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The Medical Marijuana Question and DEA Opposition

Law, Crime and Law Enforcement

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LAW, CRIME AND LAW ENFORCEMENT

THE MEDICAL MARIJUANA QUESTION AND DEA OPPOSITION

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AND
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PREFACE

As part of a larger scheme to regulate drugs and other controlled substances, federal law prohibits the cultivation, distribution, and possession of marijuana. No exception is made for marijuana used in the course of a recommended medical treatment. By categorizing marijuana as a Schedule I drug under the Controlled Substances Act (CSA), the federal government has concluded that marijuana has "no currently accepted medical use in treatment in the United States." This book will review the federal government's constitutional authority to enact the federal criminal prohibition on marijuana; highlight certain principles of federalism that prevent the federal government from mandating that states participate in enforcing the federal prohibition; consider unresolved questions relating to the extent to which state authorization and regulation of medical marijuana are preempted by federal law; and assess what obligations, if any, the U.S. Department of Justice (DOJ) has to investigate and prosecute violations of the federal prohibition on marijuana.

Chapter 1 - As part of a larger scheme to regulate drugs and other controlled substances, federal law prohibits the cultivation, distribution, and possession of marijuana. No exception is made for marijuana used in the course of a recommended medical treatment. Indeed, by categorizing marijuana as a Schedule I drug under the Controlled Substances Act (CSA), the federal government has concluded that marijuana has "no currently accepted medical use in treatment in the United States." Yet 16 states and the District of Columbia have decriminalized medical marijuana by enacting exceptions to their state drug laws that permit individuals to grow, possess, or use marijuana for medicinal purposes. In contrast to the complete federal

prohibition, these 17 jurisdictions see medicinal value in marijuana and permit the drug's use under certain circumstances.

Although the U.S. Supreme Court has established Congress's constitutional authority to enact the existing federal prohibition on marijuana, principles of federalism prevent the federal government from mandating that the states actively support or participate in enforcing the federal law. While state resources may be helpful in combating the illegal use of marijuana, Congress's ability to compel the states to enact similar criminal prohibitions, to repeal medical marijuana exemptions, or to direct state police officers to enforce the federal law remains limited by the Tenth Amendment.

Even if the federal government is prohibited from mandating that the states adopt laws supportive of federal policy, the constitutional doctrine of preemption generally prevents states from enacting laws that are inconsistent with federal law. Under the Supremacy Clause, state laws that conflict with federal law are generally preempted and therefore void. Courts, however, have not viewed the relationship between state and federal marijuana laws in such a manner, nor did Congress intend that the CSA displace all state laws associated with controlled substances. Instead, the relationship between the federal ban on marijuana and state medical marijuana exemptions must be considered in the context of two distinct sovereigns, each enacting separate and independent criminal regimes with separate and independent enforcement mechanisms, in which certain conduct may be prohibited under one sovereign and not the other. Although state and federal marijuana laws may be "logically inconsistent," a decision not to criminalize—or even to expressly decriminalize—conduct for purposes of the law within one sphere does nothing to alter the legality of that same conduct in the other sphere.

This report will review the federal government's constitutional authority to enact the federal criminal prohibition on marijuana; highlight certain principles of federalism that prevent the federal government from mandating that states participate in enforcing the federal prohibition; consider unresolved questions relating to the extent to which state authorization and regulation of medical marijuana are preempted by federal law; and assess what obligations, if any, the U.S. Department of Justice (DOJ) has to investigate and prosecute violations of the federal prohibition on marijuana.

Chapter 2 - Marijuana is properly categorized under Schedule I of the Controlled Substances Act (CSA), 21 U.S.C. § 801, et seq. The clear weight of the currently available evidence supports this classification, including evidence that smoked marijuana has a high potential for abuse, has no accepted medicinal value in treatment in the United States, and evidence that

there is a general lack of accepted safety for its use even under medical supervision.

