of Oregon's Oral History Program has collected biographical interviews of judges, lawyers and lay persons who play a significant role in Oregon legal history. These oral histories are preserved by the Oregon Historical Society library archives and are available to both the public and researchers. At present, the Oral History collection includes approximately 120 interviews. Some oral histories have been collected by professional interviewers, but many were collected by volunteers. All of the interviews are preserved on tape recordings and many include written transcripts. The U.S. District Court Historical Society is currently working to transcribe all of the oral histories in the collection. Most recently, we have begun adding a video interview with judges as a part of the collection.

The Oral History Program has added two important histories to our collection of the histories of individuals who have had a significant impact upon the law in Oregon.

William Long recently recorded the oral history of George Rives of the Stoel Rives law firm. Ken Perry completed oral history interviews of former U.S. Attorney Kristine Olson. The U.S. District Court Historical Society wishes to thank Ms. Olson and Mr. Rives for agreeing to let their stories be a part of our collection and Mr. Long and Mr. Perry for their volunteer efforts to record Oregon's legal history.

We Need Volunteers

Volunteers make this oral history project possible. We need volunteers willing to go through training and willing to conduct oral histories. In the past, volunteers have made it possible to collect the histories of many figures in Oregon legal history. The list is extensive and includes people such as Rupert Bullivant, Jack Collins, Thomas Cooney, Velma Jeremiah, Sidney Lezak, and Noreen Kelly Saltveit McGraw, to name a few.

Many of these interviews are not transcribed. In order to make them more accessible, we need sponsors for the transcribing project. If you or your firm is interested in volunteering to transcribe an oral history, to collect an interview, or in making transcription possible through a donation, please contact Stephen Brischetto, *slb@brischettolaw.com* or Donna Sinclair, *donnas@pdx.edu.*

The following firms or individuals have donated transcribing time

Bullivant Houser Bailey transcribing Rupert Bullivant (ca. 4 hours); Cooney & Crew transcribing Thomas Cooney (ca. 5 hours); University of Oregon (Dave Frohnmayer) transcribing Otto Frohnmayer (ca. 4 hours); Jolles & Bernstein transcribing Bernard Jolles (ca. 8 hours); Newcomb, Sabin, Landsverk transcribing Sidney Lezak (ca. 8 hours); Scarborough McNeese O'Brien & Kilkenny transcribing General Chester McCarty (ca. 6 hours); David Rhoten transcribing George Rhoten (ca. 2 hours); Schwabe Williamson Wyatt transcribing Wendell Wyatt (ca. 6 hours); Dunn Carney Allen Higgins & Tongue LLP transcribing Hattie Kremen (ca. 4 hours); Markowitz Herbold transcribing Norm Sepenuk (ca. 9 hours); David R. Williams (ca. 2 hours)

Stoel Rives is also sponsoring the collection of three professionally col-

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Glancing Backward, Striding Forward: Case Management/Electronic Case Filing (CM/ECF)

By Camile S. Hickman, Director of Operational Services

When I began working for the Clerk's Office in 1971, attorneys (not the messenger service) brought their documents to the Clerk's Office for filing. The clerk at the counter hand stamped the date filed on the front page. Case file dockets were maintained on heavy card stock in a rolling tray that sat beside the manual typewriter. As documents were filed, the docket sheet was pulled and the filing date and style of the document entered. An index card for each party in a case was created on 1.5" by 2.5" cards; yellow for plaintiffs, blue for defendants and pink cards for criminal defendants. Over the years, automation began to gain a hold on the judiciary; moving from a manual docketing system, to WANG, to Courtran, to ICMS and presently to CM/ECF.

Until the advent of CM/ECF, each of these docketing systems were designed for use by court staff only. When CM/ECF was first delivered to pilot courts in November 1998, it was envisioned solely as an application which would enable attorneys to file their documents electronically over the internet. After a few courts had a chance to work with the software, it became evident that the primary function of the application should enable the court to manage its case load. Attorney participation became a secondary goal. The U.S. District Court for Oregon was one of four pilot district courts that played a major role in focusing development of a viable case management system. From the start of this project, our court wished to encourage attorneys to participate voluntarily. As a consequence, attorneys filing their documents electronically with our court today account for over 35% of the entries made to the system.

Amendments to LR 100, which governs electronic filing in the U.S. District Court of Oregon, become effective June 1, 2006. As of September 1, 2006, attorneys will be required to electronically file their documents with the court. Analogous to the move from manual typewriters to personal desktop computers, snail mail to e-mail and telephones to fax machines, it will be necessary for attorneys to have internet access and e-mail. Adobe Writer software is necessary to convert word processing documents to PDF format and attorneys will need access to scanning equipment. Benefits to electronically filing documents include 24-hour Internet access to electronically filed documents, automatic e-mail notice of case activity, the ability to download and print documents directly from the court database, and concurrent access to case files by multiple parties.

The Clerk's Office is ready to assist attorneys and their staff in learning how to navigate in the CM/ECF environment. In addition to the on-line *User Manual and Tutorial* located on the court's CM/ECF Project Page, training classes will be offered during the months of April, May and June. Dates, locations and registration information may be found by visiting the court's site at ***www.ord.uscourts.gov***.

Judge Panner Moves to Medford

By Nancy Moriarty

Effective May 1, 2006, Judge Owen Panner has moved his chambers to the James A. Redden U.S. Courthouse in Medford, becoming the first Article III Judge permanently working in Medford.

The Court has frequently discussed the need for an Article III Judge in Medford. Magistrate Judge John Cooney has been headquartered in Medford for a number of years, but cannot try criminal cases or non-consent civil cases. The case load in Medford has grown substantially — there are now over 100 criminal cases pending.

