IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN JUSTIN PICKARD, et al.,

Defendants.

Case No. 2:11-CR-449-KJM

REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT PICKARD'S MOTION TO DISMISS INDICTMENT AS VIOLATIVE OF THE UNITED STATES CONSTITUTION (ART. VI; AMEND. V, X) AND REQUEST FOR EVIDENTIARY HEARING

Date: March 19, 2014
Time: 9:00 a.m.
Judge: Hon. Kimberly J. Mueller

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Table of Contents

Table of Authorities

Statutes and Constitutional Provisions

Cases

Other Authorities

COMES NOW, Defendant, Brian Pickard, and submits the following in reply to the Plaintiff's Opposition to Defendants' Motion to Dismiss Indictment. (Doc. No. 224).[1]

I. INTRODUCTION

Rather than address the issues presented in the Motion to Dismiss, the Government presents a lengthy recitation of the facts underlying the investigation, and thereafter misapplies the law to issues which, for the most part, are not raised by the defense.

First, it must be noted that while the facts presented on pages 1 - 8 of the Opposition are contested, the defense will not confront these factual disputes since they play no role in the determination of the present motion. For if this Court finds, as it is urged, that *21 U.S.C. Section 812, Schedule 1(c) (10)* and *(17)* are constitutional invalid, they may not form the basis for a prosecution under *21 U.S.C. Sections 846, 841(a)(1)*, under any circumstances. (*See*, Bond v. United States, __ U.S.__, 131 S.Ct. 2355, 2367 (2011), (Ginsburg, concurrence, "Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law.... If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free);" *see also* Ex parte Siebold, 100 U.S. 371, 376-377 (1880), a "conviction under [an unconstitutional law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id*., at 376-377.) The inclusion of the facts underlying the Indictment is, therefore, employed to prejudice this Court against the defendants, and to divert the attention away from the relevant facts regarding the classification of marijuana as one of this Nation's most dangerous substances; facts for which the Government fails to dispute.

Second, the three issues raised in the Opposition inaccurately apply the law, and/or address issues *not* raised by the defense. The Government contends:

1. This Court lacks jurisdiction to reschedule marijuana;

2. Marijuana is properly listed as a Schedule I controlled substance, and

3. This Court should not find the August 29, 2013, Department of Justice [DOJ] memorandum "Guidance Regarding Marijuana Enforcement" ("Cole

[1] This document will hereinafter be referred to as "Opposition," and Defendant's Motion to Dismiss the Indictment as Violative of the United States Constitution (Art. VI; Amend. V, X) and Request for Evidentiary Hearing will hereinafter be referred to as "Motion to Dismiss."

Memorandum") violates defendant's rights.

As discussed in detail below: (1) it is precisely the jurisdiction and, indeed the role, of this Court to review acts of Congress which may infringe on constitutional rights, as do *21 U.S.C. Section 812, Schedule 1(c) (10)* and *(17)*; (2) as the *undisputed* evidence proffered by defendant establishes the classification of marijuana as a Schedule I controlled substance can not survive even the rational basis test which "must find some footing in the realities of the subject addressed by the legislation." Heller v. Doe, 509 U.S. 312, 321 (1993), and (3) contrary to the Government's assertion, the defense does not contend that the Cole Memo creates a right to use and distribute marijuana, nor that it is a *de facto* rescheduling of the substance. (*See*, Exhibit A, 2013 Cole Memorandum.) Rather the defense asserts that it is evidence of the federal government's acknowledgment that cannabis is not deserving of its Schedule I status, and the state-based facilitation policy violates the doctrine of Equal Sovereignty.[2]

II. THIS COURT HAS ORIGINAL JURISDICTION, AND INDEED A DUTY TO REVIEW THE CONSTITUTIONALITY OF CONGRESSIONAL ACTIONS.

Rather than confronting the factual assertions and legal theories underlying the Motion to Dismiss, the prosecution urges this Court to abdicate its role as one of the equal branches of government and find that, pursuant to *21 U.S.C. § 877*, it is without authority to review the challenge here made. Such an assertion wholly misconstrues *§ 877*, which by its terms applies to judicial review of *administrative* action, *not* Congressional Acts.

Relying on the case of Young v. U.S. Attorney General, 2013 WL 1934949 (D.D.C. 2013), the Government asserts that as *§ 877* vests original jurisdiction with the Court of Appeals for review of any *final determination of the Attorney General*, the defendant is precluded from challenging the constitutionality of the Controlled Substances Act as applied to marijuana. (Opp.

[2] While at the time this motion was filed the Government's policy could be characterized as one of state based non-enforcement, since then the administration has adopted regulations for financial institutions which allow them to service marijuana related businesses in those states in which distribution is legal. (See, U.S. Department of the Treasury memorandum dated February 14, 2013, and entitled "BSA Expectations Regarding Marijuana-Related Business," and DOJ memorandum of the same date entitled "Guidance Regarding Marijuana-Related Financial Crimes," attached as Exhibit B and C, respectively, and collectively referred to as marijuana banking regulations, hereinafter.) Thus, it can now be said that the federal government is facilitating the distribution of cannabis within specified states. (See, part III.B.3, *infra*.)

p 9-10.) Young, however, involved an *administrative petition* brought by extraordinary writ to compel the Attorney General to reschedule cannabis under *21 U.S.C. § 811*. While the Court found it lacked jurisdiction to take the requested action, it was not confronted with a constitutional challenge to the Act of Congress which placed marijuana in Schedule I.[3]

In the present case, this Court is urged to determine whether the Congressionally-enacted statutes violate Equal Protection of the Law and the Equal Sovereignty of the States. This challenge has always found jurisdiction in the first instance the District Court. (See, e.g. Gonzales v. Raich, 545 U.S. 1, 6-8 (2005) the case establishing Congress' authority to regulate medical cannabis under the Commerce Clause, and United States v. Emerson, 846 F.2d 541 (9th Cir. 1988), where the defendants successfully challenged their convictions under *21 U.S.C. § 841, 846*, for the distribution of 3,4-methylenedioxymethamphetamine.)

In fact, most of the cases relied upon in the Opposition belie the notion that the constitutionality of the Controlled Substances Act cannot be challenged in a District Court. For example, United States v. Canori, 737 F.3d 181 (2nd Cir. 2013), was brought in the Southern District of New York (cited in Opp. at p. 15), and in United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978), the criminal defendant's claim was challenged in the first instance in the Central District of California. (Cited in Opp. at p. 10.)

To be sure, the application of *§ 877* to constitutional challenges would in effect allow the Attorney General to avoid all but the most minimal judicial scrutiny (i.e., arbitrary and capricious standard of review). Yet, it has been the firm duty of the Courts to interpret the constitutionality of Congressional action since 1803 when the United States Supreme Court struck down a portion of the Judiciary Act of 1789, holding:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*

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[3] The Petitioner's status in Young, *supra*, as a federal prisoner was irrelevant to his administrative petition. Young v. U.S. Attorney General, *supra*, 2013 WL 1934949 (D.D.C. 2013). That case is in no way analogous to the instant matter.

Marbury v. Madison, 5 U.S. 137, 178 (1803), emphasis added.

For over 200 years, this principle has been applied by the Courts, and has been instrumental in preserving the rights of the citizenry and the protection of our Constitution. In 2012, citing to Marbury v. Madison, the High Court again reaffirmed its role when striking a portion of the legislation known as the Affordable Care Act:

> There can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566, 2579 (2012).

Accordingly, the Government's suggestion that this Court is without jurisdiction to question the judgement of Congress is not only inaccurate, it divests the Court of "the very essence of [its] judicial duty," (i.e., to determine whether a Congressional action comports with the Constitution).

