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# Half Baked: The Federal and State Conflicts of Legalizing Medical Marijuana

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CLAREMONT McKENNA COLLEGE

HALF BAKED: THE FEDERAL AND STATE CONFLICTS OF LEGALIZING  
MEDICAL MARIJUANA

SUBMITTED TO  
PROFESSOR FREDERICK R. LYNCH

AND

DEAN GREGORY HESS

BY  
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FOR  
SENIOR THESIS  
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In loving memory of Emma Wihlborg

Table of Contents

Introduction.....i

Chapter 1

The Chronic Problem: A Legal History of Medical Marijuana.....1

Chapter 2

Blitzed: Lopez Topples the Expansion of Federal Power.....12

Chapter 3

Joint Priorities: Federalism and Individual Rights.....21

Chapter 4

Homegrown Reeform: Congressional Attempts to Reform Medical Marijuana..... 31

Chapter 5

Blazing New Trails: California Strays from the Federal Position.....35

Chapter 6

Blunt Enforcement: The Federal Government Crackdown.....48

Chapter 7

Policy Burnout: The Hazy Future of Medical Marijuana.....53

## Introduction

The issue of supremacy between state and federal powers was of paramount importance to the drafters of the United States Constitution. The founding fathers stress the importance of supremacy several times in the Federalist Papers. Alexander Hamilton writes, "Law, by the very meaning of the term includes supremacy."<sup>1</sup> Hamilton goes on to argue that when smaller political societies form a larger government together, the larger encompassing government must be supreme or it would just be a mere treaty between small political societies. For these reasons, the founding fathers created Clause 2 in Article VI of the Constitution. Known less formally as the Supremacy Clause, it states,

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."<sup>2</sup>

This clause affirms that all federal statutes, treaties, and constitutional powers shall have supremacy over state laws, and all state judges, must recognize this supremacy. The Supremacy Clause is forthright in its intentions and the courts, on many occasions, have used it to rule that federal law is preemptive over state law. In addition, state judges must adhere to federal laws. Examples of the courts ruling in favor of federal supremacy include *Ware v. Hylton*, *McCulloch v. Maryland*, and *Martin v. Hunter's Lessee*. At first glance, the Supremacy Clause appears to offer a clear mandate, from

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<sup>1</sup> Alexander Hamilton, James Madison, John Jay, *The Federalist* ed. Jacob Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 207.

<sup>2</sup> U.S. Constitution, Article 6." *The U.S. Constitution Online*. N.p., n.d. Web. 03 Dec. 2012.

which conflict should not arise, but the historical record suggests that this is not always the case.

There are many areas of government concerning individual rights that have traditionally fallen under the realm of state power, including institutions of health care and crime. After the Civil War, the Judiciary Branch permitted the federal government to extend its oversight into in such areas.

However, decades of federal regulation were contested when the Supreme Court blocked congressional power through the Commerce Clause in the monumental case, *United States v. Lopez*. The Commerce Clause creates several ambiguities surrounding the federal government's scope of legislation and has important implications for the legality of medical marijuana.

When Federal authority is only partially preemptive over state law, conflict arises. This has been the case for laws regarding medical marijuana. Some states, through voter initiatives, have used this power vacuum to legalize marijuana for medical purposes. Cannabis, even for medical purposes, is considered a Schedule I drug under the Controlled Substances Act, and its use is not permitted by the federal government.

After many court battles and years of litigation and regulation, the federal government is still contesting the medical marijuana industry, which it equates to drug trafficking. This climate has led to a series of complicated legal cases and has left many federal, state, and local officials in a position of confusion.

Problems within the legal grey area occur when government officials and agencies, at both the state and local level, are tasked with managing the business aspect of medical marijuana dispensaries and are subsequently pressured to follow federal laws or risk felony persecution. These aspects include zoning, licensing, and tax disputes that have left many puzzled. This situation has turned into a legal battle that has left extremely ill patients with semi-legal medication. Patients and providers are constantly at risk of federal prosecution. Such prosecution is often subject to the discretion of individuals in the federal government with the cooperation of state and local officials. This legal grey zone has exposed government policy inconsistencies; while activists for and against medical marijuana wait for an end to the ambiguity.

For the purpose of exploring and understanding the conflict between state and federal supremacy, this paper will examine the complications that have arisen with the implementation of these laws. This piece will critically analyze what is currently happening to people caught in the legal crossfire and will ultimately propose a series of solutions to resolve the current impasse.

## Chapter 1

### The Chronic Problem: A Legal History of Medical Marijuana

Although the federal government currently prohibits the possession and distribution of marijuana, this was not always the case. In 1611, marijuana was brought into the colonies by Jamestown settlers for hemp cultivation, and hemp remained a major industry in the United States until the Civil War.<sup>1</sup> It is estimated that around 75 tons of hemp were produced in the United States in 1850.<sup>2</sup> In the 1840's physicians used marijuana as medication to help patients with various illnesses, leading to its official recognition as medicine in the United States Pharmacopeia from the years 1850 to 1941.<sup>3</sup> Cannabis was removed from the pharmacopeia after 1941 not because of its ineffectiveness as a medicine, but as a result of two events that greatly diminished its practicality as a medicine. The first was the development of other medications such as aspirin, morphine, and ten other opium derived drugs which treated pain and other medicinal needs.<sup>4</sup> The second was that the federal government began to regulate its use.

The federal government had not yet outlawed marijuana. Ironically, states were the first to officially criminalize medical and non-medical marijuana. This is the complete

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<sup>1</sup> Pacula, Rosalie L., Jamie F. Chriqui, Deborah A. Reichmann, and Yvonne M. Terry-McElrath. "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." *Journal of Public Health Policy*, 23.4 (2002), 415.

<sup>2</sup> Anne Ash, "Hemp- Production and Utilization," *Journal of Economic Botany* 2.2 (1948), 164.

<sup>3</sup> Congressional Research Service, Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, (2010), 1.

<sup>4</sup> Bill Zimmerman, *Is Marijuana the Right Medicine for You? A Factual Guide to Medical Uses of Marijuana* (New Canaan, CT: Keats Publishing, 1998), 19.

opposite of the present day situation where on November 6 2012, Colorado and Washington voted to legalize the sale of non-medical marijuana. When these two states voted to repeal their marijuana prohibition laws, they are reversing the exact legal path marijuana prohibition traveled, that is, prohibition at the state level before the federal level.

State drug prohibition policies began a couple decades after the Civil War when opium and morphine were abundant and around one percent of the population was addicted to a pain killer due to over-prescription.

Narcotic regulation began in 1877 when Nevada enacted the first law prohibiting the sale of any non-medical opiates.<sup>5</sup> Twenty-nine states enacted similar narcotic regulation, the last being in 1914.<sup>6</sup> It is important to note that nearly all of these measures were aimed at distribution rather than consumption.

Drugs were first officially regulated by the Federal government when congress enacted the 1906 Pure Food and Drug Act. This act, among many other things, required labels on containing any of ten items which the federal government considered as “dangerous” substances. On this list was alcohol, morphine, opiates, and cannabis. Furthermore, this act gave federal authorities the power to confiscate and destroy non-compliant products. It is important to note that this act did not limit or prevent the purchase any of these drugs. Rather, this legislation was merely aimed to inform people of the dangers of addictive drugs in their products. The first federal legislation that

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<sup>5</sup> Bonnie, Whitebread, “The Forbidden Fruit,” 986.

<sup>6</sup> *Ibid.*

actually restricted narcotics was the 1909 Act to Prohibit Importation and Use of Opium. This act restricted opium importation to specific ports, limited the use of opium to medicinal use, and called for diligent record keeping for opium importation.

As anti-narcotic measures grew in popularity, so did pressure for federal legislation regarding other drugs considered problematic at the time. The Harrison Act of 1914 required legitimate handlers of cocaine, opium, or other derivatives to file returns on the importation or exportation of these substances.<sup>7</sup> Registration with the federal authorities was required to obtain the necessary forms and the penalty for failing to register was a fine of up to \$2,000 and a maximum sentence of five years in jail.

This act is important because for the first time, the federal government established a group of harmful drugs labeled as narcotics to supervise and regulate. As a result, this act created the first black market for drugs in United States history and ultimately contributed to the growth of drug related criminal activities.

In 1920, the Federal government established an agency to enforce drug regulation policies. This agency was called the Narcotics Division and became part of the Prohibition Unit of the Internal Revenue Service until it was transferred to the Prohibition Bureau that was created in 1927.<sup>8</sup> In 1930 it was removed from the Prohibition Bureau and was re-established as the Federal Bureau of Narcotics (FBN) under the Treasury Department.<sup>9</sup> Here it assumed enforcement of the Narcotic Drugs Import and Export Act

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<sup>7</sup> Bonnie, Whitebread, "The Forbidden Fruit," 987.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

of 1922, the Marijuana Tax Act of 1937, and the Opium Poppy Control Act of 1942.<sup>10</sup>

The FBN worked with local government agencies to undermine drug trafficking activities. In 1968 the FBN merged with the Bureau of Drug Abuse Control to form an agency called the Bureau of Narcotics and Dangerous Drugs. This was eventually merged with other agencies to form the Drug Enforcement Agency (DEA) in 1973. This merging was part of the Reorganization Plan No. 2 signed by Richard Nixon following his promises to strengthen the federal government's war on drugs.

Marijuana was first regulated at the state level beginning with Utah's adoption of a statute to prohibit the sale or possession of marijuana in 1915. Twenty-two other states joined in the prohibition by 1931.<sup>11</sup> About a decade before marijuana had become a matter of national debate, the majority of states had enacted marijuana legislation. Concern over this drug was partially a result of the increasing influence of the Mexican laborers who often smoked marijuana after long days of working in the field.<sup>12</sup> Mexicans were immigrating to the United States in increasing numbers as laborers, and began to constitute a significant portion of the population. Nearly all of the marijuana legislation passed by states contained references to the Mexican origin of the drug and the criminal conduct it inevitably generated.<sup>13</sup> Consequently, sixteen of the twenty-two states that passed legislation regarding marijuana were in the southern or western portions of the United States.<sup>14</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> Bonnie, Whitebread, "The Forbidden Fruit," 1010.

<sup>12</sup> *Ibid.*

<sup>13</sup> Bonnie, Whitebread, "The Forbidden Fruit," 1012.

<sup>14</sup> *Ibid.*

Marijuana started to receive more attention as it was regarded by some as “Mexican opium.”<sup>15</sup> This increased publicity raised concerns that marijuana would become a substitute for alcohol or opium which had both been banned.

Sensationalist reporting on the violent criminal nature of marijuana addicts resulted in its confiscation. It was mentioned as a “habit forming drug” in many instances.<sup>16</sup> The momentum of popular opinion grew, and public pressure mounted to regulate the “loco-weed.”<sup>17</sup> Marijuana was included in the Uniform State Narcotic Drug Act of 1934, where “states wishing to regulate sale and possession of marijuana [were] instructed to add cannabis to the definition of narcotic drugs.”<sup>18</sup>

It wasn't until the Marihuana Tax Act of 1937 that marijuana was officially regulated at the federal level. This act imposed registration requirements as well as taxes on growers, sellers and buyers of marijuana. It is important to note that federal law still allowed pharmacists to prescribe marijuana, but the passage of this act restricted its use as a medication by making its prescription and use as a medication impractical for many physicians. This is primarily due to the paperwork and fees associated with the annual licensing. In addition to these burdens, the medication was taxed at every level from production to distribution. The passage of this act received considerable criticism from the medical community, most notably from Dr. William C. Woodward who served on the legislative counsel of the American Medical Association. Dr. Woodward criticized the

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<sup>15</sup> Bonnie, Whitebread, “The Forbidden Fruit,” 1014.

