



FEDERALISM ISSUE: SHOULD STATES BE ALLOWED TO LEGALIZE MARIJUANA DESPITE ITS FEDERAL STATUS AS A CONTROLLED SUBSTANCE?

BY ELLEN LEMPRES '18 & CAROLINE PECK '18

Image Credit: Jennifer Martin

The Controlled Substances Act (CSA) of 1970 categorized marijuana as a Schedule I drug: a drug which has a “high potential for abuse,” “no currently accepted medical use,” and “a lack of accepted safety for use... under medical supervision.”¹ In 2005, the Supreme Court examined California’s Compassionate Use Act of 1996, which permitted the manufacture and consumption of marijuana for medical purposes. *Gonzales v. Raich* reaffirmed the federal government’s ability to regulate marijuana cultivation and possession in the states under the Commerce Clause, which grants federal supremacy over interstate commerce.² Despite the ruling, 23 states currently have comprehensive medical marijuana provisions, and 17 additional states allow limited medical marijuana usage.³ Within the last five years, Colorado, Oregon, Washington, and Alaska have passed provisions allowing the recreational use of marijuana, and 5 states are considering similar measures on their ballot in November, in addition to 4 states considering medical marijuana provisions.⁴ After Colorado passed its recreational usage initiative in 2012, questions arose about how federal law regarding cannabis use would be enforced within the state. The Office of the U.S. Attorney General released a memo in 2013 stating it would defer to state enforcement agencies regarding marijuana regulations, provided states still prioritize particular enforcement objectives.⁵ In August, 2016, however, the Drug Enforcement Administration declined a petition for the rescheduling of marijuana.⁶ It is likely the next president will have to address this clash between federal and state regulation of marijuana.

Although it is often seen as a “liberal” position, many libertarians and some conservatives, such as National Review founder William F. Buckley, have long favored loosening marijuana laws. Legalization of marijuana is not an exclusively Democratic party platform, and this

is evident when one examines the states that have passed legalization measures. While the state of Oregon is led by both a Democratic governor and legislature, Washington and Colorado have Democrats and Republicans in control of state offices. And while Alaska’s State Senate and House are held by a Republican majority, Governor Bill Walker ran for office as an Independent candidate.⁷

The conflict between state and federal cannabis regulation also reached the Supreme Court in 2016. Nebraska and Oklahoma filed a petition of certiorari against Colorado on the grounds of original jurisdiction, claiming Colorado’s recreational use provision violates the Supremacy Clause of the Constitution by legalizing marijuana.⁸ Nebraska and Oklahoma further claimed that Colorado’s law undermines their efforts, as neighboring states, to enforce the federal law within their borders.⁹ The plaintiffs were supported by an amicus curiae brief from all nine former DEA administrators, while Colorado was supported by an amicus curiae brief from Washington and Oregon. On December 16, 2015, the federal government filed a brief amicus curiae positing that the circumstances do not meet original jurisdiction standards for the Supreme Court, and the case should not be heard by the court.¹⁰ The Supreme Court agreed, and denied the petition in March, 2016.¹¹ The denied petition may not represent, however, a final word from the Supreme Court on state provisions legalizing marijuana.

THE CANDIDATES

The Democratic candidate, Hillary Clinton, has addressed the issue of marijuana mainly through policy proposals regarding criminal justice system reform, and seeks to change the federal classification of marijuana as

a Schedule I drug. Hillary Clinton's official campaign supports "laboratories of democracy" in states that have legalized marijuana, with certain provisions which parallel those of the Attorney General's office, as well as the rescheduling of marijuana to a Schedule II substance.¹² Clinton maintains that moving marijuana to a Schedule II would enable research on the drug to help determine appropriate classification.¹³ "Laboratories of democracy" alludes to Supreme Court Justice Brandeis's dissenting opinion in *New State Ice Co. v. Liebmann* (1932), as well as Justice Sandra Day O'Connor's reference to the idea in her dissenting Raich opinion.¹⁴ A senior policy advisor to Clinton affirmed her position on the rescheduling of marijuana in August, 2016, in response to the DEA's announcement.¹⁵ In addition, the 2016 Democratic Party Platform gives further support to rescheduling, even suggesting the change could provide "a reasoned pathway for future legalization."¹⁶ Thus far, Clinton's rhetoric has fallen short of proposing full legalization of the drug.

