

CONNOR ON *SCHIAVO**

Good morning. My name is Ken Connor and I had the privilege of representing Governor Bush in connection with the *Bush v. Schiavo* litigation.¹

The central question that really derives out of that litigation is whether the courts have a monopoly on protecting the weak and the handicapped, or whether there is a role for the executive branch and the legislative branch in protecting the frail and the vulnerable in our society against the possibilities of exploitation or neglect.

I think it's important that you understand the context of the milieu in which the Governor and the Florida Legislature found themselves. It was a sad case indeed. A young woman had collapsed under circumstances that really were never fully explained and about which her husband had given multiple inconsistent statements.²

A lawsuit arose out of her collapse; a lawsuit against her physician.³ Seven figures were recovered.⁴ The husband told the jury that he needed millions of dollars to take care of his wife, that with good care, she could be expected to live a normal life expectancy.⁵ The life care plan that was introduced said it would require millions of dollars to take care of her.⁶

* © 2005, Kenneth Connor. All rights reserved. Edited transcript of Kenneth Connor's comments from the January 28, 2005 live symposium. Mr. Connor, a civil trial attorney with Wilkes & McHugh, P.A., in Leesburg, Va., represented Governor Jeb Bush in the Schiavo litigation. He is based in the Washington, D.C., area and practices around the nation. He received his B.A. and J.D. from Florida State University.

1. *Bush v. Schiavo*, 885 So. 2d 321, 323 (Fla. 2004).

2. *Id.* at 324.

3. *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. 2d Dist. App. 2001).

4. Jay Wolfson, *The Rule in Terri's Case: An Essay on the Public Death of Theresa Marie Schiavo*, 35 Stetson L. Rev. 39, 42 (2005). Dr. Wolfson, Terri Schiavo's special guardian ad litem, reported that \$300,000 went to Terri's husband for loss of consortium and \$700,000 was placed in Terri's guardianship account. *Id.*

5. See O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 Fla. L. Rev. 53, 58 (2005) (asserting that damages in the malpractice suit were based on Michael Schiavo's testimony that he expected Terri to live a normal life span).

6. See Br. of Appellant at 16, *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004) (requesting discovery by the Governor as to why Michael Schiavo presented evidence at the malpractice case regarding the cost of Terri's life care plan).

The husband indicated that he took his marriage vows very seriously and that he intended to take care of his wife for the rest of her life. At no time during the course of the trial did the young husband ever indicate to the civil jury from whom he sought millions of dollars that his wife really would not want to live under these circumstances, but rather she would prefer to die. And even as he testified under oath that he took his marriage vows very seriously, he was already finding comfort in the arms of another woman who later averred that he had told her that he and Terri had never discussed the issue of what Terri would want under these circumstances.⁷ His response, according to her, was, “How the hell should I know; we were young, we never talked about these things.”⁸

When he got his hands on the money, the husband refused to permit further rehabilitative treatment; he withdrew antibiotic therapy; he melted down her wedding rings for a ring of his own; and he put her cats to sleep.⁹ He reportedly, according to the staff of the nursing home who filed affidavits in our case, came to the facility and said things like, “Is the bitch dead yet? When is the bitch going to die? I’m going to be rich.”¹⁰

A hearing was ultimately held on the husband’s motion seeking an order authorizing withdrawal of nutrition and hydration from his wife.¹¹ He was the sole heir of the wife and was the only one who stood to gain from her demise. He had admitted financial conflicts of interest as well as other personal conflicts of interest that should be manifest at this point.

Now, Florida law prohibits a judge from serving as a guardian.¹² It also prohibits a guardian from having a conflict of interest.¹³ This hearing was held at a time when Terri Schiavo’s guard-

7. *Excerpts from Cynthia Shook May 8, 2001 Deposition*, <http://www.hospicepatients.org/cynthia-shook-deposition-excerpts-05-08-2001.html> (Sept. 12, 2005) [hereinafter *Excerpts from Cynthia Shook*].

8. *Id.*

9. Aff. Carla Sauer Iyer ¶6 (Aug. 29, 2003) (on file with the *Stetson Law Review*); *Excerpts from Cynthia Shook*, *supra* n. 7, at <http://www.hospicepatients.org/cynthia-shook-deposition-excerpts-05-08-2001.html>; Anita Kumar, *A Family Divided*, St. Petersburg Times 1B (Jan. 30, 2000).

10. Aff. Iyer at ¶¶9–10.

11. *In re Guardianship of Schiavo*, 780 So. 2d at 177.

12. Fla. Stat. § 744.446 (2004).

13. *Id.*

ian, her husband, who sought to recover from her death, had a conflict.

Terri had heretofore had a guardian ad litem who was subsequently dismissed, and so at the time that the court made the decision about whether Terri Schiavo would live or die, Terri Schiavo had no legal guardian, effectively, who was not conflicted. She had no guardian ad litem. The judge was prohibited by the Florida guardianship law from serving as a guardian, but he effectively stepped in, becoming both advocate and adjudicator, although he was not under oath or subject to cross-examination by the other side.¹⁴ And in the meantime, while Mr. Schiavo had a lawyer and a conflict of interest, while the Schindlers were represented and had a conflict of interest, Terri Schiavo was utterly unrepresented in this proceeding.