<sup>16</sup> The *Times* published an article in July 1927 reporting on a Mexican family that went insane from eating Marijuana. Many other articles published during this time referenced marijuana with acts of violence committed by Mexicans on white people. Bonnie, Whitebread, “The Forbidden Fruit,” 1019.

<sup>17</sup> *Ibid.*

<sup>18</sup> Bonnie, Whitebread, “The Forbidden Fruit,” 1033.

act because it discouraged the medical profession and pharmacologists from developing this drug or conducting further research as they see fit.<sup>19</sup> It also limited physicians' ability to control the non-medical use of marijuana.<sup>20</sup> By 1941, the majority of marijuana products had disappeared, and almost a century of marijuana in the medical industry had come to an end. After the Marihuana Tax Act, federal regulation of marijuana wasn't altered until the Controlled Substance Act of 1970. With the passage of this act, medical marijuana was no longer just discouraged through overburdening taxes, but it became outright prohibited from any medicinal use.

One cause for the movement by Congress to pass new legislation was a growing concern that drugs use among high school and university students was rising. President Nixon asked congress to enact legislation to stop the rising levels of drug use. In 1970 congress enacted the Controlled Substance Act. The Act separated drugs into categories based on current medical use and potential for abuse.

Drugs that had no current medical use and were thought to have high potential for abuse were placed into a category titled schedule I. In this category marijuana, heroin, LSD, peyote and psilocybin were placed. Then there are the other categories titled Schedule II-V. These categories contain all the drugs that the federal government recognizes as having a medical use. Drugs are placed into the schedule categories in descending order by potential for abuse, with Schedule II having the highest potential and

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<sup>19</sup> Eddy, *Medical Marijuana: Review*, 2

<sup>20</sup> Rosalie, Chriqui, Reichmann, and Terry-McElrath. "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." 415.

Schedule V having the lowest. In these categories are opium, cocaine, and amphetamines.

The decision to schedule marijuana with heroin and other very dangerous drugs with no medicinal value was highly controversial because it subjected those who used marijuana medicinally to potential federal prosecution.<sup>21</sup> Another issue with the Schedule I category that many in the scientific community took issue with was that this new regulation of drugs in Schedule I would impede research. Many people felt that the placement of marijuana into Schedule I would prevent the research necessary to prove its medical value. Proponents of medical marijuana feared that its placement in Schedule I would prevent it from being rescheduled in the future.<sup>22</sup>

In 1972, citizens upset with the new scheduling system, submitted a petition to the Bureau of Narcotics and Dangerous Drugs (BNDD). This petition asked the federal government to reschedule marijuana so people who need it for medical purposes could access it through prescription.<sup>23</sup> The petition was promptly rejected resulting in twenty-two years of court battles until February 18, 1994 when the U.S Court of Appeals D.C circuit upheld that marijuana would be Schedule I.<sup>24</sup>

In 1975, three years after the petition was submitted, a person suffering from glaucoma named Robert Randall was arrested for cultivating his own cannabis. Despite the federal stance that marijuana is Schedule I and is not recognized as having any

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<sup>21</sup> Eddy, *Medical Marijuana: Review*, 9.

<sup>22</sup> Eddy, *Medical Marijuana: Review*, 9.

<sup>23</sup> Rosalie, Chriqui, Reichmann, and Terry-McElrath, "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." 416.

<sup>24</sup> Eddy, *Medical Marijuana: Review*, 9.

medicinal value, Robert won his case on the basis of medical necessity. This victory was significant because it was the first time that the common law concept of necessity was applied to a medical condition, and because it contested the federal position that marijuana cannot serve a medical purpose.

The Federal government's stance was also weakened when the National Commission on Marihuana and Drug Abuse published a final report stating that scientific and medical research indicated that previous reports on the harmfulness of marijuana were exaggerated.<sup>25</sup> Both of these events prompted the federal government to open up an Individual Patient Investigation New Drug (IND) program under the FDA in 1978 to explore the medicinal benefits of marijuana.<sup>26</sup>

The program gave participating physicians the ability to prescribe marijuana to enrolled patients. The program was intended to be a trial program in which patients would receive marijuana grown under the supervision of the federal government on a trial basis, as long as strict scientific protocols were followed. This program did create a legitimate opportunity for patients to obtain marijuana for medicinal purposes but it was extremely difficult for patients to enroll. Very few patients were accepted into this program. In the subsequent 14 years that followed, less than 100 people were admitted into the program for various ailments. The program received a spike of applications in 1992 from AIDS patients seeking to reverse the wasting disease with marijuana. The

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<sup>25</sup> Rosalie, Chriqui, Reichmann, and Terry-McElrath, "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." 417.

<sup>26</sup> Eddy, *Medical Marijuana: Review*, 8.

program was shut down by the George H. W. Bush Administration shortly after this increase in applicants.

In the year 1988, after several years of the federal government treating patients with medical marijuana through the IND program, the chief administrative law judge of the Drug Enforcement Administration (successor agency of the BNDD), Francis L. Young, ruled to have marijuana changed to Schedule II.<sup>27</sup> This ruling was a response to the 1972 petition and the many appeals and court proceedings that followed it. After several public hearings on the medicinal value of marijuana Judge Young wrote:

The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for the DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record.<sup>28</sup>

Young's position was rejected by the administrator of the DEA who reasoned that marijuana has not been suitably demonstrated as a medicine.<sup>29</sup> Another citizen made an attempt at rescheduling in 1995 with a petition submitted to the DEA. The DEA consulted the Department of Health and Human Services (HHS) for an evaluation of marijuana's potential for abuse and for a recommendation concerning its scheduling. The HHS found there was a high potential for abuse and that there was no recognized safe

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<sup>27</sup> Eddy, *Medical Marijuana: Review*, 9.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

medical use, even under supervision.<sup>30</sup> On March 20, 2001, the DEA sent a letter to the petitioner informing him of the petition rejection.

Judge Young was not alone in predicting a change in federal policy regarding medical marijuana. Many states began to pass their own legislation in the 1970's. A total of thirty-one states and the District of Columbia passed legislation involving medical marijuana.<sup>31</sup> The majority of this legislation involved the creation of TRP programs that were similar to the federal IND programs that authorized clinical trials. The legislation was written so that the TRP programs, like the IND programs, would be funded by NIDA (National Institute on Drug Abuse).<sup>32</sup> Twenty-two states passed this legislation but federal oversight only allowed for eight to function. Meanwhile six states went even further by rescheduling marijuana to Schedule II in their own state schedules. This would have enabled physicians to prescribe marijuana to patients that qualified, except that the federal government was still responsible for the distribution of licenses for prescriptions and medications.<sup>33</sup>

Over the next several years, state legislation concerning medical marijuana was halted because of numerous court battles and the introduction of Marinol, an FDA

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<sup>30</sup> Eddy, *Medical Marijuana: Review*, 11.

<sup>31</sup> Rosalie, Chiqui, Reichmann, and Terry-McElrath, "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." 417.

<sup>32</sup> Rosalie, Chiqui, Reichmann, and Terry-McElrath, "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." 419.

<sup>33</sup> *Ibid.*

approved oral capsule containing delta-9-tetrahydrocannabinol (THC).<sup>34</sup> THC is the active ingredient in marijuana that some physicians believe has medicinal value.

This was satisfactory for some advocates but over time many patients who took this drug were not able to use it properly. This drug is prescribed for nausea associated with AIDS or to alleviate the side effects of chemotherapy treatment for cancer patients. Patients found the pill less effective than vaporized or smoked marijuana because Marinol was often accidentally purged before it could take effect. The problems associated with Marinol became widely publicized in the mid 1990's while evidence was emerging on the positive medicinal effect from smoked marijuana. This brought about the introduction of new legislation. In 1996, California began a movement that defied the federal stance on marijuana when California voters passed Proposition 215. Today, eighteen states and the District of Columbia have passed similar initiatives that legalize medical marijuana.<sup>35</sup> This has caused a series of legal cases involving local, state, federal, and individual rights where supremacy has been defined by court cases.

The legalization of medical marijuana at the state level and the court cases that have ensued has created some confusion about the legal status of medical marijuana. It has also raised questions over federal, state, and local supremacy. In the context of medical marijuana, the preemptive power of the federal government has been limited in a unique way. The next chapter will analyze these developments and their significance.

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<sup>34</sup> Rosalie, Chriqui, Reichmann, and Terry-McElrath, "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." 420.

<sup>35</sup> *ProCon.org*, "18 Legal Medical Marijuana States and DC," *Medical Marijuana*, [Phttp://medicalmarijuana.procon.org/view.resource.php?resourceID=000881](http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881) (accessed 2 Dec. 2012).

## Chapter 2

### Blitzed: Lopez Topples the Expansion of Federal Power

In November 1996, Californians passed Proposition 215 also known as the Compassionate Use Act of 1996. This legislation was historic because for the first time a state had defied the federal government's policy on a controlled substance. The state legalized, for medical purposes, a substance recognized by the Controlled Substance Act of 1970 as having no medical purposes. Californians passed Proposition 215 with three intentions. The first was to permit seriously ill Californians to obtain and use marijuana for medicinal purposes. The second was to prevent patients who obtained and used medical marijuana from being prosecuted as criminals. The last was to encourage the implementation of a plan by state and federal governments to aid in the safe distribution of marijuana to all patients who need it.<sup>1</sup> Despite the best intentions of California voters to help seriously ill patients, the federal government viewed the passage of this law as a shortcut attempt to legalize marijuana. The federal government could have permitted the passage of this law and worked with state and local authorities to safely implement it. Instead the federal government has chosen to use every legal option available to resist the law's implementation.

The federal government has many ways to do this because there are many points of legal conflict between this state law and the federal law. The main conflict being that

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<sup>1</sup> Alistair Newbern, "Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use after *United States v. Lopez*," *California Law Review* 88, no. 5(2000), 1576.

marijuana still remains Schedule I under federal law with no recognized medicinal use. Use, distribution or possession of any Schedule I drug subjects individuals to federal prosecution, unless the individuals are sanctioned under an FDA study.<sup>2</sup>

Federal officials recognize that resources are too limited to pursue individual cases, but they have taken alternative measures to prevent the safe application of these laws. One method is to suspend the licenses of physicians who prescribe medical marijuana to their patients. Since physician licenses are federally regulated this is a viable option.

Another way for the federal government to disrupt state medical marijuana laws is to deny participating physicians Medicaid funding. Both of these options are powerful methods to disrupt the operation of these laws. These methods have recently become less realistic because of the many more states that have passed medical marijuana laws. Eight other states had enacted similar legislation by 2000. The passage of these medical marijuana laws in some cases has been met with resistance. In one case, the results of the initiative vote had to eventually be released by court order.<sup>3</sup>

The federal government has used the Commerce Clause and the CSA to establish authority over states and their legislation regarding marijuana. The federal government over the years has been able to rely on the commerce clause a source of its authority because the Courts have permitted the expansion of the federal view of what is commerce related. The Commerce Clause is the primary reason for the expansion of the federal government's power over the last half a century.

