Strong Dissents by Justices O'Connor, Thomas, and Rehnquist

U.S. Supreme Court Ruling on *Raich* Case Leaves Doctor-Patient Relationship Intact; DEA Targets Some Growers, Dispensaries

In a six-to-three vote announced June 6, the U.S. Supreme Court denied Angel Raich and Diane Monson the right —established by California voters in 1996— to obtain and use marijuana for medical purposes. Antonin Scalia and Anthony Kennedy, two of the five justices who have been advocating limits on federal power, in this case made a War-on-Drugs exception to their "principles."

John Paul Stevens, who wrote the majority opinion, was joined by Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Scalia wrote a concurring opinion trying to justify his apostasy. Kennedy didn't feel he owed the public an explanation.

Sandra Day O'Connor's dissent was joined by Chief Justice William Rehnquist, and Clarence Thomas, staying true to their states-rights line. Thomas wrote an eloquent separate dissent.

Raich and Monson are California medical-marijuana users who in October, 2002 sought to enjoin the DEA from confiscating their marijuana and raiding their suppliers. They argued, among other things, that the feds had no jurisdiction to enforce the Controlled Substances Act against them because their activities weren't affecting interstate commerce.

After failing to get an injunction from a federal district judge, they appealed to the Ninth Circuit Court of Appeal, which ordered that the injunction be granted. The Bush Administration appealed to the U.S. Supreme Court, which heard arguments in November '04. The case started out as *Raich et al v. Ashcroft et al* but goes down in the history books as *Gonzales et al v. Raich et al*.

An Apologetic Majority

Regulating the noncommercial cultivation and use of marijuana in California "is squarely within Congress's commerce power," Stevens wrote for the majority. Previous cases, notably *Wickard v. Filburn*, had established "Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."

Some of Stevens's opinion was actually apologetic in tone."The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case."

DISSENTERS THOMAS AND REHNQUIST

"Whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our commerce clause cases require that room for experiment be protected in this case."

—Sandra Day O'Connor

Stevens recounted the futile efforts to remove marijuana from Schedule 1 (dangerous drugs with no medical use): "After some fleeting success in 1988 when an Administrative Law Judge declared that the DEA would be acting in an 'unreasonable arbitrary, and capricious' manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule 3 substance, the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's finding, and since that time has routinely denied petitions to reschedule the drug. The Court of Appeals for the District of Columbia circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order."

Stevens concluded by noting that Raich and Monson can appeal again to the Ninth Circuit with their due-process and medical-necessity arguments, which were not considered previously. They can also seek to have marijuana rescheduled by the DEA and/or avail themselves of "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."

Stevens would apologize for the effect of his own ruling in a speech Aug. 24 to the American Bar Association. See following story.

"In the early days of the republic it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."—Clarence Thomas

Thomas's Dissent

Thomas's dissent stated, "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything and the Federal Government is no longer one of limited and enumerated powers... In the early days of the republic it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."

O'Connor's dissent quoted Justice Brandeis's famous line that "a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." She added, "This case exemplifies the role of States as laboratories."

O'Connor concluded, "If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our commerce clause cases require that room for experiment be protected in this case."

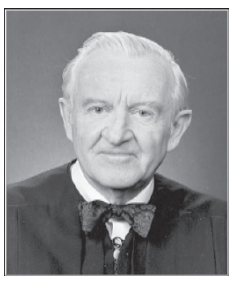
Attorney Robert Raich says he was most surprised that "Stevens, who I thought would be our biggest supporter, ended up authoring this negative opinion and Rehnquist, who I thought would be our biggest opponent, ended up joining this terrific opinion by O'Connor... Stevens had commented about the issue of federalism in his concurrence in the Oakland Cannabis Buyers' Cooperative case. He should have ruled for us on that basis. It is inexplicable why that analysis is missing from his opinion."

Raich says that Stevens's hypocrisy was exposed by Thomas, who quoted his comment in the OCBC case (May, 2001): "The majority's rush to embrace federal power 'is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union.'"