III. MARI JUANA IS NOT PROPERLY LISTED AS A SCHEDULE I CONTROLLED SUBSTANCE.

A. Standard of Review

While the Opposition fails to specify under what standard the defense challenge should be evaluated, it must be reiterated here that a heightened scrutiny applies. The fundamental right at issue is freedom from arbitrary incarceration. *See* Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997); *see also* Boumediene v. Bush, 553 U.S. 723, 739 (2008) ("Chief among [freedom's first principles] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.")[4]

[4] Mr. Pickard further renews the assertion made in his Motion to Dismiss that this Court may analyze the challenge under a heightened level of scrutiny where the law exhibits "invidious distinctions between classes of its citizens." *See, inter alia*, Department of Agriculture v. Moreno, 413 U.S. 528, 543 (1973); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). Recent statements by President Obama recognize the disparate impact of the marijuana laws: "What clearly does trouble [the President] is the radically disproportionate arrests and incarcerations for marijuana among minorities. 'Middle-class kids don't get locked up for smoking pot, and poor kids do,' he said. 'And African-American kids and Latino kids are more likely to be poor and less likely to have the resources and the support to avoid unduly harsh penalties.' But, he said, 'we should not be locking up kids or individual users for long stretches of jail time when some of the folks who are writing those laws have probably done the same thing.'" (Exhibit D.) Again, the defense contention on this issue was not squarely addressed in

Moreover, the rational basis standard has recently been heightened in Equal Protection challenges to federal statutes involving issues of federalism and the Equal Sovereignty of the States, which the defense has asserted in the instant matter.[5] In the 2012 case of United States v. Windsor, 133 S. Ct. 2675, 2693 (2012), the Court analyzed the Defense of Marriage Act [DOMA] under principles of federalism that converged with the Plaintiff's Fifth Amendment rights. Ultimately striking the statute on the federalism grounds, the Court determined that DOMA's "interference with the equal dignity of same-sex marriages, *a dignity conferred by the States in the exercise of their sovereign power*, was more than an incidental effect of the federal statute. It was its essence." *Id*., emphasis added. Deferring to the sovereignty of the States, the Court held, "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." *Id*. at 2692. Importantly, the Court employed a heightened level of rational basis scrutiny, rather than employ the intermediate scrutiny that is afforded to cases involving gender and illegitimacy. *See*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985), for discussion of intermediate scrutiny. Justice Kennedy set forth what has since been dubbed "active" rational basis review, finding that "[d]iscriminations of an unusual character especially require careful consideration." *Id.*, citing Romer v. Evans, 517 U.S. 620 (1996).

Also in Shelby County v. Holder, 133 S. Ct. 2612 (2013), the Supreme Court employed a heightened or "active" rational basis test when deciding that the justification proffered for the Voting Rights Act in 1965 was no longer rationally related to the problems existing in 2004, and thus, invalidated sections of the Voting Rights Act. *Id*. (*See also* Leary v. United States, 395 U.S. 6, 38, fn. 68 (1969), "[a] statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge, a court must, of course, be free to reexamine the factual declaration;" and, Massachusetts v.

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the Opposition.

[5] *See*, Ernest A. Young and Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, in CATO INSTITUTE SUPREME COURT REVIEW 2012-2013, 117-147, (Ilya Shapiro eds., 2014), acknowledging "active" or heightened rational basis review for Equal Protection claims involving challenges to our nation's federalist structure.

United States Health & Human Services Agency [HHA], 682 F.3d 1 (1st Cir. 2012) (heightened scrutiny *greater than* rational basis applied in Equal Protection cases involving federalism challenges.)

Thus, for the foregoing reasons, should this Court decline to apply the strict scrutiny standard of review, the issues should be evaluated under the heightened rational basis test.

B. No Rational Basis Under Current State of the Evidence

Contrary to the heading recited in the Opposition at page 10 line 3, marijuana is *not* properly listed as a Schedule I Controlled Substance. The defense here references only the heading, because the argument which follows presents *no* basis on which the Government's assertion relies. This is so, because even when employing a rational basis standard of review, there exists *no* facts to support a finding that marijuana is constitutionally classified.

While it is conceded that the law presumes the constitutionality of an Act of Congress, and the prosecution may rely on this presumption when defending a challenge. Where, as in the present case, evidence is proffered which rebuts that presumption, and the "policy goals" can not be justified by the policy employed by federal government officials, the failure to proffer *any* rational basis for the continued inclusion of marijuana in Schedule I lends truth to the defense assertion that such classification can not survive even the most deferential judicial scrutiny as it has no footing in the realities of the subject. See, Heller v. Doe, *supra*, 509 U.S. 312, holding"even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id*, at 321.

Yet, it is apparent that the Government can not articulate a policy justification, for if the goal is to remedy the purported harm caused by the use of marijuana in this Country, then their policies which *facilitate* the distribution of marijuana are not only unrelated to the stated goal, but in fact are designed to defeat it . (See, Exhibits A, B and C.)

Because, the prosecution can not defend the rationality of the challenged statute, the Government turns to cases which support issues *not* presented by the defense, and/or have no precedential value in this case.

1. Issues Presented

Preliminarily, and to be clear:

1. The defense is *not* asserting the defendant has a fundamental right to use and distribute medical marijuana, nor that the current classification violates the Ninth Amendment. (Opp. p. 10-11.) Raich v. Gonzales (Raich II), 500 F.3d 850 (9th Cir. 2007) and Sacramento Nonprofit Collective v. Holder, 2014 WL 128998 9th Cir. Jan. 15, 2014, are therefore, irrelevant.

2. The defense in *not* asserting the defendant has established the defense of medical necessity defense. (Opp. p. 11-12.) United States v. Oakland Cannabis Buyer's Coop, 532 U.S. 483 (2001) is therefore irrelevant.

3. The defense in *not* asking this Court to force the DEA to reclassify marijuana. (Opp. p. 11-12.) Americans for Safe Access (ASA) v. DEA, 706 F.3d 438 (D.C. Cir. 2013) is therefore irrelevant.

Specifically, the defense asserts that the current scheduling of cannabis in Schedule I is irrational and is thus violative of Equal Protection as an unreasonable classification inconsistent with the current scientific and medical research, and the prosecution of defendant is based on an arbitrary classification that violates Equal Protection.[6] These challenges are supported by detailed evidentiary proffers, including expert statements made under penalty of perjury and supporting exhibits. Without discrediting any of this evidence, nor addressing the Equal Protection and Equal Sovereignty arguments, the Government ostensibly relies on cases with no precedential value. While several court opinions have touched on the issue of reclassifying marijuana, not one has been confronted with the Constitutional challenges raised by the defense in the instant motion, nor presented the evidence proffered in support thereof. Further, most of these opinions recognize that the scientific evidence is evolving, and therefore a decision made in

[6] It is well settled that "the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." United States v. Caroline Products, *supra*, 394 U.S. 144, 153-154. The Controlled Substances Act, as applied to marijuana, is without support in reason and, as each day goes by, this assertion is becoming more apparent. As discussed below, since the Motion to Dismiss was filed on November 20, 2013, events continue to occur which reinforce this position. (See, Section III.B.3, *infra*.)

1978,[7] will have no factual similarity to the issues to be litigated in 2014.

In fact, the United States Supreme Court almost invited the present challenge when, in what is admittedly *dicta* from the case of Gonzalez v. Raich, *supra*, 545 U.S. 1, it stated: "We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." *Id*., at p. 28.