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<sup>2</sup> Newbern, "Good Cop Bad Cop," 1576.

<sup>3</sup> Newbern, "Good Cop Bad Cop," 1578.

There has especially been a very large increase in criminal provisions deemed to be commerce related that have been enacted since the Civil War. A significant portion of these laws were created after 1970.<sup>4</sup> Despite the large increase in the number of federal laws, the federal government plays a very small role in persecuting individuals for breaking laws. Federal prosecutions are estimated to make up about five percent of prosecutions across the nation.<sup>5</sup> Some believe the federal government appears to be selective with the cases they do prosecute. They assert that the rate of federal prosecutions is not a realistic way to control crime and that these prosecutions serve more as political statements.

When the founders created the Constitution they gave police power to the nation specifically to combat the areas of counterfeiting, piracies, military crimes and treason.<sup>6</sup> These crimes are understandably within the interest of the federal government because they directly affect the federal government or its institutions.

Federal power had gradually been expanded to prevent abuse of the mail service and for regulation of commerce between states.<sup>7</sup> Initially, in the beginning Congresses' expansion of power through the Commerce Clause was guarded by the Supreme Court. Since 1939, its view of Congresses' power had become more generous and federal power has grown exponentially. The drastic increase in federal criminal legislation has consequently also led to a large increase in federal litigation.<sup>8</sup> The growth of federal responsibility has directly led to a significant rise in the amount of resources the federal

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<sup>4</sup> Newbern, "Good Cop Bad Cop," 1581.

<sup>5</sup> *Ibid.*

<sup>6</sup> Newbern, "Good Cop Bad Cop," 1583.

<sup>7</sup> Newbern, "Good Cop Bad Cop," 1583.

<sup>8</sup> *Ibid.*

government consumes. The increase in expenditures by the federal justice system doubled that of state and local judiciary expenditures between 1980 and 1990.<sup>9</sup> The American Bar Association Task Force on Federalization of Criminal Law asserted that attempts by the federal government to decrease the rate of national crime by federally prosecuting criminals has unintentionally decreased the effectiveness of local law enforcement. The task force concluded that the costs of increased federalization outweigh the benefits.<sup>10</sup>

This federal expansion of power comes directly from the Supreme Court's interpretation of the Commerce Clause. From the drafting of the Constitution until the Civil War, the Supreme Court ensured that criminal law was seen exclusively as the jurisdiction of state governments<sup>11</sup> The Supreme Court's rulings on the limitations of the federal government's power over state government in this time period was much more restrictive than in the post-Civil War era.

The first significant conflict involving federal power through the Commerce Clause came when President Roosevelt used the power of the Commerce Clause to implement New Deal legislation. In cases like *A.L.A. Schechter Poultry Corporation v. United States* and *Carter v. Carter Coal* the Court countered the federal government's jurisdiction maintaining that local economic activity would only be within the reach the

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<sup>9</sup> *Ibid.*

<sup>10</sup> Newbern, "Good Cop Bad Cop," 1584.

<sup>11</sup> Newbern, "Good Cop Bad Cop," 1598.

federal government's regulation if it were to directly have an effect on interstate commerce.<sup>12</sup>

However after Roosevelt's "court packing" there was a shift in the Supreme Courts Commerce Clause interpretation.<sup>13</sup> In *NLRB v. Jones and Laughlin Steel Corp*, the Court decided to uphold the National Labor Relations Act of 1935, which prevented Jones and Laughlin Steel from firing employees on the basis of union organizing. This decision essentially overruled the previous two cases. The Supreme Court found that "although activities may be intrastate in character when separately considered, they have such a close and substantial relation to interstate commerce that their control is essential or appropriate."<sup>14</sup>

The courts expanded on this interpretation of Federal power under the Commerce Clause even further in the case of *Wickard v. Filaburn*. The Court ruled that a farmer's production of wheat is not permitted to be in excess of the Agricultural Adjustment Act of 1938, even if the farmer had had grown the wheat for himself. The Supreme Court found that Filaburn's "own contribution to the demand for wheat may be trivial by itself," but it was "not enough to remove him from the scope of federal regulation where ...his contribution, taken together with that of many others...[who are] similarly situated, is far from trivial."<sup>15</sup> The Court also asserted that by growing his own wheat, Filaburn was removing himself from the market and obstructing the Act's purpose of stimulating trade. This case affirms that Congress has authority over personal and local affairs if the

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<sup>12</sup> Newbern, "Good Cop Bad Cop," 1600.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Newbern, "Good Cop Bad Cop," 1601.

person's conduct multiplied would influence interstate commerce. The reach of federal power through the Commerce Clause was expanded again when the United States encountered the Civil Rights era court cases. In many of these cases, the Supreme Court affirmed Congresses' power by indirectly relating each case to intrastate commerce.

One of the most important cases was *Perez v. United States*, where the Court upheld the Consumer Credit Protection Act which was created to prohibit loan sharking activities and to counter organized crime. The Court found that "extortionate credit transactions, though purely intrastate, may... affect interstate commerce."<sup>16</sup> This is important because it implies that "even if a single, interstate instance of crime was too insubstantial to merit federal jurisdiction, the Court held that if the type of crime could be categorized as a national problem then the effects of individual instances of that type of crime, in aggregate, merited Congressional attention."<sup>17</sup> Justice Stewart argued that with this finding, anyone can be prosecuted federally for any crime. The *Perez* case cleared a path for a multitude of federal criminal legislation, even if the crimes or their effects are local in nature.

It wasn't until the *Lopez* case that the federal government's power under the Commerce Clause was halted for the first time in sixty years.<sup>18</sup> In *United States v. Lopez* the Supreme Court struck down the Gun-Free School Zones Act of 1990 from a section of the Crime Control Act of 1990.<sup>19</sup> The act made it a crime to bring a gun to school or a place that the individual has reason to believe is a school. Alfonso Lopez, a young high

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<sup>16</sup> Newbern, "Good Cop Bad Cop," 1604.

<sup>17</sup> *Ibid.*

<sup>18</sup> Newbern, "Good Cop Bad Cop," 1605.

<sup>19</sup> *Ibid.*

school student, had done just that. Alfanzo was paid forty dollars to deliver a gun to someone after school. He brought the gun and bullets to school but was caught by officials.

Lopez was charged under Texas state law, but the state dropped all charges when the Assistant U.S Attorney of the district decided to press federal charges on Lopez with the Gun-Free School Zones Act. Lopez was convicted and sentenced to six months in prison.<sup>20</sup> Lopez appealed on the grounds that the Gun-Free School Zones Act was beyond Congressional legal jurisdiction. The appeals court reversed his conviction. The court found that as “broad as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned.”<sup>21</sup>

Congresses does have jurisdiction over any interstate channels of commerce, interstate “commerce instrumentalities” and that which “substantially effects interstate commerce.”<sup>22</sup> The Court expressed concern over a “general police power of the sort retained by the States.”<sup>23</sup> Many were surprised by this monumental court case because it put a stop to a half century of nearly unrestricted congressional jurisdiction. The case was soon reaffirmed by *United States v. Morrison*.

*United States v. Morrison* was about a woman who was raped by two men. After raping her, the men verbally abused her with derogatory sexist remarks. The men were federally prosecuted under the Violence Against Women Act of 1994. The Court found that the Violence Against Women Act exceeded the jurisdiction of Congress. The Court

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<sup>20</sup> Newbern, “Good Cop Bad Cop,” 1606.

<sup>21</sup> *Ibid.*

<sup>22</sup> Newbern, “Good Cop Bad Cop,” 1607.

<sup>23</sup> *Ibid.*

came to the conclusion that violent gender-motivated crimes are not economic in nature and have no relation to interstate commerce.

The courts made it clear with these two cases that Congress could not continue general policing powers that overlap state powers. The reaffirmation of the Court's stance on the Commerce Clause with *Morrison* establishes that concrete evidence of an economic interstate connection is necessary for Congress to federally prosecute individuals.

This decision also marks a change of direction in the Court to a new form of federalism and it represents a shift in favor of state autonomy and limitation of federal power. This shift has received some criticism, particularly from Justice Souter. Justice Souter expressed concern that this new direction "does not properly account for the interdependent nature of modern commerce."<sup>24</sup> This change in the Court's view of federal power was again supported in *Alden v. Maine*. In this case, the Court highlighted the lack of Congresses' authority under Article I to "subject non-consenting States to private suits for damages in state courts."<sup>25</sup> These court cases in addition to others have indicated a shift to support state control over functions that traditionally belong to the state.<sup>26</sup>

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<sup>24</sup> Newbern, "Good Cop Bad Cop," 1613.

<sup>25</sup> Newbern, "Good Cop Bad Cop," 1615.

<sup>26</sup> See *New York v. United States* and *Printz v. United States*, Newbern, "Good Cop Bad Cop," 1617.

## Chapter 3

### Joint Priorities: Federalism and Individual Rights

The *Lopez* and *Morrison* court cases give insight into a direction that should be pursued for the proponents of medical marijuana. It is most common that individuals who make arguments in favor of medical marijuana pursue the individual rights argument. Many find it to be more satisfying to directly argue for and peruse greater individual rights but it may be more effective for advocates to follow *Lopez* and question the reach of the CSA. If they were to question congressional authority under the Commerce Clause to regulate medical marijuana, they might be able to stop the federal government from interfering.

After California started the movement to stray from federal policy with medical marijuana initiatives, many other states began to join. The increase in the number of states with medical marijuana legislation resulted in a rise in legal cases to test the new laws. The federal government began to threaten physicians with the revoking of licenses for those who planned to follow California's state law.<sup>1</sup> With the aid of two non-profits, a group of patients and physicians filed a case in the U.S. District Court for the Northern District of California in 1997. In *Conant v. McCaffery*, the plaintiffs sued on the grounds that their First Amendment rights were being infringed upon because the restriction of

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<sup>1</sup> Alistair Newbern, "Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use after *United States v. Lopez*," *California Law Review* 88, no. 5(2000), 1585.

physician-recommended marijuana breached doctor-patient confidentiality. The court found that the federal government cannot prevent physicians from merely recommending marijuana.<sup>2</sup> The court also found that the government was overly broad in its policy. It held that while the government can control the regulation and distribution of drugs, it cannot prevent speech about those drugs. The court did note that that if this speech was intertwined with criminal conduct or if the physician used speech that was criminal in nature such as conspiracy, than it is within the government's power to regulate it.<sup>3</sup> In a footnote of the ruling the fears of the government were found to be exaggerated because the court found it unreasonable to believe that the use of medical marijuana by a small portion of the population would affect interstate drug trade.<sup>4</sup> This note leads many to speculate that the Court would not allow federal prosecution of individuals for medical marijuana on the grounds that it does not fall within international commerce or the regulatory power of Congress.

In 1994 a women was apprehended with two pounds of marijuana that she claimed was for the treatment of her migraine headaches and religious purposes. The Court dismissed the religious reasoning but considered the idea that it was necessary for medical purposes, and the Court allowed the woman to apply a medical argument to her case.<sup>5</sup> The Court found that the quantity being transported did not qualify for a medical defense under the Compassionate Use Act. The Court found that "if the quantity transported and the method, timing and distance of the transportation are reasonably

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<sup>2</sup> Newbern, "Good Cop Bad Cop," 1586.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Newbern, "Good Cop Bad Cop," 1587.

related to the patient's current medical needs," then it might qualify for the Compassionate Use Act. Even though the Compassionate Use Act does not provide for any transportation of marijuana the Court considered it a legal possibility if the conditions are appropriate.

