

**ACLU Drug Law Reform Project Legal Analysis of the Effect Upon
State Medical Marijuana Laws of the U.S. Supreme Court's Decision
in Gonzales v. Raich.**

Overview

On June 6, 2005, the U.S. Supreme Court issued its decision in the medical marijuana case Gonzales v. Raich¹, reversing the Ninth Circuit and ruling against medical marijuana patients Angel Raich and Dianne Monson. Speculation about Raich has generated a great deal of confusion about the status of state medical marijuana laws like California's Proposition 215. This memorandum will explain the effect that the Supreme Court's decision will (and will not) have upon state medical marijuana laws.

At the outset, it is important to recognize that Raich addresses only purely intrastate non-commercial medical marijuana cultivation, possession and use by individual patients and caregivers. The Ninth Circuit Court of Appeals in Raich held – for the first time ever – that the federal government cannot enforce federal marijuana laws against such activity in states where medical marijuana is legal under state law. The federal government's authority to prohibit and prosecute commercial marijuana cultivation and distribution was not at issue in Raich and was never restricted in any way by the Ninth Circuit's ruling.

As to the limited medical marijuana activity at issue in Raich, however, the Ninth Circuit's decision represented a significant shift in the balance of power between the federal and state governments. Courts, legislatures and legal scholars have long assumed that federal law enforcement officials have authority under the federal Controlled Substances Act ("CSA") to seize marijuana from patients and caregivers, and even to arrest and prosecute them in federal court, despite state law protections.² The eleven states that have enacted medical marijuana laws did so with this understanding. The Ninth Circuit in Raich rejected this assumption and extended a new and greater protection to medical marijuana patients and caregivers.

In this context, three interrelated points are critical to understanding the impact of the Supreme Court's decision in Raich:

First, under our federalist form of government, there are independent federal and state laws regulating marijuana and other drugs. The federal government enforces federal law and the state governments enforce state law. The unquestionable power of state governments to enact and enforce state medical marijuana laws was not challenged in Raich, and the Court's decision did nothing to undercut or diminish that basic state government authority.

Second, Raich addresses a very narrow issue of constitutional law. Congress can enact laws only where the Constitution grants it power to do so. Federal drug laws are

¹ Originally Raich v. Ashcroft, re-titled Gonzales v. Raich in light of the U.S. Supreme Court's grant of certiorari and the appointment of the new attorney general, 545 U. S. ____ (2005), Slip. Op. 03-1454. The Ninth Circuit's decision is reported at 352 F.3d 1222 (2003). The Supreme Court's certiorari grant is reported at Ashcroft v. Raich, 124 S.Ct. 2909 (2004).

² See, e.g., United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001); United States v. Rosenthal, 266 F.Supp.2d 1091, 1098-99, 1100 (2003) (N.D. Cal. 2003); Pearson v. McCaffrey, 139 F.Supp.2d 113, 121 (D. D.C. 2001) ("Though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law under the CSA").

based upon the federal government's regulatory authority and police power under the Commerce Clause, *i.e.*, the federal power to regulate interstate commerce. The Ninth Circuit held that the Commerce Clause does not justify federal regulation of purely intrastate non-commercial medical marijuana cultivation, possession and use. The Supreme Court's decision reversing the Ninth Circuit reinstates the previous status quo, and federal agents will once again have the authority to enforce federal law even against medical marijuana patients and caregivers acting in compliance with state law. Importantly, however, state medical marijuana laws like Proposition 215 in California will remain valid and states will retain the power to enact and enforce state laws permitting medical marijuana. The Raich decision does nothing to grant the federal government power to require states to enforce federal drug laws or to enact state laws prohibiting medical marijuana.