2. Precedential Value of Cases Cited in Opposition

As discussed below, the cases relied upon by the prosecution do not defeat the present challenge, and in fact in some instances they support the need for an evidentiary hearing.

For instance, in Americans for Safe Access (ASA) v. DEA, *supra*, 706 F.3d 438, the issue was limited to questioning an administrative decision not to undergo further studies into the medical benefits of cannabis. The Court specifically articulated the question before it as follows:

> On the merits, the question before the court is not whether marijuana could have some benefits. Rather the *limited question* that we address is whether the DEA's decision declining to initiate proceedings to reschedule marijuana under the CSA was arbitrary and capricious.

Id., at p. 440, emphasis added.

The Court in ASA was therefore, not confronted with a Constitutional challenge to the statute which results in the deprivation of liberty for those who transgress it, but was instead asked to determine whether it could force the DEA to act, where such action was entirely within the discretion of the agency. *Id.* at 44. Importantly such a decision was made only *after an evidentiary hearing* was held, and further, it was based on "the limited existing clinical evidence" available in 2002. *Id*. at 440. In the 12 years that have followed, the scientific evidence has advanced beyond expectations. In fact, of the scientific studies described and referenced in the Declaration of Philip A. Denney, M.D., filed in support of this motion, at least 174 separate

[7] Opposition, p. 10, citing to United States v. Miroyan, 577 F.2d 489, a case the government relies upon, but admits arose "approximately thirty-five years ago."

medical and scientific studies have been conducted *since* the initiation of the ASA petition.[8] It is unclear, therefore, if the record proffered to this Court would even support a finding that the DEA's decision in ASA is not arbitrary and capricious according to current evidence.

This, however, is not the standard by which this Court must decide the questions presented. Rather the issue here, even assuming arguendo the rational basis test applies, is whether the *evidence* supports a finding that marijuana should be scheduled as one of the most dangerous drugs existing in this Nation, not whether the DEA can be judicially forced to study the medical benefits of cannabis because the agency's decision not to do so is arbitrary and capricious. Yet, under either standard the Court's finding *must* be predicated on contemporary evidence presented at a hearing - such as that proffered in defendant's moving papers. Notably, in ASA, the DEA was required by the Court to proffer evidence justifying its decision to deny ASA's petition. While, here, there has been no Government proffer whatsoever. Instead, the prosecution relies on a case which evaluated administrative decision based on *evidence presented by each side*, and although the ASA court concluded the DEA's construction of its regulation was not arbitrary or capricious, and therefore deferred to the agency's interpretation of "adequate and well-controlled studies," it did so only after hearing the scientific evidence, evidence which is now dated by well over a decade. ASA v. DEA, *supra*, 706 F.3d at 452.

The Government also relies on the unpublished opinion United States v. Oakland Cannabis Buyers' Coop., 259 Fed. Appx. 936, 938 (9th Cir. 2007), where the Ninth Circuit upheld a District Court's grant of injunction, sought by the government, restraining the Oakland Cannabis Buyers' Co-op from distributing marijuana. Citing to United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978), this Circuit noted that "new information has been developed concerning the use of marijuana since 1978, "which may be properly considered if such "developments... left [a previous case's] central holding obsolete." *Id*., citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992), invalidating portions of the

[8] As the Court stated, "It is also noteworthy . . . Petitioner's argument focuses at length on one study - the March 1999 report from the Institute of Medicine ("IOM") that was clearly addressed by the DEA." ASA v. DEA, *supra*, 706 F.3d at 450.

Pennsylvania Abortion Control Act of 1982 under Roe v. Wade, 410 U.S. 113 (1973). In Casey, *supra*, the Court was asked to determine:

> [W]hether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

Id. at 855.

Here, in the "approximately thirty-five years" since Miroyan was decided, the facts regarding the irrationality of the current scheduling of cannabis are "so far changed" as to be rendered obsolete, and the defense will establish the same at an evidentiary hearing on the matter. The prosecution does not attempt to show that such facts are *not* "subject to [valid] constitutional attack on the ground that the facts no longer exist," as they fail to proffer a constitutionally adequate justification, or indeed any justification at all. *See* Leary v. United States, *supra*, 395 U.S. 6, 38, fn 68; *see also* Shelby County v. Holder, *supra*, 133 S.Ct. at 2629, noting the challenged legislation was based on "40-year-old facts that had no logical relation to the present day" when striking down portions of the Voting Rights Act; and, United States v. Caroline Products, 304 U.S. 144, 153-154 (1938), "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." Moreover, the government's own policies which facilitate the distribution of cannabis evidences that the current scheduling of marijuana has become nothing more than a "doctrinal anachronism," currently existent due to base deference that abides in opposition with common sense.

Likewise, the case of United States v. Canori, *supra*, 737 F.3d 181, lends no support to the Government's position, and in fact rather supports the defense contention that the status of the legalization of cannabis is evolving. The defendant in Canori argued the 2009 Department of Justice memorandum (the "Ogden Memo") created a *defacto* rescheduling of marijuana. (Opp. p. 15.) The Motion to Dismiss filed here, does not in any way rely or even reference the 2009 Ogden Memo, nor is it asserted that anything the Executive Branch has done creates a *right* to use and distribute marijuana. Interestingly, the Canori Court limited its holding to the facts of

the case, leaving open the possibility that as the government policy evolves the Attorney General's discretion of non-enforcement may violate the Equal Sovereignty of the States, stating that federalism was not implicated "in the circumstances presented" under the Ogden Memo. *Id.* at 185.

Finally, the case of James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) is also inapposite. Cited in the section of the opposition purportedly addressing the Equal Sovereignty challenge, the government's contention that this case "is analogous to the case here" is misguided. (Opp. p. 15.) The opinion does not address the Equal Sovereignty issue in even the slightest manner. Moreover, the civil case was brought by disabled California residents under the Americans for Disabilities Act [ADA] asking for a preliminary injunction. *Id.* at 396-397. Acknowledging "that California has embraced marijuana as an effective treatment for individuals like the plaintiffs who face debilitating pain," the Court was required to hold that the ADA "does not protect medical marijuana users who claim to face discrimination *on the basis of their marijuana use.*" *Id.* at 397, fn 3. In the twelve-page opinion, only a single paragraph addresses the Equal Protection claims. *Id.* at 405.[9] The paragraph, however, actually supports the defense position, in that it finds that Equal Protection is not violated were the federal rules are applied *evenly among the States*. *Id.* It can no longer be said that the federal government applies the law evenly among local jurisdictions, as the Cole Memo and marijuana banking regulations establish. Thus, the holding in James v. City of Costa Mesa, although not analogous, supports the position that Equal Protection and Equal Sovereignty are impinged upon by the disparate application of the Controlled Substances Act as it relates to marijuana prosecutions.

Most importantly, however, is the fact that no cases have considered the rationality of classifying marijuana in Schedule I since the federal government adopted the policies which

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[9] Interestingly, while in James v. Costa Mesa, *supra*, the Court held that there was no disparate treatment between California and Washington D.C., because the federal government applied federal prohibition in both jurisdiction, this analysis lead to a different conclusion since on March 4, 2014, the day prior to filing this reply brief, the D.C. Council voted to eliminate jail time for marijuana possession. Article located online at: http://www.washingtonpost.com/local/dc-politics/dc-council-eliminates-jail-time-for-marijuana-possession-stepping-to-national-forefront/2014/03/04/df6fd98c-a32b-11e3-a5fa-55f0c77bf39c_story.html

facilitate the distribution of cannabis in certain states. Thus, this Court is bound by no relevant precedent, but rather asked to apply venerated constitutional principles to all the facts as they exist in the year 2014.

