

Chief Justice at the Bedside

John Roberts and the End of Life

During his September 2005 confirmation hearing for the position of Chief Justice of the United States, John G. Roberts was asked a number of questions related to science and technology, including questions about television in the courtroom, DNA evidence in capital cases, Internet pornography, and even the regulation of animal cloning. The following excerpts about end-of-life issues, taken from the hearing transcripts, perhaps reveal more about the assumptions and beliefs of the two Democratic Senators

asking the questions than about the fitness of Mr. Roberts for the position of Chief Justice. At the very least, their insistence that he answer their questions based on his “feelings as a man” were inappropriate for a hearing intended to emphasize the nominee’s judicial temperament, reasoning, and qualifications.

Senator Joseph Biden (Delaware): My family faced—and I’m sure many people in this audience’s families faced—a difficult decision of deciding when to no longer continue the appli-

cation of artificial apparatus to keep your father or mother or husband or wife or son or daughter alive. It's of great moment to the American public now. And there is a view expressed by Justice [Antonin] Scalia that there is no right that is absolute—or no fundamental right that exists for a family member—assuming the person is not capable of making the decision themselves, to make that judgment. He says, and I'm speaking in layman's terms, he says the state legislature can make that decision. I firmly believe, unless there's some evidence that the family's incompetent, the husband or the wife, with the advice of the doctor, should be able to make that decision. What do you think?

Judge John G. Roberts: Well, Senator, that does get into an area that is coming before the court. There is a case pending on the docket right now that raises the question of whether or not state legislatures have a prerogative to lay down rules on certain end of life issues.

Senator Biden: It's suicide, isn't it, Judge?

Judge Roberts: Well, in that case it's the application of the federal controlled substances law. The issue of illness in those cases do come before the court. The *Glucksberg* case raised a similar question. The *Cruzan* case that you mentioned presented it in a very difficult context of an incompetent individual no longer able to make a decision and the question of how the state law should apply in that situation. Those cases do come before the court.

Senator Biden: Do you think the state—well, just talk to me as a father. Don't talk to me—just tell me, just philosophically, what do you think? Do you think that is—not what the Constitution says, what do you feel? Do you feel personally, if you are willing to share with us, that the decision of whether or not to remove a feeding tube after a family member is no longer capable of making the judgment—they are comatose—to prolong that life should be one that the legislators in Dover, Delaware, should make, or my mother should make?

Judge Roberts: I'm not going to consider issues like that in the context as a father or a husband or anything else. . . . I think obviously putting aside any of those considerations, these issues are the most difficult we face as people and they are profoundly affected by views of individuality and moral views and deeply personal views.

Now, that's obviously true as a general matter. But at the same time, the position of a judge is not to incorporate his or her personal views in deciding issues of this sort. If you're interpreting a particular statute that governs in this area, your job as a judge is to interpret and apply that according to the rule of law. If you are addressing claims of a fundamental right under the liberty protected by the due process clause, again, the view of a judge on a personal matter or a personal level is not the guide to the decision.

Senator Biden: All right. Well, Judge, let me ask you then, with your permission, about your constitutional

view. Do you think the Constitution encompasses a fundamental right for my father to conclude that he does not want to continue—*he* does not want to continue—on a life support system?

Judge Roberts: Well, Senator, I cannot answer that question in the abstract, because. . . .

Senator Biden: That's not abstract. That's real.

Judge Roberts: Well, Senator, as a legal matter, it is abstract, because the question would be in any particular case: Is there a law that applies, that governs that decision? What does the law apply. . . .

Senator Biden: That's the question, Judge. Can any law—can *any* law—trump a fundamental right to die? Not to commit suicide, a right to decide, “I no longer want to be hooked up to this machine, the only thing that's keeping me alive. I no longer want to have this feeding tube in my stomach”—a decision that I know I personally made, and many people out here have made. And the idea that a state legislature could say to my mom—your father wants the feeding tube removed, he's asked me, the doctors heard it—and the state legislature's decided that, no, it can't be removed. Are you telling me that's even in play?

Judge Roberts: Well, Senator, what I'm telling you is, as you know, there are cases that come up in exactly that context so that it is in play and the sense is that there are cases involving disputes between people asserting their rights to terminate life, to remove feeding tubes either on their own behalf or

on behalf of others. There is legislation that states have passed in this area that governs that. And there are claims that are raised that the legislation is unconstitutional.

Those are issues that come before the Court. And as a result, I will confront those issues, in light of the Court's precedents, with an open mind. I will not take to the court whatever personal views I have on the issues. And I appreciate the sensitivity involved. They won't be based on my personal views. They will be based on my understanding of the law.

Senator Biden: That's what I want to know about because without any knowledge of your understanding of the law, because you will not share it with us, we are rolling the dice with you, Judge. . . .

Senator Dianne Feinstein (California): I was interested in a colloquy you had with Senator Biden on the end of life. And he used the word—he asked a number of legal questions. And then he says, “Okay, just talk to me as a father and tell me.” Now, I have been through two end-of-life situations, one with my husband and one with my father, both suffering terrible cancers, a lot of pain, enormous debilitation. Let me ask you this question this way: If you were in that situation with someone you deeply love and you saw the suffering, who would you want to listen to, your doctor or the government telling you what to do? To me, it's that stark because I've been through it.

Judge Roberts: Well, Senator, in that situation, obviously, you want to talk and

take into account the views and heartfelt concerns of the loved one that you're trying to help in that situation, because you know how they are viewing this. You know what they mean when they're saying things like what their wishes are and their concerns are and, of course, consulting with their physician. But it seems to me that in that situation, you do want to understand and make sure that you appreciate the views of the loved one. And only you can do it because. . . .

Senator Feinstein: That wasn't my question.

Judge Roberts: I'm sorry.

Senator Feinstein: I'm trying to see your feelings as a man. I'm not asking you for a legal view.

Judge Roberts: I wasn't trying to

give a legal view. My point was that, obviously, you look to the views of the person involved. And if it's a loved one, you are the one who is in a position to make sure that you understand their views and can help them communicate those.

Senator Feinstein: How would you feel if you were in that position?

Judge Roberts: An end of life situation? You know, I do think it's one of those things that it's hard to conceptualize until you're there. I really would be hesitant to say this is what I would definitely want done or that's what I would definitely want done. You do need to confront that and appreciate all of the different concerns and impulses and considerations.