Republican candidate Donald Trump has made fewer statements on the question of marijuana. Donald Trump has been open to the medicinal legalization of cannabis, and, though he has been critical of full legalization in the past, more recently he commented that, "In terms of marijuana and legalization, I think that should be a state issue, state-by-state."¹⁷ In an interview in February, 2016, Trump hesitated to suggest there should be a federal policy on marijuana because "in some ways... [marijuana is] good and in other ways, it's bad."¹⁸ This hands-off approach appears disparate from the 2016 GOP Platform, which included no provision for the rescheduling of marijuana, instead complaining that "The progress made over the last three decades against drug abuse is eroding, whether for cultural reasons or for lack of national leadership. In many jurisdictions, marijuana is virtually legalized despite its illegality under federal law."¹⁹ ■

2016 SWING STATES AFFECTED:

- › COLORADO
- › FLORIDA
- › NEVADA

¹ Comprehensive Drug Abuse Prevention and Control Act, 1970, Pub. L. No. 91-513, 91st Congress.

² *Gonzalez, Attorney General, et. al. v. Raich et. al.*, 545 U.S. 1, No. 3-1454 (June 6, 2005).

³ "State Medical Marijuana Laws." National Conference of State Legislatures. December 10, 2015. Accessed December 15, 2015. <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

⁴ Wallace, Ajlicia. "Definitive Guide to Marijuana on the 2016 Ballot: Recreational & Medical Initiatives." *The Cannabist*. July 14, 2016. <http://www.thecannabist.co/2016/07/14/definitive-guide-us-states-voting-recreational-medical-marijuana-inovember-2016-election/58063/>.

⁵ "Guidance Regarding Marijuana Enforcement." James M. Cole to All United States Attorneys. August 29, 2013.

⁶ "DEA Announces Actions Related to Marijuana and Industrial Hemp." U.S. Drug Enforcement Administration. August 11, 2016. Accessed August 16, 2016. <https://www.dea.gov/divisions/hq/2016/hq081116.shtml>.

⁷ "2016 Governors and Legislative Partisan Splits." Stateside Associates. Accessed December 10, 2015. <http://www.stateside.com/states/governors-legislatures-partisan-splits/>.

⁸ "Nebraska and Oklahoma v. Colorado." SCOTUSblog. January 6, 2016. <http://www.scotusblog.com/case-files/cases/nebraska-and-oklahoma-v-colorado/>.

⁹ "Motion for Leave to File Complaint, Complaint, and Brief in Support", *Nebraska and Oklahoma v. Colorado*. <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/12/Neb.-Okla.-original-suit-vs.-Colorado-12-18-14.pdf>

¹⁰ "Brief for the United States as Amicus Curaie", *Nebraska and Oklahoma v. Colorado*. <http://www.scotusblog.com/wp-content/uploads/2015/12/Original-No.-144-US-CVSG-Br.pdf>

¹¹ "Nebraska and Oklahoma v. Colorado." SCOTUSblog. March 21, 2016. <http://www.scotusblog.com/case-files/cases/nebraska-and-oklahoma-v-colorado/>.

¹² "Criminal Justice Reform." Hillary Clinton. Accessed December 8, 2015. <https://www.hillaryclinton.com/issues/criminal-justice-reform/>.

¹³ Seitz-Wald, Alex, and Monica Alba. "Hillary Clinton Calls for Easing Restrictions on Marijuana." MSNBC. November 9, 2015. <http://www.msnbc.com/msnbc/hillary-clinton-calls-easing-restrictions-marijuana>.

¹⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), No. 463 (March 21, 1932); *Gonzalez, Attorney General, et. al. v. Raich et. al.*, 545 U.S. 1, No. 3-1454 (June 6, 2005).

¹⁵ Baca, Ricardo. "Government Officials (Team Hillary, Too) Respond to DEA's Pot Rescheduling Denial." *The Cannabist*. August 11, 2016. <http://www.thecannabist.co/2016/08/11/dea-rescheduling-marijuana-hillary-clinton/60849/>.

¹⁶ "2016 Democratic Party Platform." Democratic National Convention. July 21, 2016. <https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf>.

¹⁷ Johnson, Jenna. "Trump Softens Position on Marijuana Legalization." *Washington Post*. October 29, 2015. <https://www.washingtonpost.com/news/post-politics/wp/2015/10/29/trump-wants-marijuana-legalization-decided-at-the-state-level/>.

¹⁸ Trump, Donald J. "Trump Talks China, Tariffs and Immigration on 'The Factor'" Interview by Bill O'Reilly. Fox News. February 11, 2016. Accessed September 21, 2016. <https://www.youtube.com/watch?v=nHsW-ewjFeA>.

¹⁹ "Republican Platform 2016." 2016 Republican National Convention. Accessed September 16, 2016. [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf).