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Marijuana for Medical Purposes: A Glimpse of the Supreme Court's Decision in *United States v. Oakland Cannabis Buyers' Cooperative* and Related Legal Issues

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Summary

There is no medical necessity defense against prosecution for the federal crimes of cultivating or distributing marijuana, even in places where state law recognizes such a defense. So said the Supreme Court in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 486 (2001). Although there may be some question as to their vitality, the Court left undecided issues involving a necessity defense for possession and possible commerce clause, enactment clause, and due process clause challenges. In *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), the Court held that Congress's' power under the commerce clause enabled it to enact a regulatory scheme that extended to the purely local cultivation and possession of marijuana for medical purposes. There are proposals in this Congress to reverse the impact of the Court's decisions.

This is an abbreviated form of CRS Report RL31100, *Marijuana for Medical Purposes: The Supreme Court's Decision in United States v. Oakland Cannabis Buyers' Cooperative and Related Legal Issues*, stripped of its footnotes and citations to authority. Penalties authorized for violations of the Controlled Substances Act are discussed in CRS Report 97-141, *Drug Smuggling, Drug Dealing and Drug Abuse: Background and Overview of the Sanctions Under the Federal Controlled Substances Act and Related Statutes*.

Background: The federal Controlled Substances Act (the Act) outlaws the cultivation, distribution, or possession of marijuana. The ban is a component of federal and state schemes which regulate the sale and possession of drugs and other controlled substances. The State of California has created a medical necessity exception to its marijuana prohibitions. The Oakland Cannabis Buyers Cooperative (the Coop) was one of the entities which dispensed marijuana to patients qualified to receive it under state law.

Federal authorities sued to enjoin cultivation and distribution of marijuana in violation of federal law by the Coop and its suppliers. The federal district court granted a preliminary injunction, which the Court of Appeals overturned for failure to consider an implicit medical necessity defense.

The necessity or "choice of evils" defense has been recognized under various circumstances by a number of other lower federal appellate courts. The Supreme Court seemed to verify its vitality, at least indirectly, when it described the prerequisites for the defense to an escape charge: "where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed . . . necessity has lost its coercive force."

Supreme Court's Coop Decision: The Coop argued that necessity, as a common law defense, was an implicit exception to the Act's prohibitions. No member of the Supreme Court agreed. In fact, the Court questioned the very existence of a federal necessity defense, although as the concurring opinion points out, the case holds no more than that there is no necessity defense to the federal proscription on the cultivation or distribution of marijuana.

On the basic point, the members of the Court were of one mind — Congress in the Act addressed and rejected the very exception for which the Coop sought recognition. Congress outlawed manufacturing or distributing controlled substances except as authorized in the Act. The only authorized exception for Schedule I controlled substances, such as marijuana, is government approved research; the Coop did not argue that it was engaged in government approved research; there is no other explicit exception for marijuana.

But the federal necessity defense is a creature of common law, frequently assumed if rarely cited by name, and Congress did not reject it by name. Yet Congress did limit Schedule I to those controlled substances with "no currently accepted medical use." It assigned marijuana to Schedule I. Thus, "[i]t is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,' §801(a), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, [the Court] reject[ed] the Cooperative's argument."

The clarity of Congress's' rejection of a medical necessary defense doomed the Coop's invocation of the constitutional avoidance doctrine, a canon of statutory construction available only in cases of ambiguity. The Court declined to consider the constitutional issues which might have called for avoidance in the face of an ambiguity because the lower court had not raised them.

Constitutional Issues: Although the Court set them aside, the Coop's brief presented commerce clause, enactment clause and due process clause questions. The

commerce clause, in conjunction with the enactment or necessary and proper clause, empowers Congress to enact legislation regulating interstate and foreign commerce. Congress passed the Act, at least in part, as an exercise of its powers under the common clause.

Congress's' commerce clause powers are substantial but not unlimited. The Court summarized the scope of those powers in *Lopez* and *Morrison*, two instances where the commerce clause was found insufficient to support a claim of legislative authority. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce."

Recognizing that the boundaries of this last category of commerce clause power, intrastate activity with an interstate impact, are not always easily identified, *Morrison* and *Lopez* identified some of the signs which reveal that a regulated activity may in fact have no significant impact on interstate commerce. "First, [they] observed that §922(q) [the section at issue in *Lopez*] was a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms . . . . The second consideration . . . that we found important . . . was that the statute contained no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce . . . . Third, we noted that neither §922(q) nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone . . . . Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated."