The order was entered authorizing withdrawal of nutrition and hydration based on oral statements (not as in the *Browning*¹⁵ case in which the ward had not one, but two previously written advanced directives that made it clear and unambiguous what her desires were).¹⁶

The order was entered and ultimately acted upon. The public, in the meantime, had become aware of the facts and circumstances and they scratched their heads. They said, wait a minute. If Ted Bundy or Danny Rolling, accused of capital offenses, were on trial for their lives, they'd get independent counsel, they'd be entitled to competent representation, they'd get a trial by jury, and if they got the death penalty, they'd be entitled to automatic review, a mandatory review by the Florida Supreme Court.¹⁷

But in this case, Terri Schiavo, who was going to be starved and dehydrated to death, she would get none of these? Wait a minute, the law requires that?

And their overwhelming response was (as was the case with Mr. Bumble in *Oliver Twist*—you'll recall that famous line), “If the law supposes that, . . . [t]he law is an ass—an idiot.”¹⁸

14. *In re Guardianship of Schiavo*, 780 So. 2d at 179.

15. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990).

16. Snead, *supra* n. 5, at 62.

17. U.S. Const. amend. VI; Fla. Stat. § 921.141(4) (2005); *Rolling v. State*, 695 So. 2d 278 (Fla. 1997); *Bundy v. State*, 471 So. 2d 9 (Fla. 1985).

18. Charles Dickens, *Oliver Twist* 463 (Buccaneer Books 1976).

They petitioned the government for redress of their grievances. One hundred and twenty thousand people contacted the Governor and the Legislature and said, "This is wrong; this is fundamentally unfair. The role of the court is to do justice. The Governor and the Legislature have responsibilities to intervene here and to afford Terri Schiavo more process than the courts provided her."

That sounded reasonable to the Legislature when they heard all the facts and they said, "We're just going to take a modest little step. When you have a situation where you have someone who has no prior written advance directive, they've been found to be in a persistent vegetative state, nutrition and hydration have been withdrawn, and there is a challenge among the family over what her intentions were, we're going to give the Governor the power to enter a one-time stay to reinstitute nutrition and hydration, and we're going to require the appointment of a guardian ad litem."

Now, does that sound like a trampling of the system, a trampling of rights? Or does it sound like a state that has a compelling interest in the protection of innocent life and the handicapped, the preservation of the ethics and the integrity of the medical profession, and the protection of the rights of innocent third parties? We're going to take this modest step to see if we can afford this extra layer of protection, an extra layer of process, to ensure that we get it right, because as the United States Supreme Court noted in the *Cruzan* case,¹⁹ when you deal with end-of-life decisionmaking, finality is not the ultimate objective, *accuracy* is.²⁰ *Accuracy* is. And the Court in *Cruzan* gave a good explanation for why that was the case, because it said, you know, if you err on one side and require the continued provision of nutrition and hydration, the error in that case simply preserves the status quo.²¹ But if you err on the other side and you withdraw nutrition and hydration erroneously, that error simply is not correctable.²²

And while this fine lawyer in a solo practice in Dunedin has done a masterful job, he was assisted, of interest I thought, and

19. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990).

20. *Id.* at 316 (Brennan, Marshall, & Blackmun, JJ., dissenting).

21. *Id.* at 283 (majority).

22. *Id.*

ironically, by the American Civil Liberties Union,²³ who typically in cases like Danny Rollings and Ted Bundy insist again and again and again that every measure of protection should be taken to ensure that justice is done and an innocent party is not done in.²⁴

Well, the case went up, and you know the rest of the story. The Florida Supreme Court concluded that Terri's Law represented an encroachment on the judicial powers of the court, that there was an encroachment on the Court's turf.²⁵ The Governor was rebuked, if you will, and the Legislature was admonished.

And those of you who follow the rulings of the Florida Supreme Court know that many would say that the Court has historically had a very expansive view of its own role and turf, and a very narrow view, as some would say, to put it kindly, of the role of the Governor and the Legislature.

And there has been tension, some have pointed out, between those branches of government. The Governor has been a critic of what he calls "judicial activism," where judges usurp the authority of the legislative branches and the executive branches.²⁶ And there's been a public discussion and dialogue that has gone on, and a tension has arisen in that regard. And some have said, well, this is just a case of the Court giving the Executive and the Legislative branches its comeuppance.

Well, I don't know whether that's the case, but I do know if—and I could recommend to your reading a very thoughtful article that just came out in the January 2005 edition of the *University of Florida Law Review* called *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Con-*

23. *Bush*, 885 So. 2d at 323.