According to Raich, Stevens "still could have let the federal government regulate all those other issues he cares about —the endangered species act, the clean water act— under the commerce clause, except when you have an actual case where a state weighs in with a specific challenge. And those would be dealt with case by case. If you had a state trying to ban abortion or re-impose segregation they would be overridden because a state can't infringe on the right to privacy or violate the equal protection clause. If a state says, 'We don't care about tailpipe emissions, we're not going to regulate factories.' Well, factories and automobiles actually are engaged in interstate commerce. So a state that tried to get out of clean-air laws would still be validly overridden by federal law under the commerce clause."

Attorney Bill Panzer was appalled by Scalia's opinion. "He seems to be saying Congress can do anything it wants under the 'necessary and proper' clause. If they have the right to regulate interstate commerce, they can regulate it any way that they want. They don't even have to show that what they're regulating has any substantial effect on interstate commerce... He's changed 'necessary and proper' to 'imagination and whim.' If congress can imagine that it'll help, they can do it. Scalia, supposedly the strict constructionist, is giving Congress incredible powers."

A well-placed Washington source thinks Scalia was never sincere about federalism, that he adopted Rehnquist's line for tactical reasons, but now he's coming out for an all-powerful federal government (under the control of his duck-hunting buddy, Dick Cheney). Panzer has a simpler analysis. "I think it's more like: 'It's drugs, they can do anything they want.'"



Justice Stevens' Unusual Apology

"Apology: something said or written in defense or justification of what appears to others to be wrong."

—Webster's New International Dictionary, 2nd Edition

U.S. Supreme Court Justice John Paul Stevens has issued an apology for the majority opinion he wrote in the *Raich* case. Addressing the Clark County, Nevada, Bar Association August 18. Stevens acknowledged that his votes in four cases decided last session would cause real harm to large groups of people. "In each I was convinced that the law compelled a result that I would have opposed if I were a legislator," he revealed.

"...The fourth case in which I was unhappy about the consequences of an opinion that I authored presented the question whether the use of locally grown marijuana for medicinal purposes pursuant to the advice of a competent physician may be punished as a federal crime.

"The uncontradicted evidence in the record indicated that marijuana did provide important therapeutic benefits to the two petitioners, that no other medicine was effective, and that without access to that drug one of the petitioners may not survive.

"Moreover, their cultivation and use of marijuana for health reasons was perfectly lawful as a matter of California law. I have no hestiation in telling you that I agree with the policy choice made by the millions of California voters, as well as the voters in at least nine other States (including Nevada), that such use of the drug should be permitted, and that I disagree with executive decisions to invoke criminal sanctions to punish such use.

"Moreover, as I noted in a footnote to our opinion, Judge Kozenski has chronicled medical studies that cast serious doubt on Congress' assessment that marijuana has no accccepted medical uses.

"Nevertheless, those policy preferences obviously could not play any part in the analysis of the constitutional issue that the case raised. Unless we were to revert to a narrow interpretation of Congress' power to regulate commerce among the States that has been consistently rejected since the Great Depression of the 1930s, in my judgment our duty to uphold the application of the federal statute was pellucidly clear."

Pebbles Trippet of the Medical Marijuana Patients Union, who accurately predicted Thomas's line, has called for "a new federal challenge, focusing on a full spectrum of constitutional violations broader than the commerce clause and states rights... We need to decide whether there is a compelling federal interest to outweigh the patient's under the Due Process Clause; whether the CSA's penalties are cruel and unusual punishment as applied to cannabis for medical use; and whether there is a rational basis for discriminating against cannabis compared to other medications."

Doctors Respond to *Raich* Ruling

Supreme Court Justice John Paul Stevens's opinion for the majority in *Gonzales v. Raich* includes a paragraph that could be read as demeaning to California's small but growing group of openly pro-cannabis physicians:

"The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with 'any other illness for which marijuana provides relief,' is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so."

"If the Medical Board and the feds had not been so damn busy harrassing and intimidating physicians, 10 to 20 times as many California physicians would be making recommendations." — David Bearman, MD

David Bearman, MD, responds: "That is an insult. No one gets in my front door for an appointment unless they represent themselves on the phone as having a well-documented serious disease. If the Medical Board and the feds had not been so damn busy harrassing and intimidating physicians, 10 to 20 times as many California physicians (e.g. 15,000 to 30,000) would be making recommendations."