The campaign to legitimize what is called "medical" marijuana is based on two propositions: first, that science views marijuana as medicine; and second, that the DEA targets sick and dying people using the drug. Neither proposition is true. Specifically, smoked marijuana has not withstood the rigors of science–it is not medicine, and it is not safe. Moreover, the DEA targets criminals engaged in the cultivation and trafficking of marijuana, not the sick and dying. This is true even in the 15 states that have approved the use of "medical" marijuana.[1]

On October 19, 2009 Attorney General Eric Holder announced formal guidelines for federal prosecutors in states that have enacted laws authorizing the use of marijuana for medical purposes. The guidelines, as set forth in a memorandum from Deputy Attorney General David W. Ogden, makes clear that the focus of federal resources should not be on individuals whose actions are in compliance with existing state laws, and underscores that the Department will continue to prosecute people whose claims of compliance with state and local law conceal operations inconsistent with the terms, conditions, or purposes of the law. He also reiterated that the Department of Justice is committed to the enforcement of the Controlled Substances Act in all states and that this guidance does not "legalize" marijuana or provide for legal defense to a violation of federal law.[2] While some people have interpreted these guidelines to mean that the federal government has relaxed its policy on "medical" marijuana, this in fact is not the case. Investigations and prosecutions of violations of state and federal law will continue. These are the guidelines DEA has and will continue to follow.

Chapter 3 - This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and 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. One timely example

underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

Chapter 4 - Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

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authorities at any time, the Obama Administration has announced an informal policy that suggests a federal prosecution in that situation would be unlikely. In an October 19, 2009, memorandum, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana.[15] Citing a desire to make "efficient and rational use of its limited investigative and prosecutorial resources," the memorandum stated that while the "prosecution of significant traffickers of illegal drugs, including marijuana ... continues to be a core priority," federal prosecutors "should not focus federal resources [] on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[16] The memorandum made clear, however, that "this guidance [does not] preclude investigation or prosecution, even where there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests."[17]

Responding to an increase in the "commercial cultivation, sale, distribution, and use of marijuana for purported medical purposes," DOJ released a subsequent memorandum in 2011 drawing a clear distinction between the potential prosecutions of individual patients who require marijuana in the course of medical treatment and "commercial" dispensaries.[18] After noting that several jurisdictions had recently "enacted legislation to authorize multiple large-scale, privately operated industrial marijuana cultivation centers," DOJ attempted to clarify the scope of the Ogden Memorandum:

> The Ogden memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.[19]

The memorandum clearly communicated that individuals operating or "facilitating" medical marijuana dispensaries, even if operated in compliance with state law, continue to be targets for federal prosecution. As a result, the last two years have seen a reported increase in the number of federal DEA raids on dispensaries and marijuana farms and the subsequent prosecutions of those who own and operate marijuana distribution facilities.[20] Additionally, a

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number of states have abandoned legislative proposals to expand their medical marijuana programs, at least partly as a result of warnings from U.S. Attorneys that the DOJ will "vigorously" enforce the CSA against those who participate in the unlawful manufacturing or distribution of marijuana, regardless of whether such activity is licensed under state law.[21]

State Laws

All 50 states and the District of Columbia have criminalized the recreational use of marijuana.[22] However, beginning with California in 1996, a number of states have decriminalized the use of marijuana for medicinal purposes or exempted qualified users from sanctions imposed under state law. Today, 16 states and the District of Columbia have enacted provisions that, in various ways, exempt qualified individuals[23] from state criminal prosecution and various state civil penalties for marijuana-related offenses.[24] Although these laws vary widely in their approaches to medical marijuana, there are a number of common characteristics that appear to adhere to these laws. First, in order for an individual to legally use medical marijuana, the drug must have been recommended by a physician for use in treating a diagnosed medical condition.[25] All states but California require that this recommendation be in writing.[26] Most states also require potential users to register with the state.[27] Upon registration, states will often provide the user with a registration card so that the individual can be identified as a qualified user of medical marijuana.[28] Additionally, all states but California limit the quantity of marijuana that a patient may possess at any one time, and most states have laws limiting the manner and place in which a qualified individual can use the drug.[29]

Although these 17 jurisdictions have established a scheme by which qualified individuals may legally possess and use marijuana for medicinal purposes under state law, qualified users in some jurisdictions lack a legal avenue to obtain adequate quantities of the drug. Some states permit users to grow their own marijuana, while others license third-party private persons or entities to cultivate and distribute the drug to qualified individuals through state-licensed and -regulated dispensaries.[30] California has also authorized patients and caregivers to collectively grow marijuana in "cannabis cooperatives."[31] In those states where supply is limited, however, many medical marijuana users are forced to acquire the marijuana they are permitted to possess and use through the black market.[32]

A Series of Constitutional Questions

The unique inconsistencies between federal and state approaches to medical marijuana give rise to a series of important constitutional questions. First, is it within Congress's power to prohibit the production, possession, and distribution of marijuana? Second, to what extent can the federal government direct states to adopt similar laws or enforce the federal prohibition? Third, to what extent are state attempts to authorize and regulate medical marijuana preempted by federal law? And finally, what obligation, if any, does DOJ have to enforce the federal prohibition?

