MEDICAL MARIJUANA IN NEW YORK:

A Symposium Publication

Following The Issues Into 2010

by

The Committee on Drugs & the Law

Preface

The Purpose of this Publication

On February 7, 2007, the Committee on Drugs and the Law of the New York City Bar Association sponsored a Symposium on Medical Marijuana in New York. Most recently, the Committee has determined that the questions debated in 2007 about legalizing medical marijuana remain the same today. Those legal questions involve **federalism, the Commerce Clause, the Supremacy Clause, free speech, and the Fifth Amendment right to life and due process.** It is the Committee's opinion that the conversation about medical marijuana should be promoted. The legal issues, which are often obscured by the medical issues, should be made public to be discussed and debated. This is particularly pertinent in New York State, as the New York State Legislature has not yet passed A. 9016 and S. 4041-B, the most recently proposed medical marijuana bills sponsored by Assemblymember Richard Gottfried and Senator Thomas Duane.[1]

In 2007, the purpose of the Symposium was three-fold:

1) to clarify the emerging legal issues caused by the passage of state-sponsored medical marijuana laws, in light of the federal prohibition against marijuana use;

2) to have the most recent medical marijuana bill before the New York State Assembly explained by the Assembly sponsor, Richard Gottfried; and

3) to create an interdisciplinary discussion about the legal and public health policy consequences of drug prohibition created by the federal Controlled Substance Act (the "CSA").

In 2010, the above stated medical marijuana agenda is still quite relevant, as the provisions of the CSA have not changed substantively since its inception. Presently, the CSA makes it difficult for:

A) legitimate research on marijuana to be conducted,

B) people with serious painful conditions to alleviate their pain, and

C) doctors to provide appropriate treatment to patients without fear of losing their licenses and/or becoming the subject of a criminal investigation.

[1] More recently, efforts have focused on the implementation of medical marijuana in New York State via its inclusion as an item in the FY 2011 Budget. Selena Ross, *Support for Medical Marijuana Lights Up In State Senate*, THE CAPITOL, Apr. 26, 2010, http://www.nycapitolnews.com/news/126/ARTICLE/1731/2010-04-26.html

Today, in 2010, New York State Assemblymember Richard Gottfried (D-75th District) and New York State Senator Thomas Duane (D-29th District) have their most recent versions of the medical marijuana bill pending before the New York State Legislature. They have offered identical bills (A. 9016 and S.4041-B, respectively), which have bi-partisan support. If passed, New York will become the 15th state to allow medical marijuana.

As stated above, the Drugs and the Law Committee has chosen to publish this transcript now, as the questions debated in 2007, particularly about the Tenth Amendment and federalism, and the Fifth Amendment right to life, health and due process in the context of health care remain important concerns. Lawyers in general, legislators and citizens of states that have yet to pass a medical marijuana law, and who struggle with the pros and cons of joining this grassroots movement, will find this transcript highly informative. Once legislators decide to support medical marijuana, they must decide how to frame their legislation. This Symposium sheds light upon the legal and political issues at the core of these challenges.

The New York City Bar Association has supported the availability of marijuana for medicinal use since 1997, just after Assemblymember Richard Gottfried offered his first bill to the New York State Legislature in 1996. Its support then, and now, is based upon substantial indicators that marijuana has medical utility, and the more recent revelation that the Drug Enforcement Administration (DEA) has declined to allow alternatives to the National Institute of Drug Abuse (NIDA) monopoly on supplying marijuana for research. The New York City Bar takes the position that freedom to conduct appropriate scientific research is vital to the welfare of the nation. The DEA's administrative law judges have overturned their own agency's decision regarding this contested policy, but compliance by the agency is voluntary. [2] The reader will, however, have an opportunity to duly consider a defense of the federal government's position against medical marijuana by reading the words of the Committee's honored colleague Edward Jurith of the White House's Office of National Drug Control Policy.

[2] See *In the Matter of Lyle E. Craker, Ph.D.*, Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, United States Department of Justice, Drug Enforcement Administration, Docket No. 05-16, February 12, 2007.

The Symposium

In pursuit of this complex and very interesting conversation, *Noah Potter, Esq.*, then-Chairperson of the Drugs and the Law Committee, was able to persuade a most outstanding set of panelists to join us in Manhattan for the Symposium. Mr. Potter began the Symposium, and discussed the Committee's historical support for drug reform. He briefly discussed the array of social policies affected by American drug policy. *Eric Sterling,* President of the Criminal Justice Policy Foundation, Washington, D.C., and our moderator, introduced the history of marijuana's medicinal use, and the development of our present day policies. *Karen O'Keefe,* then-Assistant Director for State Policy for the Marijuana Policy Project, Washington, D.C. (and now Director), presented a slide show of the medical marijuana laws presently in place, and how those laws are being enforced. Her slides are included. Her presentation highlighted the difficulty the federal government has had in executing federal law in those states that have legalized medical marijuana. *Robert Raich,* Attorney from Oakland, California, and Counsel to Respondent in the U.S. Supreme Court case *Gonzales v. Raich*[3], gave a look at the deliberations of the U.S. Supreme Court in that case. He discussed the ONE question the Court agreed to consider, and reviewed the legal impact of all the issues *not* decided by the Supreme Court in that case. *Edward Jurith,* General Counsel of the Office of National Drug Control Policy, Washington, D.C., educated the audience about the U.S. Constitution and the powers vested in each branch of government. He revealed the political and legal reality behind existing federal law, and the power and authority Congress has to pursue the national interest of a united society. *Susan Herman,* Centennial Professor of Constitutional Law at Brooklyn Law School and General Counsel of the American Civil Liberties Union, continued the discussion about the U.S. Constitution, the role of Article II, and the complex process of constitutional decision-making. She explained to the audience as to how the medical marijuana legal discussion is a classic problem in federalism, and discussed how the federal government can enforce its laws in a state

[3] *Gonzales v. Raich*, 545 U.S. 1 (2005)

without violating state sovereignty. Lastly, *Assemblymember Richard Gottfried* outlined the details of his 2007 medical marijuana bill[4], and how it was designed to minimize exposure to the federal law. He also discussed the bi-partisan political support the bill had been attracting and its increased chances of being passed.

Medical Marijuana in New York in 2010:

It is important to note that A. 9016 is substantially different in content than A. 4867-B. A. 4867-B allowed certified patients and/or their caregivers to grow their own marijuana, and possess up to twelve plants, or up to 2.5 ounces of usable marijuana. A. 9016 allows marijuana to be produced and dispensed only through state certified organizations. This is designed to provide for the State's capacity to monitor marijuana as it monitors other pharmaceuticals. However, under present day federal law, any organization or governmental entity engaging in the production or distribution of medical marijuana has no legal protection from the federal government and, theoretically, the assets of such businesses or entities could be seized by the federal government and the operator/owners criminally prosecuted.

In October 2009, the Obama Administration's U.S. Justice Department issued guidelines stating that the focus of federal resources should not be on individuals whose actions are in compliance with existing state laws in states that have passed medical marijuana legislation. [5] Concerns about marijuana's prohibited status under federal law and diversion have influenced some New York State Senators to oppose the patient and caregiver production provision found in A. 4867-B. A. 9016 provides for "registered organizations," defined as hospitals, pharmacies or non-profit entities, to produce and dispense marijuana, and allows certified patients and caregivers to possess up to 2.5 ounces of marijuana. The insistence on an external source of marijuana, as opposed to patient and caregiver production, is intended to make it easier for the government to monitor the distribution of marijuana, and to control diversion of the drug.

In the interest of the health and welfare of the people of New York, the New York City Bar Association is committed to exploring the legal and policy considerations that

[4] A. 4867-B, 2007 Leg., Reg. Sess. (N.Y. 2007)
[5] The guidelines are at http://blogs.usdoj.gov/blog/archives/192

drive both sides of this conversation. Additionally, we look forward to the challenges that are likely to emerge. We recognize that both the individual states and the federal government will struggle with questions of federalism and human rights well into the 21st Century. The Association will continue to be a part of that struggle and that conversation.