Third, since 99% of marijuana arrests are made by state and local law enforcement rather than by federal agents, individual medical marijuana patients and caregivers acting in compliance with state laws will almost certainly not be arrested or have their medicine seized by federal DEA agents. The federal government, to our knowledge, has never criminally prosecuted an individual medical marijuana patient for personally cultivating, possessing or using medical marijuana, and we do not anticipate it will do so now. Due to limited federal prosecutorial and judicial resources, the federal government generally limits marijuana prosecutions to large-scale cultivation and distribution schemes.³

Legal Analysis

The federal Controlled Substances Act ("CSA") prohibits all possession, manufacture, distribution and use of marijuana, except under very narrow exceptions for scientific research programs approved by the federal government.⁴ Since 1996, eleven states have enacted laws that confer various state legal protections on medical marijuana patients, and the people who provide care to them (including physicians and caregivers).⁵

³ The dissenting judge from the Ninth Circuit's decision in Raich noted that, "plaintiffs do not show there is a threat of future prosecution or a history of past prosecutions, at least as applied to their unique factual situations. I doubt whether anyone can or will seriously argue that the DEA intends to prosecute these two seriously ill individuals." Raich v. Ashcroft, 352 F.3d at 1237 (2003) (Beam, J., dissenting), citing Alex Kreit, Comment, The Future of Medical Marijuana: Should the States Grow Their Own?, 151 U.Pa.L.Rev. 1787, 1799 n. 85 (2003) (noting that "DEA's limited resources make it practically impossible for its officers to enforce minor possession laws without extensive cooperation from state police").

⁴ Congress enacted the CSA, 21 U.S.C. § 801 et. seq., as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1236. The CSA establishes five "schedules" of certain drugs and other substances and designates these items "controlled substances." 21 U.S.C. §§ 802(6), 812(a). Marijuana is a Schedule I controlled substance. *Id.* § 812(c). Among other things, the CSA makes it unlawful to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as provided for in the statute. 21 U.S.C. § 841(a)(1). Possession of a controlled substance, except as authorized under the CSA, is also unlawful. *Id.* § 844(a).

⁵ The states are California, Oregon, Washington, Maine, Colorado, Nevada, Hawaii, Vermont, Alaska, Maryland, and Montana. District of Columbia voters approved an initiative in 1998 with 69 percent of the vote, but Congress overrode the law. In addition, a few states, including Arizona, Virginia, Connecticut, and New Hampshire have authorized doctors to prescribe marijuana; this has no practical effect because

- The legal protections conferred by states typically include (but are not limited to):
- The right under state law to cultivate, possess, transport and use certain amounts of medical marijuana by qualified persons (the amounts differ by state);
- Protection from state prosecution – and in some cases arrest – for medical marijuana patients (standards for qualifying as a protected patient differ by state);
- Protection from state prosecution – and in some cases arrest – for medical marijuana caregivers (standards for qualifying as a protected caregiver differ by state);
- Protection from state sanctions for physicians who recommend medical marijuana to patients (definition of physician differs by state);
- The right of the patient and/or caregiver to have returned or be compensated for any medical marijuana seized by state officials pursuant to an investigation (some states), and;
- Establishment of a state or local registry – with state-issued identification cards – for medical marijuana patients and caregivers (some states).

In California, voters passed Proposition 215 in 1996, creating the Compassionate Use Act,⁶ and in 2003 the legislature enacted S.B. 420,⁷ amending the Act to further clarify and implement the medical marijuana provisions. The Compassionate Use Act permits a patient or primary caregiver to possess or cultivate marijuana for personal medical purposes with a physician's recommendation.⁸

In the Raich case, Angel Raich, Dianne Monson and two of Angel Raich's caregivers brought a lawsuit in federal district court in San Francisco seeking an injunction prohibiting the federal government from enforcing the CSA against their cultivation, possession and use of marijuana for medical purposes in compliance with Proposition 215. The district court denied their request, but the Ninth Circuit reversed, holding that enforcing the federal CSA against patients and their caregivers engaged in purely intrastate non-commercial medical marijuana activity in compliance with state law is unconstitutional because such enforcement exceeds Congress' authority under the Commerce Clause.⁹

The Supreme Court granted certiorari in June 2004 and heard oral argument in November 2004. The question presented in the petition for writ of certiorari the federal government filed with the Supreme Court in Raich was, "Whether the Controlled Substances Act, 21 U.S.C. 801 et seq., exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported

doctors' licenses to formally prescribe scheduled drugs are governed by federal law, and federal law explicitly prohibits prescribing Schedule I drugs such as marijuana.

