

Nominee Is Pressed on End-of-Life Care

By Sheryl Gay Stolberg

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Correction Appended

WASHINGTON, Aug. 9 - Terri Schiavo, the brain-damaged Florida woman whose case provoked Congressional action and a national debate over end-of-life care, became an issue on Tuesday in the Supreme Court confirmation of Judge John G. Roberts Jr. when a Democratic senator pressed him about whether lawmakers should have intervened.

The senator, Ron Wyden of Oregon, said that Judge Roberts, while not addressing the Schiavo case specifically, made clear he was displeased with Congress's effort to force the federal judiciary to overturn a court order withdrawing her feeding tube.

"I asked whether it was constitutional for Congress to intervene in an end-of-life case with a specific remedy," Mr. Wyden said in a telephone interview after the hourlong meeting. "His answer was, 'I am concerned with judicial independence. Congress can prescribe standards, but when Congress starts to act like a court and prescribe particular remedies in particular cases, Congress has overstepped its bounds.'"

The answer, which Mr. Wyden said his aides wrote down word-for-word, would seem to put Judge Roberts at odds with leading Republicans in Congress, including the Senate majority leader, Bill Frist, and the House majority leader, Representative Tom DeLay, who both led the charge for Congressional intervention in the Schiavo case this spring. Mr. DeLay said at the time that the federal judiciary had "run amok."

Mr. Wyden has a keen interest in end-of-life issues because his home state, Oregon, has a law providing for physician-assisted suicide. That law is the subject of a Supreme Court case, on the docket for Oct. 5, about whether the federal government has the right to withdraw prescribing privileges for doctors who follow the Oregon law and prescribe lethal doses of medicine to their dying patients.

Mr. Wyden said that he asked Judge Roberts whether he believed states should take the lead in regulating medical practice, and that the nominee replied that "uniformity across the country would stifle the genius of the founding fathers."

Mr. Wyden said, "I came away with the sense that he was somewhat sympathetic to my notion that there should be a wide berth for states to take the lead."

In discussing how the law was evolving on end-of-life care, Mr. Wyden said Judge Roberts cited a dissent by Justice Louis D. Brandeis in a 1928 Supreme Court case, in which he famously spoke of "the right to be left alone." Legal scholars view that dissent as a pithy formulation of the right to privacy -- a principle that, years later and in a different context, formed the basis for the court's ruling in *Roe v. Wade*, which legalized abortion.

Senator Wyden said he also asked Judge Roberts what he meant when, in his 2003 confirmation hearings for the United States Court of Appeals for the District of Columbia Circuit, he told senators he viewed the *Roe* decision as "settled law." Mr. Wyden said Judge Roberts replied that "settled law depends to a degree on the bench on which you sit," meaning that while it may be settled for a circuit judge, the same may not be true for justices of the Supreme Court.

"His definition of settled law based on what he told me this afternoon is not settled," Mr. Wyden said, adding, "That is certainly something that needs to be followed up on."

The meeting between Judge Roberts and Mr. Wyden came as Democrats on the Senate Judiciary Committee said the White House was dragging its feet in providing thousands of pages of documents, promised two weeks ago by President Bush. The documents, which cover Judge Roberts's tenure as a young Justice Department official in the administration of Ronald Reagan, are housed at the Ronald Reagan Presidential Library in Simi Valley, Calif.

In a letter sent Tuesday, Senator Patrick J. Leahy of Vermont, the senior Democrat on the judiciary panel, reminded Mr. Bush that Democrats had put a priority on receiving certain documents, and asked that they "be produced to us on a rolling basis."

But the records have not been forthcoming, and Mr. Leahy said it appeared that the request had been "ignored or rejected."

Also Tuesday, abortion-rights advocates and opponents traded barbs, and national television advertisements, about Judge Roberts's involvement in a 1971 Supreme Court case, *Bray v. Alexandria Women's Health Clinic*, that involved Operation Rescue, a group that staged protests at abortion clinics.

The *Bray* case unfolded while Judge Roberts was working for the office of the solicitor general under the first President Bush, and he filed a friend-of-the-court brief that argued, successfully, that a century-old statute designed to quell the Ku Klux Klan could not be used to quash the abortion clinic protests.

Citing that case, the abortion rights group NARAL Pro-Choice America has begun a national advertising campaign intended to link Judge Roberts with advocates of clinic violence. The advertisement will begin running Wednesday on cable television and networks in two states, Maine and Rhode Island, that are home to centrist Republican senators. It immediately prompted an advertisement by Progress for America, a conservative advocacy group, defending Judge Roberts.

Judge Roberts has been quoted as saying that lawyers do not always share the views of their clients. But the Bray case -- which prompted Congress to enact a law barring abortion clinic blockades -- is particularly upsetting to advocates for abortion rights because the lead plaintiff, Michael Bray, had been convicted for his involvement in 10 bombings at health centers in the 1980's.

Correction: August 13, 2005, Saturday An article on Wednesday about comments by Judge John G. Roberts Jr. on the evolution of law governing end-of-life issues surrounding the Terri Schiavo case misstated a word in a 1928 Supreme Court dissent by Justice Louis D. Brandeis cited by Judge Roberts. The opinion spoke of "the right to be let alone" -- not "left" alone.

The article also misstated the year in which Judge Roberts filed a brief with the Supreme Court arguing, successfully, that a century-old antidiscrimination statute could not be used to quash protests at abortion clinics. It was 1991, not 1971.

The article also referred incorrectly to Michael Bray, a plaintiff in that case, *Bray v. Alexandria Women's Health Clinic*. (This error also occurred in some copies yesterday, in an article about an anti-Roberts advertisement placed and then withdrawn by NARAL Pro-Choice America.) Mr. Bray, who had been convicted of abortion-clinic bombings, was just one of seven plaintiffs; the lead plaintiff was his wife, Jayne.