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States are Making Their Own Decisions Regarding Marijuana Should Be Illegal: How Should the Federal Government React?

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POLICY NOTE

STATES ARE MAKING THEIR OWN DECISIONS REGARDING WHETHER MARIJUANA SHOULD BE ILLEGAL: HOW SHOULD THE FEDERAL GOVERNMENT REACT?

By Joseph Tutro

I. INTRODUCTION

On November 6, 2012,[1] three states proposed landmark legislation for a vote to the people of their respective states.[2] These landmark pieces of legislation allowed for the recreational use of marijuana.[3] While the potential legislation failed in Oregon, the proposed legislation passed in Colorado and Washington.[4] Washington's marijuana legislation went into effect on December 6, 2012,[5] and Colorado Governor John Hickenlooper signed Colorado's marijuana legislation into law on December 10, 2012.[6] The passage of recreational

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[1] This date represents Election Day 2012.

[2] *See Colorado, Washington Pass Marijuana Legalization; Oregon Says No*, CNN (Nov. 7, 2012, 01:05 AM), http://politicalticker.blogs.cnn.com/2012/11/07/colorado-washington-pass-marijuana-legalization-oregon-says-no/.

[3] *Id.*

[4] *Id.*

[5] Gene Johnson, *Legalizing Marijuana: Washington Law Goes into Effect, Allowing Recreational Use of Drug*, HUFFINGTON POST (Dec. 6, 2012, 03:42 PM), http://www.huffingtonpost.com/2012/12/06/legalizing-marijuana-washington-state_n_2249238.html.

[6] Will C. Holden & Thomas Hendrick, *Governor Signs Amendment 64, Marijuana Officially Legal in Colorado*, KDVR (Dec. 10, 2012, 12:14 PM), http://kdvr.com/2012/12/10/governor-signs-amendment-64-marijuana-officially-legal-in-colorado/.

marijuana usage legislation in Colorado and Washington joins them with twenty states, plus the District of Columbia, which have legalized use of marijuana for medical purposes.[7]

While it has been legalized by the states, marijuana still remains illegal under federal law.[8] Because of the Supremacy Clause of the United States Constitution,[9] federal law remains binding on the states.[10] Therefore, while the states have passed legislation legalizing the use of marijuana, whether for medical use or recreational use, these laws are essentially moot due to federal law. The issue now is whether the federal government will investigate and prosecute those who follow their state marijuana laws or will use investigatory and prosecutorial discretion to allow the laws to take effect.

This paper will discuss the ever-widening acceptance by state legislatures of marijuana, especially for medical purposes, and the refusal by the federal government to recognize these acceptances, thus resulting in a federalism fight. The federal government should use its investigatory and prosecutorial discretion to allow these state experiments with marijuana. The current arguments for keeping marijuana illegal can be examined by allowing the states to implement their new and existing marijuana laws.

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[7] *See 20 Legal Medical Marijuana States and DC*, PROCON.ORG (Jan. 7, 2013, 01:42 PM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.

[8] 21 U.S.C. §§ 812(c)(c)(10), 844(a) (2006).

[9] U.S. CONST. art. IV, cl. 2.

[10] Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

II. THE LEGISLATIVE HISTORY OF FEDERAL MARIJUANA LAWS

The first federal legislation that attempted to regulate drugs in interstate commerce came in 1906.[11] But the primary drug control law came in the form of the Harrison Narcotics Act of 1914.[12] This act attempted to control narcotics mainly by assessing taxes. Then the first real attempt by Congress to regulate marijuana occurred in 1937.[13] The 1937 law "did not outlaw the possession or sale of marijuana outright."[14] However, the law imposed strict administrative requirements and high taxes on the trade of marijuana.[15] Then, in 1969, "President Nixon declared a national 'war on drugs.'"[16] In response to this declaration, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 or Controlled Substances Act (CSA).[17] The CSA repealed most of the previous antidrug laws.[18]

Under the CSA, narcotics are placed in one of five schedules.[19] Congress placed marijuana in Schedule I.[20] Being classified as a Schedule I drugs means that marijuana meets three criteria: (1) a "high potential for abuse"; (2) "lack of any accepted medical use"; and (3) an "absence of any accepted safety for use in medically supervised treatment."[21] By classifying marijuana as a Schedule I

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[11] Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, *repealed by* Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059.
[12] Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970).
[13] Marihuana Tax Act of 1937, 50 Stat. 551 (repealed 1970).
[14] *Raich*, 545 U.S. at 11.
[15] *See id.*
[16] *Id.* at 10.
[17] 21 U.S.C. §§ 801-971 (2006).
[18] *Raich*, 545 U.S. at 12.
[19] 21 U.S.C. § 812(a) (2006).
[20] 21 U.S.C. § 812(c)(c)(10) (2006).
[21] *Raich*, 545 U.S. at 14; *see also* 21 U.S.C. § 812(b)(1) (2006).

