

Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck

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INTRODUCTION



Stuart Taylor, Jr. is a Brookings nonresident senior fellow. His most recent book is *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*, coauthored with Richard Sander.



This paper is one of a series Governance Studies at Brookings is undertaking in partnership with the Washington Office on Latin America (WOLA).

This paper explores how the federal government and the eighteen states (plus the District of Columbia) that have partially¹ legalized medical or recreational marijuana or both since 1996 can be true to their respective laws, and can agree on how to enforce them wisely, while avoiding federal-state clashes that would increase confusion and harm the community and consumers.

The paper takes no position (and this writer has no firm conviction) on whether legalizing recreational marijuana use, production, and distribution—as Colorado and Washington have now become the first modern jurisdictions to do—is a good or a bad idea. Rather, the paper seeks to persuade even people who think legalization is a bad idea that the best way to serve the federal interest in protecting public health and safety is not for the federal government to seek to abort state legalization. To the contrary, a federal crackdown would backfire by producing an atomized, anarchic, state-legalized but unregulated marijuana market that federal drug enforcers could neither contain nor force the states to contain.

Rather, the Justice Department should use its considerable leverage to ensure that state regulators protect the federal government's interests in minimizing exports across state lines, sales outside the state-regulated system, sales of unduly large quantities, sales of adulterated products,

1. The qualifier “partially” is used here, and occasionally elsewhere, to emphasize that all eighteen legalizing states continue to criminalize the growing and distribution of marijuana without a license; possession of large quantities; exports across state lines; distribution to minors; some forms of promotion; and more.

sales to minors, organized crime involvement, and other abuses. Legalizing states, for their part, must provide adequate funding for their regulators as well as clear rules to show that they will be energetic in protecting federal as well as state interests. If that sort of balance is struck, a win-win can be achieved.

And the Obama Administration and legalizing states should take advantage of a provision of the 1970 federal Controlled Substances Act (CSA) to hammer out clear, contractual cooperation agreements so that state-regulated marijuana businesses will know what they can and cannot safely do.

The urgency of this subject is at a zenith because of the ballot initiatives that 55 and 56 percent majorities of the voters in Colorado and Washington, respectively, adopted in November, legalizing possession (and, in Colorado, home growing and gifting) of small quantities of recreational marijuana. Both states are also putting in place plans, effective later this year, to license, regulate, and tax commercial production and distribution of marijuana. Both states had previously legalized medical marijuana.

With public opinion tipping toward legalization,² more states seem poised to legalize medical or recreational marijuana or both in the next few years.³ But the criminal sanctions and other penalties in the CSA for marijuana possession, cultivation, and distribution seem etched in stone by congressional inertia. So the Obama Administration's response to the Colorado and Washington initiatives, and state officials' sensitivity to federal law and federal interests, will shape the evolution of state as well as federal drug policy for years to come.

The time for presidential leadership on marijuana policy is now. And, happily, Congress long ago directed in the CSA that the Attorney General "shall cooperate" with the states on controlled substances and authorized him "to enter into contractual agreements . . . to provide for cooperative enforcement and regulatory activities."⁴ The CSA also gives the Administration ample leverage to insist that the legalizing states take care to protect the federal interests noted above.

2. According to an April 4, 2013, Pew Research Center poll, a majority of Americans—52 percent, up from 41 percent in 2010—favor legalizing use of marijuana, for the first time in more than four decades of polling; support is strongest among younger adults. A striking 57 percent of Republicans and 59 percent of Democrats say the federal government should not enforce federal marijuana laws in states that permit its use, while 67 percent of Republicans and 71 percent of Democrats say federal enforcement of marijuana laws is not worth the cost. A substantial majority of Americans, 77 percent (up from 58 percent in 1997), say that marijuana has legitimate medical uses.

3. Maryland appears at this writing to be on the verge of legalizing medical marijuana. See Associated Press, "Maryland Lawmakers Pass Medical Marijuana Bill," *USA Today*, April 8, 2013. A 2012 initiative to legalize recreational marijuana failed in Oregon by 53 to 47 percent. Legislative efforts to legalize marijuana are also under way in Massachusetts, California, Oregon, Nevada, Maine, Rhode Island, Vermont, Pennsylvania, and Iowa.

4. 21 U.S.C. § 873(a)(7). See also 21 U.S.C. 871(b).

Cooperation versus Confrontation: The Administration's Dilemma, and the Stakes

To be sure, it might be possible for the Administration to shut down the state-taxed, state-licensed, state-regulated, consumer-protection-focused, out-in-the-open, large-scale marijuana industries planned by Colorado and Washington. The Administration could probably do that by unleashing (or just omitting to leash) the Justice Department's prosecutorial and asset-forfeiture powers. It could, for example, use threats of conspiracy prosecutions to scare off applicants for state licenses to grow or sell marijuana, and it could threaten legal action against their landlords. But that would be a Pyrrhic victory. The Administration could also file a civil suit or suits against Colorado and Washington or both arguing that the CSA broadly preempts state *regulation* of marijuana. But even if the courts agreed, which seems doubtful (as argued below), that, too, would be a Pyrrhic victory.

The reasons are twofold. First, the federal government has no legal power to force states to enforce federal law or prevent them from simply repealing their own marijuana penalties—a point to which I will return in more detail. Second, with only 4,400 federal Drug Enforcement Administration (DEA) agents across the nation—about one for every 3,000 regular marijuana users and one for every 170 state and local cops⁵—the federal government has nowhere near enough manpower to restrain the metastasis of the grow-your-own-and-share marijuana market that state legalization without regulation would stimulate.⁶

An Obama Administration attack on the Colorado and Washington laws would bring about such a metastasis immediately in Colorado, whose new law (unlike Washington's) has already removed state penalties for adult residents who grow their own marijuana (up to six plants at a time) and who share it with networks of friends and others (by giving away up to an ounce at a time). The result would be to let millions of *unregulated*, unlicensed, untaxed, state-legalized, easy-to-grow home-grown marijuana plants bloom, with individual growers and users fairly confident that the feds have too few troops to enforce the harsh penalties provided by federal law for growing and distributing marijuana.

5. See Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, Cato Institute, Dec. 12, 2012, at 3, 19-21, 37-38 nn. 141-148, 155-159 (hereinafter *Mikos 2012*). The DEA handles only about one percent of the 800,000 or so marijuana cases generated each year in the United States, and almost all of those federal cases involve allegations of large-scale distribution. *Id.*

6. In addition, any federal effort to prosecute a few recreational users to strike fear into others—an option reportedly discussed at high levels of the Administration—would smack of arbitrary and selective prosecution. See Charlie Savage, "Administration Weighs Legal Action Against States that Legalized Marijuana Use," *New York Times*, Dec. 6, 2012.

Such an atomized, free-for-all market, with the small-time criminals and underworld dealers who would crowd into it, seems far more likely to increase spillover to other states, sales to minors, and violent crime than would a much smaller number of closely regulated and watched, state-licensed dispensaries, which Colorado is to begin licensing by January 1, 2014.⁷ Indeed, part of the strategy underlying the Colorado initiative, says one key supporter, was to tell the federal government, in essence: “Do you want regulation, or chaos? You decide. Doesn’t regulation sound better? Isn’t it more consistent with your public health goals?”

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An Obama Administration attack on the state-regulated marijuana sectors would also spur leaders of the legalization movement in Washington State—whose new law currently bans all marijuana growing and distribution outside the regulated system—and other states to give up on state regulation. Instead, they might emulate Colorado’s grow-your-own provisions, or simply repeal state penalties for small-scale marijuana cultivation and distribution as well as possession. That is what Michigan’s 88-word Constitutional Amendment to End Marijuana Prohibition would do.⁸ Just such a pattern of simple-repeal laws helped unravel (alcohol) Prohibition starting with a New York law in 1923.⁹ And, in the view of four leading experts of diverse views on legalization, “short of massively expanding the DEA payroll, [the feds] could do essentially nothing to stop a legalize-only action such as the Michigan amendment.”¹⁰

While the simple-repeal approach is fine with the more libertarian, anti-regulation wing of the legalization movement, it would arguably be the worst of both worlds for those who worry about the damage that an atomized market could do to kids—whose brain development could be harmed by marijuana, some contested studies suggest¹¹—and other consumers. A federal crackdown would probably

7. “From a public health perspective, a well-regulated market is better than a *laissez-faire* free-for-all.” Jonathan P. Caulkins, Angela Hawken, Beau Kilmer, and Mark Kleiman, “A Voter’s Guide to Legalizing Marijuana,” *The American Interest*, November-December 2012 (hereinafter *Voter’s Guide*).

