

Making the Case for Medical Marijuana:

A Legal Perspective

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AT A TELLING MOMENT during the oral argument before the U.S. Supreme Court in Angel Raich's 2005 case, Justice Stephen Breyer leaned over the bench and peered down at Raich's attorney. If marijuana is such an important medicine, Breyer wanted to know, why don't medical marijuana patients and those who advocate for them simply take it through the FDA approval process? Wouldn't that be the most efficient way to make marijuana into a legal medicine? And since that had not been done, asked Breyer, "Don't I have to take this case on the assumption that there is no such thing as medical marijuana that's special and necessary?"

As one of the attorneys representing Professor Lyle Craker in proceedings before the DEA, I didn't know whether to laugh or cry. Craker was applying for an application to be permitted to grow twenty-five pounds of marijuana at the University of Massachusetts-Amherst for research intended to take marijuana through the FDA approval process. At that point, Craker's application had been languishing for over three years with no action by the DEA (unless one counts the DEA claiming to have lost the application and demanding that it be re-filed an "action").

The Court ultimately ruled against Ms. Raich. Less than two weeks after Judge Breyer asked his question, the DEA formally denied Craker's application, finally giving us a chance to demand a hearing before an administrative law judge (ALJ). Our hearing commenced in December 2005, and involved ten days of competing witnesses over the course of several months. In February 2007, the ALJ issued her 80-page opinion. Remarkably detailed and thorough, the opinion was a resounding vindication of our legal arguments and a rejection of those presented by the DEA.

The ALJ found that granting Craker's application was in the public interest because (among other reasons) the current system in which NIDA is the sole provider of marijuana to medical researchers has repeatedly allowed the agency to block FDA-reviewed research projects by refusing to grant researchers access

to marijuana. For this reason, despite the hundreds of pounds of marijuana locked in deep-freeze at the University of Mississippi, where NIDA stores its marijuana stock, the ALJ found the current marijuana supply "inadequate." The ALJ also found there was no danger of the marijuana grown by Craker being diverted for illegal (non-research) purposes and that Craker's proposed facility would not violate international treaties. The U.S. is a signatory to the Single Convention on Narcotic Drugs of 1961, which places restrictions on the production and distribution of marijuana by member countries.

Unfortunately, an ALJ decision is not binding under the rules of administrative agency law; it is instead considered a "recommendation" to the head of the agency—in this case, to the Administrator of the DEA. In response to the decision, Massachusetts Senators John Kerry

and Ted Kennedy sent letters to the DEA supporting Craker's application. Forty-five other members of Congress from around the country also signed onto a letter from Representatives John Olver and Dana Rohrabacher urging then-DEA head Karen Tandy to accept the ALJ recommendation to license Craker's facility. The congressional sign-on letter quoted one of Tandy's predecessors, Robert Bonner, who once said, "Those who insist that marijuana has medical uses would serve society better by promoting or sponsoring more legitimate scientific research, rather than throwing their time, money, and rhetoric into lobbying public relations campaigns and perennial litigation." The opinion of the ALJ and the pleas of Congress fell upon deaf ears.

After nearly two more years of delay, on the eve of President Obama's inauguration, then-acting DEA chief Michelle Leonhart formally rejected the ALJ recommendation. However, Leonhart's order was founded on information that had not been presented as part of the DEA's evidence before the ALJ, providing further arguments for Craker's legal team to seek reconsideration and an opportunity to respond to this new evidence. On August 15, 2011—more than a decade after Craker first filed his application—the DEA issued its Final Order formally denying the application.

Undaunted—well, maybe a little daunted, but not surrendering—Professor Craker fights on. With the help of MAPS, the prestigious law firm Covington & Burling has agreed to represent Craker pro bono in the U.S. Court of Appeals for the First Circuit. Covington & Burling, with continued assistance from the American Civil Liberties Union (ACLU) of Northern California and the ACLU of Massachusetts, is now preparing Craker's opening brief to appeal the DEA's final order. Briefing will likely be completed and the case argued sometime in 2012.

Even after more than a decade, Craker's case remains crucially important to the fight for legal medical marijuana. Craker's supporters have always believed, and continue to believe, that if the politics of obstruction can be overcome, then science will carry the day. In the meantime, seventeen states plus the District of Columbia have now passed laws permitting medical marijuana, and the federal government continues to rattle its sabre, threatening and bullying patients and those who provide marijuana to them.

As Justice Breyer said during the 2005 Raich proceedings, "medicine by regulation is better than medicine by referendum." If the DEA and NIDA will stop obstructing the research and let the FDA do its job and review the evidence, marijuana will be approved as a medicine. More to come... •

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