Judge Owen and Nancy Panner

Judge Panner's wife, Nancy, got the ball rolling. When visiting her brother and his wife in Jacksonville, she noticed that the neighboring 25 acres were for sale. The family connection, the opportunity to buy an adjacent property, and the need for an Article III Judge in Medford convinced Judge Panner to volunteer to embark upon this new adventure.

While Judge Panner's law clerk Jackie Sanders has relocated to Medford, his judicial assistant, Deborah DesJardins, will remain in Portland. Technology has made this transition easier. Daily mail, email, and video conferencing keep the court connected. At Chief Judge Haggerty's insistence, Judge Panner will also maintain Portland chambers on the 8th Floor of the Mark O. Hatfield U.S. Courthouse, which he will use when he is needed in Portland.

Judge Panner, his wife Nancy and their three horses are settling in on their 25-acre spread in Jacksonville. Home remodeling, landscaping and a new barn have kept them busy during the transition. They plan to raise some cattle on the three pastures and enjoy riding. While Judge Panner claims that he and Nancy are basically "rednecks", they are very elegant "rednecks"! Judge Panner is joining the Rogue Valley Country Club, even though he claims he won't have time to play golf for a while. While they will miss their friends in the Portland area, the Panners are looking forward renewing friends and acquaintances in Medford.

Supreme Court Decision continued from page 1

vices. The department, in turn, is required to collect information regarding compliance with ODWDA and to make available to the public an annual statistical report of information collected. The department's annual reports are available on its website *www.oregon.gov/DHS/ph/pas/*. Oregon was, and is, the only state in the country with such a law.

ODWDA did not immediately go into effect. A group of physicians, four terminally ill patients, and a residential care facility, among others, filed an action in U.S. District Court seeking to enjoin ODWDA from taking effect. In *Lee v. State of Oregon*, 869 F. Supp. 1491 (D.Or. 1994), Chief U.S. District Judge Michael Hogan granted plaintiff's motion for preliminary injunction preventing ODWDA from going into effect. Thereafter, the District Court held that ODWDA violated the Equal Protection Clause because it did not provide sufficient safeguards to prevent incompetent (i.e. depressed) terminally-ill adults from committing suicide; ODWDA irrationally deprived terminally-ill adults of safeguards against suicide that are otherwise provided to adults who are not terminally ill. *Lee v. State of Oregon*, 891 F. Supp. 1429 (D.Or. 1995). The District Court entered judgment permanently enjoining the enforcement of ODWDA. *Lee v. State of Oregon*, 891 F. Supp. 1439 (D.Or.1995). On appeal, the Ninth Circuit reversed. The court held that plaintiffs had failed to establish actual injury, and therefore had no standing. The Ninth Circuit vacated the District Court judgment and remanded with instructions to dismiss the complaint for lack of subject matter jurisdiction. Lee v. State of Oregon, 107 F.3d 1382 (9th Cir. 1997). The Ninth Circuit did not reach the equal protection arguments that were the basis of the District Court's decision.

A 1997 Supreme Court Decision

In the meantime, in June 1997, the Supreme Court issued its decision in *Washington v. Glucksberg*, 521 U.S. 702. While rejecting the argument that the right to assistance in committing suicide was a fundamental liberty interest protected by Due Process Clause, and while holding that Washington's ban on assisted suicide was rationally related to legitimate government interests, the Court also noted "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues." 521 U.S. at 719. This statement has been important to all subsequent judicial considerations involving the ODWDA. A few months later, on October 14, 1997, the Supreme Court denied a petition for certiorari in *Lee. Lee v. Harcleroad*, 522 U.S. 927 (1997).

The 1997 Oregon Vote

The injunction was then lifted on October 27, 1997, but that was not the end of challenges, non-judicial at least, to ODWDA. Believing voters might be of a different mind about the moral, ethical, and legal choice they had made in 1994, the Oregon Legislative Assembly referred a measure to the voters to repeal ODWDA in the November 1997 general election. This time, however, the vote was only more decidedly lopsided, with 60% to 40% voting not repeal ODWDA.

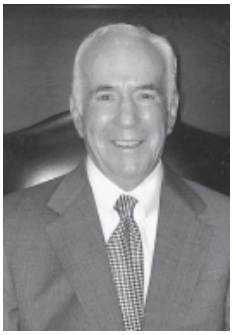
With the second vote, challenges to ODWDA switched from the local level to the national level. The medications that attending physicians prescribe under ODWDA are regulated under the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq*. In 1971, the Bureau of Narcotics and Dangerous Drugs (predecessor of the Drug Enforcement Agency) adopted formal regulations implementing the CSA, including what is now 21 C.F.R. § 1306.04. It provides in relevant part: "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." [Emphasis added.] In 1997, members of Congress, concerned about ODWDA, wrote the director of the DEA arguing that the DEA should prosecute or revoke the CSA registration of Oregon physicians who prescribe medications under ODWDA. They contended that hastening a patient's death was not a "legitimate medical" practice and that prescribing controlled substances for that purpose violated the CSA. The director agreed, but seven months later, Attorney General Janet Reno disagreed. She determined the DEA could not take the proposed action because the CSA did not authorize the DEA to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." *Oregon v. Gonzales*, 126 S.Ct. 904, 913 (2006).

Bills were introduced in 1998 (Lethal Drug Abuse and Prevention Act of 1998) and again in 1999 (Pain Relief Promotion Act) designed to block ODWDA. The proposed Pain Relief Promotion Act became a leading cause of the Senate Majority Leader, Don Nickles. Neither bill passed.