8. See <https://repealtoday.org/amendment.cfm>.

9. See Jonathan Caulkins, Angela Hawken, Beau Kilmer, and Mark Kleiman, *Marijuana Legalization: What Everyone Needs to Know* (Oxford University Press, 2012; hereinafter *What Everyone Needs to Know*), 185.

10. *Voter’s Guide*.

11. E.g., Roni Caryn Rabin, “Legalizing of Marijuana Raises Health Concerns,” *New York Times*, Jan. 7, 2013; Benedict Carey, “Early Marijuana Use Linked to IQ Loss,” *New York Times*, August 27, 2012. But see Ole Rogeberg, “Correlations Between Cannabis Use and IQ Change in the Dunedin Cohort Are Consistent with Confounding from Socioeconomic Status,” *PNAS* 2013 110 (11) 4251-4254 (Jan. 14, 2013); J. Jacobus et al., “White Matter Integrity in Adolescents with Histories of Marijuana Use and Binge Drinking,”

not achieve its goal of raising prices as a way to reduce consumption.¹² But it would definitely prevent Colorado, Washington, and other states from regulating price, purity, potency (much higher than in decades past),¹³ and labeling to protect consumers.

The two states seem intent on responsible regulation, in contradistinction to, say, the chaotic medical marijuana regime in California, where state laws are hopelessly unclear and often unenforced. The Colorado and Washington ballot initiatives were drafted by experts who took pains to accommodate federal interests. Plus, with the Washington and Colorado regulatory regimes not due to start operating until December and January, respectively, there is time to work out state-federal agreements. The Obama Administration should do so before the two states are much farther along in shaping regulatory regimes that could benefit from constructive federal input.¹⁴

U.S. Attorney General Eric Holder has already been personally urged by John Hickenlooper, Colorado's veteran Democratic governor, and Jay Inslee, Washington's new Democratic governor, to work cooperatively with them. Both opposed legalization last year. But both have said they can make their states' new laws work well and protect federal interests from the harms that could come from simple repeal. House Speaker Nancy Pelosi has also called for the Justice Department to stop enforcing federal marijuana laws in Colorado and Washington for conduct allowed by state law.¹⁵ And, as noted within, in Colorado the federal government has for several years largely left alone hundreds of state-regulated medical marijuana dispensaries, some very large, excepting those that federal prosecutors deemed to be too close to schools.

Reasons for Optimism About Avoiding Federal-State Clashes

The Obama Justice Department's approach to the eighteen state medical marijuana laws sheds light on how it might deal with the new, bigger, bolder issue presented by state-legalized recreational marijuana. **Appendix 1** describes the Administration's record on medical marijuana enforcement in detail. Here, suffice to say that the Administration's policy has been inconsistent at best and chaotic at worst, at first sounding permissive, then cracking down on marijuana entrepreneurs who had relied on the permissive rhetoric. As

Neurotoxicology and Teratology 31 (2009) 349-355; Sunita Bava et al., "Longitudinal Changes in White Matter Integrity among Adolescent Substance Users," *Alcoholism: Clinical & Experimental Research*, Vol. 37, Supplement S 1, E181-E189 (Jan. 2013).

12. One survey showed that even under the full drug-war regime, it is easier for minors to buy marijuana than beer: http://www.cbsnews.com/2100-204_162-519228.html/.

13. See, e.g., Emily Marris, "Not *That* High," *Slate*, March 20, 2013.

14. See, e.g., Chris Weigant, "Still Waiting for Obama's Marijuana Policy," *Huffington Post Politics*, April 8, 2013.

15. See Kevin Robillard, "Nancy Pelosi: End Feds Pot Action in Colorado," *Politico*, March 12, 2013.

a result, “There are storefronts across the country where those with a medical marijuana ‘recommendation’ from a physician (which is not, technically, a prescription) can openly buy marijuana.”¹⁶ Yet, especially since 2011, U.S. Attorneys and DEA agents in California, Washington, Montana, and Oregon have raided or used threats of enforcement to close hundreds of marijuana shops, rejecting as bogus their claims to be only for medical users. They have also forced out of business a substantial number of large, bona-fide medical marijuana entrepreneurs who were regulated by local governments and were at least arguably compliant with the laws of their states, which have not charged them with any violation. A few now face long federal prison terms.

A crackdown of this sort—or perhaps the kind of lawsuit that eight former DEA chiefs have called on the Administration to bring,¹⁷ arguing that the state legalization schemes are preempted by the CSA—is what many fear may happen in Colorado and Washington. But there are several reasons to hope that, this time, Obama and Holder may see the large political advantage, as well as the major policy advantages, of a more accommodating response—and that they might perhaps even seize the opportunity to bring some order to the chaos that has defined the state-federal relationship on medical marijuana until now.

First, in California, and other states where the feds have launched multiple crackdowns on growers and dispensaries licensed by local governments, the statewide medical marijuana laws were so vague, sloppily enforced, and devoid of meaningful *state* regulation that it has been easy for U.S. Attorneys to claim in some (though not in all) cases that large medical marijuana business were likely violating the state law against selling medical marijuana for profit.

On the other hand, there have been few (and relatively mild), if any, federal crackdowns on large, out-in-the-open, *state-licensed* medical marijuana dispensaries in states that have serious regulation, including New Mexico (which created the first statewide regulatory regime and has been a model), Colorado, and Maine.¹⁸ “The presence of a [well-designed] statewide regulatory system [for medical marijuana] is what distinguishes the states with fewer crackdowns from those with more crackdowns,” observes Ethan Nadelmann, head of the Drug Policy Alliance.¹⁹

Second, the federal raids on well-meaning (as well as shady) medical marijuana suppliers in California and some other states were far enough below the national

16. *What Everyone Needs to Know* at 190. The federal government, which controls physicians’ licenses to prescribe medications, has not allowed them to prescribe marijuana.

17. Michael Tarm, “Ex-DEA Heads: Feds Should Nullify Pot Laws,” AP News, March 5, 2013.

18. See Jack Healy, “In Colorado, No Playbook for New Marijuana Law,” *New York Times*, Nov. 30, 2012; T.W. Farnam, “Colorado Pot Growers Gear Up for ‘Green Rush,’” *Washington Post*, March 25, 2013.

19. See also Jacob Sullum, “Can Licenses Protect Medical Marijuana Businesses? (Part II),” *Reason.com*, June 13, 2012 (quoting Rob Kampia of the Marijuana Policy Project).

media radar so that defenders of Holder and Obama could plausibly attribute them to the substantial autonomy traditionally enjoyed by the 93 U.S. Attorneys around the country, of whom the four in California have been especially aggressive. Indeed, the U.S. Attorneys themselves have denied that their crackdowns were orchestrated by the Justice Department, with the concurrence of a Holder spokesperson.²⁰ Be that as it may, any future Justice Department attacks on the pervasively state-regulated marijuana industries to be set up under the new Washington and Colorado laws would be front-page news all over the country, and Holder and Obama would be held accountable for their subordinates' actions.

Not to mention that marijuana won the 2012 election in Colorado by more votes than Obama did; and that an Obama attack on Colorado and Washington would flout the will of those states' voters, especially their Obama supporters. Obama and Holder may also come to see the attraction of Justice Louis Brandeis's famous encomium to the states' roles as laboratories of democracy. By far the best way to inform the empirical debate about the probable effects of broadly legalizing marijuana—a likely outcome of current trends unless arrested by sobering new evidence—is to allow state experiments like those in Colorado and Washington to generate new evidence, sobering or otherwise.

So the federal government may have political reason to take a second look at marijuana policy, and perhaps try to reorganize and rethink what until now has been a policy without coherence or direction. But what about the law?

The Federal Controlled Substances Act and State Partial Legalization of Marijuana

Where marijuana is concerned, the interaction of federal and state law has always been complicated, and two states' legalization has just made it much more so. **Appendix 2** discusses the laws which have today come into conflict: on the one hand, the federal Controlled Substances Act; on the other, the legalization regimes approved by the voters of Colorado and Washington. The question before us today is whether any kind of bridge can be built between the two.