In closing, I must thank all the participants for donating their personal time and resources to the creation and success of this event. I particularly thank Eric Sterling and the Criminal Justice Policy Foundation for providing a grant to cover the cost of housing and transportation for the Committee's out of town guests. I thank Noah Potter for single-handedly assembling this distinguished group of scholars. Lastly, I express deep appreciation to the staff of the New York City Bar Association, who is unequivocally both supportive and generous in assisting the Committee in its work.

Respectfully,

Susan Guercio,
Chair, Drugs & the Law Committee
2009-2012

MEDICAL MARIJUANA IN NEW YORK

A New York City Bar Symposium
February 7, 2007

Our guest speakers (in alphabetical order):

Richard Gottfried, New York State Assemblymember, and Chairperson of the Health Committee for the Assembly;

Susan Herman, Centennial Professor of Constitutional Law at Brooklyn Law School and General Counsel of the American Civil Liberties Union;

Edward Jurith, General Counsel of the Office of National Drug Control Policy, Washington, D.C.;

Karen O'Keefe, Assistant Director for State Policy for the Marijuana Policy Project, Washington, D.C.;

Noah Potter, Chairperson, Drugs & the Law, The Association of the Bar of the City of New York;

Robert Raich, Attorney ,Oakland, California; Counsel to Respondent in the U.S. Supreme Court case *Gonzales v. Raich*;

Eric Sterling, President of the Criminal Justice Policy Foundation, Washington, D.C., and Moderator of the Event.

The Symposium

Noah Potter: Good Evening. My name is Noah Potter and I am the Chair of the Drugs and the Law Committee of the New York City Bar Association. I am up here for two reasons to set the program back for two minutes. I want to thank all of the speakers and the moderator Eric Sterling for agreeing to participate in this event; some of our speakers come from long distances and have given of their time. They are all distinguished persons with extensive and impressive resumes and it's a great honor to have them here as part of this event.

I also have to give thanks to people in the Association, for facilitating the event and working with us to make it possible. For the record I have thanks to give to Alan Rothstein, Jayne Bigelsen, Matt Kovary, Linda Kemble, Martha Harris, Arlene Mordjikian and Nick Marricco and their staffs. And I have to thank the Committee members, the members who helped to put this event together and particular I want to acknowledge the assistance of the Committee Secretary, Susan Guercio, who has been involved in this event from the inception, and has been involved in almost all aspects of the event across the board … so thanks.

The second reason I am here is to talk about the Committee. The Committee is a unique institution and it is a great privilege to serve as its chairman. This Committee was founded in 1986 and has engaged in numerous activities in various reports. Here are a few of the highlights.

In 1994 the Committee issued a report entitled "A Wiser Course" calling for an end to drug prohibition. [6] In 2000 the Committee sponsored a two-day symposium in conjunction with the Academy of Medicine and the NY Academy of Sciences, in which a wide array of experts gathered to speak about the myriad aspects of drug control policy. Closer to the topic tonight, in 1997, the Committee issued a report in support of the state initiative to permit the use of marijuana for medical purposes. [7] At that time it was fairly early on in the career of the state initiatives. Only California and Arizona had laws permitting the medical use of marijuana and the Committee wrote in favor of those laws.

[6] Available at http://www.nycbar.org/pdf/report/94087WiserCourse.pdf
[7] Available at http://www.nycbar.org/pdf/report/Marihuana_report.pdf

In 2006 the Committee wrote a letter in support of the application of Dr. Lyle Craker at the University of Massachusetts to be registered as a bulk manufacturer of marijuana for use in clinical trials necessary to meet the standards of the FDA.[8]

The Drugs & the Law Committee consists of attorney and non-attorney experts on the topic of drug control. The Committee's scope of inquiry is extremely broad, as broad as the vast stretch of human endeavors which intersect with the topic of drugs. For example, this event focuses primarily on two issues: 1) the state level regulation of drugs and 2) the proposed therapeutic use of Schedule I substances. The Committee is also positioned to examine international issues related to drug control such as the treaty regime that controls drugs on a global scale, the relationship between the drug trade and the financing of international terrorism, and the legal aspects of that relationship and human rights. The Committee is also positioned to examine drug related expenditures at the federal, state and local levels, and to examine the standards used to measure success in drug control policy. The Committee is also positioned to examine constitutional issues implicit in drug control policy, such as the free speech issue in *Conant v. Walters*[9] in the Court of Appeals for the Ninth Circuit, and the free exercise issue in *União do Vegetal* decision in the U.S. Supreme Court. [10] The Committee is also positioned to consider policy changes and improvements. This list is actually a short list. I welcome the new members of the Committee and I encourage all of those who are here tonight who are interested in the subject matter to apply for membership to the Committee. It is not necessary that you come with any particular ideology. We are looking for people who can identify issues in drug control, critically focus on them, with a willingness to work. My hope is that this Committee can serve as a laboratory that will discover points of consensus with regard to drug policy, give voice to the profound questions in the human experience which disputes in drug policy represent, and thereby contribute positively to the welfare of society. I now call upon the moderator Eric Sterling to introduce the topic and the speakers and to set the program in motion.

[8] Available at http://www.nycbar.org/pdf/report/Craker%20Letter.pdf
[9] *Conant v. Walters*, 309 F. 3d 629 (9th Cir. 2002)

[10] *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006)

Eric Sterling

Eric Sterling: Noah, thank you very much. Oh behalf of the NYC Bar, welcome everyone. I am Eric Sterling from the Criminal Justice Policy Foundation in Silver Spring, Maryland, a member of the drugs and the law committee.

Our program tonight is going to get into some fascinating legal issues. But I, looking around, suspect that there's a large number of you who are in fact not lawyers. Those of you who are not lawyers, will you raise your hand? It is in fact an overwhelming majority. And so, what I am going to do then is to lay out some of the background that we are going to be talking about and then I'll introduce our panel.

Many of you may know that marijuana has been reported in medical literature from around the world for thousands of years, in China, in the Mideast, in India, and entered into western medicine in the 19th century. It was used in medicine in the US and various patent medicines in other forms for a wide variety of conditions. After the passage of the federal Marijuana Tax Act[11] in 1937, marijuana began to pass out of use in medicine in the US both for legal and cultural reasons. The use of natural materials in medicine in our modern scientific age began to diminish.

In 1970 as the contemporary drug problem came to a head under President Nixon, the U.S. Congress unified all of the federal drug laws in a law called the Controlled Substances Act[12] which is still the federal law which governs the distribution of these materials. This includes marijuana, which we will be talking about tonight, cocaine, heroin, amphetamines, and any compound that has a stimulant or depressant effect on the central nervous system. Compounds that we think of as drugs of abuse are regulated by this law. This law is grounded on Congress' power in the U.S. Constitution in Article I, Section 8 to control commerce, regulate commerce with foreign nations, with the Indian tribes and among the several states. Marijuana was put in the first schedule of five – the schedule of compounds which had no medically accepted used in treatment in the U.S. and were considered among the most dangerous. This was done in 1970. But the law envisioned that the placement in these schedules was a matter of certain flexibility.

[11] Pub. 238, 75th Congress, 50 Stat. 551 (1937)
[12] Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, codified at 21 U.S.C. §§ 801-971.