The Ashcroft Directive

In 2001, John Ashcroft became Attorney General. As a U.S. Senator Ashcroft was a proponent of the two bills and of the DEA taking action. On November 6, 2001, Attorney General Ashcroft issued an interpretive rule, often referred to as the Ashcroft Directive, that "assisting suicide is not a 'legitimate medical purpose'" within the meaning of administrative rules that had been adopted under the CSA, and that "prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act." He ruled that such "conduct by a physician registered to dispense controlled substances may 'render his registration ... inconsistent with the public interest'" and therefore subject to possible suspension or revocation under the CSA. The interpretive rule provided it applied regardless whether state law authorized or permitted the conduct. 66 Fed. Reg. 56608 (Nov. 9, 2001).

The next day, on November 7th, the State of Oregon commenced an action in U.S. District Court against the Attorney General, and filed a motion for a temporary restraining order and a preliminary injunction "to enjoin defendants from enforcing, applying, or otherwise giving any legal effect to the Ashcroft directive pending further order of the court." On November 8th, U.S. District Judge Robert Jones heard the motion and issued a temporary restraining order. On November 20, the court heard and issued a preliminary injunction. *State of Oregon v. Ashcroft*, 192 F. Supp.2d 1077, 1084 (D.Or. 2002). Thereafter, the court granted motions for summary judgment filed by plaintiffs and denied a motion to dismiss and a motion for summary judgment filed by defendants. The District Court held that the determination of what constitutes a "legitimate medical purpose" or practice had been traditionally left to the states, that nothing in the CSA delegated to the Attorney General or the DEA the authority to decide as a matter of national policy whether physician-assisted suicide constitutes a "legitimate medical purpose" or practice, and that in enacting the CSA, the intent of Congress was to address problems of drug abuse, drug trafficking, and diversion of drugs from legitimate channels to illegitimate channels. The court said:



U.S. District Judge Robert Jones, who will also speak on this Famous Case, issued the first ruling on the Ashcroft Directive

> *Without doubt there is tremendous disagreement among highly respected medical practitioners as to whether assisted suicide or hastened death is a legitimate medical practice, but opponents have been heard and, absent a specific prohibitive federal statute, the Oregon voters have made the legal, albeit controversial, decision that such a practice is legitimate in this sovereign state.*
> –192 F. Supp.2d at 1092.

Ninth Circuit Opinion

The Ninth Circuit, in an opinion by Judge Tallman, and over a lengthy dissent by Judge Wallace, affirmed. *State of Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004). Among other things, the Ninth Circuit concluded that the District Court did not have jurisdiction of the matter, that review in the first instance lay with the U.S. Circuit Courts of Appeal. The District Court had recognized that it might lack jurisdiction over the matter and had alternatively treated the actions as petitions for review which it ordered to be transferred to the Ninth Circuit under 28 U.S.C. § 1631. The Ninth Circuit said:

> *Although we conclude that the district court did not have jurisdiction, Judge Jones' opinion on the merits is well reasoned, and we ultimately adopt many of his conclusions.*
> – 368 F.3d at 1120 n. 1.

Presumably because the parties had shifted their arguments on review, the Ninth Circuit focused more on the Attorney General's authority under the CSA to revoke a practitioner's registration to dispense a controlled substance, 21 U.S.C. § 824. The Ninth Circuit held that while the Attorney General had the authority to revoke a registration because a practitioner has "committed such acts as would render his registration under section 823...inconsistent with the public interest as determined under such section" (§ 824(a)(f)), § 823(f) required the Attorney General to consider five factors including the recommendation of the appropriate State licensing board or professional disciplinary authority, the individual practitioner's experience in dispensing controlled substances, and the individual practitioner's criminal history. The Attorney General, the court found, had considered none of these.

The majority rejected the argument of Judge Wallace in his dissent that the Ashcroft Directive does not ban physician assisted suicide outright, but only bars the use of controlled substances for assisting suicide. Among other reasons, the majority said "it is clear to us that controlled substances provide the best and most reliable means for terminally ill patients to painlessly take their own lives." 368 F.3d at 1123 n.5.

The Supreme Court Decision

The Supreme Court granted certiorari. Oral argument was heard the first week of the October 2005 term, and the Court issued its decision on January 17, 2006. In an opinion by Justice Anthony Kennedy, and over the dissent of Chief Justice Roberts and Justices Scalia and Thomas, the Court affirmed the Ninth Circuit. *Gonzales v. Oregon*, 546 U.S. ___, 126 S.Ct. 904 (2006).

The issue, as the Court saw it, was whether the CSA allowed the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding ODWDA which permits the procedure, and in particular whether the interpretive rule was authorized by, or otherwise consistent with, the CSA. The Court particularly considered what levels of deference were or were not available to the Attorney General's interpretive rule under the Court's administrative law jurisprudence. The Court held the interpretive rule was not entitled to *Auer* deference, because the administrative rule that was the subject of the interpretive rule, was little more than a restatement of the terms of the CSA, that the "language the Interpretive Rule addresses comes from Congress, not the Attorney General." The question then was not the meaning of the regulation but the meaning of the statute. "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." The Court held that the interpretive rule was not entitled to *Chevron* deference either because, although the statutory language was sufficiently ambiguous for *Chevron* deference to apply, the Attorney General had not promulgated the rule pursuant to authority Congress delegated to the Attorney General. The Court found that while certain matters had been del-

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Remembering Mercedes Deiz

By Katherine H. O'Neil

The Hon. Mercedes Lopez Deiz, the first African-American woman admitted to the practice in Oregon and nationally known trial judge and champion of civil rights, was 87 at the time of her death on October 5, 2005.[1] Appointed to the Multnomah County District Court bench by Governor Tom McCall in November 1969, Deiz was the first African-American woman judge in the Pacific Northwest. [2]

Nationally, Justice Sandra Day O'Connor included her in the group of women judges who gathered in Los Angeles in 1979 to organize the National Association of Women Judges, an organization Deiz later served as a director. She chaired Oregon's Advisory Committee to the U.S. Civil Rights Commission, the ABA Juvenile Justice Commission, was director and instructor for the National Center for State Courts, the Association of Family Conciliation Courts and was a faculty member at the National Judicial College. She taught trial advocacy at Harvard Law School as a Woodrow Wilson Visiting Fellow.