By far the best way to foster healthy federal-state cooperation on marijuana would be for Obama and Congress to revise the CSA to clarify how federal law enforcers should respond to state legalization efforts, and to provide safe harbors for states that legalize responsibly. But that seems so unlikely to happen in the near term that this paper focuses on the most important legal principles and policy approaches for managing the

20. Lucia Graves, "Obama Administration's War on Pot," *Huffington Post San Francisco*, April 18, 2012; Graves, "Decision to Crack Down on Medical Marijuana Made in California, Not Washington, U.S. Attorney Says," *Huffington Post San Francisco*, Oct. 16, 2011.

tensions under current federal law.

An understanding of those principles begins with two important if often indistinct constitutional boundaries between federal and state power: federal supremacy, qualified by lack of power to commandeer states.

The Constitution provides that it 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 . . . any thing in the Constitution or laws of any state to the contrary notwithstanding.”²¹

This “Supremacy Clause” makes clear that state marijuana laws are void if they conflict with or are otherwise preempted by any federal laws that are themselves constitutional. But federal supremacy has its limits, and what constitutes a conflict or preemption is not always self-evident. An important qualification is the Supreme Court’s rulings that the Tenth Amendment bars the federal government from coercing states either to enforce federal laws or to keep (or adopt) state laws that they don’t want, on marijuana or anything else.²²

Of course, federal laws can penalize conduct for which there are no state penalties only if so intended by Congress and authorized by the Constitution. The CSA’s provisions passed those tests in Supreme Court decisions on medical marijuana in 2001 and 2005, both from California. The first, *United States v. Oakland Cannabis Buyers’ Cooperative*, held that Congress intended to criminalize even the state-approved, noncommercial, purely intrastate growing and possession of marijuana for personal medical use.²³ The second, *Gonzales v. Raich*—a landmark decision broadly construing federal powers—held that Congress had the constitutional authority to criminalize such local, noncommercial activity by two women.²⁴ Once that much was established, the Supremacy Clause made it clear that the two women’s compliance with California’s 1996 medical marijuana law was no obstacle to federal seizure of their marijuana plants.

But, as noted above, federal law cannot go so far as to “commandeer”—a fancy word for coercing—states. Indeed, the states’ independence on marijuana is evident from the fact that many of them criminalized the substance before the federal government did; that all or most have in recent decades imposed much less severe penalties than

21. U.S. Constitution, Article VI.

22. *New York v. United States*, 505 U.S. 144, 188 (1992); *Printz v. United States*, 521 U.S. 898, 935 (1997).

23. 532 U.S. 483, 491 (no defense of medical necessity was available to medical marijuana users, no matter how dire their health problems, or to their suppliers, because “Congress has made a determination that marijuana has no medical benefits worthy of an exception”).

24. 545 U.S. 1, 19. In *Raich*, the Court held by a 6-3 vote that Congress’s constitutional power to “make all laws which shall be necessary and proper” to regulate interstate commerce was broad enough to authorize enforcement of the CSA against the local, noncommercial growing and use of marijuana for medical purposes. It reasoned that “a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use” would lead to diversion of large quantities to the interstate market.

the CSA for marijuana and other drug offenses; and that sixteen (including Colorado and Washington) have decriminalized marijuana use. These sixteen states' departures from federal marijuana laws differ only in degree from partially legalizing medical use, as eighteen states (including many of the sixteen) have done, or recreational use, as Colorado and Washington have now done.

Federal efforts to coerce states—as distinguished from providing them with financial or other inducements to do the feds' bidding—violate the Tenth Amendment, the Supreme Court has ruled, in decisions that were originally characterized as “conservative” but that have acquired a more liberal constituency in the marijuana context.²⁵

This explains why it seems undisputed that the CSA could not preempt state law in the sense of coercing states to maintain criminal penalties or otherwise act against medical (or other) use of marijuana, even though a state's partial withdrawal from the war against marijuana sends a message contrary to the CSA's effort to stigmatize it as an outlaw drug. Because of the anti-commandeering rule, “Congress may not preempt the exemptions at the core of state medical marijuana laws,” as Robert Mikos has written.²⁶

Nor did *Raich* either purport to preempt any state law or have the effect of much slowing down the medical marijuana movement, as dissenting justices and others had predicted it would.²⁷ Eight of the eighteen state laws (and the District of Columbia law) that have legalized medical marijuana have been adopted since *Raich*.

In theory, Congress *could* constitutionally have broadly preempted all state regulation of medical and recreational marijuana, and many scholars, federal officeholders, and others have asserted, at best imprecisely, that it did.²⁸ Congress could have declared either an intent to “occupy the field,” the broadest form of federal preemption, or to sweep away any state law that could pose an indirect obstacle to full achievement of the CSA's purpose, as the Colorado and Washington regulatory regimes no doubt will. But Congress did neither.

Instead, in a sort of anti-preemption clause, the CSA explicitly provides that Congress did *not* intend “to occupy the field . . . to the exclusion of any state law on the same subject matter . . . unless there is a positive conflict between [the CSA] and that state law so that the two cannot consistently stand together.”²⁹ This was a logical approach,

25. See, e.g., Zack Coleman, “Calif. Gov. Brown: DOJ, Obama Should ‘Respect’ State Marijuana Laws,” *The Hill*, Nov. 11, 2012 (“‘It’s time for the justice department to recognize the sovereignty of the states,’ Gov. Jerry Brown . . . declared. ‘We don’t need some federal gendarme to come and tell us what to do.’”).

26. Mikos 2012 at 10, 15; see *Qualified Patients Assn. v. City of Anaheim*, 187 Cal.App.4th 734, 757 (2010).

27. *Raich*, 545 U.S. at 43 (O’Connor, J., dissenting). See Mikos 2012 at 8, 31 n. 67.

28. See authorities cited in Mikos 2012 at 8, 31-32 nn. 67-69, 73-75.

29. 21 U.S.C. § 903 (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State

given that state drug laws, which predated the CSA, have always differed both from it and from one another. This CSA non-preemption clause reinforces both the above-noted CSA direction that the Attorney General “shall cooperate” with the states on controlled substances and the Supreme Court’s traditional rule that “the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest intent of Congress.”³⁰

To be sure, some state courts have held that, even under the CSA’s anti-preemption language, any state regulation of marijuana (beyond simple repeal of criminal penalties) is preempted if it “stands as an obstacle” to the objectives of the federal statute by “affirmatively authorizing” conduct prohibited by federal law—as, to some extent, do all medical and recreational marijuana laws.³¹ But this twists the plain meaning of the CSA’s anti-preemption clause. The better view is that, with narrow exceptions, there is no “positive conflict” between the CSA and the new Colorado or Washington law, or most state medical marijuana regulations, because most of them neither prevent the federal government from enforcing the CSA nor make it impossible for people to comply with both federal and state laws (easily done by simply avoiding marijuana).³²

Given the CSA’s anti-preemption clause, it appears likely that the only state legalization efforts clearly preempted by federal law are those that would involve state or local officials themselves in unambiguously committing or requiring others to commit federal crimes, as by possessing, growing, or distributing marijuana, aiding and abetting, or conspiring in such activities with private actors.³³

What Legalizing States Probably Can Do Without Violating or Being Preempted by Federal Law

At what point does state licensing or other encouragement of medical or recreational marijuana use, and especially of the growing and distribution of marijuana, cross the line into aiding and abetting or conspiracy to violate federal law? Not very often, it appears. There are lots of things states can do. For example:

(1) *States may license and regulate marijuana suppliers even though the suppliers themselves are violating the CSA.* As noted above, while the Obama Administration

law so that the two cannot consistently stand together”).

30. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

31. *Emerald Steel Fabricators Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159, 175-78, 230 P.3d 518, 529 (Ore. 2010); *Pack v. Superior Court*, 2011 Cal. App. Lexis 1266 (2011) (subsequently ordered “depublished” as moot and not citable as authority by *Pack (Ryan) v. S.C. (City of Long Beach)*, 136 Cal. Rptr. 665, 268 P.3d 1063, 2012 Cal. LEXIS 1038 (Cal. 2012), but cited here because it presents a detailed argument for broad CSA preemption).

32. *County of San Diego v. San Diego NORML*, 165 Cal.App.4th 798, 823 (2008); *Mikos 2012* at 12-13.

33. *Id.*

Even though states including California and Colorado and localities including Oakland have been taxing medical marijuana sales for years, the federal government has never tried to seize the receipts as proceeds of crime.

has considered a civil lawsuit arguing that the CSA broadly preempts the state regulatory regimes to be set up by the Colorado and Washington initiatives, it would probably lose (not to mention that any victory would be Pyrrhic, also explained above). Nothing in the CSA bars states from licensing and regulating medical marijuana dispensaries to ensure compliance with state laws, although certain specific provisions might arguably be preempted.