Is It within Congress's Power to Prohibit the Production, Possession, and Distribution of Marijuana?

The U.S. Supreme Court considered the reach of Congress's Commerce Clause authority and the constitutionality of the CSA in *Gonzales v. Raich*.[33] *Raich* involved a challenge to the federal marijuana prohibition brought by Angel Raich and Diane Monson after agents of the federal DEA seized and destroyed marijuana plants that Monson had been cultivating for medical purposes consistent with California law. The respondents argued that the CSA's "categorical prohibition," as applied to the "intrastate manufacture and possession of marijuana for medical purposes," exceeded Congress's authority under the Commerce Clause, and, therefore, could not serve as the basis for their prosecution.[34] The Court rejected this argument, and clearly held that the federal prohibition was within Congress's constitutional authority.

In a 6-3 decision, the Court upheld Congress's power to prohibit even the purely intrastate cultivation and possession of marijuana. Relying heavily on its 1942 decision of *Wickard v. Filburn*, the Court held that prior precedent had "firmly establish[ed] Congress'[s] power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[35] In enacting the CSA, Congress had sought to regulate the supply and demand of controlled substances, including marijuana. Consistent with that objective, Congress had rationally concluded that "leaving home-consumed marijuana outside federal control" would have a "substantial effect on supply and demand in the national market" for marijuana.[36] The Court noted that even small amounts of marijuana grown at home— though intended for personal medicinal use—would likely be diverted into the national market and frustrate Congress's goal of strictly controlling overall

supply.[37] Thus, in enacting the federal prohibition on marijuana production, possession, and distribution, Congress was acting "well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate commerce ... among the several states.'"[38]

For purposes of this report, it is important to note that the Court's opinion in *Raich* dealt only with the question of whether the Commerce Clause permitted Congress to prohibit the wholly intrastate possession and use of marijuana. The Court did not consider the question of whether the California law, which permitted the use of marijuana for medicinal purposes, was preempted by the CSA. The Court noted only that respondents' compliance with state law in cultivating marijuana had no impact on the scope of Congress's power under the Commerce Clause, as "[i]t is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be."[39]

May the Federal Government Direct the States to Adopt Similar Laws or to Enforce the Federal Prohibition?

Although *Raich* established Congress's constitutional authority to enact the existing federal prohibition on marijuana, principles of federalism prevent the federal government from mandating that the states support or participate in enforcing the federal law. While state resources may be helpful in combating the illegal use of marijuana, Congress's ability to compel the states to enact similar criminal prohibitions, to repeal medical marijuana exemptions, or to direct state police officers to enforce the federal law remains limited. The Tenth Amendment likely prevents such an intrusion into state sovereignty.

The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[40] Initially, the Supreme Court interpreted the Tenth Amendment as establishing that certain "core" state functions would be beyond the authority of the federal government to regulate.[41] The Court's interpretation of the Tenth Amendment soon shifted, however, from protecting "core" state functions to preventing the federal government from "commandeering" state government.[42] In *New York v. United States*, http://www.crs.gov/pages/Reports.aspx?PRODCODE=RL30315&Source=search - fn118#fn118the Court struck down a federal statute that had mandated that states either develop legislation on how to

dispose of all low-level radioactive waste generated within their borders, or be forced to take title to such waste and become responsible for any financial consequences.[43] The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it had only the power to regulate the waste directly—Congress could not require that the states perform the regulation rather than regulate the waste directly itself. In effect, Congress could not "commandeer" the legislative process of the states.[44]

Nor may Congress "commandeer" state executive branch officers for purposes of carrying out or enforcing federal law. In *Printz v. United States*, the Supreme Court invalidated a provision of the Brady Handgun Violence Prevention Act that had required that state police officers conduct background checks on prospective handgun purchasers within five days of an attempted purchase.[45] The Court held that the provision constituted an unconstitutional "commandeering" of state officers and, like a commandeering of the legislature, was outside of Congress's power and a violation of the Tenth Amendment.[46]