In Oregon, Deiz served on several Oregon State Bar committees chairing three including the Civil Rights committee. She was an early secretary-treasurer of the Multnomah Bar Association (the only position open to women at the time) and president of the Owen Panner Inns of Court. She chaired the Metropolitan Youth Commission, was vice chair of the Urban League, and a member of the Governor's Commission on Judicial Reform. She had wide ranging and eclectic interests as shown in her board service in organizations ranging from Lewis and Clark College, OMSI, and Portland Community College to Good Samaritan Hospital and Pacific Ballet Theatre.

She was born Mercedes Frances Lopez in New York City in 1917, the oldest of ten children of a Czechoslovakian mother and Cuban father of African descent. Her parents migrated to New York as children. Her father was a former vaudevillian and after his fourth child was born, he began working as a valet "in those very prestigious hotels throughout downtown Manhattan." Like many in their Harlem immigrant community, the Great Depression plunged the family into chronic economic insecurity. Deiz's father abruptly lost his job. Deiz drew strength and determination from her Harlem community. "We were living in a wonderful polyglot neighborhood of Italians and Jews and French and Germans and Polish people and Russian people." Children ate in each other's homes sharing as food was available. Deiz remembered eating a lot of spaghetti, homemade and dried on racks on tenement roofs.

The neighborhood public schools were the foundation for her later academic and professional success. They provided an education "superior to what the children are getting today." The Lopez children enjoyed the free museums, libraries, and concerts available in New York City. Harlem's Wadleigh High School was the forum for her first political campaign, the race for lunchroom director. On the morning that student campaign speeches were delivered, Eleanor Roosevelt came to address the student body. Deiz remembered sitting next to the First Lady, who gathered the student candidates around her after the program, complimenting them on running for office. The First Lady told them, "I want you to know that you can become anything you want to become, but you have to be prepared and ready for it." The message resonated with those Mercedes' parents gave her and her siblings. This was the first of many elections that she won.

A high school graduate at 16, she worked briefly as a maid at a Fifth Avenue boutique before beginning a four-year stint at the WPA's Lafayette Theatre in Harlem. It was just opening with Orson Welles as director and John Houseman as producer. Deiz's father insisted that she keep away from backstage "where they talk so badly," so she worked at the switchboard and in the box office. Deiz returned to Wadleigh High in the evening for French lessons to obtain the second foreign language required for admission to Hunter College. She entered Hunter College in 1938. In all of her jobs, Deiz was "very active with trade unions," organizing women within her union of office workers.

Her brother, Paul Lopez, encouraged her to come to Oregon, establish residency and end a troubled marriage. With $12 in her pocket, she and her four-year-old son, Bill, got on the train in 1948. The African-American railroad porters and waiters were the first Portlanders they met. After evaluating her situation, the porters came to her coach seat bearing "a great big stack of sandwiches with the crusts all cut off, chicken sandwiches" for Bill and instructed her to bring Bill and come to the dining car every day. These

1 Beatrice Cannady, a 1922 graduate of Northwestern College of Law, has been erroneously reported by several sources including the Oregon Historical Society to be the first African-American woman to be admitted to practice in Oregon. In spite of having failed the bar exam five times, Cannady held herself out as an attorney and was admonished by the OSB board of governors to desist. *Serving Justice: A History of the Oregon State Bar*. Pp. 54-56.

2 Sources for this article include the author's almost 30-year friendship with Judge Deiz; the author's November 22, 1999 videotaped interview of Judge Deiz; Oregon Women Lawyers' *AdvanceSheet*, fall 1989; OSB Judicial Candidate Statement of Judge Deiz, March, 1990; I*mages of Oregon Women* by Ellen Nichols; Judges' Profile, *Multnomah Lawyer*, January 1987.

men and their relatives became lifelong friends.

Deiz worked a series of jobs in Portland until she found work at the Bonneville Power Administration in the library. Fairly quickly she met "that wonderful Carl Deiz," a Portland native, World War II vet, and a Tuskegee Airman, on the staff of the Internal Revenue Service. They married in October 1949 and had two children, Karen and Gilbert. Deiz often credited Carl Deiz with making her success possible. "I could not have done the things I did without Carl. Especially with respect to raising our children."

Returning to the BPA after the birth of her son Gilbert, Deiz was encouraged to challenge the BPA policy that closed jobs above her grade level to anyone not a World War II veteran. In her civil service exam she scored the highest possible grade but BPA stood firm and refused to allow her to advance from GS-3 to GS-4. Deiz quit.

In 1954, a friend introduced her to attorney Graham Walker who hired her as his legal secretary. Walker recognized her obvious talent and offered to pay her first semester's tuition at Northwestern School of Law. She accepted and enrolled in night law school. Continuing work as a legal secretary by day, she attended night law school and excelled. She was the only woman in her class. While in law school she worked as a legal secretary at Anderson, Franklin, Jones and Olson. Two of the partners, Robert E. Jones and Cliff Olson, were later her colleagues on the bench.

After graduating fourth in her class, she couldn't get hired, a fact she attributed to gender rather than racial bias. She opened her own office and found that she "always had lots of work," bankruptcies, dissolutions, child custodies, a wide range of trial practice and that the "overwhelming majority" of her clients were white men.