(2) *States can collect tax revenue from marijuana businesses; the federal government may have legal power to seize such tax receipts but never has, and probably never will.* Even though states including California and Colorado and localities including Oakland have been taxing medical

marijuana sales for years, the federal government has never tried to seize the receipts as proceeds of crime.³⁴ The reason appears to be that any such move to take medical marijuana money from cash-strapped states and cities would be politically unpopular as well as a symbolic affront to state sovereignty. Still, the federal government could and perhaps should use the threat of seizing recreational marijuana tax receipts, as well as enforcing the CSA, to pressure states to appropriate adequate funds for marijuana regulation to prevent exports and other affronts to federal interests.³⁵ Here, too, a federal-state contractual agreement would make sense.

(3) *State officials can advocate violations of federal law, as can everyone else.* The Supreme Court famously ruled in *Brandenburg v. Ohio* that the First Amendment guarantee of free speech protects “advocacy . . . of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁶ This and related decisions make it quite clear that, to the extent that state officials’ efforts to legalize or regulate marijuana under state law could be seen as advocacy of violating the CSA, such efforts are constitutionally protected.

(4) *States can register and issue identification cards to qualified medical marijuana users.* Such registries have not been widely challenged by federal drug enforcers. They are necessary to the efficient operation of a state’s exemption of bona fide medical users from state sanctions; they do not purport to exempt them from the federal CSA; and they protect federal interests by preventing non-medical users from claiming exemption.³⁷ To be sure, the Oregon Supreme Court has held that such state laws are preempted

34. See *What Everyone Needs to Know* at 186.

35. See *Voter’s Guide*.

36. 395 U.S. 444, 447 (1968).

37. See *Mikos 2012* at 15; *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 823 (2008).

because they “authorize” marijuana use contrary to the CSA, and some state officials have refused to approve such registries for fear of subjecting their employees to federal prosecution.³⁸ Although probably ill-founded, these concerns are sufficiently serious that they should be addressed in federal-state contractual agreements.

(5) *The federal government cannot penalize physicians who recommend marijuana to patients.* An early federal tactic to torpedo medical marijuana laws was to revoke the prescription rights of any physician who recommended marijuana to a patient. But a federal appeals court in California enjoined this tactic as violating doctors’ First Amendment rights to give sensitive medical advice to their patients on the pros and cons of medical use. The court distinguished such a “recommendation” from dispensing or even writing a prescription for marijuana, which it said would subject physicians to CSA penalties.³⁹ While the distinction seems slippery, other courts reached similar judgments and the federal government gave up on the idea of penalizing physicians for bona fide medical advice to their patients.

What Legalizing States Probably Can’t Do Without Violating Federal Law

The argument for federal preemption is sufficiently strong in the case of several types of state regulatory provisions that it would be ill-advised for states to risk provoking a preemption lawsuit or crackdown unless and until they can work out a clear contractual agreement with the Justice Department:

(1) *State ownership or operation of any marijuana business might be in criminal violation of the CSA.* At least six states have considered state control of the medical marijuana industry, to insure prevention of exports, tighter quality control, and the like, but none has done it. Some experts have argued, and state appeals courts in California and Washington have implied, that such activities are protected by section 885(d) of the CSA, which provides that “no civil or criminal liability shall be imposed . . . upon any duly authorized officer of any state . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance

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38. See citations at note 31 above; *Mikos 2012* at 8-9 & 33 n. 75.

39. *Conant v. Walters*, 309 F.3d 629, 634-35 (9th Cir. 2002); see *id.* at 639, 645-46 (Kozinski, J., concurring) (in addition to violating the First Amendment, the federal effort “runs afoul of the ‘commandeering’ doctrine” by “in effect, forcing the state to keep medical marijuana illegal”).

relating to controlled substances.”⁴⁰ But the apparent purpose of that provision was simply to immunize state agents from liability for handling illegal drugs in the course of investigations and seizures. Any state that tried setting itself up in the marijuana business in reliance on section 885(d) would be taking a big risk of provoking a federal crackdown.⁴¹

(2) *Physically handling and lab-testing marijuana could put state officials in technical criminal violation of the CSA.* Whether the Justice Department would enforce the CSA against such officials is unclear. And states could try to keep their employees’ hands off marijuana by requiring licensed marijuana businesses to do their own lab tests and labels or hire independent laboratories to do it. The independent-lab approach, too, might possibly cause a preemption problem.⁴² Any such problems could best be averted by a federal-state contractual agreement.

(3) *The CSA may or may not preempt state laws authorizing officials to return marijuana seized from authorized medical users or caregivers.* State appeals courts in California and Washington have held that such state laws are not preempted, but these holdings are debatable, because returning erroneously seized marijuana is arguably a form of distribution.⁴³ Again, a state-federal contractual agreement could establish a clear understanding of what state officials can and cannot safely do.

(4) *Banks and credit card companies typically refuse to deal with state-licensed medical (or recreational) marijuana suppliers because federal law prohibits such transactions.* State laws (if any exist) requiring banks and credit-card companies to deal with state-licensed marijuana suppliers would be preempted by this federal law. It has the effects of making it difficult for marijuana suppliers to raise capital and forcing them to take in large amounts of cash, which can make them targets for crime and harder for regulators to monitor money-laundering and tax evasion. There may be no cure for this problem short of new federal legislation, which Colorado and Washington are requesting.

(5) *Federal tax laws disallowing business expense deductions for sales of federally banned substances make it hard for state-licensed marijuana businesses to make profits.*⁴⁴ No state law can override federal tax law. Colorado and Washington seem certain to request a federal tax code revision.

40. 21 USC § 885(d).

41. See *Mikos 2012* at 5-6, 16-17. The state appeals court decisions mentioned in text are those cited in note 43 below.

42. *Pack v. Superior Court*, above.

43. See *Mikos 2012* at 17, 36-37 nn. 125, 129-131; *State v. Kama*, 39 P.3d 866, 868 (Or. App. 2002); *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007).

44. 26 USC § 280E.

Middle Ground: How Colorado and Washington Could Show the Federal Government That They Will Regulate Responsibly and Protect Federal Interests

Between the things the states can do without federal preemption, and the things the federal government can do to preempt the states, lies a range of things which the states can do, and which the federal government might permit, that could serve the interests of both. In particular, Colorado and Washington—and all medical marijuana states—should do their utmost to regulate marijuana in the ways that are least likely to provoke federal crackdowns. And Colorado and Washington seem so far to be doing just that, except that it's unclear whether they will provide enough funding for their regulators to do an adequate job of protecting federal (as well as state) interests.

...Gov. Inslee of Washington has written to Holder that "I am personally committed to having a well-regulated, disciplined system with tight inventory controls and close coordination with law enforcement."

Gov. Hickenlooper has stressed (in Executive Order B-2012-004) the need for "[r]econciliation of Colorado and Federal laws" to avoid subjecting state and local employees to federal prosecution, and his chief legal counsel, Jack Finlaw, has added that the state should show the feds that its regulations are comprehensive and well-funded enough to keep marijuana from spilling over its borders and away from children.⁴⁵ Similarly, Gov. Inslee of Washington has written to Holder that "I am personally committed to having a well-regulated, disciplined system with tight inventory controls and close coordination with law enforcement."⁴⁶

But the federal government has reason to be skeptical that the states can deliver on such assurances, and to insist on concrete evidence that they will not only issue strict rules but also appropriate enough money to enforce them. A scathing state audit of Colorado's Medical Marijuana Enforcement Division, released on March 26, 2013, found that even though touted by legalizers as a model, it has done a very bad job because of insufficient funding and mismanagement. Although no adverse federal action has resulted, some state officials have warned that the regulations to be issued under Colorado's new recreational marijuana law will also fail unless the legislature finds more adequate funding sources than the new law itself provides.⁴⁷

45. John Ingold, "Hickenlooper Lawyer: Effective Regulations Key for Pot Legalization," *denverpost.com*, March 13, 2013.

46. Joel Connelly and Jake Ellison, "EXCLUSIVE: Inslee's Marijuana Memo to Feds Pitches Control, Prosecution of Violators," *seattlepi.com*, undated.