Another critical case was *People v. Peron*. This case also had to do with the issue of the sale and possession of marijuana for medical use. The Court found that the sale and possession of marijuana was not permitted even if it was not for profit, and that the Compassionate Use Act only protected individuals for simple possession and cultivation of marijuana. In turn, the Court ruled that many of the states' cannabis clubs did not qualify as authorized as primary care givers and were not exempt under the state statute for possession or cultivation of marijuana. The Court took issue with the loose definition of "primary caregiver." It made the point that any drug dealer could become a primary care giver under this argument.<sup>6</sup> The Court did note that its ruling should not stop an actual primary caregiver from producing and distributing marijuana. This should presumably be taken as a hint that transactions of marijuana between patient and caregiver without money will not be within the congresses jurisdiction under the Commerce Clause.

Another case that gave insight into the reach of federal power was *United States v. Cannabis Cultivators Club*. This conflict occurred when federal marshals started closing down cannabis clubs which patients had been using to acquire their medical marijuana. A preliminary injunction was filed by the federal government to close down

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<sup>6</sup> Ibid.

the San Francisco Cannabis Cultivators Club. The United States District Court of the Northern District of California ruled in favor of the prosecution in May 1998.<sup>7</sup> The Court based this decision on the legal legitimacy of the club to distribute marijuana rather than the patient's right to use the drug.

The Court concluded that just because a drug is grown for medical use doesn't make it any less part of a national drug market. The Court distinguished this case from Lopez by highlighting the fact that Lopez was merely possessing a gun whereas the Club was distributing marijuana, thus making it a commercial activity within the jurisdiction of the Commerce Clause.

Despite the fact that no concrete evidence had been used to prove that marijuana had been engaged in interstate travel or made an impact on the national market, the Court held it had an impact on the national market. Some believe that this case was dismissed because it was a preliminary injunction and because the case dealt primarily with distribution.<sup>8</sup>

The next major court activity involved a motion in February 1999 by the Oakland Cannabis Collectors Club to stop the federal government from enforcing the Controlled Substance Act. The district court dismissed the motion on the grounds that plaintiffs can't get marijuana from a buyer's club.<sup>9</sup> Some speculate that the court did not rule on whether the plaintiffs could grow marijuana they had used on their own because it was out of

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<sup>7</sup> Newbern, "Good Cop Bad Cop," 1588.

<sup>8</sup> Newbern, "Good Cop Bad Cop," 1589.

<sup>9</sup> Ibid.

federal jurisdiction under the Commerce Clause.<sup>10</sup> It would seem as though the Court's power should be saved for the rights of individuals where its purpose is best served. Some find it to be more comfortable to avoid the "liberal paradox," or being in the strange position of arguing for less federal control over states' rights when historically states tried to fight the federal government for their rights in order to maintain racist laws.<sup>11</sup>

One direction that the individual rights argument has gone with medical marijuana is a claim to equal rights. The federal government, through the Controlled Substance Act prohibits all marijuana use including medical purposes. However, the federal government provides eight very ill patients with marijuana. This violates the Equal Protection Clause that all persons should be treated equally. If two patients with similar or identical medical conditions are given unequal treatment by the state, it is possible to argue a "substantive due process claim" which would "contend that plaintiffs have been denied a fundamental liberty interest" or possibly even "the right to effective medical treatment."<sup>12</sup>

It is worthy to note that courts have been hesitant to accept medical treatment as a fundamental right. It had been recognized as so in the context of abortion but some perceive a change in this view over the years.<sup>13</sup> If medical marijuana were to qualify as an infringement of equal protection or due process claims, then the rationale behind this would be reviewed and scrutinized heavily.

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<sup>10</sup> Ibid.

<sup>11</sup> Newbern, "Good Cop Bad Cop," 1590.

<sup>12</sup> Newbern, "Good Cop Bad Cop," 1591.

<sup>13</sup> Ibid.

One such court case of equal protection claim came from a drug called Laetrile. It was made from the pits of apricots. Proponents of the drug claimed that if it was taken in very high doses in coordination with a special diet it would slow the growth of cancer. The medical community condemned this drug as illegitimate medicine and it was banned by the FDA. The FDA asserted that the medication failed effectiveness and safety standards. Shortly after, twenty-two states went against the FDA's ban on the drug by making the sale of it legal within their state boundaries. The issue came to the Supreme Court in *United States v. Rutherford* when patients and physicians brought a suit to stop the FDA from banning Laetrile's distribution. At first they argued that an exception should be made and terminally ill patients should be allowed access to the drug. They based this argument on their belief that federal interference with a person's ability to access the drug was an invasion of their right to privacy.<sup>14</sup>

Justice Marshall wrote that judicial deference was "particularly appropriate," because of considerable public controversy surrounding this drug, and because the authority for new drug approvals resided with the FDA.<sup>15</sup> The Court also held that exceptions couldn't be made based on the extent of a patient's illness, but that patients should be protected from "fraudulent cures not recognized by the FDA."<sup>16</sup>

In *Carnohan v. United States* another plaintiff was trying to prevent the FDA from interfering with his right to access Laetrile. The Court found that "constitutional rights of privacy and personal liberty do not give individuals the rights to obtain Laetrile

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<sup>14</sup> Newbern, "Good Cop Bad Cop," 1592.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

free of the lawful exercise of government police power.”<sup>17</sup> In *Cannabis Cultivators Club II*, the district echoed the Carnohan finding that the plaintiffs had no fundamental right to have the medicine of their choice.<sup>18</sup> This ruling ended the plausibility of an argument for medical marijuana under the Equal Protection Clause.

An equal protection argument was used in 1996 by Ralph Seely who asserted that the classification of marijuana as Schedule I was in violation of his protection of equal rights under the Constitution of Washington.<sup>19</sup> Seely had bone cancer and smoked marijuana to reduce the nausea and vomiting. The Court found that he had no fewer rights under the state Constitution than he did under the U.S Constitution.

Another person made the individual rights argument in an attempt to gain the right to be admitted to the Federal Compassionate Use Program. In *Kuromiya v. United States*, Kuromiya made the argument that he was not given equal protection because the federal government was providing a small number of individuals with medical marijuana but was refusing to admit Kuromiya into the program and provide equal treatment.

The Court found that the Federal government had the right to address problems in parts and therefore did not have to allow all patients to receive medical marijuana.<sup>20</sup> The Court also acknowledged that the federal government had decided to shut the program down for various reasons. However, the Court condemned the federal government for not

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<sup>17</sup> Ibid.

<sup>18</sup> Newbern, “Good Cop Bad Cop,” 1593.

<sup>19</sup> Newbern, “Good Cop Bad Cop,” 1595.

<sup>20</sup> Newbern, “Good Cop Bad Cop,” 1596.

having produced “a single useful clinical result as to the utility or safety of marijuana as a medicine.”<sup>21</sup>

It is important to note that in the case of the Oakland Cannabis Buyers’ Cooperative, the United States Court of Appeals for the Ninth Circuit Court remanded the district court for a preliminary injunction that prevented the Oakland Cannabis Buyers’ Club from the distribution of medical marijuana during the legal proceedings.

The Ninth Circuit objected to the fact that the district court had failed to consider a defense based off medical necessity. Under this defense, clubs could distribute marijuana to patients whose physicians certify that they:

“(1) suffer from a serious medical condition, (2) will suffer imminent harm without access to cannabis, (3) need cannabis for the treatment of a medical condition or alleviation of symptoms associated with a condition, or alleviation of symptoms associated with a condition, and (4) have no legal alternative of the effective treatment of the condition because the patient has tried other legal alternatives for the effective treatment of the condition because the patient has tried other legal alternatives and found them ineffective.”<sup>22</sup>

The Ninth Circuit court found no particular reason for the injunction to be necessary because if they would have just prosecuted the defendants under the current drug laws the defendants would have been able to use a medical necessity defense. This case does show that the Ninth Circuit court does place a larger emphasis on considering patient medical necessity but it is still very difficult to win a medical necessity defense case.

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<sup>21</sup> Ibid.

<sup>22</sup> Newbern, “Good Cop Bad Cop,” 1597.

This is shown in the case of McCormick and McWilliams in the United States District Court for the Southern District of California. In the Case McCormick who suffers from bone cancer, and Peter McWilliams, who suffers from AIDS were facing Federal drug charges in the Los Angeles district court. On November 5, 1999, the U.S District Court Judge George King prevented the two defendants from testifying their medical condition, or the passage of Proposition 215 because he found that such testimony would be irrelevant.<sup>23</sup> The patients are unable to testify their debilitating nausea or excruciating pain. The patients essentially had their hands tied behind their back and would no longer be able to present a necessity defense.

They were tried like ordinary criminals. This case has very important implications for medical marijuana legalization. In order for a patients defense to work the federal government's ability to prosecute individuals without medical consideration needs to be halted. One of the most plausible ways to do this would be through an attack on congressional authority using Lopez based argument on the Commerce Clause.

It is important to note that these cases reveal a trend that the majority of justices are looking at the future with a renowned sense of federalism. In the cases of *Lopez* and *Morrison*, it is important to acknowledge the Justices changing view of individual rights.

Both of these cases affirm that the Supreme Court does not agree with the broad scope of power the federal government has been granted in the past. The Court is looking to make sure that federalism is not hindered. It is unlikely that any court will strike down the CSA but *Lopez* does affirm the significance and necessity of a fundamental

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<sup>23</sup> Newbern, "Good Cop Bad Cop," 1598.

connection between medical marijuana and interstate commerce. It is very likely that federal regulation will be limited to Justice Thomas's view of Congress power under the CSA being able to "regulate the buying, selling and transporting" of marijuana , but congress lacks the power to "regulate the mere possession or use of marijuana."<sup>24</sup> Under this view it appears as though people who have a small amount of marijuana may be able to get out of federal prosecution. This means that medical marijuana patients may be free from prosecution if they have a small amount. However, the state programs are still in jeopardy because the clinics and dispensaries that many patients rely on are within federal jurisdiction. Since the federal government views any large scale marijuana movement, medical or not as criminal drug trafficking, the facilities which provide for the patients will most likely remain targets of the federal government.

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<sup>24</sup> Newbern, "Good Cop Bad Cop," 1630.

## Chapter 4

### Homegrown Reeform: Congressional Attempts to Reform Medical Marijuana

There has been a significant amount of legislation through Congress over the years relating to the legal standing of medical marijuana. The 105 Congress in September of 1998 passed H.J.Res.117. The resolution supported the federal drug approval process and prohibited the legalization of any Schedule I drugs for medicinal use “without valid scientific evidence or approval from the FDA.”<sup>1</sup> Congress also amended the Act to prevent the District of Columbia from counting the ballots from its initiative vote on the legalization of medical marijuana for persons with serious diseases like cancer and HIV. This amendment was challenged in the District Court and overturned. The ballots were counted with a strong victory of sixty-nine percent to thirty-one percent.