On October 12, 1960, the *Oregonian* noted that yesterday Oregon's "first Negro woman lawyer" had tried her first case, a land sale foreclosure, in room 540 of Multnomah County Courthouse. In line with the sensibilities of the time, the reporter described Deiz as a "light-skinned Negro with a

The Hon. Mercedes Deiz (left) and Betty Roberts

dazzling smile and fancy black glasses" and gave Deiz's age (42) as well as height, weight and home address, noting that she "was trim and pretty in a black dress with a striped black and white top trimmed with red roses peeking out of the jacket." Deiz's office address was also given but not the outcome of the trial.

After a year on her own, Nels Petersen invited her to join his firm which later included Donald Londer (who also became Deiz's colleague on the Multnomah County bench) and, briefly, Bob Packwood. After 15 months in this setting, being "in court every single day, without exception" and "liv[ing] in the law library," Deiz

The "wonderful" Carl Deiz and Judge Mercedes Deiz

went on to become an administrative law judge with Workman's Compensation.

Deiz submitted her name to the Multnomah Bar Association for a judicial appointment but the MBA did not forward her name to then Governor Tom McCall. Governor McCall was aware of Deiz's prodigious talents (from their years of friendship since before he entered politics) and he appointed her to the District Court bench in November 1969. Thus the first African-American woman to pass the Oregon bar became the first African-American woman on the bench in the Pacific Northwest.

State senator and attorney, Don Willner became her campaign director for the May 1970 primary election and she handily defeated her male opponent. Two years later she ran in the May primary for a newly created Circuit Court position against seven male opponents. In the fall run-off election she defeated Ron Gervurtz by a wide margin. She was re-elected to her Circuit Court position for four six-year terms until she was forced into mandatory retirement at age 72. She continued as a senior judge and then as a mediator.

Deiz was a special advocate for juvenile justice with a concern for the many children that passed through her courtroom. She said that termination of parental rights was the most difficult action that she had to take as a judge, yet noted that many parents came into her court wanting their children removed from their home. Recalling her own parents' nurture, Deiz firmly believed that the failure of parents to impress on their children that they are special and loved was the cause of much juvenile delinquency. Security at Multnomah County Courthouse was tightened in 1978 after a murder in her courtroom when the husband in a dissolution proceeding killed attorney Candice Duboff Jones with a bullet intended for his wife.

Deiz's activism with community organizations such as the Urban League and the NAACP was kept apart from her profession. She noted that she had "always [been] fighting, advocating for

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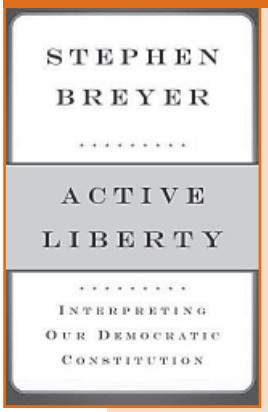
On Our Members' Bookshelves



Active Liberty: Interpreting Our Democratic Constitution

By Justice Stephen Breyer

Knopf, 2005

Reviewed by Mary Ellen Farr

Active Liberty began as a series of Tanner Lectures on Human Values given by Justice Breyer at Harvard University in late 2004. Justice Breyer used these lectures to discuss how differences in judicial philosophy affect statutory and Constitutional interpretation, and in some part, to defend his own judicial philosophy. Although this volume is small, the concepts are not.

Justice Breyer's philosophy begins with the principle that the United States is built on liberty. This liberty includes freedom from government coercion as well as freedom to participate in government. Justice Breyer calls the latter "active liberty." His thesis states that "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." Noting that all judges have essentially the same interpretive tools for statutes and the Constitution-language, history, tradition, precedent, purpose, and consequence-he observes that judges differ in the emphasis they put on those tools.

Justice Breyer argues that active liberty (the sharing of power among the people) should drive judges' selection of purpose and consequence as the bases for interpretation of statutes and the Constitution. This theme falls within an interpretive tradition encompassing a view of democracy as including both the rights and the duties of the people and calling for judicial restraint. He writes that judges are ill-equipped to determine whether a law is or isn't desirable. Therefore, courts should seek to determine what the purpose of the law was and the attendant consequences of any particular interpretation. In this sense, Justice Breyer acknowledges that the Constitution must apply to new matters, thereby necessitating an analysis of the consequences of a proposed interpretation, and a realization that the original Constitution was insufficient, requiring occasional amendment and interpretation. However, the Constitution established a system through which citizens may share in the government's authority, and that system, Justice Breyer suggests, should be the ultimate goal of interpretation of statutes and the Constitution.

Justice Breyer applies his theme of active liberty in interpretation to speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law. In each of these examples, he seeks to demonstrate how application of laws to modern situations can be improved by attention to the basic concepts of democracy. In his discussion of privacy, he notes that cases coming before the Supreme Court often arise from changes in technology that allow the government to know more about the individual than was possible to know in the past. Justice Breyer acknowledges that Americans will search for pragmatic laws allowing them to use technology, including adopting laws that allow or forbid certain intrusions. He cautions against the courts intruding too much into the democratic discussion occurring in the face of technological change. On the other hand, the need for the democratic discussion also warns against adopting an overly rigid method of interpreting the Constitution.

Justice Breyer defends his analysis against those objecting to an interpretation primarily based on purpose and consequence, and those who prefer focusing on text, the Framers' original expectations, and historical tradition. He acknowledges that those critics (including textualists, originalists, and literalists) believe that focus on text, history, tradition, and precedent will safeguard against judges usurping the democratic will of the people. Nonetheless, he asserts that focusing on active liberty is more in keeping with the Constitution because no judge can actually know what the Framers might have thought about any modern issue. Furthermore, Justice Breyer notes that while literalists eschew analysis of consequences in case by case study, their entire theory is focused upon the consequences they foresee in the potential for judges substituting their reasoning for the reasoning of the government. Finally, he argues that an analysis of consequences does not necessitate a choice of the right consequence, but rather an analysis and understanding of what those consequences might be.