47. John Ingold, "Colorado Marijuana Regulation Needs More Money, State Official Says," *denverpost.com*, April 4, 2013; John Ingold, "Scathing Audit Throws Colorado Recreational Marijuana Rules into

Among other possible federal concerns is a DEA analysis in 2009 of Colorado's medical marijuana industry showing "that well over half the folks who were involved in dispensaries at the time had prior criminal convictions for serious felonies," according to Troy Eid, former U.S. Attorney for Colorado. He also noted that "we had a tremendous reduction in the age of the average user from an average of the mid 50's when the [medical marijuana] initiative first passed in the year 2000, to 28 years old by the time of the [2012] election."⁴⁸

Another question likely to be of concern to the federal government is whether the prospect of reaping big tax revenues from sales of marijuana might cause regulators in Colorado or Washington to be less than meticulous about enforcing the new laws' requirement that all sales be to consumers and not for export into other states' black markets. The temptation to look the other way might be especially strong if (as seems likely) the revenues that come in initially fall short of expectations.⁴⁹

Also of likely federal concern will be how Colorado and Washington handle the temptations of "marijuana tourism," which could be a major source of revenues both for marijuana businesses and for the state. A Colorado task force appointed by Gov. Hickenlooper recommended allowing sales to nonresidents, but with strict limits on quantities, and perhaps a ban on licensing marijuana retailers near the state's borders, to limit spillover into other states. (If Colorado were to prohibit nonresidents from purchasing marijuana in the state, even in small quantities, it might spur unregulated black market sales of larger quantities). But the marijuana industry may lobby against such restrictions, and the federal government—as well as neighboring states—will be watching to see how the detailed marijuana tourism regulations unfold.

States cannot perfectly solve all the problems that will be associated, from a federal point of view, with their legalization (and decriminalization) policies. But conscientious, properly funded state efforts to focus regulatory and criminal enforcement on the areas mentioned above would go a long way toward assuaging the federal government's legitimate concerns.

Chaos," *Denver Post*, March 28, 2013; Eric Gorski, "Audit: Serious Flaws in Colorado's Regulation of Medical Marijuana," *denverpost.com*, March 26, 2013; John Ingold, "Colorado Recreational Marijuana Regulations Need Money, Officials Say," *Denver Post*, March 26, 2013.

48. The Brookings Institution, "Washington vs. Washington (and Colorado): Who Should Decide about Marijuana?" January 8, 2013, remarks of Troy Eid, former United States Attorney for Colorado, transcript at 27, 52. According to Colorado data, the average age of medical marijuana patients in the state is currently 41. See <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044>.

49. See *Voter's Guide*.

How Dual Sovereigns Can Accommodate One Another's Interests: The Case for Federal-State Contractual Cooperation Agreements

The good news is that even without a congressional action, and even given President Obama's opposition to legalizing recreational or medical marijuana, the CSA provides a standing invitation for his Administration to work out contractual cooperation agreements with Colorado, Washington, and some or all of the sixteen other medical marijuana states and the District of Columbia. The CSA not only directs that the Attorney General "shall cooperate" with the state and local governments on drugs but also gives him broad discretion to do so, through means including legally binding contractual agreements.

This is a president who has taken bold unilateral action amid congressional paralysis on issues including immigration (ordering amnesty for a generation of Dream Act immigrants), gay marriage (an extraordinary refusal to defend in federal court the duly enacted Defense of Marriage Act), and military force abroad (bombing Libya without consulting Congress, using drones to kill people in multiple countries, and much more). Doing with marijuana what the congressionally adopted CSA tells the Attorney General he should do (cooperate with the states) should not require much boldness.

Indeed, with this option sitting in plain view, it would be intolerable for the Obama Administration to put officials in eighteen states and D.C. to the choice of either ignoring the will of their own voters or gambling on limited enforcement of a federal marijuana law that is widely seen as outmoded. The Obama Administration should instead work with Colorado and Washington (and later with other medical marijuana states) to implement their partial legalization initiatives in ways that serve both federal and state interests in protecting the public health and safety.

Written contractual agreements should, suggests Tamar Todd of the Drug Policy Alliance, provide for Colorado and Washington to tightly control and regulate licensing, production and distribution within their borders and do everything feasible to prevent diversion to other states; for federal resources to focus primarily on preventing such diversion; and for federal and state law enforcement agencies to cooperate in targeting those who grow and distribute marijuana without state licenses. This would be more consonant with the CSA's intent to control trafficking, abuse, and diversion than for federal and state governments to be at cross-purposes.

Federal-state agreements should also include clear, unambiguous commitments by the Attorney General to exercise his prosecutorial discretion to ensure that his Justice Department subordinates take no enforcement action against any state-licensed marijuana supplier unless the Attorney General (or a high-level designee) personally

finds, in writing, that the supplier has violated state as well as federal law and that state and local authorities are unable or unwilling to correct the problem. Any such agreement could be voidable at the option of the Attorney General if he believes that the state has failed to carry out responsibly its commitment to regulate.

This is not to suggest that such a contractual agreement could provide a state-licensed marijuana supplier with a legal defense recognized by the courts in the event of a federal prosecution or other enforcement action that violates the agreement. But the formality and specificity of a contractual agreement would provide a strong political deterrent to such an unwarranted enforcement action. It would also protect federal interests far more effectively than would a federal effort to abort states' experiments with partial legalization.

The commitments that states would make in negotiating contractual agreements, and the subsequent federal scrutiny of their compliance, would help keep states honest, giving them a powerful incentive to take seriously their obligations to control marijuana distribution and accommodate federal priorities—as, for example, California has not done with medical marijuana. By the same token, the process of sitting down with the states and drawing up agreements would force the federal government to get its act together, by setting enforcement priorities and then applying them consistently—again, in marked contrast to the chaos and uncertainty that have so far marked the federal government's approach to medical marijuana.

The moral is that we will need enlightened, determined leadership on both the federal and state level for the partial legalization of recreational marijuana in Colorado and Washington to avoid the federal-state conflicts and confusion that have so far been emblematic of the Obama-Holder medical marijuana regime. Fortunately, the leaders of Colorado and Washington State appear so far to be doing a better job of setting clear rules and protecting federal interests than have the states whose medical marijuana regimes have been on the receiving end of most federal crackdowns.

With the state-legalized recreational marijuana ball now in the Obama Administration's court, with the above-mentioned invitation from the CSA to enter into cooperation agreements with states, and with leaders in Colorado and Washington who seem willing and able to do their part, the President and Attorney General are poised to make history, for better or worse. At the very last, they should be able to bring some order to a marijuana-policy regime that has seen, of late, all too much chaos.

The moral is that we will need enlightened, determined leadership on both federal and state levels for the partial legalization of recreational marijuana...

Appendix 1: The Obama Administration's Approach to Medical Marijuana: A Study in Chaos

President Obama sounded a conciliatory note when asked in December of 2012 by Barbara Walters about the Colorado and Washington votes to legalize recreational marijuana: “[I]t would not make sense for us to see a top priority as going after recreational users in states that have determined that it’s legal,” he said, because “we’ve got bigger fish to fry.”

But unless and until the Obama Administration makes very, very clear commitments not to go after marijuana suppliers who comply with the new state laws, anyone tempted to rely on the President’s public posture might want to consider how the Obama Justice Department cracked down on medical marijuana suppliers who had naively relied on similarly soothing assurances from Obama during the 2008 campaign, and from Attorney General Eric Holder thereafter.

Ask Chris Williams of Montana (now serving five years without parole), or Aaron Sandusky of Rancho Cucamonga, California (now serving ten years without parole, after his judge refused to let him show his jury videos of friendly statements about medical marijuana by Obama and Holder), or Matthew Davies of Stockton (under indictment on charges that carry a sentence of ten years without parole), or Matthew Cohen of Mendocino (raided and handcuffed with his wife by federal agents who came at night with machine guns and chainsaws to destroy his crop).⁵⁰

A. Medical Marijuana Laws at Present

Eighteen states (including Colorado and Washington) and the District of Columbia—twelve of them by popular votes—have removed state law penalties for possessing, using, cultivating, and in some cases distributing limited quantities of marijuana for medical purposes, starting with California’s “Compassionate Use Act” (Proposition 215) in 1996. At least another twenty state legislatures have considered proposals to legalize medical marijuana since 2011.⁵¹

While medical marijuana laws vary considerably, all provide that, to be exempt from arrest, prosecution, and civil forfeiture of their marijuana, medical users must show that they have a debilitating medical condition (except in California, where any illness

50. See, e.g., Gwen Florio, “Medical Marijuana Grower Gets Five Years in Federal Prison,” *Independent Record*, Feb. 1, 2013; KABC, “IE Man Gets 10 Years for Running Marijuana Clinics,” Jan. 7, 2013; Adam Nagourney, “In California, It’s U.S. vs. State on Marijuana,” *New York Times*, Jan. 13, 2013; Michael Montgomery, “Prosecutors Move to Shut Down Mendocino Pot Permit Program,” *Newsfix*, Jan. 11, 2012; Montgomery, “Mendocino County Pot Program at Risk after Raids,” *California Watch*, April 6, 2012.