3. Events Impacting the Issues Presented Occurring Since the Filing of the Motion to Dismiss

The DOJ's policy outlined in the 2013 Cole Memo has yet to be addressed by this or any Court in the context of an Equal Sovereignty challenge, although a recent District Court did consider the Memo's impact on marijuana prosecutions. In United States v. Dayi, No. JKB-13-0012, JKB-13-0304, 2013 WL 5878922 *4 (D.Md. Nov 1, 2013), the Court *sua sponte* departed downward two levels when sentencing each of the 22 defendants. Holding:

> [T]he Court finds that it appropriately may consider recent changes in federal marijuana enforcement policy, as well as the changes in state law that have apparently motivated the change in federal enforcement policy" in sentencing.

Id.

Recognizing a potential Equal Protection violation, the Court concluded: "[t]he Court therefore finds it should use its sentencing discretion to dampen the disparate effects of prosecutorial priorities." *Id.* Although the Court in Dayi stopped short of declaring the CSA unconstitutional as applied to marijuana, the Judge clearly questioned the continued viability of the scheduling scheme, stating: "[t]here is no evidence that Congress has ever thoroughly reevaluated the appropriateness of its Schedule I designation for marijuana," the Court went on to note the 2013 Cole Memo evidences "an undeniable signal that violating federal marijuana laws is not as serious an offense as it once was." *Id*.

Not only have the trial courts begun to recognize the rapidly changing legal landscape for cannabis in the sentencing context, significant changes have occurred since the filing of the instant motion. Importantly, the DOJ and the Department of Treasury each issued memoranda relating to financial crimes involving marijuana which present guidelines for legally providing services to marijuana-related businesses. (Exhibits B and C, respectively.) To be sure, this regulation would have been deemed money laundering in any other context.

Also since filing the instant motion, our own President in essence acknowledged that

cannabis does not meet the three criteria required for inclusion in Schedule I, stating, "I don't think [marijuana] is more dangerous than alcohol." *See*, Exhibit D, New Yorker Magazine, "Going the Distance: On and off the road with Barack Obama," published on January 27, 2014.

While the Government argues this Court should defer to Congress, Congress itself has deferred its own authority to the Executive Branch, and specifically to the DEA Administrator. *See 21 U.S.C. § 811; 28 C.F.R. § 0.1000.* Congress' frustration with the DEA's refusal to reschedule marijuana has been patent, as the DEA Administrator famously refused to acknowledge that crack cocaine or heroin are worse for one's health than marijuana when asked while testifying before Congress in 2012. (*See*, Huffington Post article entitled "Michele Leonhart, DEA Chief, Won't Say Whether Crack, Heroin Are Worse For Health Than Marijuana," dated June 21, 2012, and attached as Exhibit E.) Moreover, a number of members of the House and Senate beseeched the Executive Branch to reschedule cannabis in a recent letter, dated February 12, 2014, stating:

> We request that you instruct Attorney General Holder to delist or classify marijuana in a more appropriate way, at the very least eliminating it from Schedule I or II. Furthermore, one would hope that your Administration officials publicly reflect your views on this matter.

(*See*, Letter on Congress of the United States letterhead to President Barack Obama, dated February 12, 2014, and attached as Exhibit F.)

President Obama, on the other hand, appears to be leaving the decision up to Congress, stating, "what is and isn't a Schedule I narcotic is a job for Congress." (Exhibit G.) Thus, while the Executive and Legislative branches of government are passing the buck to each other, millions of people are going to prison for a substance that almost all agree does not belong in Schedule I of the CSA.[10]

The judiciary's role, established in Marbury v. Madison, *supra*, almost two centuries ago, demands that this Court step in where the other branches of government have failed to act, and

[10] In fact, the legalization of cannabis has been embraced by the global community. For instance, after adopting legislation legalizing marijuana, Jose Mujica, the President of Uruguay, was nominated for a Nobel Peace Prize for his efforts. (*See*, Huffington Post article, dated February 5, 2014, and attached as Exhibit H.)

where this failure infringes on the Constitution.

IV. THE COLE MEMORANDUM AND EQUAL SOVEREIGNTY

Again, the Government has misconstrued the basis for the defendant's constitutional challenge under the Equal Sovereignty Doctrine. Addressing issues of specific performance and selective prosecution. To be clear, the defense does not request, nor will contend, that this Court order specific performance of the 2013 Cole Memo, but rather asks this Court find that the current facilitation policy evidenced by the Cole Memorandum and the marijuana banking regulations improperly implicates the Equal Sovereignty of the States, rendering the current prosecution untenable.

Federalism demands that each State be granted Equal Sovereignty, that is, that each State be treated equally in power and authority. *See*, *inter alia*, United States v. Loiusiana, 363 U.S. 1, 16 (1960); Shelby County v. Holder, *supra*, 133 S. Ct. 2612. Where the federal balance is impacted by Congressional action, the "disparate geographic coverage must be sufficiently related to the problem it targets." Shelby County v. Holder, *supra*, 133 S. Ct. at 2624; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 328-329 (1966). The government also must show the current burdens of the disparate treatment is justified by current needs." *Id*., at 2627, *citing* Northwest Austin (Municipal Utility District No. One) v. Holder, 557 U.S. 193, 203 (2009). Finally, the Equal Sovereignty of the States must be limited to remedy present-day and "local" evils. *Id*.; Katzenbach, *supra*, 383 U.S. at 309.

The Government's claim that Shelby County, *supra,* undercuts the Defendants' position is incorrect. The Opposition posits that Shelby County assists their cause because the federal government does not "have a general right to review and veto State enactments before they go into effect," and that the federal power was limited to allow "state laws to take effect, subject to later challenge under the Supremacy Clause." (Opp. p. 12-13, quoting Shelby County, *supra*, 133 S. Ct. at 2623.) Again the prosecution defends assertions not presented in the Motion to Dismiss. For the defense does not contend that the federal government's intrusion into state law

is at issue here, nor that the state marijuana statutes preempt the CSA.[11]

In addition, the Government has taken the Shelby County quote out of context; for in the very next paragraph the Court distinguishes the powers of the states verses the federal government:

> Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Id., at 2623, internal citations omitted.

Thus, cautions the Court, where the *states* retain broad autonomy to pursue various legislative objectives, the *federal* system does not. The federal power must be applied evenly across the States under the doctrine of Equal Sovereignty, or sufficient justification for not doing so must be proffered, according to the standards set forth in Supreme Court cases such as Windsor, *supra*, 133 S. Ct. 2675, Shelby County, *supra*, 133 S. Ct. 2612, Bond, *supra*, 131 S.Ct. 2355, Northwest Austin, *supra*, 557 U.S. 193, *inter alia*.

Shelby County confirms that Northwest Austin, *supra*, provides the controlling analysis, to wit: "a statute's disparate geographic coverage [must be] sufficiently related to the problem that it targets." Shelby County, *supra*, 133 S. Ct. at 2622. In the present case, not only has the Government failed to offer any justification showing a relationship between the targeted problem and the irrational scheduling of marijuana, it has failed to identify the "problem that it targets." For if it is the eradication of marijuana use in this Nation, then their facilitation policies can not under any reasonable interpretation be deemed rational. As a challenge to the Equal Sovereignty of the States requires sufficient justification, the Opposition falls flat on this issue.