drug, the only research that can be performed on the drug is through "a Food and Drug Administration pre-approved research study."[22]

Even with the CSA in place, eighteen states enacted legislation that attempts to legalize marijuana for medical purposes prior to the votes on recreational marijuana usage laws in 2012.[23] Then, in 2012, two states legalized marijuana for recreational use.[24] However, the CSA remains in place, and marijuana is still classified as a Schedule I drug.[25]

III. CHALLENGING THE CSA

a. Challenges in Federal Courts

Because Colorado and Washington are the first states to legalize the recreational use of marijuana,[26] the majority of the development of the law has focused on the use of medical marijuana. The first challenge to the CSA came in the form of a medical necessity defense.[27] Without bringing criminal charges, the United States sought to enjoin certain medical marijuana dispensaries from manufacturing and distributing marijuana.[28] The Supreme

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[22] *Raich*, 545 U.S. at 14.
[23] *See 20 Legal Medical Marijuana States and DC*, PROCON.ORG (Jan. 7, 2013, 01:42 PM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.
[24] *See* COLO. CONST. art. XVIII, § 16; WASH. REV. CODE § 69.50.325 (LEXIS through 2013 Regular Session); WASH. REV. CODE § 69.50.535 (LEXIS through 2013 Regular Session).
[25] 21 U.S.C. § 812(c)(c)(10) (2006).
[26] *See* COLO. CONST. art. XVIII, § 16; WASH. REV. CODE § 69.50.325; WASH. REV. CODE § 69.50.535.
[27] United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).
[28] *See id.* at 486-87.

Court narrowly held that the medical necessity defense does not apply to those who manufacture and distribute marijuana.[29] Therefore, the United States was successful in enjoining the medical marijuana dispensaries.

The seminal case regarding the legalization of marijuana by states is *Gonzales v. Raich*.[30] *Raich* deals specifically with the medical marijuana laws of California.[31] The plaintiffs believed that the CSA, as applied to them, "would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity."[32] The district court denied their motion for a preliminary injunction.[33] The Court of Appeals for the Ninth Circuit reversed, agreeing with the plaintiffs that "the CSA is an unconstitutional exercise of Congress' Commerce Clause authority."[34]

The Supreme Court reversed the decision of the Ninth Circuit, justifying the CSA as a "valid exercise of federal power" under the Commerce Clause.[35] The Court's main justification was "the undisputed magnitude of the commercial market for marijuana."[36] Therefore, the Court found that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial."[37] Thus, the Court remanded the case to the Ninth Circuit.

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[29] *Id.* at 486.
[30] Gonzales v. Raich, 545 U.S. 1 (2005).
[31] *See id.* at 5.
[32] *Id.* at 8.
[33] *Id.*
[34] Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003).
[35] Gonzales v. Raich, 545 U.S. 1, 9 (2005).
[36] *Id.* at 33.
[37] *Id.* at 32.

On remand, the Ninth Circuit rejected the other arguments put forth by the plaintiffs.[38] The court was uncertain whether the Supreme Court's previous decision regarding the medical necessity defense was binding on the case.[39] To avoid the question, the court stated that the question would better be resolved in a criminal proceeding.[40] The court also rejected the substantive due process argument because "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering" at the present time.[41] Finally, the court rejected the Tenth Amendment argument because of the Supreme Court's decision regarding the Commerce Clause.[42]

b. Administrative Challenges

Besides the traditional method of seeking to enjoin the enforcement of the CSA against the plaintiffs, an alternate option is to petition the Drug Enforcement Agency (DEA) to reschedule marijuana.[43] Congress has delegated its CSA rescheduling powers to the Attorney General.[44] The Attorney General, in turn, has delegated these powers to the DEA.[45] The DEA has recently denied petitions to reschedule marijuana[46] after seeking a "scientific and medical evaluation"[47] by the Department of

[38] *See* Raich v. Gonzales, 500 F.3d 850 (9th Cir. 2007).
[39] *Id.* at 860.
[40] *Id.* at 861.
[41] *Id.* at 866.
[42] *Id.* at 867.
[43] *See* 21 U.S.C. §§ 811, 812 (2006).
[44] 21 U.S.C. § 811(a) (2006).
[45] Am. for Safe Access v. DEA, 706 F.3d 438, 441 (D.C. Cir. 2013).
[46] *See, e.g.*, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011).
[47] 21 U.S.C. § 811(b) (2006).

Health and Human Services (DHHS).[48] The DHHS's recommendation to the DEA is that "research on the medical use of marijuana has not progressed to the point that marijuana can be considered to have a 'currently accepted medical use' or a 'currently accepted medical use with severe restrictions.'"[49] Therefore, while state legislatures have determined that marijuana has medical uses, the federal government has not been convinced by the current clinical research and further research is required.