51. See Robert A. Mikos, “A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana,” Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 11-07 (2011) (hereinafter *Mikos 2011*) at 633.

will do if a physician says that marijuana might provide relief), diagnosed by a physician (or, in some states, other medical practitioner); they must also have the physician's recommendation, which must be in writing (again except in California, where an oral recommendation will do), that marijuana might provide relief. Most laws list eligible diagnoses, typically including cancer, AIDS, glaucoma, and other chronic diseases with symptoms such as severe pain, seizures, and nausea. California's list includes a broad catch-all: any condition for which marijuana may, in the treating physician's opinion, benefit the patient.⁵²

Most but not all medical marijuana states require qualifying patients to register with the state beforehand and provide a signed form from the physician. The state then issues a registry identification card that looks like a driver's license for the patient and the caregiver to show to authorized providers of marijuana. State laws generally ban use while driving or on public property; they also prohibit driving under the influence, and limit (yet again excepting California) how much marijuana a patient may have.

Physicians who recommend medical marijuana are protected by all of these state laws from being prosecuted under state law or sanctioned at the hands of state licensing boards and hospitals. They are also protected by the First Amendment from federal as well as state sanctions. Designated personal caregivers are protected from state sanctions for possessing, handling, and in some states cultivating marijuana for their patients. Some states also seek to shield patients, physicians, and dispensaries from adverse actions by private actors including landlord, schools, and employers.

Several of the medical marijuana states relegate qualified patients to growing their own, getting it from friends, or buying illegally from the black market.⁵³ California law allows very vaguely defined nonprofit so-called cannabis cooperatives, with minimal state regulation; while many localities have regulations, many of those are not tightly enforced. In Colorado, Arizona, and New Mexico, among others, the state or local governments license limited numbers of medical marijuana growers and dispensaries, with tight restrictions.⁵⁴ Local regulations include zoning as well as licensing, and some localities have banned marijuana dispensaries.

52. For an overview of state medical marijuana laws, see *Mikos 2012* at 4-6; <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

53. See William Yardley, "New Federal Crackdown Confounds States that Allow Medical Marijuana," *New York Times*, May 7, 2011; see generally *Mikos 2012* at 5-6.

54. *Mikos 2012* at 5; See Fernanda Santos, "Arizona Tries to Keep Reins Tight as It Starts Regulating Medical Marijuana," *New York Times*, June 8, 2012. Oregon allows growers to supply at most four qualified patients and accept reimbursement only for costs of materials and utility bills, and not for their labor. OR. REV. STAT. § 475.304, 475.320(2)(C) (2010). New Mexico requires that licensed growers be nonprofit and prohibits volume discounts. N.M. STAT. ANN. § 26-2B-4(F) (West 2010) ("A licensed producer shall not be subject to arrest, prosecution or penalty, in any manner, for the production, possession, distribution or dispensing of cannabis pursuant to the . . . Compassionate Use Act").

B. The Obama Administration's Initial Policies

During his 2008 campaign, Barack Obama voiced unqualified approval of these complex, variegated medical marijuana laws: "I think the basic concept of using medical marijuana for the same purposes and with the same controls as other drugs prescribed by doctors is entirely appropriate. I'm not going to be using Justice Department resources to try to circumvent state laws on this issue."

Attorney General Holder was similarly reassuring and much more specific in a March 18, 2009, press conference. He said the Administration would end the Bush Administration's raids on medical marijuana suppliers and that "[t]he policy is to go after those people who violate both federal and state law," meaning "traffickers who falsely masqueraded as medical dispensaries and 'use medical marijuana laws as a shield'" (emphasis added).⁵⁵

Holder's assurance was formalized in an October 2009 memo from Deputy Attorney General David Ogden to United States Attorneys stating that while "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, . . . continues to be a core priority . . . , pursuit of these priorities 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."⁵⁶ Some states took this as encouragement to adopt medical marijuana laws and regulations. But as to growers and distributors of marijuana for medical use, including those who complied with state laws, this "Ogden memo" was pocked with ambiguities that turned out to be traps for the unwary.⁵⁷

The Justice Department has continued under Obama to give a free pass to medical marijuana users—as it did by and large under Presidents Clinton and George W. Bush. Simple possession for recreational (as well as for medical) use is only a misdemeanor under federal law, and for many years federal prosecutions for mere possession have

55. Associated Press, "Attorney General Signals Marijuana Policy Shift," NBC News, March 18, 2009; David Johnston and Neil A. Lewis, "Obama Administration to Stop Raids on Medical Marijuana Dispensaries," *New York Times*, March 18, 2009; see also *id.*: "In the Bush administration, federal agents raided medical marijuana distributors that violated federal statutes even if the dispensaries appeared to be complying with state laws. . . . Mr. Holder's comments appeared to be an effort to clarify the policy after some news reports last month interpreted his answer to a reporter's question to be a flat assertion that all raids on marijuana growers would cease. Department officials said Mr. Holder had not intended to assert any policy change last month but was decidedly doing so on Wednesday."

56. Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," October 19, 2009 (hereinafter Ogden memo), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

57. It also said, for example, that "even when there is clear and unambiguous compliance with existing state law," federal investigation or prosecution should go forward whenever it "serves important federal interests."

been rare even in most states where all marijuana use is illegal. Marijuana possession charges by local police are more common, but often grow out of searches in traffic stops and stop-and-frisks and seldom lead to prison or even jail time.⁵⁸

For recreational as well as medical users, “Marijuana is, as a practical matter, already legal in much of California,” despite the federal ban and the defeat of a recreational-marijuana ballot initiative in California in 2010, the *New York Times* reported in December 2012. “Marijuana has, in many parts of this state, become the equivalent of a beer in a paper bag on the streets of Greenwich Village. It is losing whatever stigma it ever had and still has in many parts of the country. . . . Marijuana can be smelled in suburban backyards in neighborhoods from Hollywood to Topanga Canyon as dusk falls – what in other places is known as the cocktail hour – often wafting in from three sides. In some homes in Beverly Hills and San Francisco, it is offered at the start of a dinner party with the customary ease of a host offering a chilled Bombay Sapphire martini.”⁵⁹

Holder did draw a firm line against *recreational* marijuana in late 2010, prompted by a ballot initiative (Proposition 19) which would have made California the first jurisdiction anywhere in modern times to legalize recreational use. Amid political pressure to speak out from nine former DEA heads and Mexico’s President Felipe Calderon, Holder vowed that the Justice Department would “vigorously enforce the CSA against those . . . that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law.”⁶⁰

The California initiative was narrowly defeated, perhaps in part because of Holder’s threat, perhaps in part because then-Gov. Arnold Schwarzenegger abolished criminal penalties for possession of up to an ounce.

All the while, medical marijuana farms and dispensaries were multiplying, in reliance on the Obama-Holder assurances and in many cases with the approval of state and local governments. And more states were moving toward licensing such suppliers. Through most of 2010, the Obama Administration “seemed to make a point of paying little attention” to this.⁶¹

C. The Administration’s Subsequent Crackdowns

But then, in 2011, with no warning from the White House or Attorney General Holder, something changed. Justice Department crackdowns on medical marijuana

58. See *What Everyone Needs to Know* at 42-47, 190.

59. Adam Nagourney, “Marijuana, Not Yet Legal for Californians, Might as Well Be,” *New York Times*, Dec. 20, 2012.

60. E.g., John Hoeffel, “Holder Vows Fight over Prop. 19,” *Los Angeles Times*, Oct. 16, 2010.

61. William Yardley, “New Federal Crackdown Confounds States that Allow Medical Marijuana,” *New York Times*, May 7, 2011.

suppliers in states including California, Washington, and Montana began to proliferate, and Holder's March 2009 assurance that those who complied with state law would be safe from federal enforcement of the CSA seemed to become inoperative, at least in parts of the country. The crackdowns were apparently spurred in part by a sense that the medical marijuana industry was spinning out of control in states including California, where the pretense of many of the state's hundreds of largely unregulated pot shops to be for bona fide medical users was widely seen as a joke. On the boardwalk in California's Venice Beach, "pitchmen dressed all in marijuana green approach passers-by with offers of a \$35, ten-minute evaluation for a medical marijuana recommendation for everything from cancer to appetite loss."⁶²

"Some federal prosecutors say states have simply let medical marijuana get out of hand," the *New York Times* reported in May 2011. "Many supporters of medical marijuana agree. 'Seeing storefront dispensaries advertise with neon pot leaves is inconsistent with the idea most people have of medical marijuana,' said [Alison] Holcomb, [director of drug policy for the ACLU of Washington]. 'But until you let states regulate these dispensaries, you have no way to control that.'"⁶³

Deputy Attorney General James Cole, Ogden's successor as Holder's number two, also expressed alarm about state and local moves toward licensing "multiple large-scale, privately-operated industrial marijuana cultivation centers," with "revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants."⁶⁴ Some U.S. Attorneys essentially declared war on such large operations, even when licensed by local governments, and even when they appeared to have complied with state law.