Further, the "fast-track" cases relied on by the Government have no relevance to the

[11] Further, it can hardly be said that the Cole Memo and Marijuana Banking Regulations merely reflect the federal government's inability to review and veto a state enactment before it goes into effect. It was only after the states of Washington and Colorado made distribution of marijuana legal that the DOJ adopted the aforementioned policies.

present inquiry in that they involved the disparity in sentencing among immigration defendants between *federal* district courts.[12] This in no way implicates the doctrine of Equal Sovereignty which provides that the disparate treatment of *the states* deserves a heightened standard of review because they impinge upon the very formation of our government. It should, however, be noted that even in these fast-track cases, the Government was required to justify a rational for the decision to apply, or not apply the fast-track departure.

The 2013 Cole Memo evidences the government's disparate treatment of the States based on the regulatory scheme effected in that State. (Exhibit A.) The differing treatment of the States is also shown by those events occurring since the filing of the instant motion, discussed *supra* in Section III.B.3, including but not limited to the DOJ and Department of Treasury's approval for federally regulated financial institutions to begin servicing cannabis-related businesses. (Exhibits B and C.) For by this action, the federal government has not only decided to allow the widespread distribution of cannabis in certain States, it has decided to facilitate such distribution. The Government cannot justify their actions, nor do they even attempt to do so. This is likely because any such justification would undercut their argument that marijuana is properly classified in Schedule I.

Remarkably, the prosecution suggests that the government should be applauded for allowing the experiments of Colorado and Washington. (Opposition at p. 16.) Applauded for facilitating the mass distribution of one of the most dangerous substances in the Nation? Certainly such applause would not be extended to a State which decided to lawfully manufacture and distribute methamphetamine.

"[I]t would be mistaken and mischievous for the political branches to forget that the

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[12] United States v. Gonzalez-Zotelo 556 F.3d 736 (9th 2009), actually involved a challenge to the District Court's application of the two level fast track departure in a jurisdiction in which such plea bargains were available, but not offered by the prosecution to the defendant because of his prior convictions for lewd and lascivious acts with a child, and the holding in United States v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006), has been questioned following the United States Supreme Court case Kimbrough v. United States, 552 U.S. 85 (2007), (See Pimental v. United States 2010 U.S. Dist. LEXIS 1386.) Importantly, neither Marcial-Santiago and Gonzalez-Zotelo implicate federalism nor Equal Sovereignty, but rather are cases involving sentencing disparities under the federal sentencing guidelines.

sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance." United States v. Lopez, 514 U.S. 549, 577 (1995). This Court is, therefore, asked to dismiss the Indictment against Mr. Pickard for the violation of the constitutional doctrine of Equal Sovereignty of the States in our federalist system.

V. CONCLUSION

For the reasons stated herein, those presented in previous filings, and in furtherance of those Constitutional rights, defendant Brian Pickard respectfully requests this Court grant this motion to dismiss and request for evidentiary hearing.

Dated: March 5, 2014

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Certificate of Service

I hereby certify that on March 5, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all attorneys of record.

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BRIAN JUSTIN PICKARD

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN JUSTIN PICKARD, et al.,

Defendants.

Case No. 2:11-CR-449-KJM

EXHIBITS A TO H IN SUPPORT OF REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT PICKARD'S MOTION TO DISMISS INDICTMENT AS VIOLATIVE OF THE UNITED STATES CONSTITUTION (ART. VI; AMEND. V, X) AND REQUEST FOR EVIDENTIARY HEARING

Date: March 19, 2014
Time: 9:00 a.m.
Judge: Hon. Kimberly J. Mueller

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Exhibit A

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

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[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Ronald T. Hosko
Assistant Director
Criminal Investigative Division
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Exhibit B

Department of the Treasury
Financial Crimes Enforcement Network

Guidance

FIN-2014-G001
Issued: February 14, 2014
Subject: BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network ("FinCEN") is issuing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice ("DOJ") concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, distribute, or dispense marijuana.[1] Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum (the "Cole Memo") to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.[2] The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates Congress's determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most

[1] Controlled Substances Act, 21 U.S.C. § 801, *et seq.*
[2] James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, the Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the "Cole Memo priorities"):[3]

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Concurrently with this FinCEN guidance, Deputy Attorney General Cole is issuing supplemental guidance directing that prosecutors also consider these enforcement priorities with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA.[4]

Providing Financial Services to Marijuana-Related Businesses

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of

[3] The Cole Memo notes that these enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA.

[4] James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014).

products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement's priorities. A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports ("SARs") as described below.

Filing Suspicious Activity Reports on Marijuana-Related Businesses

The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.[5] Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds.

One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a SAR that facilitates law enforcement's access to information pertinent to a priority.

"Marijuana Limited" SAR Filings

A financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a "Marijuana Limited" SAR. The content of this

[5] *See, e.g.,* 31 CFR § 1020.320. Financial institutions shall file with FinCEN, to the extent and in the manner required, a report of any suspicious transaction relevant to a possible violation of law or regulation. A financial institution may also file with FinCEN a SAR with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations.

SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term "MARIJUANA LIMITED" in the narrative section.

A financial institution should follow FinCEN's existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a "Marijuana Limited" SAR.[6] The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a "Marijuana Priority" SAR.

"Marijuana Priority" SAR Filings

A financial institution filing a SAR on a marijuana-related business that it reasonably believes, based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law should file a "Marijuana Priority" SAR. The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. Financial institutions should use the term "MARIJUANA PRIORITY" in the narrative section to help law enforcement distinguish these SARs.[7]

"Marijuana Termination" SAR Filings

If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it should

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[6] Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (Question #16), *available at:* http://fincen.gov/whatsnew/html/sar_faqs.html (providing guidance on the filing timeframe for submitting a continuing activity report).

[7] FinCEN recognizes that a financial institution filing a SAR on a marijuana-related business may not always be well-positioned to determine whether the business implicates one of the Cole Memo priorities or violates state law, and thus which terms would be most appropriate to include (i.e., "Marijuana Limited" or "Marijuana Priority"). For example, a financial institution could be providing services to another domestic financial institution that, in turn, provides financial services to a marijuana-related business. Similarly, a financial institution could be providing services to a non-financial customer that provides goods or services to a marijuana-related business (e.g., a commercial landlord that leases property to a marijuana-related business). In such circumstances where services are being provided indirectly, the financial institution may file SARs based on existing regulations and guidance without distinguishing between "Marijuana Limited" and "Marijuana Priority." Whether the financial institution decides to provide indirect services to a marijuana-related business is a risk-based decision that depends on a number of factors specific to that institution and the relevant circumstances. In making this decision, the institution should consider the Cole Memo priorities, to the extent applicable.

file a SAR and note in the narrative the basis for the termination. Financial institutions should use the term "MARIJUANA TERMINATION" in the narrative section. To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity. See *Section 314(b) Fact Sheet* for more information.[8]

Red Flags to Distinguish Priority SARs

The following red flags indicate that a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law. These red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list. It is thus important to view any red flag(s) in the context of other indicators and facts, such as the financial institution's knowledge about the underlying parties obtained through its customer due diligence. Further, the presence of any of these red flags in a given transaction or business arrangement may indicate a need for additional due diligence, which could include seeking information from other involved financial institutions under Section 314(b). These red flags are based primarily upon schemes and typologies described in SARs or identified by our law enforcement and regulatory partners, and may be updated in future guidance.

- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
    - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
    - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
    - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
    - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
    - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.

[8] Information Sharing Between Financial Institutions: Section 314(b) Fact Sheet, *available at: http://fincen.gov/statutes_regs/patriot/pdf/314bfactsheet.pdf.*

- Deposits apparently structured to avoid Currency Transaction Report ("CTR") requirements.
- Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
- Deposits by third parties with no apparent connection to the accountholder.
- Excessive commingling of funds with the personal account of the business's owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
- Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
- Financial statements provided by the business to the financial institution are inconsistent with actual account activity.
- A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.

- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
- The business is unable to demonstrate the legitimate source of significant outside investments.
- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a "consulting," "holding," or "management" company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
- Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.

- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.

- A marijuana-related business's proximity to a school is not compliant with state law.

- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

Currency Transaction Reports and Form 8300's

Financial institutions and other persons subject to FinCEN's regulations must report currency transactions in connection with marijuana-related businesses the same as they would in any other context, consistent with existing regulations and with the same thresholds that apply. For example, banks and money services businesses would need to file CTRs on the receipt or withdrawal by any person of more than $10,000 in cash per day. Similarly, any person or entity engaged in a non-financial trade or business would need to report transactions in which they receive more than $10,000 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). A business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8), and therefore, is not eligible for consideration for an exemption with respect to a bank's CTR obligations under 31 C.F.R. § 1020.315(b)(6).

* * * * *

FinCEN's enforcement priorities in connection with this guidance will focus on matters of systemic or significant failures, and not isolated lapses in technical compliance. Financial institutions with questions about this guidance are encouraged to contact FinCEN's Resource Center at (800) 767-2825, where industry questions can be addressed and monitored for the purpose of providing any necessary additional guidance.

Exhibit C

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General *Washington, D.C. 20530*

February 14, 2014

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Related Financial Crimes

On August 29, 2013, the Department issued guidance (August 29 guidance) to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). The August 29 guidance reiterated the Department's commitment to enforcing the CSA consistent with Congress' determination that marijuana is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. In furtherance of that commitment, the August 29 guidance instructed Department attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against marijuana-related conduct:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Under the August 29 guidance, whether marijuana-related conduct implicates one or more of these enforcement priorities should be the primary question in considering prosecution

under the CSA. Although the August 29 guidance was issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide. The guidance, however, did not specifically address what, if any, impact it would have on certain financial crimes for which marijuana-related conduct is a predicate.

The provisions of the money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a "specified unlawful activity," including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct can also serve as a predicate for prosecution under 18 U.S.C. § 1960. Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. *See, e.g.*, 31 U.S.C. § 5318(g). Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.

As noted in the August 29 guidance, the Department is committed to using its limited investigative and prosecutorial resources to address the most significant marijuana-related cases in an effective and consistent way. Investigations and prosecutions of the offenses enumerated above based upon marijuana-related activity should be subject to the same consideration and prioritization. Therefore, in determining whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance and reiterated above. [1] For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers' activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers

[1] The Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) is issuing concurrent guidance to clarify BSA expectations for financial institutions seeking to provide services to marijuana-related businesses. The FinCEN guidance addresses the filing of Suspicious Activity Reports (SAR) with respect to marijuana-related businesses, and in particular the importance of considering the eight federal enforcement priorities mentioned above, as well as state law. As discussed in FinCEN's guidance, a financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the federal enforcement priorities or violate state law, would file a "Marijuana Limited" SAR, which would include streamlined information. Conversely, a financial institution filing a SAR on a marijuana-related business it reasonably believes, based on its customer due diligence, implicates one of the federal priorities or violates state law, would be label the SAR "Marijuana Priority," and the content of the SAR would include comprehensive details in accordance with existing regulations and guidance.

services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.

The August 29 guidance rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities. Consequently, financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal enforcement priorities.[2] In addition, because financial institutions are in a position to facilitate transactions by marijuana-related businesses that could implicate one or more of the priority factors, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors. Moreover, as the Department's and FinCEN's guidance are designed to complement each other, it is essential that financial institutions adhere to FinCEN's guidance.[3] Prosecutors should continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct of a person or entity threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

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[2] For example, financial institutions should recognize that a marijuana-related business operating in a state that has not legalized marijuana would likely result in the proceeds going to a criminal organization.

[3] Under FinCEN's guidance, for instance, a marijuana-related business that is not appropriately licensed or is operating in violation of state law presents red flags that would justify the filing of a Marijuana Priority SAR.

Exhibit D

THE NEW YORKER

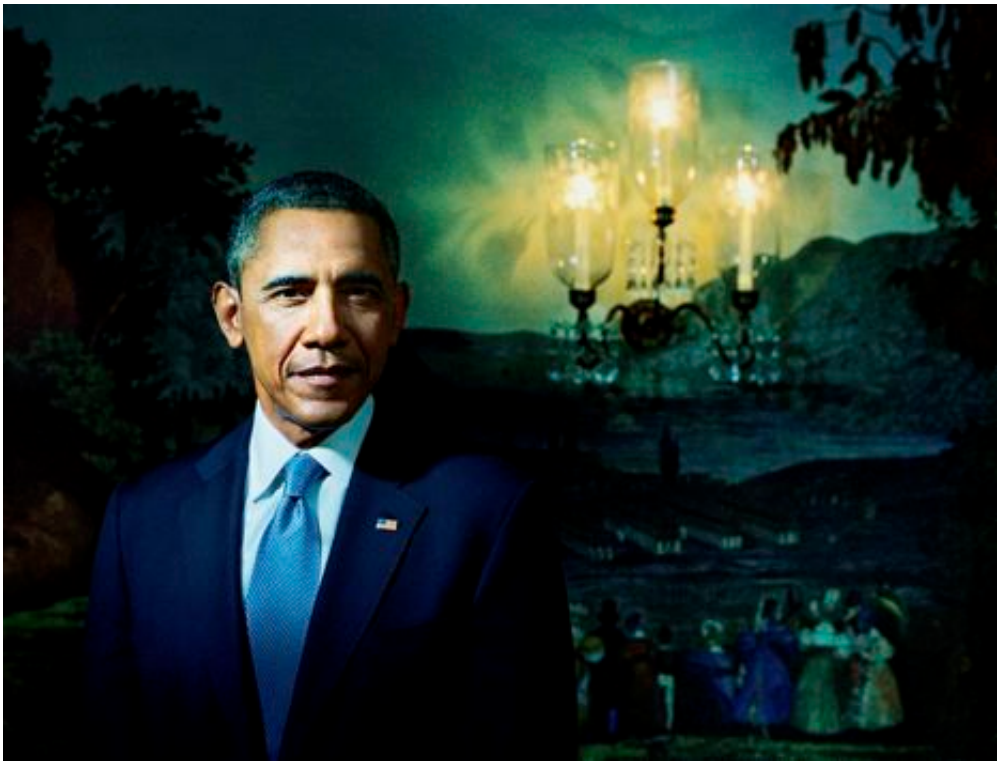
ANNALS OF THE PRESIDENCY

GOING THE DISTANCE

On and off the road with Barack Obama.

BY DAVID REMNICK

JANUARY 27, 2014



Obama's Presidency is on the clock. Hard as it has been to pass legislation, the coming year is a marker, the final interval before the fight for succession becomes politically all-consuming. Photograph by Pari Dukovic.

n the Sunday afternoon before Thanksgiving, Barack

applause.

At the next event, a fund-raiser for the Democratic National Committee at a music venue, the SFJAZZ Center, Obama met the host's family ("Hold on, we got some White House M&M's") and then made his way to the backstage holding area. You could hear the murmur of security communications: "Renegade with greeters"—Renegade being Obama's Secret Service handle.

Obama worked with more enthusiasm than at the midday event. He did the polite handshake; the full pull-in; the hug and double backslap; the slap-shake; the solicitous arm-around-the-older woman. ("And you stand here. . . . Perfect!")

The clutch over, the crowd cleared away, Obama turned to his aides and said, "How many we got out there?"