IV. FEDERAL AND STATE POLICIES

a. Federal Policy on Medical Marijuana: The Ogden Memo

The most interesting document showing the federal government's policy regarding medical marijuana is the "Medical Marijuana Guidance" memorandum, which was prepared by then-Deputy Attorney General David Ogden (Ogden Memo).[50] The Ogden Memo was distributed from the United States Department of Justice to "SELECTED UNITED STATES ATTORNEYS."[51] The goal of the memorandum was to give "clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana."[52]

While the Ogden Memo did "not 'legalize' marijuana or provide a legal defense to a violation of

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[48] *Am. for Safe Access*, 706 F.3d at 442.
[49] Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,562 (July 8, 2011).
[50] David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEP'T OF JUST. (Oct 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf.
[51] *Id.* at 1.
[52] *Id.*

federal law . . . [and] is intended solely as a guide to the exercise of investigative and prosecutorial discretion,"[53] the memorandum acknowledged that "[a]s a general matter, pursuit of [drug traffickers of illegal drugs] should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[54] Thus, while acknowledging that the CSA is still federal law, the United States Attorneys should "mak[e] efficient and rational use of [the Department's] limited investigative and prosecutorial resources," and prosecuting those who comply with "existing state law . . . is unlikely to be an efficient use of limited federal resources."[55]

While the Ogden Memo focuses on prosecution of those following medical marijuana laws, it also points out the reasons that the United States Attorneys should still pursue illegal drug traffickers.[56] The memorandum states that "the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels."[57] As a telling example, the Ogden Memo states that "marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels."[58] This reasoning is interesting because it would apply to both medical and recreational use of marijuana. Thus, the memorandum sheds some light on the federal government's policy toward recreational use of marijuana.

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[53] *Id.* at 2.
[54] *Id.* at 1-2.
[55] *Id.*
[56] *See id.* at 1.
[57] *Id.* at 1.
[58] *Id.*

b. State Purposes for Legalizing Recreational Marijuana

Colorado amended its own constitution to legalize marijuana.[59] The amendment starts by stating the purpose of the legalization:

> In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.[60]

The amendment states three very distinct reasons for legalizing marijuana. The rest of the amendment contains the restrictions and regulations regarding marijuana.[61] These restrictions and regulations fairly mirror those that are placed on alcohol.[62]

While Washington's marijuana legislation does not specifically state its purpose, the purpose can be fairly deduced from the statutory language. Washington's marijuana legislation states in pertinent part as follows:

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[59] COLO. CONST. art. XVIII, § 16.
[60] COLO. CONST. art. XVIII, § 16(1)(a).
[61] *See* COLO. CONST. art. XVIII, § 16.
[62] COLO. CONST. art. XVIII, § 16(1)(b).

> There is levied and collected a marijuana excise tax equal to twenty-five percent of the selling price on each wholesale sale in this state of marijuana by a licensed marijuana producer to a licensed marijuana processor or another licensed marijuana producer. This tax is the obligation of the licensed marijuana producer.[63]

The first purpose is to receive taxes on the sale of marijuana.[64] In fact, the legislation taxes marijuana three times before it reaches the consumer.[65] The other implied purpose is to control who can sell marijuana.[66]

V. THE FUTURE OF THE FEDERALISM FIGHT OVER MARIJUANA

The issue now becomes what stance the federal government will take with regard to the recreational use laws. The biggest problem is the fear that those who cultivate and distribute marijuana, even while following state law, will be subject to punishment by the federal government. The federal government must decide whether to investigate and prosecute those people.

The closest analogy to the current situation is the prohibition of alcohol in the 1920s and 1930s.[67] The

[63] WASH. REV. CODE § 69.50.535.
[64] *See* WASH. REV. CODE § 69.50.535.
[65] *Id.*
[66] *See* WASH. REV. CODE § 69.50.325.
[67] U.S. CONST. amend. XVIII (repealed 1933).

Eighteenth Amendment to the United States Constitution made "the manufacture, sale, or transportation of intoxicating liquors" illegal.[68] While the amendment had an initial positive effect, the long-term effect was an increase in not only crime but also organized crime.[69] Because the manufacture and sale of intoxicating liquors was illegal, those who participated in the organized crime were able to pocket the entirety of the profits without being taxed.[70] The negative effects ultimately led to the Twenty-First Amendment, which repealed the Eighteenth Amendment in its entirety.[71]

The biggest difference between the 1920s alcohol prohibition and the current marijuana initiative is that the alcohol prohibition was performed by amendment and subsequently repealed by amendment. The CSA, however, is a statute that has been held valid under the Commerce Clause.[72] Congress's inaction with respect to the CSA has caused states to reevaluate the goals of the CSA themselves. As Justice O'Connor astutely notes in her dissent in *Raich*, "[o]ne of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[73]