Justice Breyer provides perhaps too few concrete examples, and particularly too few concrete examples for those not focused on the Supreme Court's case load. Furthermore, these are not simple concepts. However, in light of the recent attention to the judicial philosophies of Supreme Court justices, Justice Breyer's book brings out many of the basic disagreements facing the nation and the judiciary. For that reason, alone, the book is well worth reading.

Correction:

In our Fall '05 issue, Judge Helen Frye was reported to be the first female judge of a general jurisdiction court in Oregon. To clarify, Judge Frye was the first female judge in Lane County Circuit Court and the first female judge able to hear criminal cases. Judge Jean Lewis was the first female judge of a general jurisdiction court in Oregon. We apologize for the error.

Long-time friends and colleagues, Mercedes Deiz (left) and Katherine O'Neil in 1999.

Mercedes Deiz continued

civil rights and human rights and against any kind of prejudice and discrimination." Deiz was a founding director of Oregon Women Lawyers, a continuation of her battle against discrimination. She wrote, "We must remember that one voice crying alone frequently is ignored, whereas many voices loudly speaking through a spokesperson shielded by an organizational framework will be heard and heeded."

She had the gift of relating to individuals of any status or ethnicity. Deiz said that "the way I know how to talk to people, it has helped a great deal in, in alleviating some of the terrible stupid ways that this country of ours can act." That talent coupled with her commitment to social justice led her to mentor dozens of minority attorneys, male and female, as well as many woman lawyers. The Hon. Ellen Rosenblum of the Oregon Court of Appeals, remembers Deiz fondly "as a friend and colleague" from their overlapping years on the Multnomah County Circuit court bench. "I remember her as a very friendly and proud person. I also know that she was a wonderful mentor to just about every minority lawyer she could get her hands on."

Okianer Christian Dark met Deiz when Dark was an assistant U.S. attorney for Oregon. Dark, now associate dean of academic affairs and professor of law at Howard Law School, describes Deiz. "She was who I wanted to be when I grew up. Her qualities as a person and her personal character included excellence, a humble spirit, and tireless commitment to achieve a truly inclusive society where equality of opportunity is real....her marvelous sense of humor, so that she did not take herself quite so seriously, although she was very serious about the issues that were important to her."

Mandatory retirement kept Deiz from realizing her oft-stated goal of continuing on the bench until another African-American woman succeeded her. The goal was realized March 23, 2006 with the investiture of Adrienne Nelson. Nelson wrote, "Judge Deiz was a wonderful role model and mentor to me. When I first moved to Portland and began to meet attorneys, meeting Judge Deiz had a profound effect on me. As a female attorney of color who had accomplished so much and broken many barriers, Judge Deiz was so warm, encouraging and open that I felt an immediate connection to her. Throughout the years, she took time to check on me, both personally and professionally....She was the first person to tell me that I should be a judge. What she did for me she did for countless others but it touched my life in a very special way."

Reflecting back on the words of Eleanor Roosevelt, Deiz said that achievement, not success, is critical. "Achievement is the knowledge that you have studied and worked hard and you have done the very best that is in you." She said, "I think that there's a big distinction between achievement and success because with success other people are praising you."

For her many achievements, Oregon Women Lawyers established the Mercedes Deiz award to be given to an individual who has advanced women and minorities within the legal profession, a fitting memorial to a woman who achieved so much and for so many.

The USDCHS Oral History Program

continued from page 2

lected interviews, including Caroline Stoel and supplements to the histories of Tom Stoel and George Frasier

We need transcribing sponsors for the following interviews:

Ten hours or less

C. Girard Davidson (ca. 9 hours); Patrick Dooley (ca. 10 hours); Alice Tomkins Fee (ca. 8 hours); William Hedlund (ca. 6 hours); Carol Hewitt (ca. 1 hour); Richard Maizels (ca. 4 hours); Kristine Olsen (ca. 3 hours); George Rives (ca. 4 hours); Noreen Kelly Saltveit McGraw (ca. 8 hours); Robert Smith (ca. 8 hours); James Weatherford (ca. 9 hours); David Williams (ca. 2 hours)

Ten hours or more

Jack Collins (ca. 16 hours); John Dellenback (ca. 19 hours); Robert Duncan (ca. 31 hours); Orlando Hollis (ca. 20 hours); Lee Johnson (ca. 21 hours); John F. Kilkenny (ca. 16 hours; partially transcribed); Berkeley Lent (ca. 22 hours); Roger Martin (ca. 11 hours); Lynn Newbry (ca. 10 hours)

CALENDAR

May 11: Famous Cases: ***United States v. Gonzales***
Mark O. Hatfield Federal Courthouse, 4:00 – 5:45 p.m.

May 25: Book signing for ***Gus J. Solomon: Liberal Politics, Jews, and the Federal Courts*** by Harry Stein, Oregon Historical Society, 5:30 – 7:00 p.m.

June 29: Summer Associate Program, location, 12 – 4:30 p.m.

June 29: Bench and Bar Social, location, 4:30– 6:30 p.m.

Reserve the dates!
August 20: Annual Picnic & **October 26:** Annual Meeting

Oral History with Stephen Bloom

By Donna Sinclair

This article is based on an oral history of Magistrate Judge Stephen Bloom conducted by Donna Sinclair. The oral history was completed for the U.S. District Court of Oregon Historical Society, and is accessible to the public at the Oregon Historical Society.