There are many other court challenges where Congress tried to inhibit the implementation of medical marijuana legislation. One such example is when Congress tried “to prohibit implementation of the initiative until the rider known as the Barr Amendment was dropped from the FY2010 D.C appropriations act (H.R. 3288) in the 111 Congress.”<sup>2</sup>

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<sup>1</sup> Congressional Research Service, Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, (2010), 4.

<sup>2</sup> Eddy, *Medical Marijuana: Review*, 4.

In the 108 session of Congress, a bipartisan bill was offered by Representatives Hinchey and Rohrabacher. It proposed an amendment for H.R. 2799 that was designed to prevent the Justice Department from using funds to intervene in the implementation of state medical marijuana laws.<sup>3</sup>

The bill was debated on the 22 of July 2003 on the floor of the House but it was defeated the next day in a vote of 152 to 273.<sup>4</sup> It was offered up again in the 108 congresses second session on July 7, 2004 but it was defeated with the same results. The amendment was offered up three more times in each consecutive congressional session but it never came closer than 49 votes short of passing. During the debates the opponents of the bill argued that medical marijuana has not been proven safe or effective and that approval of this bill would “send the wrong message to young people.”<sup>5</sup>

In the 110 Congress there was an amendment (S. 1082) offered by Senator Coburn that was designed to stop the state medical marijuana programs. It was adopted in an 11-9 vote. The amendment basically reaffirmed that medical marijuana would be fully subject to the FDA approval. However this amendment was not included in H.R. 2900 the version that was approved by Congress and enacted into law.

Also in the 110 Congress’s second session Representative Frank advanced H.R. 5842 an amendment called the Medical Marijuana Patient Protection Act.<sup>6</sup> The bill was created to provide federal legitimacy to the medical use of marijuana in accordance with the laws of the states. The bill would have changed the status of marijuana from Schedule

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<sup>3</sup> Eddy, *Medical Marijuana: Review*, 4.

<sup>4</sup> Eddy, *Medical Marijuana: Review*, .5.

<sup>5</sup> *Ibid.*

<sup>6</sup> Eddy, *Medical Marijuana: Review* 6.

I to Schedule II on the Controlled Substance act. This would have given marijuana medical legitimacy while maintaining its status as controlled substance for those who do not have a prescription. It also would have permitted states with medical marijuana programs to legitimize a physician's ability to prescribe or recommend marijuana for medical use.<sup>7</sup> The bill permitted authorized patients who reside within states that permit it, to possess, obtain, manufacture, transport or use marijuana.<sup>8</sup> It allowed for authorized individuals and pharmacies to distribute marijuana to authorized patients.<sup>9</sup> The bill also would have prevented any other act or agency from interfering with the state's ability to run the medical marijuana programs they had legally put into place.

The bill was "referred to the House Committee on Energy and Commerce and saw no further action."<sup>10</sup> This legislation is not the first that was created in an attempt to legitimize the medical marijuana programs in states. Versions have been seen in every congress since 1997, but this one was seen by many as the most legitimate attempt to decriminalize state medical marijuana programs.<sup>11</sup>

Another bill called the Truth in Trials Act (H.R. 3939), was introduced on the October 27, 2009 by Representative Sam Farr. This bill was intended make it okay for medical marijuana users or providers to reveal to the juries of federal courts that their marijuana related activity is medical in nature and legal under state laws.

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<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*

<sup>9</sup>Eddy, *Medical Marijuana: Review 7*.

<sup>10</sup>*Ibid.*

<sup>11</sup>Eddy, *Medical Marijuana: Review 7*.

During and after the 2001 Supreme Court decision *U.S v. Oakland Buyers' Cooperative*, it was no longer permitted for individuals to reveal the legal status or medical nature of their marijuana related activities. This would have allowed individuals like McCormick and McWilliams to reveal their grave illnesses as well as the legal status of their activity in their state and apply the medical necessity defense. The bill also would have placed limitations on the federal agent's abilities to confiscate marijuana which has been authorized for medicinal purposes under state law.<sup>12</sup> It would return any plants that have been seized for pending cases. This bill was "referred to the Committee on the Judiciary and also to the Committee on Energy and Commerce."<sup>13</sup>

Even though Congress has remained significantly opposed to recognizing marijuana medicinally, there have been several pieces of litigation passed through Congress since the beginning of state-run medical marijuana programs. Some of this legislation has attempted to reform federal opposition medical marijuana.

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<sup>12</sup> *Ibid.*

<sup>13</sup> Eddy, *Medical Marijuana: Review* 8.

## Chapter 5

### Blazing New Trails: California Strays from the Federal Position

Since voters passed Proposition 215 in California, the implementation of this program has been anything but smooth. Not only has the federal government fought its implementation at every level but this program has seen local resistance as well. For the purpose of this analysis, the medical marijuana program of California will be reviewed because it has been at the front of the battle for medical marijuana. It has been leading the way with the most liberal medical marijuana laws, a booming multi-billion dollar marijuana industry as well as some of the most stringent federal and local resistance.

On November 5 1996, fifty-six percent of voters approved the California Compassionate Use Act of 1996, also known as Proposition 215.<sup>1</sup> The day after the law took effect. Criminal penalties for “medical marijuana use, possession and cultivation by patients with the written or oral recommendation or approval of a physician who has determined that a patient’s health would benefit from medical marijuana” were now legally protected from state prosecution.<sup>2</sup> The Compassionate Use Act would be different from the legislation many other states would pass later on because it allowed marijuana

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<sup>1</sup> The NORML Foundation, “California Medical Marijuana” <http://norml.org/legal/item/california-medical-marijuana>

<sup>2</sup> Congressional Research Service, Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, (2010), 20.

for the treatment of AIDS, cancer, anorexia, spasticity, chronic pain, arthritis, glaucoma, migraines or “any other illness for which marijuana provides relief.”<sup>3</sup>

The last part is one of the most important parts of this proposition because it fails to designate which illnesses do not qualify for medical marijuana. This theoretically makes medical marijuana available to anyone with any ailment that a physician deems would benefit from medical marijuana. This part makes the program more controversial because it allows for the treatment of illnesses beyond the scope of scientific studies done on marijuana and its effects as a treatment for specific medical conditions.

This part of the act is one of the reasons California’s medical marijuana laws are the most liberal and is also part of the reason the implementation of California’s medical marijuana program has received so much scrutiny. In addition to the nonspecific definition of who qualifies, the act is also open-ended about how much marijuana patients can possess stating that a patient can possess an amount “sufficient for the patient’s personal medical purposes.”<sup>4</sup>

After this legislation was passed some groups made attempts to test the waters of this new bill and create facilities to dispense marijuana to patients despite the federal position that marijuana was still illegal under the Controlled Substance Act. This was tested in *People v. Peron* and in *United States v. Oakland Cannabis Buyer’s Cooperative* where the courts ruled that medical marijuana clubs did not count as primary caregivers despite the fact that they were not for profit.

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<sup>3</sup> Eddy, *Medical Marijuana: Review* 20.

<sup>4</sup> Ibid.

In 2003 a bill was passed by the California State Senate titled Senate Bill 420 that effectively clarified and created a system for medical marijuana distribution centers to function under with more legal clarity. This bill specifically required the State Department of Health Services to create and maintain a system which would issue I.D. cards to qualified patients and it also established crimes surrounding the system to maintain its legitimacy and prevent any fraudulent access to marijuana by illegitimate patients. The bill aimed to “promote unified and consistent application of the Act among counties within the state” and with local law enforcement officers.<sup>5</sup>

The bill authorized the Attorney General to “recommend modifications to the possession or cultivation limits set forth in the bill.”<sup>6</sup> It also gave him power over the security and prevention of marijuana being used outside its intended medicinal realm.

This bill was important to implement some security and clarification over the ambiguity of Proposition 215 because as the courts stated in their ruling of *People v. Peron*, there is little distinction between a medical marijuana caregiver and the average drug dealer under the limited regulations.<sup>7</sup> Despite the improvements made to proposition 215 with Senate Bill 420 there was still a lot of confusion of how the caregivers, dispensaries and collectives would be able to operate since they were technically categorized as drug dealers under Federal law.

Since the Federal government and the courts established in *People v. Perez*, that the federal government did not distinguish between medical marijuana transactions that

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<sup>5</sup> United States.Cong. Senate. Medical Marijuana Program Act of 2003. S 420. 2003. Print

<sup>6</sup> Ibid.

<sup>7</sup> “Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use after United States v. Lopez,” *California Law Review* 88, no. 5(2000), 1587.

involved cash or no cash there was little incentives for the dispensaries to not make a profit off their activities. Many in the medical marijuana industry continued to operate as dispensaries that essentially sold marijuana in exchange for cash as permitted by state law under Proposition 215.

Early on some cities accepted or embraced the passage of these laws and the implementation of the medical marijuana program and actively created city ordinance to regulate the growth of dispensaries in their cities. In Oakland, city leaders quickly implemented regulations to control the number and location of dispensaries.<sup>8</sup> In Berkley the number of dispensaries was limited to three. In San Francisco, officials went so far as to place the authority of regulating dispensaries under the Department of Public Health and gave them the power to enforce the handling of edible marijuana medication.<sup>9</sup> Regulation in cities that took the initiative to establish it was well managed and there since has been relatively little dispute between the local governments and the dispensaries which provide for the patients.

In contrast, other cities that failed to recognize their legitimacy let alone regulate their existence were quickly over run with dispensaries. The City of Los Angeles has chosen to fight the legitimacy of marijuana dispensaries albeit unsuccessfully, and because of inaction, had created a regulation vacuum in which 600 to 800 medical marijuana dispensaries had opened from 2007 to 2011 with little oversight.<sup>10</sup> According L.A. city council man Paul Krekorian there are more medical marijuana dispensaries in

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<sup>8</sup> "Regulations Work: Lessons from California's Experience with medical marijuana," *The Houston Chronicle*, 20 September 2012

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

Los Angeles then there are Starbucks coffee shops.<sup>11</sup> Los Angeles City now is unable to regulate these dispensaries because of lawsuits.

Some counties have taken measures to try and discourage the implementation of the state mandated Medical Marijuana I.D. card program mandated by Senate Bill 420. In 2006, San Diego filed suit against the state of California on the grounds that the state mandated program is in violation of federal law. The San Diego Superior Court and the Fourth District Court of Appeals both ruled in favor of the State Mandate.<sup>12</sup> The trial court asserted that “Counties have standing to challenge only those limited provisions of the MMP that impose specific obligations on counties.”<sup>13</sup> The court also wrote that counties can’t directly attack legislation that does not directly impose obligations that “inflict any particularized injury to Counties.”<sup>14</sup> The court also wrote in its opinion that the medical marijuana program provisions do not “positively conflict with the CSA,” and that further “obstacles” are not posed to the CSA from the provisions that exempt prosecution under California law.

When San Diego appealed to the Supreme Court in *San Diego v. State of California 2008*, the Supreme Court refused to review the case and reaffirmed the lower court decisions. The medical marijuana advocacy group Americans for Safe Access (ASA) claimed that, “No longer will local officials be able to hide behind federal law and

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<sup>11</sup> “What Will Los Angeles Ban on Medical Marijuana Dispensaries Mean?” *The Daily Beast*, 24 July 2012

<sup>12</sup> “U.S. Supreme Court Affirms California’s Medical Marijuana Law.” *Salem-News*, 18 May, 2009

<sup>13</sup> *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 - Cal: Court of Appeal, 4th Appellate Dist., 1st Div. 2008

<sup>14</sup> *Ibid.*

resist upholding California's medical marijuana law."<sup>15</sup> This ruling affirms that the Supreme Court has taken the stance that local government must obey this state mandate. This would mean that all of the 9 other counties who had failed to permit the implementation of this program would have to comply or face lawsuit.<sup>16</sup> Despite the Courts support for the identification program, the legitimacy of the program was challenged again by the city of Garden Grove.