Congress has moved materials in and out of different schedules in the 35 years since the law took effect. There is an administrative agency, the DEA, which is part of the Department of Justice, and they can move materials into and around these different schedules. So marijuana is in Schedule I, as it was set up by Congress, with no accepted medical use in treatment. This means doctors can't prescribe it, and you can't get it at a drug store. But the medical knowledge about marijuana has not died with the acts of Congress. In 1972 the National Organization for the Reform of Marijuana Laws filed a petition with the DEA's predecessor agency. It said that we should put marijuana in another schedule. It claimed that marijuana had medical use. It's not so dangerous that it can't be used in medicine. It tried to initiate an administrative fact finding process under federal law. The agency ignored them and ignored them for many years until finally the U.S. Court of Appeals for the District of Columbia insisted the DEA have a hearing and determine what the facts might be. [13] In the years 1986 and 1987 the administrative law judge looked at and took testimony from different parts of the country from physicians, from patients, from the agency itself. The judge issued a ruling in September 1988 that said, in his opinion, marijuana had a valid use in treatment for certain conditions and that it would be arbitrary and capricious not to reschedule it and make it available for medical purposes. [14] This decision was not binding on the administrator of the DEA and the administrator rejected it, issued different findings, found that marijuana was still an extreme dangerous drug, and had no medical use in treatment in the US. That was appealed and the administrator's opinion was upheld. So that is the state of the play about 1988-89-90. In 1996 a number of citizens in California circulated a petition to put on the ballot the proposition to create something called the Compassionate Use Act. Its purpose was to allow marijuana to be used under California law for medical purposes. Rather quickly written in the1996 presidential election year when Bill Clinton ran for re-election against Bob Dole, medical marijuana was on the ballot, and medical marijuana got a million votes more than Bill Clinton did in California. About 56% of the voters voted for medical marijuana in California. Now, there was a state law in place that tried

[13] *NORML v. DEA*, 182 U.S. App. D.C. 114, 559 F.2d 735 (1977)
[14] See *In the Matter of Marijuana Rescheduling Petition*, Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, United States Department of Justice, Drug Enforcement Administration, Docket No. 86-22, Sept. 6, 1988.

to say that marijuana could be used by medical patients, it could be recommended by physicians, but there wasn't any kind of distribution scheme set forth in this proposal. It was very general in how it applied. There began to be informal dispensaries established, cooperatives to make marijuana available to sick people. The California law provided for some category called "caregivers." These were individuals who could grow or supply marijuana to people who were severely ill or incapacitated or unable to grow their own marijuana, and these caregivers were to be protected under the law also. The federal government challenged this in a number of ways, and then a case went to the Supreme Court in 2001 involving the Oakland Cannabis Buyers Cooperative. [15] One of our panelists, Rob Raich, from Oakland, California was instrumental in that litigation before the Supreme Court in 2001. The Supreme Court ruled in that case that the buyers club could not claim a medical necessity against the federal prohibition. The federal prohibition did not recognize a medical necessity that 3rd party organizations could raise. Originally, in 1976 in the District of Columbia, and in the state of Florida, patients who were using marijuana were being prosecuted. The patients defended themselves, using the common law notion of necessity. They argued that the potential loss of their life, the loss of their vision created a medical necessity for the use of marijuana that outweighed the value of enforcing of the law. The courts sustained and said the patients had a defense of medical necessity to the criminal prosecution of violating the drug law. [16] So the Oakland case comes down in 2001. In 2002 Rob's then wife, Angel Raich, and Diane Monson, two women who were seriously ill in California, sued the Attorney General of the United States. [17] They said to the court – look – as very seriously ill people here in California we want the protection of the California law. We have doctors who are outstanding doctors here in California. We are seriously ill. Marijuana has, for whatever reason, been critical to our survival, and we want to enjoin the U.S. Department of Justice from prosecuting us in the collection of the marijuana that we get from our caregivers. We don't feel that we should be waiting around for you to come knock on our door and arrest us. We want the court to rule that we are protected. Our argument to the court is

[15] *United States v. Oakland Cannabis Buyers Cooperative*, 532 U.S. 483 (2001)
[16] *United States v. Randall*, Super. Ct. D.C. Crim. No. 65923-75 (1976), available at http://www.drugpolicy.org/docUploads/randall.pdf
[17] *Raich v. Ashcroft*, 248 F. Supp. 2d 918 (N.D. Cal. 2003)

that the power that Congress has to write the CSA, to regulate Congress among the several states, doesn't go so far to control conduct that is only taking place in California, legal under California law, for which no money is involved. Where is the commerce, and where is the other state? The argument was persuasive to a three-judge panel in the U.S. Court of Appeals in the Ninth Circuit. [18] The Ninth Circuit's opinion was groundbreaking in saying that Congress's power under the constitution doesn't go so far. It doesn't reach all the way into the home or the garden with respect to medical marijuana. However, in 2005 the Supreme Court in a 6-3 decision turned down that argument. Meanwhile, as this is going on, other states are passing medical marijuana laws.

Assemblyman Gottfried has introduced a bill in the New York legislature to provide for the protection of medical patients in the use of marijuana for life threatening conditions. We will have an opportunity to hear from him about his legislation and the issues that it represents. As background, then, we are going to hear first from Karen O'Keefe.

[18] *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003)

Karen O 'Keefe

Eric Sterling: **Karen O'Keefe** is a member of the bar of the District of Columbia. She is the Assistant Director for State Policy at the Marijuana Policy Project in Washington, D.C. She is a graduate of Michigan State University with a degree in public policy and international studies. She earned her Juris Doctor from Loyola School of Law.

Karen O'Keefe: Hello everybody. Good evening. Thanks for coming. There are going to be some slides. (attached) I am going to give an overview of the different state medical marijuana laws and how they are working. There are 11 states that have effective medical marijuana laws.[19]

These laws remove the states' criminal penalties, like California's, from seriously ill patients' medical use of marijuana. In order to qualify, patients generally have to have one of several listed debilitating conditions. The most restrictive[20] of the states is Vermont, where patients only qualify if they have multiple sclerosis, HIV/AIDS, or cancer.[21] In California, unlike other medical marijuana states, patients qualify if they have any kind of medical condition that a physician feels marijuana would alleviate.

In almost all of the states you also need to have a doctor's recommendation. The doctors have to say that the benefits of marijuana would outweigh its harms, or that marijuana may mitigate symptoms that the patients have, or simply they "recommend" it. One state, Vermont, just requires that the patients have one of the qualifying conditions, and they don't actually need a doctor's recommendation.

In each of these 11 states, the laws provide some means of access for patients to get their medical marijuana. In none of the states, except California, are there dispensaries where patients can go to get medical marijuana. This is because the federal government occasional raids and arrests people at those dispensaries.[22] The state laws generally allow patients to grow their own medical marijuana, in limited amounts, usually

[19] Since this presentation, three additional states and the District of Columbia have passed medical marijuana laws, bringing the number to 14.
[20] New Jersey now has the most restrictive list of conditions.
[21] Since this presentation, Vermont's law was amended to include additional conditions, including serious conditions causing seizures, severe pain, wasting syndrome or severe nausea.
[22] Since this presentation, federal policy has changed. See n. 5 *supra*. There are now dispensaries operating in Colorado and New Mexico. In addition, Rhode Island, Maine and New Jersey have enacted laws allowing for dispensaries that are currently being implemented.

6-12 plants or so, and to designate a caregiver to do so for them. Caregivers are allowed because a lot of patients are bedridden and are very sick and they are not able to grow their own medicine. So this way, patients don't have to go get marijuana from drug dealers and risk not having a steady supply or violence or things like that. Instead, they can produce a steady, safe supply of their medicine.

Each of these laws also protects patients from being arrested. An *effective* medical marijuana law doesn't simply provide a defense that the patients can raise in court after hiring a lawyer, after experiencing pre-trial incarceration and things like that.[23]

The way most of the laws work is that the patient will send in a doctor's recommendation or certification that they have an illness to some kind of State department, like the Department of Health or the Department of Public Safety. They will get an ID card back. It will have a number on it. If the patient encounters a police officer and they have their medicine with them, the police officer can just call the department or go on a web site or something like that, and verify they are truly a registered patient who has a doctor's recommendation. As long as they have the amount of marijuana they are allowed to have, and there is no other illegal conduct or anything, they are free to leave. They don't have to endure trial and arrest and those very stressful and expensive things.

Two of the states, Maine and Washington, don't have ID cards.[24]

The way their state laws are worded is, if a patient has a written certification from a doctor (they actually have a piece of paper with the doctor's recommendation), and they encounter a police officer, they just show that written certification to the police officer. I think the police officer would call the doctor and verify it, which I think could be difficult at off hours. However, most of the laws provide for the ID cards instead. In California, patients are protected from arrest if they have an ID card, or if they have a doctor's recommendation. So they can choose between the two.

There is a twelfth state, Maryland. Its legislature passed a medical marijuana law, but it is not very effective because it doesn't protect patients from arrest. Instead, a

[23] However, on January 21, 2010, the Washington State Supreme Court ruled that the Washington State law was simply an affirmative defense, and did not prevent an arrest. *State of Washington v. Fry*, 2010 Wash. LEXIS 64.