24. ACLU, *About Us*, <http://www.aclu.org/about/aboutmain.cfm> (accessed Sept. 12, 2005) (stating that the mission of the American Civil Liberties Union is to preserve individual protections and guarantees under the United States Constitution); *but see* Bill O'Reilly, *Death, Liberty and the Pursuit of Happiness*, <http://www.Jewishworldreview.com/cols/oreilly040405.asp> (Apr. 4, 2005) (stating "[t]he ACLU may be big on privacy, but it is not big on life in general, unless it is the life of a convicted murderer").

25. *Bush*, 885 So. 2d at 329–332.

26. *Black's Law Dictionary* defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." *Black's Law Dictionary* 862 (Bryan A. Garner ed., 8th ed., West 2004).

text by Carter Snead,²⁷ general counsel to the Presidential Commission on Bioethics. Mr. Snead had written this article before the Court ruled, and he determined the Legislature and the Governor properly exercised the authority that they had, that they had not encroached improperly, or unconstitutionally, or impermissibly on the turf of the Court, and made a very compelling case for why that was the case.

And then in his postscript he said, “Shortly before this Article went to press the Florida Supreme Court issued an opinion declaring Terri’s Law unconstitutional.”²⁸ And he went on to say,

The [C]ourt’s analysis of the judicial encroachment question was quite spare. The [C]ourt acknowledged that the key question in this context is whether the underlying judgment is final or executory. However, without any discussion (indeed without reference to any relevant precedent whatsoever) and contrary to the logic of the Florida guardianship regime and the clear language of the District Court of Appeal (designating its own order as “executory”), the [C]ourt simply asserted that the underlying judgment was final for purposes of separation of powers analysis. For reasons discussed extensively above, this conclusion is erroneous.²⁹

Would that Mr. Snead had been on the Court! And now we see, with the United States Supreme Court having denied review of the Florida Supreme Court’s decision,³⁰ we see the truth of Justice Hughes’s observation that the law is “what the judges say it is.”³¹

That may or may not be true, but in reality that’s what happens. And so this decision has come down to that.

But in the final analysis, I think we have to ask ourselves anew, do courts have a monopoly on these issues? Or is there a role for the executive and for the Legislature to play?

27. Snead, *supra* n. 5.

28. *Id.* at 88.

29. *Id.*

30. *Bush v. Schiavo*, 125 S. Ct. 1086 (2005) (denying Governor Bush’s petition for writ of certiorari).

31. Columbia U., *Columbia 250, Charles Evans Hughes*, http://c250.columbia.edu/c250_celebrates/remarkable_columbians/charles_hughes.html (accessed Nov. 11, 2005).

If you look at both the law as it relates to the Life-Prolonging Procedures Act and the Guardianship Law, those are both legislatively created bodies of law administered by the courts. And I would submit to you that, of course, there is a role for the Legislature to play; of course there is a role for the Governor to play.

The courts have long recognized the compelling interests that the state has in the preservation of innocent life, the protection of the disabled, and the preservation of the ethics of the medical profession, all of which are implicated here. Florida does not require these, but it is certainly a matter worthy of discussion to evaluate whether it should require, whether there is merit to requiring, some prior written advance directive in this arena. I'm not advocating that. I'm saying there is merit to that discussion. After all, we require a writing to enforce a contract for the sale of goods over \$500; don't we require that it be in writing? If it is not, the agreement violates the Statute of Frauds. You're going to convey an interest in real property; for it to satisfy the Statute of Frauds, guess what, it has to be in writing.

Is it so outrageous and nonsensical that we would say, before you can take action to starve a person to death and dehydrate them, their wishes need to be expressed in writing? That is a matter worthy of discussion, and it should not be trivialized, because the law has required written instruments for subjects that involve far less import than that.

During my representation of the Governor, I received a call from a lawyer in South Carolina who said, "Look, you know, I've been involved in drafting health care surrogacy and power of attorney agreements for years." And he said, "I'm now putting in a new provision that says, 'if my spouse cohabits with another person, their authority under this agreement is withdrawn.'"

Doesn't that make sense? Would you want somebody—would you want your spouse, who is living with someone else and who has fathered two children by someone else, would you want that person making the decision?

I would submit to you that all the Legislature sought to do was to afford just an extra measure of protection to ensure that we get it right. Now the editorial boards of this State have demonized the Governor over this issue, and I believe wrongly so. They made him out to be some insensitive lout who inserted himself in a way that he absolutely shouldn't have.

I would submit to you that the Legislature and the Governor in the finest tradition acted in a way to afford an extra measure of protection to handicapped people. Members of the disabled community have complained for years that they are not treated as whole persons, that they're not entitled to all the rights under the law. And when you look at how Terri Schiavo was treated, the due process protections that were not afforded her, and you compare them to convicted capital felons, I think you can only conclude that *Bush v. Schiavo* proves them right.

These are enormously important issues. We'd do well in my judgment to conduct our discussion with thoughtfulness and civility, because the stakes simply couldn't be higher.

Thank you.

(Applause)