Federal Cannabis Law Overview

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Timeline of Cannabis Reform in US

- **1850:** In the United States, cannabis was sold over the counter and was commonly used as treatment for sundry illnesses including, but not limited to, cholera, alcoholism, opiate addiction, and convulsive disorders.

  1936: Every state had passed a law to restrict possession of cannabis, eliminating its availability as an over-the-counter drug.

  1937: The Marihuana Tax Act of 1937 was passed to prohibit all non-medical use of cannabis in the United States. However, it also limited medical use due to fees and regulatory restrictions that imposed a significant burden on doctors prescribing cannabis. The American Medical Association opposed the Marihuana Tax Act of 1937 because the tax was imposed on physicians prescribing cannabis, retail pharmacists selling cannabis, and medical cannabis cultivation and manufacturing. The AMA's opposition was unsuccessful.

  1970: On October 27, 1970, the Comprehensive Drug Abuse Prevention and Control Act was enacted. Title II of the act – the Controlled Substances Act – established categories varying from Schedule I (the strictest classification) to Schedule V (the least strict). Cannabis was provisionally placed in the Schedule I category, thereby prohibiting its use for any purpose.

- **1972:** Following the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, a commission was formed under decree of the act to study the rising use of cannabis in America, and subsequently make policy recommendations. Formally known as the National Commission on Marihuana and Drug Abuse, the Shafer Commission – led by former Pennsylvania governor Raymond P. Shafer – determined in its March 1972 report to the President and Congress that the societal harms caused by cannabis were limited, and recommended removal of criminal penalties for possession and distribution of small amounts of the drug. Although no federal reforms resulted, the report's findings helped influence the passage of decriminalization laws in a number of states during the 1970s.

  1979: Operation Green Harvest begins in Hawai'i and California, expanding to 25 states by 1982.

1996: California voters approved Proposition 215 to legalize medical cannabis. However, the Clinton administration opined its opposition to the proposition and threatened to revoke the prescription-writing abilities of doctors who recommended or prescribed the drug.

Timeline of Cannabis Reform in US, Cont'd

- **2000:** In response to the Clinton administration's aversion to Proposition 215, a group of physicians challenged this policy as a violation of First Amendment rights, and in September 2000 prevailed in the case *Conant v. McCaffrey*, which allows physicians to recommend – but not prescribe – medical cannabis.
- Hawaii became the first state to legalize medical cannabis through an act of state legislature.

  2005: During the G.W. Bush administration, agents were enforcing federal laws against state-legal medical cannabis cultivators and patients. In June 2005, the Supreme Court ruled in favor of the federal government's ability to enforce federal cannabis prohibition against individuals complying with state medical cannabis laws in the case *Raich v. Gonzales*.
- In Gonzalez v. Raich 545 U.S. 1 (2005), the U.S. Supreme Court ruled (6–3) that Congress acted within its authority under the *inter*state Commerce Clause of the U.S. Constitution when it prohibited even *intra*-state *non-commercial* cannabis possession and cultivation (as it had done in the Controlled Substances Act).
- In *Gonzales* the plaintiffs argued that because the cannabis in question had been grown, transported, and consumed entirely within California and in compliance with California medical cannabis laws and did not involve any commercial activity and as such could not be regulated by the federal government through the interstate Commerce Clause.
- The Supreme Court disagreed, reasoning that cannabis grown within California for medical purposes is indistinguishable from illicit marijuana and that because the intrastate medical cannabis market contributes to the interstate illicit marijuana market, the Commerce Clause applies. Even where California citizens are using medical cannabis in compliance with state law, those individuals and businesses can still be prosecuted by federal authorities for violating federal law.
- To combat state-approved medical cannabis legislation, the Drug Enforcement Administration continued sporadic targeting and arrests of medical cannabis providers and the seizure of medical cannabis and the business assets of growers and medical dispensaries.

Timeline of Cannabis Reform in US, cont'd

2009: In the first term of the Obama administration, Attorney General Eric Holder stated that only medical cannabis providers "who violate both federal and state law" would be targeted for prosecution. States, starting with New Mexico, began licensing and regulating commercial medical cannabis activity. Deputy Attorney General David Ogden issued a memorandum with guidelines for federal enforcement while also largely affirming the earlier-stated hands-off approach for state-legal medical cannabis activities.