U.S. Attorneys including Jenny Durkan and Michael Ormsby, of the Western and Eastern Districts of Washington, respectively, also went so far as to imply in a letter to Washington Gov. Christine Gregoire that if she signed a pending bill to license and regulate medical marijuana suppliers, the state regulators would be violating the CSA (and might be prosecuted). This implication was probably wrong as a matter of law. But the implied threat scared Gregoire into vetoing most provisions of the proposed legislation.⁶⁵ This did little to uproot Washington's large marijuana industry; it just

62. Norimitsu Onishi, "Medical Marijuana Only for the Sick? A Farce, Some Angelenos Say," *New York Times*, Oct. 7, 2012 (hereinafter *Only for the Sick*).

63. Norimitsu Onishi, "Cities Balk as Federal Law on Marijuana Is Enforced," *New York Times*, June 30, 2012 (hereinafter *Cities Balk*).

64. Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," June 29, 2011 (hereinafter Cole memo), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

65. Letter from Jenny A. Durkan and Michael C. Ormsby to Hon. Christine Gregoire, April 14, 2011, available at http://www.thestranger.com/images/blogimages/2011/04/14/1302831694-usa_letter_4-14-

prevented the state from regulating it.

Cole formalized the new hard line in a June 29, 2011, memorandum to U.S. Attorneys. Not only did Cole sharply qualify the more ambiguous October 2009 Ogden memo. He also, like the Durkan-Ormsby letter, flatly contradicted Holder's March 2009 assurance that the Administration would go after only "those people who violate both federal and state law." To the contrary, Cole stressed that the feds could go after "[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities. . . *regardless of state law*" (emphasis added). He added—in what could be seen as a reference to state and local taxation of medical marijuana proceeds—that "[t]hose who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."

Then, on October 7, 2011, California's four U.S. Attorneys, the DEA, and the IRS, came together to claim at a press conference that the medical marijuana movement had been "hijacked by profiteers" in violation of California as well as federal law. They announced criminal charges against growers and dispensaries—including one charged with sending hundreds of pounds of supposedly medical marijuana to New York and Pennsylvania—and sent out dozens of letters warning suppliers and their landlords to stop growing and selling marijuana or face confiscations and prosecution.⁶⁶ U.S. Attorney Melinda Haag, of the Northern District of California, said at the press conference that cities and counties which were "licensing and ostensibly authorizing the commercial and very profitable distribution of marijuana" were being "inconsistent with federal law."⁶⁷ To the extent that Haag implied that such cities and counties were *violating* the CSA, her assertion, like the Durkan-Ormsby letter, was probably wrong as a matter of law.

The four U.S. Attorneys in California proceeded over the ensuing months to shut down hundreds of dispensaries statewide, although hundreds also remained open. Their actions, plus further implied threats to go after local officials involved in regulating medical marijuana, prompted the vast majority of the 50 California municipalities with medical marijuana ordinances to suspend their regulation of dispensaries. Another 180 localities in California have banned dispensaries.⁶⁸

2011.pdf/. See Olivia Katrandjian, "Under Federal Threat, Wash. State Gov. Vetoes Medical Marijuana Dispensary Bill," *ABC News*, April 30, 2011.

66. Peter Hecht, "Feds Unveil Charges Against Some Medical Marijuana Operators in California," *Sacramento Bee*, Oct. 8, 2011; John Hoeffel, "Federal Crackdown on Medical Pot Sales Reflects a Shift in Policy," *Los Angeles Times*, Oct. 7, 2011.

67. Michael Montgomery, "Prosecutors Move to Shut Down Mendocino Pot Permit Program," *news fix, KQED's Bay Area news blog*, Jan. 11, 2012.

68. *Only for the Sick*.

D. Where Things Stand: Criticism and Confusion

Critics of the crackdown have accused the feds of causing chaos by indiscriminately trashing good as well as bad operators and pushing seriously ill patients into the black market. Among those that closed down were Humboldt Medical Supply, a dispensary in Humboldt County that had obtained a permit in 2010, gave free marijuana to elderly patients, and was seen as a model of compliance with local regulations; Divinity Tree, a San Francisco cooperative run by a quadriplegic medical marijuana patient; and “Oaksterdam University,” an Oakland-based marijuana trade school run by Richard Lee, who started using medical marijuana for pain control after a work accident left him paralyzed from the waist down. He said he had trouble paying the big federal taxes for which Oaksterdam was liable due to federal law’s disallowance of ordinary business expense deductions for marijuana businesses.⁶⁹ Then there are the federal prosecutions like the ones that have brought long prison terms for would-be medical marijuana entrepreneurs Chris Williams and Aaron Sandusky, and the one that threatens Matthew Davies with a ten-year, no-parole sentence.

Amid speculation⁷⁰ that the Justice Department crackdowns may have been motivated in part by desire to preempt Republican attacks on Holder as soft (or incompetent) on crime, including the uproar over the “Fast and Furious” gun scandal, the U.S. Attorneys running the crackdowns and a Holder spokesperson claimed (as noted above) that these were local operations, not orchestrated by Holder.

Be that as it may, the crackdowns have brought Holder and Obama some very bad reviews from liberal activists and journalists who almost certainly voted for Obama.

“[O]ver the past year,” Tim Dickinson of *Rolling Stone* magazine complained in February 2012, “the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush. The feds are busting growers who operate in full compliance with state laws, vowing to seize the property of anyone who dares to even rent to legal pot dispensaries, and threatening to imprison state employees responsible for regulating medical marijuana. With more than 100 raids on pot dispensaries during his first three years, Obama is now on pace to exceed Bush’s record for medical-marijuana busts. ‘There’s no question that Obama’s the worst president on medical marijuana,’ says Rob Kampia,

69. *Cities Balk*; Lucia Graves, “Obama Administration’s War on Pot,” *Huffington Post*, April 18, 2012 (hereinafter Graves); Matthew Artz, “Oaksterdam Founder to Leave Cannabis Business,” *Oakland Tribune*, April 6, 2012.

70. See, e.g., Matthew Boyle, “Book: Holder Went on Anti-Marijuana Campaign to Distract from Fast and Furious,” *foxnews.com*, Aug. 13, 2012; Kristen Gwynne, “Why Is the Government Cracking Down on California’s Pot Dispensaries?” *rollingstone.com*, August 22, 2012.

executive director of the Marijuana Policy Project. 'He's gone from first to worst.'"⁷¹

In fairness to the four U.S. Attorneys in California, that state's law, which bans for-profit marijuana suppliers, is hopelessly vague and confusing on what dispensaries may and may not lawfully do to qualify as nonprofit cooperatives or collectives. A plausible case can be made that would-be-legal marijuana entrepreneurs including Sandusky, Davies, and Cohen have violated not only federal but also California law, thus meeting Holder's on-again-off-again litmus test, simply by creating large collectives with many members. Even top state officials have—sometimes mistakenly, a California appeals court recently held—equated being large with being for-profit and thus illegal.⁷² "The catch-22," explains William Portanova, a seasoned Sacramento criminal defense lawyer and former federal prosecutor familiar with marijuana cases, "is that there really is no way to comply with California law, because no one knows what it is; it is so unclear and underdeveloped and Balkanized that no one knows if or how it might be done legally. The California legislature has done very little to help, nor have the various [state] attorneys general."⁷³

Portanova adds that—in the wake of the early, reassuring Obama-Holder talk, and on the expectation that California might soon legalize a multibillion-dollar recreational marijuana industry—"many bad California lawyers encourage wannabe marijuana entrepreneurs to get into the business early, and then drift away after their clients have been indicted. The feds are a separate but equally worthy target for harsh criticism for their miserable failures at crime-enforcement prioritization in an era of global terror and fiscal crisis. . . . Despite the mess that California marijuana law is, the feds make it worse. Charlatans hypnotize the weak, then the feds bust them."