"Five hundred. Five-fifty."

"Five-fifty?" Obama said, walking toward the wings of the stage. "What are we talking about? Politics? Can't we talk about something else? Sports?"

The aides were, as ever, staring down at their iPhones, scrolling, tapping, mentally occupying a psychic space somewhere between where they were and the unspooling news cycle back in Washington.

"We're off the cuff," Pfeiffer said. No prepared speech.

"Off the cuff? Sounds good. Let's go do it."

Obama walked toward the stage and, as he was announced, he mouthed the words: "Ladies and gentlemen, the President of the United States."

Then it happened again: another heckler broke into Obama's speech. A man in the balcony repeatedly shouted out, "Executive order!," demanding that the President bypass Congress with more unilateral actions. Obama listened with odd indulgence. Finally, he said, "I'm going to actually pause on this issue, because a lot of people have been saying this lately on every problem, which is just, 'Sign an executive order and we can pretty much do anything and basically nullify Congress.' "

Many in the crowd applauded their approval. Yes! Nullify it! Although Obama has infuriated the right with relatively modest executive orders on gun control and some stronger ones on climate change, he has issued the fewest of any modern President, except George H. W. Bush.

"Wait, wait, wait," Obama said. "Before everybody starts clapping, that's not how it works. We've got this Constitution, we've got this whole thing about separation of powers. So there is no shortcut to politics, and there's no shortcut to democracy." The applause was hardly ecstatic. Everyone knew what he meant. The promises in the second inaugural could be a long time coming.

IV—THE WELCOME TABLE

For every flight aboard Air Force One, there is a new name card at each seat; a catalogue of the Presidential Entertainment Library, with its hiply curated choices of movies and music; baskets

of fruit and candy; a menu. Obama is generally a spare eater; the Air Force One menu seems designed for William Howard Taft. Breakfast one morning was "pumpkin spiced French toast drizzled with caramel syrup and a dollop of fresh whipped cream. Served with scrambled eggs and maple sausage links." Plus juice, coffee, and, on the side, a "creamy vanilla yogurt layered with blackberries and cinnamon graham crackers."

The most curious character on the plane was Marvin Nicholson, a tall, rangy man in his early forties who works as the President's trip director and ubiquitous factotum. He is six feet eight. Nicholson is the guy who is always around, who carries the bag and the jacket, who squeezes Purell onto the Presidential palms after a rope line or a clutch; he is the one who has the pens, the briefing books, the Nicorette, the Sharpies, the Advil, the throat lozenges, the iPad, the iPod, the protein bars, the bottle of Black Forest Berry Honest Tea. He and the President toss a football around, they shoot baskets, they shoot the shit. In his twenties, Nicholson was living in Boston and working as a bartender and as a clerk in a windsurfing-equipment shop, where he met John Kerry. He moved to Nantucket and worked as a caddie. He carried the Senator's clubs and Kerry invited him to come to D.C. Since taking the job with Obama, in 2009, Nicholson has played golf with the President well over a hundred times. The Speaker of the House has played with him once.

A fact like this can seem to chime with the sort of complaints you hear all the time about Obama, particularly along the Acela Corridor. He is said to be a reluctant politician: aloof, insular, diffident, arrogant, inert, unwilling to jolly his allies along the fairway and take a 9-iron to his enemies. He doesn't know anyone in Congress. No one in the House or in the Senate, no one in foreign capitals fears him. He gives a great speech, but he doesn't understand power. He is a poor executive. Doesn't it seem as if he hates the job? And so on. This is the knowing talk on Wall Street, on K Street, on Capitol Hill, in green rooms—the "Morning Joe" consensus.

There are other ways to assess the political skills of a President who won two terms, as only seventeen of forty-four Presidents have, and did so as a black man, with an African father and a peculiar name, one consonant away from that of the world's most notorious terrorist. From the start, however, the political operatives who opposed him did what they are paid to do—they drew a cartoon of him. "Even if you never met him, you know this guy," Karl Rove said, in 2008. "He's the guy at the country club with the beautiful date, holding a Martini and a cigarette, that stands against the wall and makes snide comments about everyone who passes by." The less malign version is of a President who is bafflingly serene, as committed to his duties as a husband and father—six-thirty family dinner upstairs in the private residence is considered "sacrosanct," aides say—as he is to his duties as Cajoler-in-Chief.

Still, Obama's reluctance to break bread on a regular basis with his congressional allies is real, and a source of tribal mystification in Washington. "Politics was a strange career choice for Obama," David Frum, a conservative columnist, told me. "Most politicians are not the kind of

people you would choose to have as friends. Or they are the kind who, like John Edwards, seem to be one thing but then turn out to have a monster in the attic; the friendship is contingent on something you can't see. Obama is exactly like all my friends. He would rather read a book than spend time with people he doesn't know or like." Joe Manchin, a Democrat from West Virginia who was elected to the Senate three years ago, said recently that Obama's distance from members of Congress has hurt his ability to pass legislation. "When you don't build those personal relationships," Manchin told CNN, "it's pretty easy for a person to say, 'Well, let me think about it.' "

Harry Truman once called the White House "the great white jail," but few Presidents seem to have felt as oppressed by Washington as Obama does. At one stop on the West Coast trip, Marta Kauffman, a Democratic bundler who was one of the creators of "Friends," said that she asked him what had surprised him most when he first became President. "The bubble," Obama said. He said he hoped that one day he might be able to take a walk in the park, drop by a bookstore, chat with people in a coffee shop. "After all this is done," he said, "how can I find that again?"

"Have you considered a wig?" she asked.

"Maybe fake dreads," her son added.

The President smiled. "I never thought of that," he said.

Obama's circle of intimates is limited; it has been since his days at Columbia and Harvard Law. In 2008, Obama called on John Podesta, who had worked extensively for Bill Clinton, to run his transition process. When Clinton took office, there was a huge list of people who needed to be taken care of with jobs; the "friends of Bill" is a wide network. After Podesta talked to Obama and realized how few favors had to be distributed, he told a colleague, "He travels light."

Obama's favorite company is a small ensemble of Chicago friends—Valerie Jarrett, Marty Nesbitt and his wife, Anita Blanchard, an obstetrician, and Eric and Cheryl Whitaker, prominent doctors on the South Side. During the first Presidential campaign, the Obamas took a vow of "no new friends."

"There have been times where I've been constrained by the fact that I had two young daughters who I wanted to spend time with—and that I wasn't in a position to work the social scene in Washington," Obama told me. But, as Malia and Sasha have grown older, the Obamas have taken to hosting occasional off-the-record dinners in the residence upstairs at the White House. The guests ordinarily include a friendly political figure, a business leader, a journalist. Obama drinks a Martini or two (Rove was right about that), and he and the First Lady are welcoming, funny, and warm. The dinners start at six. At around ten-thirty at one dinner last spring, the guests assumed the evening was winding down. But when Obama was asked whether they should leave, he laughed and said, "Hey, don't go! I'm a night owl! Have another drink." The party went on past 1 A.M.

At the dinners with historians, Obama sometimes asks his guests to talk about their latest work.

On one occasion, Doris Kearns Goodwin talked about what became "The Bully Pulpit," which is a study, in part, of the way that Theodore Roosevelt deployed his relentlessly gregarious personality and his close relations with crusading journalists to political advantage. The portrait of T.R. muscling obstreperous foes on the issue of inequality—particularly the laissez-faire dinosaurs in his own party, the G.O.P.—couldn't fail to summon a contrasting portrait.