[24] In November 2009, 59% of Maine voters approved an initiative that will add ID cards to their existing law. The initiative expands conditions and allows dispensaries.

patient would have to go through court and raise an affirmative defense which is of course, stressful and expensive. Also, this law doesn't allow for cultivation. So Maryland patients also don't have a steady supply of their medicine.

There are also a number of symbolic laws. Before California passed the first medical marijuana law that protects patients from arrest, about 36 states passed different laws with therapeutic research programs and things like that. [25] But almost all of these laws required some kind of cooperation from the federal government, like the federal government giving medical marijuana to patients. It is very rare for the federal government to approve this kind of research, and it is very cumbersome to get the research approved. So those laws have not been effective, and that is why states in the past 10 years or so have been passing these different kinds of medical marijuana laws that are not criminalizing patients.

(Referring to the slides) So the black states on the map are those that have effective medical marijuana laws that protect patients from arrest. Eight of these laws were passed by initiative, by voters, and three of them were passed by state legislators.[26] Maryland is the 12th state that has the law that is not so effective. There are fifteen states that are considering medical marijuana legislation this session or that we expect to do so. They are marked on the map also: New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Maryland, South Carolina, Indiana, Michigan, Alabama, Mississippi, Illinois, Minnesota, Texas and Arizona. There are seven states with existing medical marijuana laws and they are considering ways to improve and expand on their laws: Maine, Vermont, Rhode Island, Montana, Washington and Oregon. Most of those are laws that would increase the conditions and qualifications. Vermont, which has only a few conditions which qualify is considering expanding the conditions to other serious conditions. Other states are considering laws to increase the amount of marijuana patients can have. All of the black states are already considering or definitely will be

[25] *State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest*, Marijuana Policy Project, 2008, p. 2 and Appendix A, available at http://www.mpp.org/legislation/state-by-state-medical-marijuana-laws.html

[26] Since the presentation, voters have enacted one more medical marijuana law by initiative in Michigan, two state legislatures (New Mexico and New Jersey) have enacted legislation, as has the District of Columbia's City Council.

considering bills this session to remove their criminal penalties for the medical use of marijuana. And NY is of course going to be one of them.

(Referring to the slides) This is a chart of the number of registered patients in each state. The lowest is Vermont because of its small population and the few conditions that qualify. The largest is Oregon where 12,895 patients are registered and about 2,000 different doctors have recommended medical marijuana to those patients. California has only about 5,600 patients that are registered, but that is because the registry program is voluntary and is only in the process of being implemented now, so California ID cards are not even available to all patients yet.

I thought I would give a quick illustration of how these laws affect real patients' lives and how they are helping them:

(Referring to slide) This is Eric, and he is from Montana. He grew up here in upstate New York. He has AIDS, and before he used medical marijuana he had very extreme wasting, appetite loss and nausea. He tried all kinds of medications that were prescribed, including Marinol, which is made of one of marijuana's many compounds, THC, which is the psychoactive compound. The various drugs didn't work and they didn't help him so he was down to 85 lbs. Although marijuana was not allowed in Montana at the time, he was basically choosing between starving to death or trying something that would break the law. So he started using medical marijuana at his doctor's advice. And he lived in absolute terror. He had sleepless nights, was afraid of losing his home or going to jail, and he was actually on antidepressants just because of the fear of being arrested and prosecuted for trying to survive. Once he tried medical marijuana it worked though, and his weight went up to 135 lbs, which is much healthier.

In 2004, 62% of Montana voters voted for the medical marijuana law. So now Eric is able to grow his medicine without any real fear of arrest and have a safe supply of it and not live in terror. But he does come back to New York occasionally to visit his family. When he comes back, he is in fear of arrest just for using his medicine. His loved ones in New York are also in fear of arrest if they give him his medicine.

Finally, I just want to go over quickly how medical marijuana laws are working. Of course, by removing the state's criminal penalties, you remove the possibility of people being arrested by state and local officials, generally. 99% of all marijuana arrests

are either by state or local officials. So, a state's medical marijuana law dramatically reduces the chance that a patient is going to be arrested for using their medicine. And as the federal government has said before, as Karen Tandy, the head of the DEA[27], has said - we don't target sick and dying people. The federal government generally doesn't have a policy of going after individual cancer patients and individual folks with multiple sclerosis and stuff like that. So, state medical marijuana laws make it so that patients have a lot more peace of mind. There is just not much of a chance that patients are going to be prosecuted for using the only medicine that works for them once a state changes its own laws.

There have been very few problems with abuse. To the extent that there has been any, people have been arrested and prosecuted if they do anything outside of the law. There have only been about two cards revoked in any of the medical marijuana states, so it is very, very rare that there is any kind of abuse.

Opponents have claimed frequently, and continue to claim, that if you pass medical marijuana laws, that teens are going to use more marijuana because it will send a bad message or something like that. Well, we have 10 years of data now. We have seen in every single state where you had before and after data — that is, data from before the medical marijuana law passed, and recent data: teen use has actually decreased in every single one of them, and in some cases it has done so dramatically. Ninth graders use of marijuana in California has gone down about 40-50% since the law passed. So basically there have not been problems. The laws have protected a lot of really sick people, and for that reason the laws are extremely popular. There were polls last year on all the medical marijuana laws and they all got 59-79% support of the people. They are working very well.

[27] Karen Tandy resigned from the DEA on Oct. 22, 2007.

Robert Raich

Eric Sterling: **Robert Raich** is an attorney who practices in Oakland and San Francisco, California. He is a graduate of Harvard University undergraduate program and a graduate of the University of Texas School of Law. Rob was on the staff of the Federal Election Commission in Washington, D.C. Before practicing law, he was on the staff of the U.S. Senate and the Texas House of Representatives. He was a member of the California Attorney General's medical marijuana task force and chaired the caregiver issues subcommittee. He has been involved as lead counsel in litigation in this area for many years. He has lectured around the world on this subject.

Robert Raich: I would like to first talk a little about the Supreme Court's recent decision from 2005 in *Gonzales v. Raich*. That case dealt exclusively with one issue and one issue only: that issue was the extent of Congress' power to legislate pursuant to the Commerce Clause of the Constitution. We raised many other issues and arguments before the court. The court chose not to reach any of those issues. So all of those issues are back before the Ninth Circuit Court of Appeals on remand.[28] We had our oral argument last year and we are waiting for a decision from that court now. In a moment I will discuss what some of the other issues are that are active in that case on remand. But first I would like to address a few things that the Supreme Court's decision did NOT discuss.

The Supreme Court did NOT discuss the ability of states to permit medical cannabis legislation under state law. That was not at issue. Most particularly, the court did not in any way invalidate the state and local laws that Karen was alluding to just now. That is important because as Karen mentioned, only about 1% of the arrests happen for marijuana nationwide by the federal government under federal laws. That means 99% of the arrests happen under state laws. So patients in those states have a large degree of safety. Now, all decisions, from all courts anywhere, that have interpreted the federal-state conflict in the medical cannabis area have all come down squarely on the side of the medical cannabis laws. The federal government doesn't somehow prohibit those laws from being active. Most recently that was borne out in the decision about 2 months ago called *County of San Diego v. San Diego NORML*.[29] That was a California case

[28] The 9th Circuit affirmed the U.S. District Court of Northern California's denial of a preliminary injunction the following month in *Raich v. Gonzales*, 500 F.3d 850 (2007)
[29] *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008)

confirming that state medical cannabis laws are not pre-empted by the Supremacy Clause of the U.S. Constitution, by the Controlled Substances Act passed by Congress or by a treaty – the Single Convention on Narcotic Drugs.

Another thing the Supreme Court decision did NOT address was the right of doctors to recommend cannabis for their patients. That right was already secured by a case called *Conant v. Walters*[30] in which cer[tiorari] was denied. Therefore, as a general rule, there is no possibility of physician liability for a physician who is doing nothing but exercising his first amendment rights recommending in his medical opinion that a patient use cannabis.