The Coop argued that "[o]nly the cultivation and distribution of cannabis in exchange for money or barter can be considered commerce, but even such commerce here is exclusively intrastate and therefore not within the power of Congress to regulate commerce among the states." Yet the Act, including its proscriptions on the cultivation, distribution and possession of marijuana, appears to be within the Congress's commerce clause powers as described in *Lopez* and *Morrison*. They identify as indicative of criminal statutes beyond the clause's reach those which purport to punish activities that have "nothing to do with commerce or any sort of economic enterprise." As the Coop's very name (Oakland Cannabis *Buyers'*) indicates, cultivation, distribution, or possession of marijuana almost always involves or is closely linked to some form of commercial activity — particularly if distribution requires the participation of physicians and health care insurers. Even marijuana grown at home for personal medical use might find its way within a regulatory scheme under the commerce clause. *Lopez* and *Morrison* cite with approval *Wickard v. Filburn* in which the Court upheld the regulation of wheat grown locally for home consumption as a rationale component of the regulation of the interstate wheat market.

In *Gonzales v. Raich*, the Court followed the path laid out in *Wickard*. It had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole

in the CSA" in light of "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" as well as "concerns about diversion into illicit channels." In the mind of the Court "when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.' That the regulation ensnares some purely intrastate activity is of no moment."

Even if Congress had lacked the legislative authority to ban cultivation, distribution and possession of marijuana under the commerce clause, its legislative authority to implement our various treaty obligations for the suppression of illicit controlled substances would probably be sufficient.

When Congress enjoys legislative subject matter jurisdiction, such as the power to regulate interstate and foreign commerce, it may nevertheless elect to pass laws which exceed what is constitutionally "proper" under the implementary necessary and proper or enacting clause. For instance, legislation is not "proper for carrying into execution" constitutionally vested powers, such as those under the commerce clauses, when it seeks to "compel the states to enact or enforce a federal regulatory program" or to when it issues "directives requiring the states to address particular problems, [or] command[s] the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

The Coop argued that Congress is not acting in the necessary and proper exercise of its legislative authority when it acts in total derogation of rights which the people of a given state have identified as fundamental unenumerated constitutional rights. The contention may have helped spur the three concurring members of the Court to urge at least a rule of construction that would recognize a medical necessity defense for marijuana possession. The majority's sweeping dicta and the accompanying footnote which sparked Justice Stevens' comments, however, may reflect the fact that at least five members of the Court found the "necessary and proper" argument unpersuasive.

Of course, the Coop's Ninth Amendment fundamental-unenumerated-rights argument is closely akin to its substantive due process contentions, i.e., that "these patients have a fundamental right to be free from government interdiction of their personal self-funded medical decision, in consultation with their physician, to alleviate their suffering through the only alternative available to them."

The due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests. . . .[I]n addition to the specific freedoms protected by the Bill of Rights, the liberty specially protected by the due process clause includes the rights . . . to bodily integrity and to abortion . . . [and in all likelihood] to refuse unwanted lifesaving medical treatment." The Court, however, has been reluctant to expand the concept of substantive due process, and has specifically refused to consider physician assisted suicide among the fundamental liberties so protected.

Glucksberg seems to pose a major obstacle to recognition of a right to use marijuana for medicinal purposes, for it appears to have refused to acknowledge the right which the Coop claims. The Coop claims patients have "a fundamental right to be free from

government interdiction of their personal self-funded medical decision, in consultation with their physician, to alleviate their suffering." *Glucksberg* found that terminally ill patients facing the prospect of a painful death have no due process right to the assistance of their physicians to secure and assist in the administration of painless but fatal substances to alleviate their suffering.

Beyond this, the *Glucksberg* expansion tests are not particularly helpful. They require that those rights within the ambit of due process protection consist of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of order liberty, such that neither liberty nor justice would exist if they were sacrificed." The history of the Coop's asserted right is arguably exactly the opposite. It is a history replete with government regulation of the practice of medicine, of the distribution and use of medicinal products, of controlled substances, and of marijuana in particular.