In the case of *City of Garden Grove v. Superior Court* a traffic stop by the Garden Grove police department resulted in the confiscation of a third of an ounce of marijuana from Felix Kha. When Felix Kha challenged this in trial court with approval from his doctor to use medical marijuana the prosecutor dropped the charges and the trial court granted a motion by Kha to return his property and "ordered the Garden Grove Police Department to give him back his marijuana."<sup>17</sup> This ruling shows the courts acknowledge the legitimacy of California's medical marijuana laws and their jurisdiction over local authorities. The courts also acknowledged the legitimacy of the protection of the patient's medicine under California law. However the confirmation of state jurisdiction of state legislation over local government does not necessarily affirm the legitimacy of the entirety of the medical marijuana program under the CSA. The federal government has used a number of leverage points, to target the institutions that facilitate the production or dispensing of medical marijuana.

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<sup>15</sup>Americans For Safe Access, *U.S Supreme Court Affirms California's Medical Marijuana Law* <http://safeaccessnow.org/article.php?id=5737> (May 2009)

<sup>16</sup> *Ibid.*

<sup>17</sup> *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 - Cal: Court of Appeal, 4th Appellate Dist., 3rd Div. 2007

This semi-legal status of these operations has been problematic because by accepting cash for marijuana, dispensaries are technically businesses. Businesses need to get a license from the city as well as pay rent, use banking services and pay taxes. This led to a substantial amount of confusion for everyone involved. How does an agency or service provider assist a business that is technically categorized by the federal government as a criminal institution?

One of the largest obstacles for the establishment of dispensaries is the difficulty dispensaries face in obtaining services from banks. In the beginning many banks would accept business from medical marijuana dispensaries. However, the federal government has stepped up pressure on these institutions threatening to prosecute them for breaking anti-money-laundering and drug trafficking laws.<sup>18</sup>

Medical marijuana dispensaries and cultivators have had difficulties acquiring a space that is willing to facilitate their semi-legal business. The federal government has threatened land lords and property owners in a February 2011 memorandum from California's top four federal prosecutors.<sup>19</sup> The federal government has threatened to take the property of those who facilitate medical marijuana operators.

Dispensary's that are trying to operate legitimately have found that paying Federal taxes can be an issue when federal law enforcement agencies view your business as criminal activity. Aside from the dangers of paying taxes many dispensaries that are able to avoid getting raided face bankruptcy because of a powerful tax provision. Many

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<sup>18</sup> "Medical Marijuana Shops Struggle With Banks, Mounting Federal Pressure To Turn The Business Away" *The Huffington Post*, June 2011

<sup>19</sup> Andrew Becker, Michael Montgomery, "Landlords, property owners are new targets in anti-pot strategy," *California Watch*.

dispensaries that pay taxes have trouble operating because of U.S. tax law Section 280E. This provision denies any deductions for businesses involved in the trafficking of controlled substances. This means that medical marijuana dispensaries are forced to pay taxes on their gross income instead of their net income. This can make it incredibly difficult for medical marijuana dispensaries to stay afloat. However, there is a loophole that has allowed many marijuana facilities to continue to operate.

Some dispensaries in addition to providing cannabis for medical marijuana patients provide other medical marijuana services such as counseling, physical therapy and other physician related services to specialize patient treatment. In the 2007 case *Californians Helping to Alleviate Medical Problems Inc. v. Commissioner*, the U.S. Tax Court ruled that marijuana is not tax deductible under Section 280E but the separate care giving services provided by the dispensary are.<sup>20</sup>

These tax court rulings have important implications for how medical marijuana dispensaries operate and are taxed. If only a small portion of the premises, let's say ten percent, is used to distribute marijuana, than ninety percent of the rent is federally tax deductible.<sup>21</sup> Despite the state's position on the legitimacy of medical marijuana dispensaries, paying state taxes for medical marijuana dispensaries is no less complicated than paying federal taxes.

The legitimate portion of the medical marijuana industry has also struggled with federal influence over the Board of Equalization. After the increase of medical marijuana

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<sup>20</sup> Wood, Robert W. "Taxes Are Killing Medical Marijuana Like Roundup." *Forbes*. Forbes Magazine, 03 Aug. 2012. Web. 03 Dec. 2012.

<sup>21</sup> *Ibid.*

dispensaries following 2003 Senate Bill 420, the State Board of Equalization upheld a policy that it has and will continue to reject efforts by the medical marijuana facilities to pay taxes because they did not view them as legitimate organizations. Specifically the State Board of Equalization refused to issue sellers permits to medical marijuana facilities which is required by state law for “the sale of tangible property.”<sup>22</sup>

As medical marijuana grew into a multi-million dollar industry the State Board of Equalization changed its policy in October 2005 and started distributing permits to businesses, “even if the only property being sold was illegal.”<sup>23</sup> After this change in policy more collectives and dispensaries began paying taxes.

In June 2007, the BOE officially put out a statement the medical marijuana is not only taxable but is also not tax exempt as a prescription medication. This is particularly interesting because normally “non-prescription medications are taxable in California.”<sup>24</sup> In January 2010 The BOE released a follow up Special Notice notifying dispensaries that failure to obtain sellers permit by those who make marijuana sales are “subject to interest and penalty charges” as well as “an eight –year look-back period.”<sup>25</sup> The notice also informs those responsible for dispensaries that may have “prior tax liabilities,” that BOE has programs to assist in paying tax liabilities.<sup>26</sup> An additional third notice was sent out on February 24, 2011 to address a tax dispute with a dispensary called the Berkeley Patients Group, Inc.

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<sup>22</sup> Joint Fiscal Office. "Medical Marijuana Fee and Tax Report." N.p., 3 Feb. 2012. Web.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Special notice by State Board of Equalization titled *Important Information for Sellers of Medical Marijuana* January 2010 [www.boe.ca.gov](http://www.boe.ca.gov) accessed 11/25/12

<sup>26</sup> *Ibid.*

The dispensary claimed that because their medical marijuana sales were classified as medicine they should be exempt from sales tax. The notice informed California dispensaries that “sales of medical marijuana do not meet the definition of a sale of exempt medicine, and are therefore subject to tax.”<sup>27</sup> The BOE stated that the case was reviewed by the BOE board in a Sacramento meeting that week.

This decision primarily came from the BOE decision to classify medical marijuana under Tax Code Section 6051 instead of a medicine. The BOE used the premise that medical marijuana is not recognized under the federal government’s CSA as medicine and should therefore be classified as tangible personal property. The BOE News Release quoted BOE Chairman Horton saying, “The United States Supreme Court has ruled that as a general matter, the unlawfulness of an activity does not prevent its taxation,”<sup>28</sup> The BOE then cited the 1994 case of *Dep’t of Revenue of Montana v. Kurth Ranch*. The BOE stated that “Sales of illegal medical marijuana and illegal marijuana in California are subject to tax.”<sup>29</sup>

The BOE has notably shifted its position on the collection of state taxes from medical marijuana. It has been more willing to recognize the importance of the economic functions of these business establishments and the tax revenue they produce. It is an understandable position because medical marijuana has brought a considerable amount of revenue to state and local governments who routinely struggle to balance their budgets. It is estimated that after the 2007 notice distributed by the BOE somewhere between \$58

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

million and \$105 million has been collected from the states five percent sales tax on medical marijuana.<sup>30</sup> Since the 2007 estimate medical marijuana has grown significantly and some estimate California's medical marijuana industry to be around one billion dollars.<sup>31</sup>

These local taxes have generated millions of dollars for the city of L.A which institutes a 5% city licensing fee and has seen out of control dispensary growth. Despite the increased revenue the city council members have understandably seen this growth as problematic. Los Angeles failure to regulate the growth of medical marijuana dispensaries early has led to dispensaries on nearly every block. The council members of L.A in a 14 to 0 vote have placed a ban on all the cities dispensaries.<sup>32</sup> Unfortunately for the council members of L.A this act seems little more than symbolic since voluntary compliance with the ban is unlikely.

It also would be difficult for police to get the resources to shut down almost a 1,000 dispensaries. Overcoming the physical limitations of enforcing this new ban would be arduous but the ban also faces serious legal challenges.

The city sent a letter to the dispensaries that on September 6 2012, which stated that their businesses would be illegally operating against city ordinance. The letter

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<sup>30</sup> Joint Fiscal Office. "Medical Marijuana Fee and Tax Report." N.p., 3 Feb. 2012. Web.

<sup>31</sup> Marois, Michael B., and Christopher Palmeri. "U.S Takes Aim at California's \$1 Billion Marijuana Dispensaries." *BloombergBusinessweek*. N.p., 8 Oct. 2011. Web. 2 Dec. 2012.

<sup>32</sup> "What Will Los Angeles Ban on Medical Marijuana Dispensaries Mean?" *The Daily Beast*, 24 July 2012

threatened a punishment of \$2,500 dollars and up to six months in jail for every day the dispensary continued to operate.<sup>33</sup>

The Patient Care Alliance, Los Angeles, or PCA-LA, filed a lawsuit and was seeking an injunction to stop what it viewed as “controversial ordinance.”<sup>34</sup> The ordinance of Los Angeles was created in response to the ruling of *Pack v. Long Beach* in 2010.

In this case the Court of Appeals of California ruled that the power of cities to place regulations on dispensaries or collectives is invalidated by the preemptive powers of federal law and the CSA. Specifically the Court stated that regulations are federally preempted because “city ordinance, which permits and regulates medical marijuana collectives rather than merely decriminalizing specific acts,” is in violation of the CSA.<sup>35</sup> This ruling was appealed to the Supreme Court.

Based on this decision cities across the state took it upon themselves to outright ban medical marijuana from their cities. Los Angeles was one of these cities. Long Beach also decided to abandon its regulations and outright ban dispensaries from the city. In response to Long Beach’s abandonment of its regulations to institute a ban, the Supreme Court decided to toss the *Pack v. City of Long Beach* finding on August 21 2012.

This act by the Supreme Court has put the feasibility of City dispensary bans based on the *Pack v. City of Long Beach* into question. Later this year the Supreme Court

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<sup>33</sup> Pamer, Melissa. "Los Angeles Sued Over Medical Marijuana Dispensary Ban." *NBC Southern California*. N.p., 17 Aug. 2012. Web. 03 Dec. 2012.

<sup>34</sup> *Ibid.*

<sup>35</sup> "PACK v. SUPERIOR COURT." *Â -Â October 4, 2011*. N.p., n.d. Web. 03 Dec. 2012.

will view several other Appellate cases which might bring some resolution to the most recent areas of dispute surrounding the legitimacy of dispensaries and the regulations surrounding them.

One of these cases is *City of Riverside v. Inland Empire Patient Health and Wellness Center*. The Supreme Court will have to decide whether to agree or disagree with the ruling that cities can regulate dispensaries but cannot ban them. This decision will affect the 50 counties and cities within California that have enacted dispensary ordinances.<sup>36</sup>

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<sup>36</sup> ASA. "Medical Marijuana Dispensary Ban Thrown Out in California Supreme Court." *Medical Marijuana Dispensary Ban Thrown Out in California Supreme Court*. N.p., 22 Aug. 2012. Web. 03 Dec. 2012.