Finally one thing that the Supreme Court's recent ruling didn't address was the doctrine of medical necessity for individual patients to use cannabis themselves. One thing the Supreme Court did talk about in a case Eric had mentioned was the medical necessity for cooperatives to provide medicine to patients. In a case called *United States v. Oakland Buyers Cannabis Cooperative* in 2001, the court ruled that that doctrine of necessity won't protect cooperatives. Since most of you aren't lawyers, let me just quickly explain what that doctrine of necessity means.

If certain conditions are meant, a person is excused for violating the law if he does so for the purpose of preventing a greater harm. For example, you are allowed to commit a theft, you can steal a boat, if you are doing so for the purpose of saving somebody who is out drowning. In the Supreme Court ruling of 2001, that could not apply to third parties like a cooperative. However, in a pretty vigorous concurrence, Justices of the Court indicated that the decision might well come down the other way if individuals were advocating their own individual necessities to use cannabis in contravention of the Controlled Substances Act. That is an issue that is now before the Court on remand in the *Raich v. Gonzales* case. We have an individual patient for whom no other medicine works, who's tried everything else, and who would die were it not for cannabis. That is a pretty serious side effect for not having the medicine you need. She would die a pretty rapid death without cannabis, and it would be a pretty excruciating and ugly death. Those are the uncontroverted facts of the case before that court.

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[30] *Conant v. Walters*, 309 F. 3d 629 (2002)

Another issue that is before the court, perhaps, really must more important in terms of its potential scope, is the issue of fundamental rights. What that means is all of you as Americans have certain rights which as a general matter the federal government cannot take away from you by Congress passing laws. Those rights are protected by the Fifth Amendment and the Ninth Amendment of the U.S. Constitution. Perhaps most fundamental of all of those fundamental rights is the right to life itself. Without life, you can't exercise any of your other rights. Most of the fundamental rights which have developed are not specifically enumerated in the Constitution. The right to life is one of those rare rights, along with liberty, which is specifically mentioned in the Declaration of Independence and the Fifth Amendment to the Constitution. Additionally, other fundamental rights involved in the case have to do with the right to bodily integrity, the right to ameliorate pain, and the right to the sanctity of the physician-patient relationship. There is ample authority in various other cases before the Supreme Court that the court has already ruled on protecting all of those rights from infringement from the federal government.

Another issue that we are waiting on the Court of Appeals to rule on in the case has to do with State's Sovereignty to regulate medical practices under the Tenth amendment to the Constitution. Now, one thing the court might do to avoid reaching the Constitutional issues entirely is focus on a statutory interpretation of the specific language of the relevant section of the Controlled Substances Act. That section, if interpreted correctly, would permit a patient to possess medical cannabis if it was obtained pursuant to an order from a physician practicing under a state law.

In closing, I would like to point out that New York has a proud history of being a leader on important public policy issues. For example, in 1923 Al Smith as governor of New York led the repeal of the Mullen-Gage Law.[31] That was a state law that had been passed to implement alcohol prohibition in New York State. It was intended to supplement the federal Volstead Act that Congress had passed to implement the Constitutional amendment for alcohol prohibition. Now that law was clogging the state courts with liquor offenders. When it was repealed in 1923, it made New York the first state to throw in the towel on alcohol prohibition. The federal government could

[31] Act June 1, 1923, c. 871; Laws N. Y. 1923, p. 1690.

continue to arrest alcohol prohibition violators using its resources and its federal laws, but New York State was no longer using its resources to do that. That could happen again now with medical cannabis. It is past time for New York to reclaim its traditional leadership role and to pass Chairman Gottfried's medical cannabis bill this term. Thank you very much.

Edward Jurith

Eric Sterling: I would like to now introduce **Ed Jurith**. Eddie is one of my oldest professional colleagues in Washington. Eddie is a New Yorker, graduate of American University where he graduated with honors, *cum laude* in government in 1973, then graduated from the Brooklyn Law School and practiced law here in New York City. In 1981 he came to Washington to work on the staff of the U.S. House of Representatives Select Committee on Narcotics Abuse and Control. In 1987 he was named the Staff Director of the Select Committee on Narcotics in the House of Representatives and served as Staff Director until 1993. In 1993, when the Clinton administration went to the White House, he went to work for the Office of National Drug Control Policy at the White House, first as the director of legislative affairs when Lee Brown was the Director, and then became the General Counsel for ONDCP in 1994 and has held that office for the past 13 years. In 2001 he was named by President Clinton to serve as the Acting Director of ONDCP until a new Director was sworn in, and that was John Walters in the current administration. Ed and I have worked together on anti-narcotic matters in the Congress and subsequently, he and I have collaborated on the American Bar Association Standing Committee on Substance Abuse on which he has been a leading figure. We are extremely grateful that he has come this evening to represent the federal government's position in this very important controversy. He is one of the most knowledgeable persons in Washington on this field and we are again delighted.

Edward Jurith: Thank you Eric for that very kind introduction. I did practice law up here in New York for about five years after graduating from Brooklyn Law School, and my former boss, Bill Erlbaum, now Justice Erlbaum of the Supreme Court in Queens County, is in the audience. So I feel like I am back doing a job interview, Bill, so I hope I pass again.

I think the speakers up to now have done a pretty good job of laying out the issues. I'd like to take a few minutes, not to rebut those points, but to give the federal perspective. And I want to give it a little bit of a context. I think we need to take a step back and think about what is at the heart of this issue. The heart of this issue is really one of political power and authority. I may be stealing a little bit of Professor Herman's thunder here, but remember the people vested the Congress with certain powers under the Constitution. That is a critical point to remember in this debate. That is the heart of political authority in this country. Remember that is what keeps us all united as a society. That political authority looks out after the national interest, not local parochial interests as important as they may be to localities. This is a very important point to remember in this

discussion. So, how do we balance those inherent authorities that the people have vested in the Congress, as opposed to the more transient ones?

Let us view the issue another way. What if California passed another ballot initiative revoking the ballot initiative they passed in 1996. Does this problem then all go away? Do those rights not exist? Certainly, if those rights are so fundamental, they shouldn't be subject to the whim of ballot initiatives. Again, where is the political power? Where is the political authority? Ultimately, going back to the early days of the republic, correct me if I'm wrong Professor, I think it was *McCulloch v. Maryland*[32], which ruled the states cannot usurp the fundamental powers that belong to the Congress. The states do not have the power to destroy the efficacy of federal law. They don't have that authority. They have a broad range of authority within their political jurisdictions, but they cannot upset what Congress legitimately determined within its scope of authority. Because ultimately as the Supreme Court held in *U.S. Term Limits v. Thornton*[33], in 1995, that the Congress operates in the interest of the nation as a whole, not for anyone particular state or jurisdiction. Okay, so with that framework in mind, let's talk a little bit about medical marijuana.

I have been involved with this issue since the passage of the ballot initiatives in California and Arizona in 1996 when General McCaffrey was the director of the office. For a while, in 2001 when I was the Acting Director, I became the main defendant in the Conant case – it was *Conant v. Jurith*. It made my mother very proud I finally had my name on a leading piece of litigation. So I have been dealing with this for a while, as Eric pointed out.

Oakland Buyers resulted in an 8-0 decision of the Supreme Court. What it held is that no medical necessity defense lies to the manufacturing or distribution of marijuana. The CSA enacted by the Congress in 1970 created what we call a "closed system" for all scheduled drugs. Schedule I-V and even the schedule II – V drugs, if used outside of a proper medical context, that use is also illegal. So Congress set up a very comprehensive system under the CSA. Congress made a determination based upon its Commerce Clause jurisdiction that Schedule I drugs, including marijuana, has no medical efficacy, except in

[32] *McCulloch v. Maryland*, 17 U.S. 316 (1819)
[33] *US Term Limits v. Thornton*, 514 U.S. 779 (1995)

research protocols, that is, properly approved protocols by the National Institute on Drug Abuse working with the FDA.

We have to respect under our law how our system works, the superiority of that legislative judgment. Rob is correct when he says that *Oakland Buyers* did not address whether a medical necessity defense exists for individual patients to use cannabis themselves. But interestingly, footnote 7 in *Oakland Buyers* specifically pointed out that the court didn't see that there would be any medical necessity exception to any of the Controlled Substances Act prohibitions, even if that patient was seriously ill and lacked alternatives for their ailment. Quoting – "lest there be any confusion, we clarify that nothing in our analysis or the statute suggests that a distinction should be drawn between the prohibition on manufacturing and distribution and the other prohibitions in the Controlled Substances Act." Again, Congress created a closed system. It is fairly exclusive in terms of what it covers.