Frank Lucido, MD, thinks Stevens misunderstands the doctor's role in approving a patient's request to self-medicate with cannabis. "The more appropriate analogy is not to a drug prescription, which would involve an exact amount you are ordering the pharmacist to dispense, but to a medical decision of 'yes' or 'no,' such as: 'Yes, you are fit to go to camp.' 'No, you cannot fly a plane' (FAA physicals) 'No, you can't have insurance from this company that I work for.' 'Yes, you should be off work for the next 3 days due to illness.' 'No, your injury is not work-related.' 'Yes, I recommend you cut back your work hours for health reasons.'"

Robert E. Sullivan, MD, says Stevens's reference to "economic incentive to grant their patients permission to use the drug" would apply as well to "a new cure for herpes, hypertension, or erectile dysfunction (talk about a 'marketed diagnosis'). What is he thinking? One can only conclude that he believes physicians really make decisions on such base motivation. Does he think they get a kickback? Very cynical."

Robert Sullivan, MD

Sullivan also questions the accuracy of Stevens's line, "In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to recommend marijuana use is open-ended."

"Not so," Sullivan says. "The medical board limited the duration of recommendations to one year, like all conventional prescriptions. And we, at least, specify an amount (on a weekly basis) for each patient approved.

"Most conventional prescriptions for pain/spasm leave quite a range of dosage/frequency up to the patient. And does he really believe the patients follow it anyway? And, oh yes, what does this have to do with the question at hand?"

Sullivan adds: "The suspicions people reveal they have about others often reveal their own true motives and styles... My overall impression of the decision is that the 'What ifs' have taken over. 'The parade is a wonderful idea, but What if someone gets run over by a float? Maybe we just better not have it.'

"What I would love to do is get Justice Stevens to go through a day at work with me. To meet an adult daughter who brought in her elderly mother on chemo, neither of whom had had any prior contact with cannabis before trying it and finding it worked far better than any other medicine she'd been given —at this point getting a frail smile from mom nodding her head too— and be able to inform them how they could obtain and use it in a manner suitable to them, and have them leave confident with an informed plan, professional endorsement, and ongoing support as needed.

To meet the plumber who walked in and seemed normal until telling and showing you a foot that'd been reconstructed through several surgeries after being run over at an intersection years ago, and now it hurt all the time but the cannabis was the only thing that helped the pain at night, allowed him to sleep and wake up clear-headed so he could still work and support his family...

The gentle 40-year-old black man who dropped out of school in Texas because he just couldn't get it and was considered stupid, tried drugs and lots of menial jobs before self-diagnosing himself in his 30s with ADD from what he'd heard about it and then deliberately learned about it, never saw a doctor but discovered that cannabis helped him focus so he could finish things. Then got his G.E.D., worked through college on the dean's list, and now was an electrical engineer with an L.A. firm. On cannabis the whole time.

"I'd love to have Stevens meet some of these folks, listen and look them over, then have the courage to go back and tell his friends about it.

"Entrenched power can see a threat to itself in its own shadow." —Robert Sullivan, MD

Entrenched power can see a threat to itself in its own shadow. The fear of loss or change controls the thinking. The only value is self; others are base, unscrupulous, expendable, totally amoral, and, more than anything, bent on taking your power for themselves. Any little loss or change can quickly get out of hand and must be assiduously avoided. We already know everything that's important so there is no need for new knowledge, or perspective, or goals; indeed, these are likely to contain unseen threats and should be actively stifled. 'Remember, we are the leaders and certainly know best.'"

Adds Tod Mikuriya, MD: "As the 'any other conditions' author I am responsible for this mention by Justice Stevens. He appears to be complaining about aesculapian hegemony that keeps the physician as a gate-keeper. He is correct in his complaint at the potential for exploitation economically but oblivious to the complexity of medical diagnosis and judgment.

"The level of skepticism or cynicism is understandable but unfortunate when the court —Supreme or lower— seeks to practice medicine. The world of stipulative reality bereft of clinical medical expertise is prejudicial to both health and governance."