## Chapter 6

### Blunt Enforcement: The Federal Government Crackdown

Since the year 1968 there has only been one source of marijuana that scientists can use for research. This marijuana is under very tight controls by the United States federal government. It has been grown at the University of Mississippi with a contract from the National Institute on Drug Abuse. The marijuana is extremely difficult to obtain by scientist whose research is approved by the FDA.<sup>1</sup> The researchers also have claimed the product of research does not meet the quality desirable for research purposes and is lacking in strain variety.<sup>2</sup>

This is not the case with other Schedule I drugs like heroin, LSD, and MDMA which are provided legally by “private U.S laboratories” or easily imported from abroad with federal permission, making marijuana the only Schedule I drug with a single federal provider.<sup>3</sup>

Dr. Lyle Cracker, a professor of plant biology and director of the medical plant program at Massachusetts at Amherst, applied to get a DEA license to cultivate some research-grade cannabis. His application was filed under the Multidisciplinary Association for Psychedelic Studies (MAPS). This is a nonprofit organization led by Dr. Rick Doblin whose goal is to conduct drug research on marijuana of higher quality and to

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<sup>1</sup> Medical Marijuana Review and Analysis pg. 11

<sup>2</sup> Medical Marijuana Review and Analysis pg. 11

<sup>3</sup> Medical Marijuana Review and analysis pg. 12

create proper conditions for a five year, five million dollar study to transform smoked or vaporized marijuana into a FDA approved prescription medicine.<sup>4</sup> The DEA at first ignored this request until it was sued on the grounds of “unreasonable delay”.<sup>5</sup> It then rejected the application in December 2004 because it found the request to be not consistent with public interest.<sup>6</sup> This decision was appealed after nine days of researchers testifying that their requests had been rejected making FDA research impossible.

On February 12 2007 a DEA administrative law judge Mary Ellen found the research supply to be inadequate and ruled to give Dr. Craker the proposed research facility. This was overturned by the DEA Deputy Administrator on the 7<sup>th</sup> of January 2009.<sup>7</sup> The federal government has been heavily involved in resisting scientific understanding of marijuana much more so than it has with heroin, LSD, MDMA and other Schedule I drugs.

The federal government’s response to medical marijuana from the beginning of its implementation in California has been strong, with regular raids on medical marijuana facilities. The DEA raids became especially common in California because caregivers can receive “reasonable compensation” and still be functioning on a non-profit basis.<sup>8</sup> The DEA does not distinguish between medical marijuana operations and drug traffickers so there are no official statistics on how many facilities get raided, but the DEA has usually prioritized its raids on the high profile marijuana patients, cultivators and

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<sup>4</sup> Medical marijuana Review and analysis pg.12

<sup>5</sup> Medical marijuana review and analysis pg. 12

<sup>6</sup> Medical Marijuana Review and analysis pg.12

<sup>7</sup> Medical marijuana review and analysis pg. 12

<sup>8</sup> Congressional Research Service, Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, (2010), 13

dispensers.<sup>9</sup> These raids were common, but in general the medical marijuana industry was surviving.

At the end of the Bush administration in 2007 the DEA stepped up its efforts with a new tactic. The DEA Los Angeles Field Division in 2007 sent out letters to owners of property being used to facilitate medical marijuana programs that they would be subject to the “crack house statute.” This was provision added to the CSA in 1986 which made it a federal offense for individuals to “knowingly and intentionally rent, lease, or make available for use, with or without compensation, a building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”<sup>10</sup> The DEA was threatening owners of property with a 20 year jail sentence, seizure of property, and fines for facilitating anyone partaking in the medical marijuana industry. These tactics have led to a series of lawsuits and legal battles.

Despite some of President Barack Obama’s campaign promises, the federal prosecution of medical marijuana continued after his 2008 election. In March 2009, the Attorney General Eric Holder made an announcement that the federal government under the Obama administration would use its resources to target medical marijuana operations that were not in compliance with state law.<sup>11</sup> This policy was formally embraced by the Justice Department memorandum addressed to the U.S. Attorney on October 19, 2009.<sup>12</sup> This became known as the Ogden Memo. It stated that federal resources should not be prioritized for use in combating “individuals whose actions are in clear and unambiguous

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Moore, David Stout And Solomon. "U.S. Won't Prosecute in States That Allow Medical Marijuana." *The New York Times*. The New York Times, 20 Oct. 2009. Web. 03

<sup>12</sup> Eddy, *Medical Marijuana: Review*, 14

compliance with existing state laws providing for the medical use of marijuana.”<sup>13</sup> This announcement was quite remarkable because it showed that the federal government had made a distinction between the states medical marijuana program and criminal enterprises. Many believed that the Obama administration was fulfilling its campaign promises and Federal government would be more flexible to the laws the state has created.

However, the federal government abruptly changed its position again when Obama re-nominated Michele Leonhard from the Bush administration to head the DEA.<sup>14</sup> In the middle of January 2011 shortly after she was confirmed as head of the DEA, she reignited the federal government’s war on the medical marijuana industry. The agency released an updated version of “The DEA Position on Marijuana.” In this document the DEA at first supports the position given by the Ogden Memo. However, the DEA then follows this by stating “while some have interpreted these guidelines to mean that the federal government has relaxed its policy on ‘medical’ marijuana, this in fact is not the case.”<sup>15</sup> With this statement the DEA has confirmed it will continue raid medical marijuana facilities and by placing quotes around ‘medical’ has confirmed that once again the DEA does not view marijuana as having any medical purposes.

The position was escalated even further when prosecutors of the federal government sent a letter to Gov. Christine Gregoire threatening legal action against state employees stating, that they “would not be immune from liability under the controlled

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<sup>13</sup> "Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana Â« Office of Public Affairs." *Justice Blog*. Justice Department, n.d. Web. 03 Dec. 2012.

<sup>14</sup> "Obama's War on Pot." *Rollingstone.com*. N.p., Web. 03 Dec. 2012.

<sup>15</sup> "TheDEA Position On Maijuana." *Wwww.justice.gov*. Justice Department, Jan. 2011. Web. 2 Dec. 2012.

substance act.”<sup>16</sup> The Federal government was essentially threatening state officials who were trying to regulate the growing medical marijuana industry in their state with felony criminal prosecution.

On June 29<sup>th</sup>, Eric Holder’s predecessor, James M. Cole released a memo reinstating medical marijuana dispensaries as targets. The memo stated, “persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.”<sup>17</sup> These actions by the federal government and its corresponding agencies shows that the Obama administration has decided to reignite the war on medical marijuana.

Some believed that this escalation in the war on medical marijuana was an attempt from the Obama administration to win the approval of older voters in an election year but the position has not been changed since Obama has been reelected in 2012. The Obama administration has neither reprimanded nor fired any federal officials for the crackdown on medical marijuana so it is very possible that this policy will hold until the end of the Obama administration.

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<sup>16</sup> "Obama's War on Pot." *Rollingstone.com*. N.p., Web. 03 Dec. 2012

<sup>17</sup> Grim, Ryan. "Medical Marijuana Memo: DOJ Cracks Down On Pot Shops." *The Huffington Post*. TheHuffingtonPost.com, 01 July 2011. Web. 03 Dec. 2012.

## Chapter 7

### Policy Burnout: The Hazy Future of Medical Marijuana

With the recent crackdown of the Obama administration on medical marijuana it is very possible that the federal government could choose to fight medical marijuana for many years to come. Another factor that might affect this issue is that in Obamas first four years, he elected Judges to the high court. In the next four years, if either of the two seventy-six year old conservative justices steps down then Obama could make a real impact on the courts.<sup>1</sup> As long as the Federal government continues to recognize medical marijuana as a Schedule I substance with no medical value the courts will play an important role in medical marijuana's future.

It is very possible that the Supreme Courts could return to their previous pre Lopez/Morrison view of Federal Jurisdiction. It is also possible that the public's opinion of marijuana could change drastically. At the moment public opinion polls show that Americans overwhelmingly approve of medical marijuana. In a 2011 poll seventy-seven percent of the public approved of medical marijuana.<sup>2</sup> However, it is possible that some kind of incident with marijuana could tarnish public opinion of medical marijuana and drastically effect the movement.

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<sup>1</sup> Biskupic, Joan. "Analysis: Obama May Now Seek to Make Deeper Mark on High Court." *Reuters*. Thomson Reuters, 08 Nov. 2012. Web. 03 Dec. 2012.

<sup>2</sup> "Here Is The Past and Future Revisited." *Investors Hub*. N.p., n.d. Web. 03 Dec. 2012.

These chances are enhanced because in the 2012 election, voters in Colorado and Washington both passed initiatives legalizing marijuana for recreational use. Any adverse factors resulting from the legalization movement could have negative impact on the medical marijuana movement. Progress with medical marijuana has been very fluid with a series of victories and setbacks for proponents of the movement. The future of this drug as a medication still remains very uncertain.

After many years and battles between advocates and opponents of medical marijuana the legal disputes have resembled that of a push and shove match between federal state and local officials that has been expensive and has had many casualties. Many are terminally ill people prosecuted to test the powers of regulation between federal and local government. At the best these methods of establishing a legitimate medication seem unconventional and at their worst uncivilized. This precarious process is unfitting for a country that considers its self to be modern and progressive. A medication should either be scientifically proven to work or not. Its use should be determined from these scientifically tested facts. A countries' federal government who refuses to conduct scientific tests on a medication because of politics should reevaluate its purpose. A government that discourages medical progression is clearly not acting within the best interest of its people.

It is also regrettable that local and state governments are willing to disobey the federal government and distribute a medication that is not fully tested or developed by the proper agencies designed to ensure public safety. In effect local and state governments have put their populations at risk.

This process has also seen amateurish legislation that has led to poor restriction, regulation, and distribution of this medication. In places like Los Angeles, regulation is minimal and an individual can visit a physician with no previous medical records, pay the physician a small fee and obtain medical marijuana card permitting access to most medical marijuana dispensing facilities in the state. This kind of patient drug access is not only questionable by professional medical standards but it is also a way for illegitimate patients to access the drug.

The medical marijuana legislation of many states has ultimately failed to distinguish between the legitimacy of seriously ill patients and recreational marijuana users. Many of which have taken over the movement of these legitimate patients and their providers who are merely trying to establish low key access to a medication.

In general the poor regulation of for-profit drug dispensing physicians has led to the deaths of a lot of Americans. This concept is an example of the abhorrent monstrous perversion of bad medicine that plagues America. If the residents of some states would like marijuana legalized it should be done through a separate initiative without corrupting safe scientifically supported medicine. The creation of this amateurish medical legislation by states is a dangerous path and a slippery slope for the future of American medicine.

This poorly regulated industry has also provided the means for opportunists to disguise highly profitable criminal activities. Others have been able to take advantage of the plight of seriously ill patients to forward a political agenda of legalizing marijuana. This has resulted in a movement that often appears to take the form of a backdoor effort

to legalize marijuana and has been rather slow and unsuccessful in getting seriously ill patients safe and proper treatment.