Consistent with *New York v. United States* and *Printz*, the federal government is prohibited from commandeering state legislatures or state executive officials by mandating that states enact certain legislation or implement or enforce a federal law.[47] Given these restrictions, Congress may not statutorily direct that states enact complete prohibitions on marijuana or repeal existing exemptions for medical marijuana. Nor may Congress direct that state police officers enforce the marijuana provisions of the CSA. Congress may, however, be able to persuade states to support the federal policy by conditioning the receipt of federal funds upon the state enacting legislation consistent with the CSA.[48] In addition, states may voluntarily alter their own laws or enforce federal laws, but they cannot be made to do so by the federal government.[49]

To What Extent Are State Medical Marijuana Laws Preempted by Federal Law?

Even if the federal government is prohibited from mandating that the states adopt laws supportive of federal policy, the constitutional doctrine of preemption generally prevents states from enacting laws that are inconsistent with federal law. Thus, the federal government typically stands on much

stronger constitutional footing when it attempts to stop a state action than when it attempts to force a state to act.

At first glance, it would appear that a state law that permits an activity expressly prohibited by federal law would necessarily create a legal "conflict" between state and federal law. Under the Supremacy Clause, state laws that conflict with federal law are generally preempted and therefore void.[50] Courts, however, have not viewed the relationship between state and federal marijuana laws in such a manner, nor did Congress intend that the CSA displace all state laws associated with controlled substances.[51] Instead, the relationship between the federal ban on marijuana and state medical marijuana exemptions must be considered in the context of two distinct sovereigns, each enacting separate and independent criminal regimes with separate and independent enforcement mechanisms, in which certain conduct may be prohibited under one sovereign and not the other. Although state and federal marijuana laws may be "logically inconsistent," a decision not to criminalize—or even to expressly decriminalize—conduct for purposes of the law within one sphere does nothing to alter the legality of that same conduct in the other sphere.

Preemption is grounded in the Supremacy Clause of Article VI, cl. 2, which states that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[52] The Supremacy Clause, therefore, "elevates" the U.S. Constitution, federal statutes, federal regulations, and ratified treaties above the laws of the states.[53] As a result, where a state law is in conflict with a federal law, the federal law must prevail. There is, however, a presumption against federal preemption when it comes to the exercise of "historic police powers of the States."[54] State medical marijuana laws have generally been accorded this presumption, as they are enacted pursuant to traditional state police powers in defining criminal conduct and regulating drugs and medical practices.

Although there is "no one crystal clear distinctly marked formula" for determining whether a state law is preempted by federal law, the Supreme Court has established three general classes of preemption: express preemption, conflict preemption, and field preemption.[55] In each instance, however, "the question of preemption is one of determining congressional intent."[56] Express preemption exists where the language of a federal statute explicitly states the degree to which related state laws are superseded by the federal statute.[57] Where, in contrast, Congress does not articulate its view as to a statute's intended impact on state laws, a court may *imply* preemption if there is

evidence that Congress intended to supplant state authority.[58] Preemption is generally implied in two situations. First, under conflict preemption, a state law is preempted "where compliance with both federal law and state regulations is a physical impossibility ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[59] Thus, where one cannot simultaneously comply with both state and federal law, or where the state law directly frustrates the purpose of a federal law, the state law is preempted. Second, under field preemption, a state law is preempted where a "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it...."[60]

The CSA contains a statutory preemption provision that expressly articulates Congress's intent as to the relationship between state and federal law and the extent to which the latter displaces the former. Section 903 states:

> 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 law so that the two cannot consistently stand together.*[61]

The CSA's preemptive effect is therefore limited to only those state laws that are in "positive conflict" with the CSA such that the two "cannot consistently stand together."[62] Notably, the provision clarifies that Congress did not intend to entirely occupy the regulatory field concerning controlled substances or wholly supplant traditional state authority in the area. Indeed, Congress expressly declined to assert field preemption as grounds for preempting state law under the CSA. Arguably, then, the preemptive effect of the CSA is not as broad as congressional authority could have allowed. States remain free to pass laws relating to marijuana, or other controlled substances, so long as they do not create a "positive conflict" with federal law. In interpreting this provision, courts have generally established that a state medical marijuana law is in "positive conflict" with the CSA if it is "physically impossible" to comply with both the state and federal law, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[63]

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