In spring 2005, Oregon water lawyer and part-time Article I Magistrate Stephen Bloom agreed to record his oral history for the District Court Historical Society. A series of three interviews took place in the Portland chambers of Judge Donald Ashmanskas. The surroundings provided the right note of austerity to underline the seriousness Judge Bloom brought to his work with the District Court, despite his good humor and tongue-in-cheek wit. Judge Bloom is a younger subject than many for an oral history, but time was of the essence since he would soon be leaving for work as a Peace Corps volunteer in Armenia at the Constitutional Rights Protective Centre.

California Youth

Stephen Michael Bloom was born June 10, 1948 in San Francisco, California, to Dr. Allan Bloom and Natalie Claire Levee. He grew up in the San Fernando Valley, where his father was a general practice physician. The oldest of three children, he begins his story in 1958: "My mother died when I was ten of aplastic anemia." A year after her death, his father married Wilma Morgan, a UCLA graduate with two children. She and Stephen's father had three children. Bloom described her as "a mom and housewife all of her life" who stayed home with eight children.

Bloom described the marriage as a turning point for the entire family, noting that "[Mom] saved us from being juvenile delinquents." The household was "hectic" at dinner time. Visitors were common and meals often interrupted by phone calls from patients. Growing up he remembered only one family vacation and that his father "worked very hard and when he wasn't working he was at home with the family. He didn't golf, he didn't hunt, he didn't fly airplanes into the sides of mountains, and he didn't gamble. He was just basically, like I was, either with the family or working. In his days, a great role model." Bloom graduated from Taft High School in 1966, attended Dartmouth College for two years and finished at Stanford in June 1970 with a degree in English.

Stephen Bloom, 2006

The Vietnam War and Law School

Coming of age during the Vietnam War shaped Bloom's social conscience. "There were a lot of protests on the Stanford campus. And I had joined the Navy ROTC because my best friend in high school was writing me from Vietnam saying, 'You don't want to be here in the Army.'...I lived with a whole house of radical people, SDS [Students for a Democratic Society]. Everyone, including me, hated the war." Bloom did ROTC weekly drill marching at five a.m. on Monday mornings to avoid protesters. "We'd have protests on the campus and the Santa Clara Sheriff's Office would come on campus. It was a disconcerting time to be in college. Interesting, exciting, but disconcerting....I wasn't radical but I thought the war was stupid. Even my folks, who were kind of Eisenhower Republicans, thought the war was stupid. And this best friend of mine, a guy I played football with in high school, he had been killed. It just seemed stupid. It wasn't going anywhere....I was very resentful of having to go into the service because of the war."

After two years of service, he left the Navy in 1972 and got a job with the California Department of Education working with the Equal Educational Opportunities Commission. When asked why he became a lawyer, Judge Bloom said, "I'm not a policy wonk.... I didn't know what a lawyer did, other than Perry Mason on TV. I had no clue." But law appealed to him and "I decided that being a lawyer looked more interesting than being...in the Department of Education" and so he headed to Willamette Law School in August 1974. "I decided that I wanted to live in Oregon. I didn't like California, thought there were way too many people....There was just too much traffic and too much pollution. And that was when they had no traffic and no pollution."

Almost to the day he arrived, he met his future wife Becky Nelson, a Minnesota graduate of St. Olaf College, and a member of his class. "I didn't want to get involved. I wanted to be a serious student...she was much smarter than me and she was much more relaxed about it and she thought we should have a social life, which we did." Theirs was "one of the first classes to let women in, significantly. I mean, Norma Paulus was like one of two [women] in her class...the mid-70s is when they were actually recruiting women law students...now I'm sure the men and women are more used to each other at that kind of level, but back in the mid-'70s it was more unusual for women to go to law school."

During law school Bloom made the dean's list and was on the Law Review. Both he and his wife got their first jobs in Corvallis and stayed there for about a year. "My wife didn't like Corvallis because it had too many people and too much rain. So we went to

Stephen Bloom, a veteran traveler, in Kew Garden. Photos courtesy of Dr. Dan Marier.

Pendleton and I got a job in a DA's office and she got a job in the East Central Oregon Association of Counties writing an economic analysis of Eastern Oregon, which they're still using. She was a home economist." She later worked for the District Attorney's Office and on the Umatilla Indian Reservation. "After four months in the DA's office I got three job offers and I was neurotic enough to think I'd never get another job offer, so I took one with the only attorney that was my age, Garry Reynolds, who is now a circuit judge in Pendleton. I practiced with Don Morrison and Garry Reynolds in Hermiston, Oregon, for about eighteen months... [then] a job opened up at Kottkamp & O'Rourke, where I have been since 1981."

Starting a Practice

The practice was small, only the three of them: "John Kottkamp, one of the best trial lawyers in Oregon. He was just incredibly bright. He was like six-foot-two, slim, with silver hair and incredibly charming...Bob O'Rourke who was incredible on water law, great business lawyer, does great probate work. And me." In 1988, Bob O'Rourke was negotiating with the Confederated Tribes of the Umatilla Indian Reservation on the exchange of Columbia River water for Umatilla River waters, a very complicated, long, drawn-out process, the Umatilla Basin Project. "He got very tired of it...[and] suggested I take over and become a water lawyer, which was fine because I was getting tired of litigating. That's when the magistrate job opened up, in 1988.... I was appointed in October of '88 and then reappointed in '92, '96, 2000 and 2004."