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[68] U.S. CONST. amend. XVIII, cl. 1 (repealed 1933).
[69] *Id.*
[70] *See id.*
[71] U.S. CONST. amend. XXI.
[72] *See* Raich v. Gonzales, 545 U.S. 1 (2005).
[73] *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

This situation is the ultimate "novel social and economic experiment[]."[74] The economic element of the experiment is readily apparent. Both Washington and Colorado have explicitly or impliedly stated that a main goal of the legislation is to recover taxes on the sale of marijuana.[75] Further, Colorado has explicitly stated that this effort is "[i]n the interest of the efficient use of law enforcement resources."[76] By legalizing the sale of marijuana, Colorado no longer has to focus as much of its policing efforts on marijuana law enforcement. Similarly, there is a beneficial economic impact on the judicial system that is not so apparent. For example, by lowering arrests on marijuana crimes, costs can be saved in the judicial system. Further, with fewer arrests there will be fewer convictions, which could save money in the prison system.

The reasoning in the Ogden Memo should provide guidance on which policy to follow in this situation. The fact that commercial marijuana distribution "provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels," such as the Mexican drug cartel,[77] pushes for a policy allowing these states to experiment with their recreational use marijuana laws. If the sale of marijuana provides revenue to these groups, then it must follow that marijuana is being sold in the United States. By allowing the states to regulate the sale of marijuana, the states, and potentially the United States in the future, will receive at least a portion of this revenue that the criminal enterprises are currently collecting. The loss

[74] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[75] *See* COLO. CONST. art. XVIII, § 16(1)(a); WASH. REV. CODE § 69.50.527 (LEXIS through 2012 Second Special Session).
[76] COLO. CONST. art. XVIII, § 16(1)(a).
[77] Ogden, *supra* note 50, at 1.

of revenue for the criminal enterprises may even curtail their other criminal ventures.

It is important to emphasize that *at least a portion* of the revenue may be recovered and that these laws *may* curtail other criminal ventures. The reason that it is important to emphasize these points is because we do not know the exact effect that the recreational marijuana use laws will have. Until we have actual, tangible evidence on the effect of legalizing marijuana, we will not know. Therefore, the federal government should use investigatory and prosecutorial discretion to allow these laws to take effect until this evidence is compiled. After evidence is gathered regarding its effects on the criminal enterprises, then the policy can be revisited and changed if necessary.

Although recreational marijuana may only be legal in two states, the federal government remains interested because there is always potential for the legal marijuana to cross state borders.[78] As noted above, however, the fact that criminal enterprises are receiving revenue from the sale of marijuana means that these criminal enterprises are still selling marijuana in the United States. This begs the question of whether we as a country would rather have marijuana, which has been taxed and regulated, sold across state borders or whether we as a country would rather have the illegal sale of marijuana continue in those states. However, the argument may then be that the sale of the legal marijuana across state borders may create new criminal enterprises. But, again, we do not know the effect that these laws will have. Therefore, the effects of legalized marijuana should not be evaluated until we gather evidence either way.

Washington's Governor Inslee and Attorney General Ferguson met with United States Attorney General

[78] *See* U.S. CONST. art. I, § 8, cl. 3.

Eric Holder on January 22, 2013.[79] The three did not discuss Holder's intentions regarding investigatory and prosecutorial discretion.[80] However, Governor Inslee decided to continue with implementation and rule-making for the law.[81] While the federal government's policy was not explicitly stated, we can be sure that the policy is not to stop the implementation of the law at the outset.[82]

VI. CONCLUSION

Although twenty states have legalized marijuana for medical use, two states have taken the bold initiative to legalize marijuana for recreational use. The legalization is directly contrary to the legislative decision made by the United States Congress in the CSA. The Supreme Court has upheld the CSA against constitutional challenges because it found that the CSA is a valid exercise of power by Congress under the Commerce Clause. Because the law is a valid exercise of federal power, the states are limited to implementing their new marijuana laws only if the United States Attorneys allow the laws to take effect by using their investigatory and prosecutorial discretion.

The United States Attorneys should use their discretion to allow the states to implement these laws until evidence can be gathered on the laws' economic effects and their effects on criminal enterprises. After gathering this evidence, both the states and federal government should convene and determine the next step, whether that step is to keep marijuana illegal or to push for legalizing marijuana

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[79] *See* Bob Young, *Inslee Encouraged by Marijuana Talk with Attorney General Holder*, SEATTLE TIMES (Jan. 23, 2013, 04:04 PM), http://seattletimes.com/html/localnews/2020190301_insleeholderpotxml.html.
[80] *Id.*
[81] *Id.*
[82] *See id.*

under the CSA. Therefore, this situation creates the perfect time to "try novel social and economic experiments without risk to the rest of the country,"[83] and the federal government should recognize the opportunity.

[83] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).