⁶ Codified at Cal. Health & Safety Code § 11362.5 et. seq.

⁷ Stats. 2003, c. 875.

⁸ Cal. Health & Safety Code § 11362.5.

⁹ The federal government's authority to enact criminal prohibitions is strictly limited. Any federal criminal laws must be authorized by a specific Constitutional provision. The CSA relies upon authorization granted under one of those provisions, the Commerce Clause. Only if an activity has sufficient impact on interstate commerce can Congress enact laws regulating or prohibiting that activity. When enacting the CSA Congress found, and the federal courts have agreed, that drug regulation, including strict controls and prohibitions of certain drugs, is permissible under the Commerce Clause because even purely intrastate drug use and trafficking has a substantial impact on the interstate drug market. The Ninth Circuit held in Raich that purely intrastate non-commercial individual cultivation, possession and use of marijuana for medical purposes in compliance with state law does not have a sufficient impact on interstate commerce to permit federal government enforcement of the CSA under the authority of the Commerce Clause.

personal ‘medicinal’ use or to the distribution of marijuana without charge for such use.”¹⁰ This is the only issue that was before the Supreme Court.

The Supreme Court reversed the Ninth Circuit’s decision on June 6, 2005. The injunction issued pursuant to the Ninth Circuit’s ruling will now be lifted and the federal government will once again be permitted to enforce federal law against medical marijuana patients. This will not, however, have any legal effect whatsoever on the validity of state medical marijuana laws, because the validity of such laws was not before the Court.

Moreover, even if the Supreme Court’s review in the Raich case had not been limited to the Commerce Clause issue the Court could not have invalidated state medical marijuana laws because the federal government cannot require state officials to enforce federal law, or force states to prohibit medical marijuana activity, or force states to repeal existing state law permitting medical marijuana. “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” Printz v. United States, 521 U.S. 898, 935 (1997); see also New York v. United States, 505 U.S. 144 (1992).¹¹

In Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2003), the Ninth Circuit upheld an injunction entered by the district court prohibiting the federal government from either revoking a physician’s license to prescribe controlled substances or conducting an investigation of a physician that might lead to such revocation, where the basis for the government’s action is solely the physician’s professional recommendation that a patient use marijuana. The Supreme Court denied the government’s petition for certiorari, letting the Ninth Circuit’s decision stand. In his concurring opinion, Judge Kozinski explained the relevance to state medical marijuana laws of this “commandeering doctrine” enunciated in Printz and New York:

The federal government’s policy deliberately undermines the state by incapacitating the mechanism the state has chosen for separating what is legal from what is illegal under state law. . . . By precluding doctors, on pain of losing their DEA registration, from making a recommendation that would legalize the patients’ conduct under state law, the federal policy makes it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws. In effect, the federal government is forcing the state to keep medical marijuana illegal. But preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated. . . . If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.

¹⁰ The petition is available on Westlaw, 2004 WL 871328.

¹¹ See also Pearson, 139 F.Supp.2d at 123 (D. D.C. 2001) (State officials are not required to enforce federal law); Barsky v. Board of Regents, 347 U.S. 442, 449 (1954). (Under fundamental principles of federalism, the individual states have, “broad power to establish and enforce standards of conduct within [their] borders relative to the health of everyone there. It is a vital part of a state’s police power”).

Conant, 309 F.3d at 645-6, 647 (emphasis added).

Conclusion

Even in light of the Supreme Court's reversal of the Ninth Circuit's decision in Raich, state medical marijuana laws like California's Proposition 215 will remain valid and in force. Raich does not grant the federal government the power to require states to enforce federal drug laws, nor the power to invalidate state medical marijuana laws. It is very unlikely that individual medical marijuana patients and caregivers will be arrested or prosecuted by federal drug agents, but high-profile patients and commercial or large-scale buyer's clubs or cooperatives are likely to be targeted once again. The adverse decision by the Supreme Court in Raich makes it even more important for state and local governments to take creative affirmative steps to protect medical marijuana patients and caregivers, for the ACLU and others to aggressively challenge the federal government's obstruction of scientific research necessary to make marijuana into a prescription medicine and for medical marijuana advocates to press Congress for national legislative solutions.