2011: Deputy Attorney General James M. Cole issued a memorandum specifically noting that the "Ogden memo" protections applied only to individuals and not large commercial operations. Federal authorities resumed raiding medical cannabis operations that were unregulated and unlicensed, including in Montana and California — but seemingly state-legal, but did not target licensed, regulated businesses — such as in New Mexico.

2012: Colorado and Washington become the first two legalization states, after voters enact adult-use legalization laws on the November ballot.

2013: In August 2013, the U.S. Department of Justice issued a second Cole Memo that offered guidance to prosecutors and law enforcement on where to focus cannabis enforcement efforts for both medical and adult-use cannabis. Federal raids and prosecutions of state-legal cannabis businesses that did not implicate these priorities ceased and have not resumed. The enforcement priorities included: preventing distribution of cannabis to minors; preventing cannabis revenue from funding criminal enterprises, gangs, or cartels; preventing cannabis from moving out of states where it is legal; preventing use of state-legal cannabis sales as a cover for illegal activity; preventing violence and use of firearms in growing or distributing cannabis; preventing drugged driving or exacerbation of other adverse public health consequences associated with cannabis use; preventing growing cannabis on public lands; and preventing cannabis possession or use on federal property. The memo was rescinded by Attorney General Jeff Sessions in January 2018.

2014: Congress adopted the Rohrabacher-Farr amendment, included in a spending bill, prohibiting the Justice Department from spending funds to interfere with the implementation of state medical cannabis laws. The provision has been included in every subsequently spending bill.

In December 2014, the Justice Department announced a policy to allow recognized Indian tribes to legalize the use and sale of cannabis on American Indian reservations. The laws on reservations are allowed to be different from state and federal laws, and as has been the case with state recreational legalization the federal government said it would not intervene as long as strict controls are maintained. In 2015, the Flandreau Santee Sioux Tribe (of South Dakota) voted to legalize the recreational use of cannabis. Others such as Yakama Nation and the Oglala Sioux Tribal Council have rejected legalization on their reservations.

2016: In August 2016, the Ninth Circuit Court of Appeals held that the spending provision also prevented the targeting of *businesses* complying with state medical cannabis laws. This was counter to the DOJ 's interpretation. (United States v. McIntosh)

2018: The 2018 United States FARM bill contained provisions legalizing hemp production with low levels of delta-9-THC. It may have inadvertently allowed production of hemp products with high levels of delta-8-THC, which is also psychoactive and has since become more popular recreationally across the U.S.
2019: In November 2019, the U.S. House Judiciary Committee passed the most far-reaching cannabis legalization bill to ever receive a committee vote in Congress (the MORE Act). This was an historic moment in our decades-long campaign to end cannabis prohibition at the federal level.

2020: In December 2020, the U.S. House of Representatives voted in favor of the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act in a 228-164 vote. This vote marked the first time in half a century that a chamber of Congress voted on a bill to end the federal prohibition of cannabis. The MORE Act is one of the most robust cannabis reform bills ever introduced in the U.S. Congress. If enacted, the MORE criminal penalties under federal law. Tulsi Gabbard was a cosponsor and Rep. Case voted yes.

Timeline of Cannabis Reform in US, Cont’d

2021: Supreme Court justice Clarence Thomas stated that "A prohibition on interstate use or cultivation of marijuana may no longer be necessary or proper to support the federal government's piecemeal approach," criticizing "[t]he federal government's ... half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana.”

In response to questions posed by Senator Cory Booker, President Biden's nominee for United States Attorney General, Merrick Garland, stated during February 2021 congressional testimony that he would reinstitute a version of the Cole Memorandum. He reiterated the statement that the Justice Department under his leadership would not pursue cases against Americans "complying with the laws in states that have legalized and are effectively regulating marijuana," in written responses to the Senate Judiciary Committee provided around March 1.