"Art Barrows had been the magistrate before me for about eighteen years. And Owen Panner was the chief judge. Owen...couldn't talk Art into trying cases, but he wanted the new magistrate to try cases....[He] wanted to make the part-time magistrate in Pendleton like a regular magistrate. Oregon is unique. They treat the magistrates like regular judges....Article IIIs are appointed for life, but handle mostly criminal, felony stuff. Article I, the magistrates, are appointed for an eight-year term, except part-times, for four year terms and we handle misdemeanor and civil cases....The magistrates can't get felonies, but all the civil trials are parceled out equally. In other states they have full-time magistrates just do Social Security hearings, writs of habeas corpus, arraignments. It's really boring stuff. It would drive you crazy....Owen and the other judges in this district have been very, very supportive of the magistrates. They want magistrates that the lawyers all respect and will allow to try the cases. I tried a lot of cases in Pendleton."

He described the way he operated as a part-time magistrate in Pendleton and the benefits he experienced from being in the position. When he began, the position paid $3,000 per year and there was a good family health insurance plan. Other judges loaned staff for the trials and it was the friendship of the judges (as well as the ability to make a difference in society) that seemed the greatest benefit. Throughout the series of oral history interviews, Judge Bloom's admiration for the judges of the District Court shone through. He explained, "I like all the judges. I really do....They're all good people. There's really not a jerk among them. Seriously, I can say that. I'm leaving, I don't care. I'm not trying to butter anybody up."

Judge Bloom spent seventeen years as a part-time magistrate, trying four or five cases a year and managing the court's monthly CVB [Central Violations Bureau] calendar in Eastern Oregon. During that time he developed a water law specialty and represented irrigators in some of the most significant deals in Columbia Basin history. The Kottkamp & O'Rourke practice combined with Corey Byler Rew Lorenzen & Hojem in February 2005 to become the largest law firm regularly practicing in Eastern Oregon. He also filled in for other magistrates in Portland, ruled on sex bias and excessive force cases, diversity issues, and worked with the FBI and the U.S. Attorneys Office. As a lawyer, he got one of the last water rights for a client from the Columbia River around 1990. As a Pendleton-based magistrate, he provided the federal connection to Portland in a part of the state near the border between two states, and in a place surrounded by federal land.

New Website

The U.S. District Court Historical Society is proud to announce that we have launched a website, www.usdchs.org. You can find out more about the organization, read past issues of *Benchmarks*, become a member or make a donation to support our work.

New Challenges

As we started the spring 2005 interviews, Judge Bloom provided a two-minute overview of his life and ended by saying, "And that's it. It didn't take five hours." Although I convinced him otherwise, we barely scratched the surface of the issues he has been involved in, many significant to the state of Oregon. We did not delve into the personal tragedies that have touched him in recent years, such as the loss of his partner John Kottkamp in 2000 and his wife Becky, in a car accident, in January 2003. He spoke warmly of his pride in his three children (Benjamin, Molly, and John) and his admiration for his wife and stepmother. He noted how ineffectual politics can be and commented on the rationality of the law as well as its cumbersome nature. He didn't regale me with tales about his many civic activities, his ethical views, or his commitment to social justice, but the stories he told reflect his values.

As does his work in Armenia. In March 2004, Judge Bloom began the application process to join the Peace Corps. In November 2004 he got news that he would be going to Armenia, a part of the former Soviet Republic, in June 2005. As of January 2006, he is currently serving as the Rule of Law Liaison to Armenia for the American Bar Association's Central European and Eurasian Legal Institute. Through recent emails, he reports he is working on "amendments to the Armenian constitution, judicial reform, a code of ethics for judges, anti-corruption, and a whole lot more."

Supreme Court Decision continued from page 5

egated to the Attorney General, the subject of the interpretive rule was not one of them. The Court noted that the interpretive rule purported to declare that using controlled substances for physician-assisted suicide is a crime, "an authority that goes well beyond the Attorney General's statutory power." The Court rejected the argument that Congress gave the Attorney General "such broad and unusual authority" by "implicit delegation": "'Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes.'" 126 S.Ct. at 921. Having concluded the Attorney General's interpretive rule was not entitled to deference, the Court went on and considered whether the interpretive rule was, even in the absence of deference, otherwise consistent with the CSA. The Court's analysis was similar to the Ninth Circuit's and the District Court's. The Court rejected the argument that the requirement in 21 U.S.C. § 829 that controlled substances cannot be dispensed without the "written prescription of a practitioner" implies that the substance can only be made available to a patient for a "legitimate medical purpose." The Court concluded that the prescription requirement does not delegate "to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." 126 S.Ct. at 925.

Oregon Department of Human Services' recent report notes:

In 2005, 39 physicians wrote a total of 64 prescriptions for lethal doses of medication. In 1998, 24 prescriptions were written, followed by 33 in 1999, 39 in 2000, 44 in 2001, 58 in 2002, 68 in 2003, and 60 in 2004. Thirty-two of the 2005 prescription recipients died after ingesting the medication. Of the 32 recipients who did not ingest the prescribed medication in 2005, 15 died from their illnesses, and 17 were alive on December 31, 2005. In addition, six patients who received prescriptions during 2004 died in 2005 as a result of ingesting the prescribed medication, giving a total of 38 PAS deaths during 2005. One 2004 prescription recipient, who ingested the prescribed medication in 2005, became unconscious 25 minutes after ingestion, then regained consciousness 65 hours later. This person did not obtain a subsequent prescription and died 14 days later of the underlying illness (17 days after ingesting the medication). —Eighth Annual Report on Oregon's Death with Dignity Act, at 4 (2006).

May 11
Upcoming Famous Case
United States v. Gonzales
highlights Oregon's
Death with Dignity Act

The U. S. District Court
of Oregon Historical Society
740 U. S. Courthouse
1000 S.W. Third Avenue
Portland, OR 97204