This fundamental failure of furthering scientifically based medical progression has been at the expense of many terminally ill patients, legitimate physicians and law abiding citizens trying to provide medicinal resources needed for seriously ill members of their community. This process has taken almost three decades and has been very taxing in both federal and local government resources.

The federal government is using its scarce resources to combat medical marijuana so rigorously when it has had few if any documented fatalities.<sup>3</sup> The United States government census estimates the prescription pill industry from the period of 1995 to 2009 grew at a 250% increase from a \$72 billion dollar industry to a \$260 billion dollar industry.<sup>4</sup> These statistics are complemented with the Center for Disease Control and Prevention statistics that prescription overdose rates have grown to approximately four times the rate of 1970.<sup>5</sup> The CDC estimated that out of the 27,000 unintentional drug overdoses 14,000 are directly from the increase of narcotic painkillers.<sup>6</sup>

Dr. Thomas Frieden of the CDC stated that “prescription overdoses are epidemic in the U.S.”<sup>7</sup> Dr. Thomas also expressed concern over the growth of “pill mills.”

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<sup>3</sup> It is incredibly difficult to find a reliable statistic for marijuana related deaths. The FDA has released reports but many advocacy groups claim these are inaccurate because other drugs were often consumed with the marijuana. A lengthy debate on this issue can be found at

<http://medicalmarijuana.procon.org/view.resource.php?resourceID=000145#mjdeaths>

<sup>4</sup> "U.S. Census Bureau, Statistical Abstract of the United States." *Www.census.gov*. N.p., 2011. Web.

<sup>5</sup> "CDC Grand Rounds: Prescription Drug Overdoses — a U.S. Epidemic." *Www.cdc.gov*. Centers for Disease Control and Prevention, 13 Jan. 2012. Web. 03 Dec. 2012

<sup>6</sup> *Ibid.*

<sup>7</sup> Roberts, John. "Report: Prescription Drug Deaths Skyrocket." *Fox News*. FOX News Network, 01 Nov. 2011. Web. 03 Dec. 2012.

Interestingly the prescription drug problem has mainly been combated more at the state level than at the federal level. The CDC asserts that the best way to lower the death rate is “enforcing existing laws” and the CDC also expressed concern that the laws are “not enforced uniformly” with “only a few states having laws regulating for-profit clinics that distribute controlled prescription drugs with minimal evaluation.”<sup>8</sup> If the federal government would have allowed science to determine medicine instead of politics this long and expensive battle could have been avoided and there would most likely not be the current semi-legitimate medical industry that has become so difficult to control. If medical marijuana was legitimized or refuted with science the federal government would be able to focus its scarce resources on the problems which are actually killing many Americans.

It is particularly unsettling that the federal government has been reluctant to scientifically test the medicinal value of marijuana while running its IND program specifically implemented for this purpose. Many international and private studies have been conducted on the medical value of marijuana.<sup>9</sup> Its use has been endorsed by the American Academy of Family Physicians, the American Public Health Association, the American Nurses Association, the New England Journal of Medicine and The Lancet.<sup>10</sup> There have been many commendable studies and evaluations by medical associations that have suggested that there is recognizable medical value to cannabis.

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<sup>8</sup> CDC Grand Rounds: Prescription Drug Overdoses — a U.S. Epidemic." *Www.cdc.gov*. Centers for Disease Control and Prevention, 13 Jan. 2012. Web. 03 Dec. 2012

<sup>9</sup>See La Guardia Report 1944, The Shafer Commission Report of 1972, the Institutions of Medicine Report 1999, 1997 study conducted by the British House of Lords, *Patients in the Crossfire: Casualties in the War on Medical Marijuana*. Berkeley, CA: Americans for Safe Access, 2004. Print. 8.

<sup>10</sup> *Ibid.*

However, in principle it is important that any medicine be approved by the FDA because safety and effectiveness is a fundamental priority of progressive medicine. The FDA was created to ensure that this priority is met. The current FDA position is that marijuana is not medicine. Decisions by the FDA should usually be supported. However, in this instance their conduct has left many questions unanswered. This federally funded agency has acted in a manner that lacks integrity and professionalism. This is evident in the Supreme Court rebuking of the federal government, in the case of *Kuromiya v. United States*, because of its failure to produce some credible research results after twenty-three years of research in its IND program. To this day the federal government has not publicly released credible research results and holds that marijuana is not medicine.

This lack of scientific research may be testament to the federal government's political opposition to marijuana and failure to pursue the advancement of medicine supported by science. At times it appears that the Federal government has chosen to jeopardize public safety by using vast resources in the pursuit of politics rather than investing in a future of scientifically based medical advancement.

The medical marijuana industry we see today is a direct result of Federal political opposition. The states have been forced to make back door medical legislation to serve the interests of the seriously ill people in their communities. This back door method of creating a legitimate medical industry has been fraught with all the problems associated with semi-legal underground activities. The legitimate portion of medical marijuana industry has now become infused with a movement for legalization and an undeniable criminal element. The medical marijuana industry is the problem it is today because the

federal government refused to accommodate scientific research and establish a controlled medical program.

It appears that the Federal government is now faced with an out of control criminal industry, a presumably endless future of resource consuming court battles across the nation and seriously ill people who have semi-legal medication. It might be time for the federal government to reconsider its strategy. It is not too late for the federal government to reform its IND program or even reform its stance on medical marijuana to create a legitimate system for seriously ill patients.

The plight of some of these terminally ill people seeking medication is really quite remarkable. Many have been federally prosecuted or fined in their efforts to help themselves or others who are seriously ill; these people have been the casualties of poorly functioning government policy.

These patients are people like Jimmy Montgomery, a paraplegic confined to a wheelchair. Jimmy suffered from muscle spasms typically associated with paralysis. Jimmy took the recommendation of his doctor to use marijuana to reduce this problem. The police confiscated two ounces from the back pocket of his wheelchair. He was charged with intent to sell because the officer testified that the amount was too large for personal use. Jimmy was charged and sentenced to life in prison. This was eventually reduced to ten years. Police also attempted to seize the home of Jimmy's sixty-two year old mother, of which Jimmy lived in. Jimmy lost a leg from an ulcerated bed sore he got

from poor prison conditions in solitary confinement. He was released on medical parole after public pressure from the community.<sup>11</sup>

Bryon Stamate was the seventy-three year old caregiver of Shirley Dorsey, who suffered from crippling back pain. Byron was caught growing cannabis for Shirley at their home. Bryon was sentenced to nine months in prison. Their home and \$177,000 in savings were seized. After she was pressured by law enforcement to testify against her caregiver Shirley committed suicide. In her suicide note she wrote,

“They want to take our property, security and herbal medicine from us, even though we have not caused harm to anyone. It is not fair or in the best interest of the people of society. I will never testify against you or our right to our home. I will not live in the streets without security and a place to sleep. I am old, tired and ill, and I see no end to the harassment and pressures until they destroy us.”<sup>12</sup>

Shirley’s situation was rather drastic and unique but her misfortunes bring light to the seriousness of medical marijuana prosecution. It is not “in the best interest of the people” for the government to continue to waste federal resources persecuting individuals for a drug which can be recommended by a physician yet is not properly researched.

There are many other patients who have gone through absurd ordeals. Many patients have lost all of their money in expensive court battles and have faced serious prosecution. Seriously ill people are getting caught between confusing and contradictory laws.

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<sup>11</sup> *Patients in the Crossfire: Casualties in the War on Medical Marijuana*. Berkeley, CA: Americans for Safe Access, 2004. Print. 12.

<sup>12</sup> *Patients in the Crossfire: Casualties in the War on Medical Marijuana*. Berkeley, CA: Americans for Safe Access, 2004. Print. 58.

For the past forty-six years now the federal government has tightly controlled research marijuana through NIDA, providing poor quality marijuana to a select few researchers, which Dr. Craker alleges “just isn’t adequate.”<sup>13</sup> Dr. Craker the highly qualified director of medicinal plant program at the University of Massachusetts at Amherst, has been trying to break the federal government’s strict control since 2001.<sup>14</sup>

He has been trying to fight the federal government’s resistance to allow high quality marijuana to be professionally studied by researchers. There are thousands of strains of marijuana, each with unique effects and medical potential. The federal government has been providing a low quality limited variety to a small number of researchers. In 2011 at the age of seventy Dr. Craker has given up his legal battle with the federal government. A disappointed Dr. Craker asserted that, “All we want to do is to produce the material that medical doctors want to use for tests.”<sup>15</sup>

It is likely that federal government officials like Michele Leonhart, current head of the DEA, will continue to prevent proper medical research. In June 2012 while testifying before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Leonhart refused to admit that marijuana was less addictive or dangerous than methamphetamine, cocaine or any of the other Schedule II drugs.<sup>16</sup> She awkwardly dodged a series of straight-forward questions asked by Rep. Jared Polis while holding

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<sup>13</sup> Kaufman, Marc. "Federal Monopoly Challenged." *Washington Post*. The Washington Post, 12 Dec. 2005. Web. 03 Dec. 2012.

<sup>14</sup> Elliott, Steve. "Professor Gives Up Bid To Grow Marijuana For Medical Research." *Take of the Town*. N.p., 4 Mar. 2011. Web. 03 Dec. 2012.

<sup>15</sup> *Ibid.*

<sup>16</sup> Wing, Nick. "Michele Leonhart, DEA Chief, Won't Say Whether Crack, Heroin Are Worse For Health Than Marijuana." *The Huffington Post*. TheHuffingtonPost.com, 21 June 2012. Web. 03 Dec. 2012.

that “All illegal drugs in Schedule I are addictive.”<sup>17</sup> This failure to publically acknowledge a difference between marijuana and other drugs is testament to the difficulties facing future research and scientific understanding of marijuana. It is strange that the federal government is so insistent on marijuana being placed in schedule I on the premise of addictive qualities when such potent addictive drugs like Oxycodone, cocaine, and methamphetamine reside in schedule II and are not as difficult to obtain for research. Politicians like her will continue to assert that the public interest resides with their professional motivations rather than with medical professionals like Dr. Craker who wants to establish legitimate scientific research.

It is time for the federal government to cooperate and allow for the collection of proper scientific data. If the research fails to show the medicinal value of marijuana then it should no longer be prescribed as medicine. If it is found to have medicinal benefits the government needs to stop disrupting medical progression and permit it to be properly regulated like any other medicine. The current impasse is dangerous and expensive. It is bad policy, bad medicine, and needs be resolved. Many people have been and continue to be punished for taking poorly regulated semi-legal medication. The federal government needs to answer to public concern and make a professional reassessment of its policies. It is important that the plights of these seriously ill people are not forgotten. The future of medicine needs to be practiced professionally by doctors without the interference of politicians.

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<sup>17</sup> *Ibid.*

This entire ordeal which has been battled in the name of public interest is testament to the difficulties the American Government faces in avoiding inefficiency while serving the public interest. This difficulty is predominantly due to a failure of officials to serve the interests of the people over their political beliefs or motivations. This inefficiency has shown that in principle, the American government can and will fail its population in regards to ensuring that they are receiving proper health treatment based on scientific facts instead of politics. In addition to providing semi legal medication, wasting billions in government resources and aiding criminal activities, this long and unorthodox process has done little more than reveal potentially reparable weakness in the U.S Government's ability to function efficiently in the interests of its people. This medical marijuana legalization process should be concerning to those who wish for progressive medicinal advancements based on scientific fact rather than political beliefs.

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