President Joe Biden became the first president to propose a budget with the Rohrabacher–Farr amendment included. On March 15 the amendment was renewed through the signing of the FY 2022 omnibus spending bill, effective through September 30, 2022

Rohrabacher – Farr Amendment Text

"None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

Federal Preemption: When state law and federal law conflict, federal law displaces, or preempts, state law, due to the Supremacy Clause of the Constitution. U.S. Const. art. VI., § 2. Pr

- The legal question is no different between medical & adult-use laws
- In the 26 years since states started passing medical cannabis laws, courts have rejected numerous preemption claims
- The federal government has never alleged in court that federal laws preempt (or nullify) state medical marijuana or legalization laws.
  - The DOJ argued in favor of dismissing a lawsuit claiming Arizona's medical marijuana law was preempted. (The case was dismissed.) *Arizona v. United States*, No. CV 11-1072-PHX-SRB, slip op. at 2 (D. Ariz. Jan. 1, 2012).
- The CSA only preempts state laws if "there is a positive conflict" between state and federal law "so that the two cannot consistently stand together." (21 U.S.C. 903 says it is not intended to preempt the field of drug laws)
  - Courts have generally held that a state law is only preempted by the CSA if it is "physically impossible" to comply with both state and federal law. (For this reason, states avoid laws with state-run stores or cultivation — as workers would be required to break federal law.)

Non-Commandeering and Preemption

- The U.S. system of government is one of dual sovereignty where the states can and do serve as "laboratories of democracy."
- The federal government is free to enforce its own marijuana laws but requiring state agents to enforce federal laws would be unconstitutional commandeering of a state's resources (violating the 10th Amendment).
  - As an Arizona court ruled, while rejecting a preemption challenge, "It is of considerable consequence that it is Arizona's attempt at partial decriminalization with strict regulation that makes the AMMA vulnerable ... This view, if successful, highjacks Arizona drug laws and obligates Arizonans to enforce federal prescriptions that categorically prohibit the use of all marijuana. The Tenth Amendment's 'anti-commandeering rule' prohibits Congress from charting that course." (*White Mountain Health Center v. Maricopa County.)*
- In *Murphy v. NCAA,* U.S. (2018) the Supreme Court ruled that Congress' attempt to prohibit state authorization of sports gambling "violates the anticommandeering rule.'' "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."
  - The same reasoning applies to well crafted medical cannabis and adult-use legalization laws. Even if Congress wanted to preempt them, it could not due to the non-commandeering rule and 10th Amendment.

Where Are We Now

- **2022:** 37 states (including Hawaii) have comprehensive medical cannabis laws and 19 have adult-use legalization laws. Up to 6 more states will have legalization ballot measures in November.
- In practice, the “Cole memo” has been respected, even after it was rescinded by then-AG Jeff Sessions. Thousands of adult-use cannabis businesses have openly operated, with the first opening in 2014, without being raided or operators prosecuted.
- However, federal illegality creates challenges, including:
  - 280e — cannabis businesses’ inability to deduct business expenses (both medical and adult-use)
  - difficulty finding banking, high fees for banking, no loans, and the inability to accept credit cards
  - implications for immigration and people living in federally subsidized housing
- Efforts to change federal law continue. Sen. Majority Leader Schumer is refining a federal legalization bill (the CAO Act) based on input.
- States with legalization and regulation in place will be positioned to participate in the interstate and international market upon federal legalization.

Recent Efforts in HI to address conflict between state & federal law

HOUSE OF REPRESENTATIVES
THIRTY-FIRST LEGISLATURE, 2022
STATE OF HAWAII

H.C.R. NO. 147

HOUSE CONCURRENT RESOLUTION

REQUESTING THAT THE DRUG ENFORCEMENT ADMINISTRATION ASSIST THE HAWAII DEPARTMENT OF HEALTH WITH OBTAINING A FEDERAL EXEMPTION FOR THE STATE AUTHORIZED USE OF CANNABIS IN HAWAII.