Federal regulation of marijuana as a crime control measure dates back from the Marihuana Tax Act of 1937, by which time every state in the Union already regulated its sale. The Act was modeled after the more general Harrison Narcotics Act of 1914 under which opium and other narcotics were regulated. Congress passed the earlier Food and Drug Act of 1906 "to prevent the manufacture, sale or transportation of adulterated, misbranded or poisonous, or deleterious foods, drugs, medicines, or drugs and for regulating the traffic therein," 34 Stat. 768 (1906). In more general terms, "the practice of medicine . . . has a long history of being regulated to protect the public safety."

Glucksberg's dicta seems to further undermine any contention that due process substantially restricts the federal government's authority to refuse to legalize marijuana for medical use. There, the Court cited *United States v. Rutherford*, for the observation that "Congress could reasonably [determine] to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise." Here, Congress appears to have done just that. It has concluded that marijuana is highly addictive and has no accepted medical use, but permits reclassification of marijuana and its subsequent use when and if its medicinal benefits can be demonstrated under the procedures of the Controlled Substances Act.

Finally, although the issue was not raised in *Oakland Cannabis Buyers' Cooperative*, the lower federal courts initially appeared divided over whether the First Amendment right to free speech shields physicians who prescribe or otherwise recommend marijuana to their patients. A court in the Northern District of California granted a preliminary injunction enjoining federal authorities from prosecuting physicians for such conduct. The order also prohibited federal authorities from revoking the physicians registration to prescribe controlled substances and from excluding them from Medicare/Medicaid participation for such conduct. The court subsequently made the injunction permanent in an unpublished opinion. It found serious questions as to whether the federal enforcement policy permitted a content-based restriction on speech and whether it was unconstitutionally vague.

A court in the District of Columbia, on the other hand, refused to issue a similar injunction. From the D.C. court's perspective, "there are no First Amendment protections for speech that is used as an integral part of conduct in violation of a valid criminal statute." Therefore, "[e]ven 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. . . . The fact that speech or writing is the mechanism used by physicians to carry out such a task does not make the conduct less violative of federal law. The First Amendment does not prohibit the federal government from taking action against physicians whose prescription or recommendation of medicinal marijuana violates the [Act]."

The Ninth Circuit muted the prospect of a conflict when it held that while the First Amendment precludes punishing doctors simply because they recommend that their patients use marijuana, it did not preclude punishment of a doctor who intends his patient to use the recommendation to acquire marijuana in violation of federal law.

Related Legislative Activity: State medical marijuana initiatives have provoked a mixed response in Congress including proposals to:

- require the Attorney General to revoke the controlled substance registration of any practitioner who recommended marijuana for medical purposes;
- bar those who recommend marijuana for medical purposes from participating in Medicare and state health care programs;
- clarify and increase the penalties applicable to Controlled Substance Act violations by registrants;
- make mandatory, in those states with a medical marijuana exception, the discretionary denial of federal benefits for those convicted of controlled substance offenses;
- make it clear that Controlled Substance Act provisions continue to apply notwithstanding the massage of state medical marijuana laws;
- provide that the Controlled Substance Act shall supersede any state law with which it differs;
- study the impact of the California and Arizona medical marijuana initiatives;
- create a federal medical marijuana exception to the Controlled Substances Act and the Federal Food, Drug and Cosmetic Act in the states with medical marijuana laws;
- prohibit use of funds appropriated for the District of Columbia to conduct any ballot initiative to legalize or reduce the penalties for violations involving Schedule I controlled substances;
- prohibit use of funds appropriated for the District of Columbia to enact or implement any law to legalize or reduce the penalties for violations involving Schedule I controlled substances (and prohibiting the D.C. medical marijuana referendum from taking effect)(Barr Amendment); and
- prohibit the recipients of transit grants from promoting the legalization or medical use of schedule I controlled substances, like marijuana.

In the 108th Congress, Congressmen Farr (H.R. 1717) and Frank (H.R. 2233) offered bills creating a medical marijuana exception in states where the exemption is recognized. And both the House and Senate versions of the D.C. appropriations legislation for FY2004 include the Barr Amendment (H.R. 2765, §123/S. 1583, §126).

Thus far in the 109th Congress only successor to Congressman Frank's proposal H.R. 2087, has appeared.