But confusion over California cannot explain how Eric Holder—just a few months after his own Deputy, James Cole, had formally encouraged U.S. Attorneys to prosecute medical marijuana businesses "regardless of state law"—could testify at a June 2012 congressional hearing that "we limit our enforcement efforts to those individuals, organizations that are acting out of conformity with state law."⁷⁴

Whatever the explanation, now Holder and Obama have big decisions to make about how to respond to the Colorado and Washington votes partially legalizing recreational marijuana. It's past time for them to get their act together.

71. Tim Dickenson, "Obama's War on Pot," *Rolling Stone*, Feb. 16, 2012; see Steph Sherer, "Did Eric Holder Lie to Congress?" *The Blog, Huffington Post*, June 8, 2012. See also Graves.

72. See *People v. Jackson*, 210 Cal. App. 4th 525 (2012), review and depublication denied, 2013 Cal. LEXIS 457 (Jan. 16, 2013).

73. Author's interview, March 20, 2013.

74. Stephen Dinan, "Holder Says No Effort to Shut Down All Medical Marijuana," *Washington Times*, June 7, 2012.

Appendix 2: Conflict of Laws: A Quick Orientation to Marijuana Law at the Federal Level and in Colorado and Washington State

A. The Federal Controlled Substances Act

In the beginning, marijuana was legal. That started changing in the early 1900s, with all 50 states eventually adopting bans on growing, distributing, and possessing marijuana. Federal restrictions on marijuana originated in 1937 and were codified in 1970 as part of the Controlled Substances Act (CSA).

It classifies drugs into five schedules, depending on their medicinal value, potential for abuse, and health effects, with marijuana classified alongside heroin, LSD, and many others in “Schedule I.” Growing, distributing, and possessing marijuana are illegal with a few very limited exceptions⁷⁵ because—in the view of the federal government—unlike the drugs classified in Schedules II through V, marijuana has a “high potential for abuse,” “no currently accepted medical use in the treatment in the United States,” and there is “a lack of accepted safety for use of the drug . . . under medical supervision.”⁷⁶

The CSA authorizes the DEA to reclassify drugs to less restrictive schedules according to various statutory criteria. A federal appeals court on January 13, 2013, denied a petition to require the DEA to initiate proceedings to move marijuana to Schedule III, IV, or V, which would allow physicians to write prescriptions. The court began by noting that “[t]here is a serious debate in the United States over the efficacy of marijuana for medical uses,” and implied that there was evidence that “marijuana could have some medical benefits,” with more than 200 peer-reviewed published studies claim to show marijuana’s efficacy for various medical uses. But the court held that it was obliged to defer to the DEA’s finding that there was no “currently accepted medical use” because there were no scientifically rigorous, “adequate and well-controlled studies *proving* efficacy” (emphasis added).⁷⁷

The other major federal legal obstacles to medical and recreational marijuana are several international treaties signed and energetically promoted by the United States.⁷⁸ These treaties place on the United States an obligation to enforce its own

75. For the exceptions, see *Mikos 2012* at 6.

76. 21 U.S.C. § 811(c)(2), (3).

77. *Americans for Safe Access v. DEA*, 706 F.3d 438 (DC Cir. 2013) at 1, 5, 34-35). The studies included a March 1999 report from the National Institute of Medicine of the National Academy of Sciences calling for more studies while finding that for certain patients “cannabinoid drugs might offer broad-spectrum relief not found in any other single medication.” *Id.* at 34-35.

78. The most important of these is the Single Convention on Narcotic Drugs of 1953, updated in 1972, with

laws, but they neither bind the states nor require the federal government to cast aside prosecutorial discretion and bring every conceivable marijuana prosecution, any more than the CSA itself does. Detailed analysis of these treaties is beyond the scope of this paper.

Despite the persistence of major criminal penalties for large-scale marijuana trafficking, surveys suggest that more than two-fifths of Americans over the age of 12 have tried marijuana at least once and more than seventeen million have used it in the past month. And the trend in public opinion has been moving toward decriminalization (and, now, partial legalization) since Oregon's legislature in 1973, followed by fifteen other states, reduced to the equivalent of a traffic ticket the penalties for possession of small amounts of marijuana.

B. The New Recreational Marijuana Laws in Colorado and Washington

The legalization movement crossed its most important threshold so far with the Colorado and Washington ballot initiatives last November. Both partially legalized recreational use, and both license and regulate growers and suppliers in ways roughly modeled on the regulation of alcohol. The Colorado law, which amended the state constitution, is called Amendment 64, or the "Regulate Marijuana Like Alcohol Act of 2012." The Washington law is called Initiative 502, or I-502.⁷⁹

Both states' initiatives have already removed all remaining criminal penalties for possessing up to an ounce of marijuana for people of age 21 and older and, as noted above, Colorado has also removed penalties for any resident who—with no license required—grows up to six plants at a time "in an enclosed, locked space" and gives away up to an ounce at a time. The Washington law will continue to ban home-grown marijuana (except under the separate, preexisting medical marijuana regime) and all distribution (including gifts) outside the regulated system.⁸⁰ Unlicensed selling will remain a crime in both states.

The Colorado and Washington laws do not allow anyone to take marijuana across state lines, to consume it in public, or to drive under the influence. A Colorado task force has recommended that nonresidents be allowed to buy small quantities of marijuana for use while in Colorado, a sensitive subject known as marijuana tourism on

184 countries as parties. See *What Everyone Needs to Know* at 145-49.

79. For details of the two initiatives, see <http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251633708470/> and <http://liq.wa.gov/marijuana/I-502/>.

80. So it is now legal in Washington to use recreational marijuana but not to obtain it until the regulated industry comes into being in December 2013.

which detailed rules remain to be worked out.

Both laws also will open the way for regulated and taxed recreational marijuana industries, with licenses available only to residents. Advisory and regulatory bodies are still working out detailed rules regarding inspections of facilities, books, and records, chemical testing of marijuana products, standards of ingredients and quality, labeling requirements, limits on retail store signs, advertising, and promotion, security requirements, and more.

Retail outlets in both states will probably be prohibited from displaying marijuana and related products or depictions of them to the general public and from admitting or advertising to people under age 21. Labeling requirements will include the potency of products in terms of levels of THC, the psychoactive component of the cannabis plant, just as liquor regulations require the labeling of alcohol content.

The Colorado amendment delegates broad rule-making discretion to the Department of Revenue, which has overseen medical marijuana since 2010, and tasks the agency to issue its rules for recreational marijuana businesses by July 1 and to begin issuing licenses by January 1, 2014. The amendment authorizes local governments to regulate the time, place, manner, and number of marijuana businesses and prohibits marijuana businesses within 1,000 feet of a school, park, playground or child care center.

The Washington law, which for the first two years can be amended only by a two-thirds vote of the legislature, assigns the State Liquor Control Board to write regulations by December 1, 2013, and start issuing in December licenses for a limited number of recreational marijuana businesses. By imposing substantial regulatory costs, both states may allow only fairly large enterprises to participate in the marijuana market, except for Colorado's grow-your-own market. This will make their licensed marijuana businesses easy targets for federal drug enforcers, unless the states can persuade the Obama Administration to leave alone those that comply with state law.

The Colorado law, which as noted above allows home growers to give away up to an ounce at a time, can be construed to authorize sales of up to an ounce at a time from licensed retailers' mobile vans or cars (since the law does not explicitly require licensed retailers to operate from fixed addresses). So Colorado's Amendment 64 might allow for distribution by many more small operators than Washington's new law, which requires that marijuana retailers be at fixed addresses and sell nothing but marijuana and related products.⁸¹

Both states hope to collect copious tax revenues as well as application and licensing fees from their planned new, for-profit recreational marijuana industries. Indeed, a major selling point for legalization has been that it will redirect from Mexican drug cartels to popular state programs some of the billions of dollars that marijuana users will continue

81. *Voter's Guide*.

to spend one way or another.

But some experts warn that the revenues are likely to be smaller than projected and may not even cover the costs of regulating the marijuana businesses. There have also been warnings that the two states' hunger for tax revenues may tempt them to be less than vigilant about preventing exports across state lines, which will be difficult to prevent in any case.

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