WHEREAS, the ongoing conflict between the state and federal regulation of cannabis is causing devastating consequences for Hawaii's lawfully registered medical cannabis patients and licensed dispensaries; and

WHEREAS, both chambers of the Legislature addressed this conflict during the 2021 Regular Session by unanimously adopting House Concurrent Resolution 132 (HCR132), which asks the Hawaii Department of Health to file a federal exemption application for the state authorized use of cannabis in Hawaii with the Drug Enforcement Administration; and

WHEREAS, the Department of Health has resisted moving forward with this request because it fears that doing so might result in negative repercussions for the State's medical cannabis program; and

WHEREAS, states have reserved the authority to decide how cannabis is regulated within the state, and the ongoing federal appropriations rider known as the Rohrabacher-Farr Amendment prevents the Department of Justice and the Drug Enforcement Administration from using resources to interfere with state medical cannabis programs; now, therefore,

BE IT RESOLVED by the House of Representatives of the Thirty-first Legislature of the State of Hawaii, Regular Session of 2022, the Senate concurring, that the Drug Enforcement Administration is requested to assist the Hawaii Department of Health with obtaining a federal exemption for the state authorized use of cannabis in Hawaii under 21 CFR 1307.03 and 21 CFR 1308.43; and

BE IT FURTHER RESOLVED that certified copies of this concurrent resolution be transmitted to the U.S. Administrator of the Drug Enforcement Administration, members of the Hawaii Congressional Delegation, U.S. Attorney General, Hawaii Attorney General, Hawaii State Governor, and the Hawaii State Director of Health.

OFFERED BY: _____

Title 21 “Food & Drugs” – Code of Federal Regulations

- **§ 1301.11 Persons required to register; requirement of modification of registration authorizing activity as an online pharmacy.**
- (a) Every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration unless exempted by law or pursuant to §§ 1301.22 through 1301.26.
- **§ 1301.22 Exemption of agents and employees; affiliated practitioners.**
- (a) The requirement of registration is waived for any agent or employee of a person who is registered to engage in any group of independent activities, if such agent or employee is acting in the usual course of his/her business or employment.
- (b) An individual practitioner who is an agent or employee of another practitioner (other than a mid-level practitioner) registered to dispense controlled substances may, when acting in the normal course of business or employment, administer or dispense (other than by issuance of prescription) controlled substances if and to the extent that such individual practitioner is authorized or permitted to do so by the jurisdiction in which he or she practices, under the registration of the employer or principal practitioner in lieu of being registered him/herself.
- (c) An individual practitioner who is an agent or employee of a hospital or other institution may, when acting in the normal course of business or employment, administer, dispense, or prescribe controlled substances under the registration of the hospital or other institution which is registered in lieu of being registered him/herself, provided that:
- (1) Such dispensing, administering or prescribing is done in the usual course of his/her professional practice;
- (2) Such individual practitioner is authorized or permitted to do so by the jurisdiction in which he/she is practicing;
- (3) The hospital or other institution by whom he/she is employed has verified that the individual practitioner is so permitted to dispense, administer, or prescribe drugs within the jurisdiction;
- (4) Such individual practitioner is acting only within the scope of his/her employment in the hospital or institution;
- (5) The hospital or other institution authorizes the individual practitioner to administer, dispense or prescribe under the hospital registration and designates a specific internal code number for each individual practitioner so authorized. The code number shall consist of numbers, letters, or a combination thereof and shall be a suffix to the institution's DEA registration number, preceded by a hyphen (e.g., APO123456-10 or APO123456-A12); and
- (6) A current list of internal codes and the corresponding individual practitioners is kept by the hospital or other institution and is made available at all times to other registrants and law enforcement agencies upon request for the purpose of verifying the authority of the prescribing individual practitioner.
- **§ 1307.02 Application of State law and other Federal law.**
- Nothing in this chapter shall be construed as authorizing or permitting any person to do any act which such person is not authorized or permitted to do under other Federal laws or obligations under international treaties, conventions or protocols, or under the law of the State in which he/she desires to do such act nor shall compliance with such parts be construed as compliance with other Federal or State laws unless expressly provided in such other laws.
- Any person may apply for an exception to the application of any provision of this chapter by filing a written request with the Office of Diversion Control, Drug Enforcement Administration, stating the reasons for such exception. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. The Administrator may grant an exception in his discretion, but in no case shall he/she be required to grant an exception to any person which is otherwise required by law or the regulations cited in this section.