Let's go to *Raich*, the *Raich* decision. As it was pointed out, these state laws operate within state authority. Section 903 of the Controlled Substances Act specifically states that the federal government does not pre-empt the field. The federal government has never argued that we pre-empt the field. Because Congress specifically says we don't, states are free to legislate their own controlled substances penalties, affirmative defenses, and other matters within the scope of their state criminal jurisdiction. We respect that. But those enactments in no way undefine what the ultimate federal authority is. The states can act within their sphere of influence, but it doesn't impact or detract or negate the federal law or the federal authority. Congress devised a closed system for the purpose of limiting access to the drugs outside of legitimate medical use.

During the *Raich* argument, the court had a lengthy discussion of how and why we have come to this conclusion. Congress has the authority to reach even a small class that claims it should be exempt from the reach of that authority because that Congressional power is all encompassing. But there was also a practical side of it. Justice Kennedy, in particular, pressed very hard on that argument: How can you segregate this medical market from the illicit market? The bottom line is that you can't. You can't do it. And that's way Congress has the authority even to make its reach of this regulation quite broad. Look at what's happening now in California. I beg to differ with

my colleagues' view that everything is fine out there in the medical marijuana world. It is not. There are over 300 clinics in California alone operating at various degrees of effectiveness and confusion. I found it interesting just this week a Reverend Scott Imler in California who was one of the authors of Proposition 215 said – and I quote - "when we wrote 215 we were selling it to the public as something for seriously ill people, said Imler, who opened the state's first marijuana dispensary in West Hollywood. It has turned into a joke. I think a lot of people have medicalized their recreational use." That was the fear that the court recognized in the *Raich* decision. That was the fear that Justice Kennedy discussed in oral argument. There is no way to segregate this market. Later on in this debate we can talk about the position of the FDA in terms of finding that there are, to date, no medical studies, or evidence that support that cannabis has any legitimate medical efficacy or that it is safe for the claims offered by its proponents. We have a system in this country for approving drugs under the Food Drug and Cosmetic Act.[34] That is another law that has been upheld constitutionally by the Court as a legitimate exercise of the Congress' Commerce Clause. There's a system to get drugs approved. So what I would suspect is, what needs to be done here, if there is legitimate support for this medical intervention, the burden is not on the federal government to throw up its hands and say, you know, we are going to back off. I think the burden lies on the proponents to establish that there is indeed medical efficacy for this drug. What the proponents of medical marijuana want is a pass – they want a pass. They don't want to play by the rules that every drug out there has to play by. That is not the American way. We don't set up special rules for some people. Everybody's got to play by the same rules. And that is the federal government's position.

I would like to touch a little bit, I think Rob[ert Raich] had pointed out, as we argued in the Ninth Circuit, on some of the other issues concerning substantive due process. I think the reach of the *Raich* decision gets to a lot of the substantive due process issues under the Fifth Amendment. As you know, for the non-lawyers in the room, basically for Fifth Amendment claims of substantive due process, we use an equal protection analysis as you would do under the Fourteenth Amendment. Clearly, Congress here, has made a rational determination. And in making that rational

[34] 52 Stat. 1040 (1938), codified at 21 U.S.C. §§ 301-399a.

determination, Congress is not required to making particularized finding in order to legislate. It doesn't have to account for every particular, unique situation a particular group of people may be confronted with. It has to act rationally within the scope of its authority, which it has done. Congress has to determine each activity that it regulates in a comprehensive fashion to be essential to statutory legitimacy. As recently as last month, Congress reauthorized the ONDCP (Office of National Drug Control Policy) - reiterated this notion that marijuana should not be available for medical purposes until it is approved by the FDA. We had a finding by Congress as recently as 60 days ago, exercising its commerce clause jurisdiction.

Lastly, we should also look at *United States v. Rutherford*[35], the old Laetrile case going back to 1979. In this decision by Thurgood Marshall, the same claims were made about laetrile: that dying cancer patients needed access to this drug in order to deal with their serious illnesses. In interpreting the Food, Drug and Cosmetics Act, not the CSA, Justice Marshall found that the Food, Drug and Cosmetics Act made no special provision for unapproved drugs to treat terminally ill patients. Congress has spoken, it has spoken in its area of authority.

Congress has made a decision that we only have approved drugs out there because we want to prevent the fraudulent use of drugs, we want to prevent charlatan medicine. Justice Marshall found in *Rutherford* that there is a key deference to Congressional judgment, and that it is particularly appropriate when the interpretation involved public controversy and Congress has acted not to correct any mischaracterization or interpretation. It is quite clear where the authority is. It lies in the Congress, in the people, to the Congress under the Commerce Clause.

So with that I will wrap up at that point, I look forward to further discussion and it is a pleasure to be with you all.

Eric Sterling: Ed, thank you so much for a very spirited articulation of the federal government's position under the constitution on these issues.

[35] *United States v. Rutherford*, 442 U.S. 544 (1979)

Susan N. Herman

Eric Sterling: **Susan Herman** is Centennial Professor of Law at Brooklyn Law School. She is a graduate of Barnard College and holds a Juris Doctor from NYU School of Law, and currently is General Counsel of the ACLU, and author of numerous law review articles and books on the Constitution, and on Criminal Law. She has been on the faculty since 1980, and so she too brings an enormous depth of experience and expertise to us.

Susan Herman: Thank you, Eric. My job as the Constitutional Law professor here is not to take sides, but to help you with the background of the Constitution. And I'm actually going to pick up where Ed Jurith was just leaving off, because I can tell those of you who are not lawyers that Ed was making very lawyer-like arguments. One part of the Constitution I will introduce you to, Article II, says that it is the job of the executive branch to enforce the laws that are duly passed by Congress. So Ed is quite properly doing his job as a member of the executive branch in arguing to you. His argument is based on what Congress decided. He is talking about process. Whether you are a lawyer or not, you can understand that it is perfectly possible for all the parts of government to follow a correct process and reach the wrong result. To me, that is the problem that we have here. From everything that I've heard, I think Congress has reached the wrong result. I think they're wrong. And I think the agencies are wrong, like the DEA, in concluding that there is no proper medical use for marijuana and that marijuana is so much more dangerous than any other drug that it can't even be prescribed. That is not where Ed was addressing his argument.

So, here is where we are: if the federal government is wrong and they are also supreme, what can anyone do about it? This, to me, is a classic problem in federalism. Justice Anthony Kennedy once said, and I thought this was a great metaphor, that the Constitution "splits the atom of sovereignty." Ed was talking about the political process being Congress, the national Congress. As Justice Kennedy points out, we have two different kinds of political entities in this Country. There is the national level, Congress and its federal law, and then there are also all the laws of all the different states. Now the problem that we have here is like a Pavlov's dogs problem in some ways. We have the federal government saying marijuana is so dangerous it cannot even be used for medical purposes, and you can be prosecuted for a crime if you distribute, possess, etc.

marijuana. On the other hand, we have states like California saying, in our judgment, marijuana is no more dangerous than any other drug we prescribe for various medical reasons and therefore we believe that people should have the right to use marijuana. Okay, so when you listen to this, especially as non-lawyers, you are thinking, Pavlov's dogs – yes or no, may I or may I not? This is where the political process and the constitutional scheme of federalism come in. Putting together what everybody else was saying, these are not really conflicting instructions. But the problem here is that the states cannot get you out of the fact that the federal government is wrong. All the states can do is not pile on. That's the basic problem here. In California or in New York, if the federal government wishes to come in and enforce its duly passed federal law, they have every right to do so.

The next part of the Constitution that Ed mentioned was the Supremacy Clause. If the federal government has a duly passed law, they can enforce it, anywhere in the country. They have enforced it. The DEA came into several homes of sick people in California and took away their drugs, although they didn't prosecute them. The *Oakland Cannabis Buyers* case that Rob Raich and Ed Jurith were both mentioning began with the federal government getting an injunction against the Cooperative and people who were distributing marijuana. The federal government, could, if it wished to, prosecute people under the federal law because it is a valid federal law, whether you think it's right or wrong. They haven't. Now I gather Rob is saying there is litigation pending on this subject. It is not so likely that the federal government will decide to prosecute people, according to Karen O'Keefe. The executive branch of the federal government says they are not going to go after sick and dying people, but they might well go after doctors who don't just recommend but prescribe, they might go after distributors, people who are growers, etc., even if they are sparing the patients. So, what happens is in California, we have this law, in New York we might have a similar law in the future, but there is no way that the state can guarantee that people who use medical marijuana under the state's appropriate conditions are going to be immune from the federal government. Karen is taking about probabilities, which is right. Rob is talking about what is actually happening in California so far. Legally, the federal government has every right to come in and prosecute, enjoin, do whatever they want. So the state law cannot prevent them from

doing that. Let me give you another example, one that is not about this particular problem, just to give you a sense how long this idea has been around.

In 1928 the Supreme Court decided a case called *Olmstead v. United States*[36], which is about the enforcement of prohibition laws. Federal agents go into Washington State in order to enforce this federal prohibition law and one thing that they do is to tap Mr. Olmstead's phone. This is a violation of Washington State law. Washington state law says we do not eavesdrop, it is a crime to tap people's telephones. So the Supreme Court gets this case. Mr. Olmstead argues that the prosecution cannot use this evidence because his state law protects him. His state law says that he has a right to privacy in his telephone conversations. The Supreme Court says that because of the Supremacy Clause, federal agents can do what they want even if Washington State disapproves.

I suspect that since we are in New York City and we are talking about the federal enforcement of drug laws and the federal enforcement of prohibition, you may be feeling a little sympathetic to the idea of state power – why shouldn't the state be allowed to protect you against the federal government? OK, if that's how you are feeling, let me say one word to you, which I suspect will be very resonant in this room, although it might not be in other places – Alabama. Back when we were in the Civil Rights Era, the federal government would come into Alabama and they would say to Alabama: you can't protect your citizens; you can't tell them you can have segregation if you want and the federal government can't prosecute you for racist acts. That's not the state's decision. It's a national decision. So what Ed was just describing is the national interest in this situation. Federalism doesn't have any particular political valence, so you can't conclude from this one example that you are generally against federal power trumping state decisions, because you are not. I bet that many of you would approve of federal power if we were talking about federal civil rights statutes trumping state decisions.

This is where I want to talk a little bit more about the *Gonzales v. Raich* case, which several people have already discussed. The big issue in that case, as has been described, was whether Congress has enough power under the interstate commerce clause to enforce its federal drug laws about marijuana even in California when California

[36] *Olmstead v. United States*, 277 U.S. 438 (1928)

doesn't like it. The chief argument that Rob and other people were making is that what was happening in California was not interstate commerce because it was all happening within the state of California. Marijuana was being grown there, distributed there and used there and it never left the state. That was the big legal issue in the case. The Supreme Court said: it doesn't matter, it is still interstate commerce because marijuana being sold in California is part of a national market, and what happens in California could have a ripple effect other places. This is what they decided and it was an important decision, 6-3. What was very interesting to me about the case was looking at the Justices who joined the majority and dissenting opinions.

The dissenters were saying that the federal government doesn't have enough power here, they should not be allowed to tell people in California what to do. California should have the right to have this medical marijuana use if it wants to. The Justices saying this were Chief Justice Rehnquist, Justice Thomas and Justice O'Connor, who wrote this opinion. To them, this is a states' rights opinion. Justice O'Connor says in her dissenting opinion, if I lived in California, I wouldn't have voted for this, I don't like this idea, I think it is a bad idea. I am against this use of drugs. The majority opinion written by Justice Stevens is written by people who may well be somewhat sympathetic to the kind of argument that Rob is talking about -- that people should have their right to autonomy, liberty or life. Those Justices are saying, we might well have approved this law but we are saying that the federal government does too have power. Why are they saying that even if they disagree with the result? Alabama. They have been arguing for years with Justice O'Connor and Justice Rehnquist and Justice Thomas about states' rights and about the power of the federal government to pass civil rights laws. Many of the other cases about the extent of the power under the Commerce Clause were cases about federal civil rights laws. Okay, so the battle lines were drawn, and a lot of people found the results very curious – it was as if the Justices were switching sides politically because of their sense of when the federal government should be allowed to do what it wants, and when the state should be allowed to have its own way.

The one other thing I am going to tell you about, because I think this is something we may want to get into in the discussion, one other part of the Constitution that comes into play here, is the Tenth Amendment. One thing that Karen [O'Keefe] and others

were saying is that *Gonzales v. Raich* – Rob[ert Raich] makes this point too -- *Gonzales v. Raich* does not wipe out the California law. *Gonzales v. Raich* says that the federal law is supreme. Now, some of my students when we studied this case in Con Law, said, how can it be that the California law survives? Isn't this the Pavlov's dogs part? California is saying that it's okay to buy and sell marijuana, and the federal government is saying that it's not. Well, this is not a direct conflict. What *Gonzales v. Raich* says is that if the federal government wishes to come into California or New York to enforce its duly passed law, unless they think better of it, they can.

So what does the California law mean then? It means that California is promising that its agents won't pile on. My students say, can't the federal government tell the state to do certain things, like prosecute drug cases? The answer is no, they can't because of the Tenth Amendment. The Tenth Amendment says that the rights that are not given to the federal government are reserved to the states. What the Supreme Court has interpreted that to mean in a case called *Printz v. United States*[37], is that the federal government cannot commandeer state officials to enforce its laws. *Printz* was a case involving the Brady Act, and it was about whether or not the federal government could enlist local law enforcement agents to do background checks before people could by a gun. And the Supreme Court said, no, you can't do that. There are two different governments here: there is the federal government, and there is the state government. If the state is paying its law enforcement people, its sheriffs, its police and so forth, with its own money, the state gets to decide what those people are going to do. The federal government cannot steal them away, put a federal hat on them, and make them enforce federal law. It is two different systems. If the federal government wants to enforce its drug laws, it is going to have to come up with the money to pay for enough federal people to enforce those drug laws. But it cannot conscript, it cannot commandeer the state people to do it for them. And that is where all this comes down, and so at the end of the day, it's not really about Pavlov's dogs, it's about two different systems. And as usual, the best thing you can do to figure out who has which power is to follow the money. Who is paying the enforcement agent? Is it the federal government or the state

[37] *Printz v. United States*, 521 U.S. 898 (1997)

government? A lot of very interesting questions arise because we have these two systems that are in tension, with the federal government wanting to enforce, to the extent they wish to, this prohibitive system of drug control, and California having a different idea.

Where Tenth Amendment issues might really come up is in the following situation: if the federal government wants to go into California because they decide they want to enforce their law, to what extent can they force people in California to cooperate with them without crossing the anti-commandeering line which the Tenth amendment says they can't cross? Can they subpoena state records? Probably, through the courts. Can they get state law enforcement people to turn over lists -- there are a lot of lists being generated under the state medical marijuana laws -- can the federal government commandeer those? So that is where I think a lot of very interesting questions are going to come up, if the federal government decides it does want to do enforcement. But meanwhile, whatever New York decides to do about its own marijuana policy, you all should be perfectly clear that New York cannot grant you immunity from federal law. Thank you.

Richard Gottfried

Eric Sterling: Friends, Assemblymember **Richard Gottfried** has been able to join us, after his long journey down from Albany and we are very grateful that he came directly here. It is presumptuous of me to introduce you to your constituents here in the City of New York, but Assemblymember Richard Gottfried has served in the Assembly since 1970, and it's striking to me that at that time I was a college dropout. And so, Mr. Gottfried is a graduate of Cornell University in 1968, Columbia University School of Law in 1973 and has been a leader not only in the State of New York but throughout the nation in health policy matters. Numerous laws benefiting the people of the State of New York have come from the pen, so to speak, of Assemblymember Richard Gottfried and we are really very honored that you came. We'll note that you are a member of the Association of the Bar of the City of New York and so we are very glad that you come back to the Association you are a member of to address your legislation, to tell us about it, and some of the political prospects, and your assessment of the federal and state conflicts, and how that might be resolved under your legislation. Thank you very much.

Richard Gottfried: Good evening. Thank you for the introduction. There are some things you have invited me to talk about that I feel competent to talk about in this hall. Federal-state relations may not be one of them. So, what I want to do is talk a little about why the bill is structured the way it is, and I'll run through the provisions in very summary form, and then talk a little about prospects.

The model we have constructed, and we didn't necessarily invent it here in New York, although I am happy to be in a line of work where plagiarism is encouraged … has evolved in its structure in the ten years since I first introduced it. The bill is designed to try to fly as far under the radar, if you will, of the federal government as possible, and to avoid, as much as possible, conflict with federal law. So, for example, it does not use the word "prescribe" because under federal law, marijuana is a Schedule I drug and a physician who prescribes a Schedule I drug will lose his or her DEA license to prescribe, and we don't want to put a physician in that kind of position. So we have created essentially a parallel structure to prescribing, which we call certifying.

Also, because of the federal role, we have stepped away from where the bill had been a year or two ago in relying on hospitals and pharmacies to acquire and distribute

medical marijuana.[38] That would have been a nice way to operate, but our concern was that we would be putting those institutions directly in the sights of the Justice Department and we didn't want to do that either. We have also written it to minimize as much as possible what the physician or other prescriber does. (We say "prescriber" because nurse practitioners can also prescribe controlled substances.) We wanted to minimize their role to make it as much as possible simply a doctor-patient speech activity: that the doctor would be just expressing an opinion and not going beyond that. And in part, because of our need not to have outside organizations involved in the manufacture and distribution of medical marijuana, the only provision in the bill dealing with manufacture is home grown, grown by the individual patient or somebody called a designated caregiver, which I will describe in a moment.

A couple of points about the structure of the bill itself. First, a lot of terms appear not to be defined. You may wonder what marijuana is. That's not defined in the bill because the bill is part of Article 33 of the Public Health Law, in which there is a whole slew of definitions. And by being in Article 33, we adopt all of the definitions of Article 33. Another thing that people often say when they look at the bill, "It is nice that you've said here in the Public Health Law that people can do this or that, but you haven't amended the Penal Law. They are going to go to jail for violating the Penal Law." Well, they won't. Because the Penal Law is structured very carefully. (And yes, I have been in the Legislature for a long time, but that part of the Penal Law was written before I got there. The Legislature was in business for 193 years before I got there.) The Penal Law makes various drug offenses illegal if the act is "knowingly and unlawfully." If you knowingly and unlawfully possess, if you knowingly and unlawfully sell, etc. The Penal Law defines "unlawful" in Article 220, the controlled substances article, as meaning in violation of the Public Health Law. So if you make something legal under the Public Health Law, by operation of law, you have made it legal under the Penal Law.

The bill defines several important terms. I won't recite to you all the definitions, but one is "serious condition." That one I will read. "'Serious condition' means a life threatening condition or a condition associated with or a complication of such a condition

[38] A. 9016 mandates the use of registered organizations to manufacture, acquire and distribute medical marijuana.

or its treatment."[39] People say if this law passes, I can just go to my doctor and say I feel bad, can you give me medical marijuana. NO. And that definition was written in consultation with the Medical Society of the State of New York. And that was the central part of the bill that they were focused on. They were also interested in the provision toward the end that says if you act reasonably and in good faith under this statute, you can't be subject to civil or criminal liability. The Medical Society is always interested in that part of any bill. We define a "certified patient" – a certified patient is a patient who has been certified by a practitioner, another term defined in Article 33, which means someone who has authority to prescribe drugs, someone who is certified by a practitioner as having a serious condition, and the certification also has to say that that condition can be treated by the medical use of marijuana and that other possible treatments would not work as well. The certification has to have a variety of other information in it, which I will talk about in a moment.

We also describe a designated caregiver, someone designated by the patient who can essentially provide medical marijuana to that person, acquire it on behalf of that person, etc. That is become many users of medical marijuana are people who are very debilitated and wouldn't be in a position to do much more than consume the medical marijuana. It is not a concept unknown in our law. Article 33 defines the concept of an ultimate user of a drug, which is primary the person who is the subject of the prescription, but it is also written that somebody else can go and pick up that person's drugs from the drug store. If I am prescribed a controlled substance under the law and I am at home, my wife can go to the drug store and pick up the prescription for me without worrying that she will be arrested for unlawful possession of a controlled substance, because she is covered by the definition of an ultimate user.

The certification specifies the person has a serious condition. You don't have to name it because we try to protect patients' privacy. It has a lot of information about the practitioner's office and phone number and DEA number and the patient's address and phone number and things like that. A certification is valid for a year, from the date made, or less if the certification specifies a shorter period. It is renewable and a copy is put in

[39] In A. 9016, "serious condition" means a severe debilitating or life-threatening condition, or a condition associated with or a complication of such a condition or its treatment (including but not limited to inability to tolerate food, nausea, vomiting, dysphoria or pain).

the patient's medical record and another copy is given to the patient. Now, with a controlled substance prescription a copy ultimately ends up in the hands (or electronically transmitted) to the Health Department. We have created an analogy to that, which I'll talk about in a moment. First let me say that once a patient is a certified patient or person that is a designated caregiver, they are then allowed by the bill to possess, deliver, use, and manufacture medical marijuana for a certified medical use which is medical use by the certified patient as is spelled out in the certification. There are a variety of restrictions. You can't consume it in a public place, or in a vehicle or on a boat. You can, if you are the certified patient or designated caregiver, possess up to twelve plants, or up to 2.5 ounces of usable marijuana, which is defined as harvested leaves and flowers. So if you harvested from your plant, you are under the 2.5 ounce definition; if your plant is still growing nicely it's the twelve plant limit. Once you have your certification, you apply to the Health Department for a registration card, attached to the application is your certification and you send it off to the Health Department. So that is how they get a copy of your certification. This is similar to their getting a copy of your prescription for a controlled substance. They then send you a registration card. So if a police officer comes into your home and says "what are you doing?" you can say "I have a registration card!" Or if you are a designated caregiver and you are carrying the marijuana from your home where you are growing it to the patient and you are stopped, you have your registration card.

The bill has a five-year sunset. The Health Department would be evaluating the law during that time. Every two years the Health Department must report to the Legislature about how it's working.

If you are interested, it was formally introduced this week. It is Assembly bill A.4867[40]., probably by tomorrow it will be on the Assembly's website or the Legislative Research Service site, and I would imagine if there are other websites that have access to that same data, the bill should be available. If you have last year's bill, the B print, it should be the same as this year's bill.

Let me talk about the prospects of the bill. I think interestingly it has acquired over the years a rather striking broad spectrum of support: some people from some of our

[40] The present proposed legislation is A9016 and S4041-B.

most urban areas in the state, people from some of our most rural parts of the state, people from upstate, downstate, Democrats. We have a bunch of Republicans on the bill. Last year Senator Vincent Leibell from the Putnam County area carried the bill. I am hopeful he will put it in again this year. The bill has not passed either house, but we are pretty optimistic that we are not far from that goal. Many of you may know that during a candidate debate during the primary, Eliot Spitzer was asked a lightening round question where you have to answer yes or no, do you support medical marijuana and he snapped out no. People have talked with him both before that and since that, and with people in the administration, and I think that snap answer is not a definitive statement of the administration's position. And I think, given the people who are in the Health Department and on the Governor's health team in his office, I would be optimistic that we may be able to persuade him. I think that if the Governor does support the bill, I think it would move us even farther forward. At the time of the Supreme Court decision, which was 2005, Senate Majority Leader Joe Bruno, just before the court decision, came out with a very positive statement about the bill. I think if the court decision had come down in July rather than June, the Senate might well have passed the medical marijuana bill, in which case the Assembly would have as well, and then we would have been trying to convince Gov. Pataki that summer. Unfortunately, it came down smack in the middle of June and totally disrupted everybody's thinking and by the time everybody's thinking had gotten back on track, the session was over. So, there is significant major bi-partisan support for the bill in the Legislature and we could well become the 12th state to enact such a law. Thank you.

Eric Sterling: Thank you very much Assemblymember Gottfried.

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