The biographer Robert Caro has also been a guest. Caro's ongoing volumes about Lyndon Johnson portray a President who used everything from the promise of appointment to bald-faced political threats to win passage of the legislative agenda that had languished under John Kennedy, including Medicare, a tax cut, and a civil-rights bill. Publicly, Johnson said of Kennedy, "I had to take the dead man's program and turn it into a martyr's cause." Privately, he disdained Kennedy's inability to get his program through Congress, cracking, according to Caro, that Kennedy's men knew less about politics on the Hill "than an old maid does about fucking." Senator Richard Russell, Jr., of Georgia, admitted that he and his Dixiecrat colleagues in the Senate could resist Kennedy "but not Lyndon": "That man will twist your arm off at the shoulder and beat your head in with it."

Obama delivers no such beatings. Last April, when, in the wake of the mass shootings in Newtown, Connecticut, eighty-three per cent of Americans declared themselves in favor of background checks for gun purchases, the *Times* ran a prominent article making the case that the Senate failed to follow the President's lead at least partly because of his passivity as a tactical politician. It described how Mark Begich, a Democratic senator from Alaska, had asked for, and received, a crucial favor from the White House, but then, four weeks later, when Begich voted against the bill on background checks, he paid no price. No one shut down any highway lanes in Anchorage; no Presidential fury was felt in Juneau or the Brooks Range. The historian Robert Dallek, another guest at the President's table, told the *Times* that Obama was "inclined to believe that sweet reason is what you need to use with people in high office."

Yet Obama and his aides regard all such talk of breaking bread and breaking legs as wishful fantasy. They maintain that they could invite every Republican in Congress to play golf until the end of time, could deliver punishments with ruthless regularity—and never cut the Gordian knot of contemporary Washington. They have a point. An Alaska Democrat like Begich would never last in office had he voted with Obama. L.B.J., elected in a landslide victory in 1964, drew on whopping majorities in both houses of Congress. He could exploit ideological diversity within the parties and the lax regulations on earmarks and pork-barrel spending. "When he lost that historic majority, and the glow of that landslide victory faded, he had the same problems with Congress that most Presidents at one point or another have," Obama told me. "I say that not to suggest that I'm a master wheeler-dealer but, rather, to suggest that there are some structural institutional realities to our political system that don't have much to do with schmoozing."

Dallek said, "Johnson could sit with Everett Dirksen, the Republican leader, kneecap to

kneecap, drinking bourbon and branch water, and Dirksen would mention that there was a fine young man in his state who would be a fine judge, and the deal would be cut. Nowadays, the media would know in an instant and rightly yell 'Corruption!' "

Caro finds the L.B.J.-B.H.O. comparison ludicrous. "Johnson was unique," he said. "We have never had anyone like him, as a legislative genius. I'm working on his Presidency now. Wait till you see what he does to get Medicare, the Civil Rights Act, and the Voting Rights Act through. But is Obama a poor practitioner of power? I have a different opinion. No matter what the problems with the rollout of Obamacare, it's a major advance in the history of social justice to provide access to health care for thirty-one million people."

At the most recent dinner he attended at the White House, Caro had the distinct impression that Obama was cool to him, annoyed, perhaps, at the notion appearing in the press that his latest Johnson volume was an implicit rebuke to him. "As we were leaving, I said to Obama, 'You know, my book wasn't an unspoken attack on you, it's a book about Lyndon Johnson,' " Caro recalled. L.B.J. was, after all, also the President who made the catastrophic decision to deepen America's involvement in the quagmire of Vietnam. "Obama seems interested in winding down our foreign wars," Caro said approvingly.

When Obama does ask Republicans to a social occasion, he is sometimes rebuffed. In the fall of 2012, he organized a screening at the White House of Steven Spielberg's film "Lincoln." Spielberg, the cast, and the Democratic leadership found the time to come. Mitch McConnell, John Boehner, and three other Republicans declined their invitations, pleading the press of congressional business. In the current climate, a Republican, especially one facing challenges at home from the right, risks more than he gains by socializing or doing business with Obama. Boehner may be prepared to compromise on certain issues, but it looks better for him if he is seen to be making a deal with Harry Reid, in the Senate, than with Barack Obama. Obama's people say that the President's attitude is, Fine, so long as we get there. Help me to help you.

When I asked Obama if he had read or seen anything that fully captured the experience of being in his office, he laughed, as if to say, You just have no idea. "The truth is, in popular culture the President is usually a side character and a lot of times is pretty dull," he said. "If it's a paranoid conspiracy-theory movie, then there's an evil aide who is carrying something out. If it's a good President, then he is all-wise and all-knowing"—like the characters played by Martin Sheen in "The West Wing," and Michael Douglas in "The American President." Obama says that he is neither. "I'll tell you that watching 'Lincoln' was interesting, in part because you watched what obviously was a fictionalized account of the President I most admire, and there was such a gap between him and me that it made you want to be better." He spoke about envying Lincoln's "capacity to speak to and move the country without simplifying, and at the most fundamental of levels." But what struck him most, he said, was precisely what his critics think he most avoids—"the messiness of getting

something done."

He went on, "The real politics resonated with me, because I have yet to see something that we've done, or any President has done, that was really important and good, that did not involve some mess and some strong-arming and some shading of how it was initially talked about to a particular member of the legislature who you needed a vote from. Because, if you're doing big, hard things, then there is going to be some hair on it—there's going to be some aspects of it that aren't clean and neat and immediately elicit applause from everybody. And so the nature of not only politics but, I think, social change of any sort is that it doesn't move in a straight line, and that those who are most successful typically are tacking like a sailor toward a particular direction but have to take into account winds and currents and occasionally the lack of any wind, so that you're just sitting there for a while, and sometimes you're being blown all over the place."

The politician sensitive to winds and currents was visible in Obama's coy talk of his "evolving" position on gay marriage. Obama conceded in one of our later conversations only that it's "fair to say that I may have come to that realization slightly before I actually made the announcement" favoring gay marriage, in May of 2012. "But this was not a situation where I kind of did a wink and a nod and a hundred-and-eighty-degree turn." The turn may not have been a sudden one-eighty; to say that your views are "evolving," though, is to say there is a position that you consider to be more advanced than the one you officially hold. And he held the "evolved" position in 1996, when, as a candidate for the Illinois state senate, he filled out a questionnaire from *Outlines*, a local gay and lesbian newspaper, saying, "I favor legalizing same-sex marriages."

When I asked Obama about another area of shifting public opinion—the legalization of marijuana—he seemed even less eager to evolve with any dispatch and get in front of the issue. "As has been well documented, I smoked pot as a kid, and I view it as a bad habit and a vice, not very different from the cigarettes that I smoked as a young person up through a big chunk of my adult life. I don't think it is more dangerous than alcohol."

Is it *less* dangerous? I asked.

Obama leaned back and let a moment go by. That's one of his moves. When he is interviewed, particularly for print, he has the habit of slowing himself down, and the result is a spool of cautious lucidity. He speaks in paragraphs and with moments of revision. Sometimes he will stop in the middle of a sentence and say, "Scratch that," or, "I think the grammar was all screwed up in that sentence, so let me start again."

Less dangerous, he said, "in terms of its impact on the individual consumer. It's not something I encourage, and I've told my daughters I think it's a bad idea, a waste of time, not very healthy." What clearly does trouble him is the radically disproportionate arrests and incarcerations for marijuana among minorities. "Middle-class kids don't get locked up for smoking pot, and poor kids do," he said. "And African-American kids and Latino kids are more likely to be poor and less likely to have

the resources and the support to avoid unduly harsh penalties." But, he said, "we should not be locking up kids or individual users for long stretches of jail time when some of the folks who are writing those laws have probably done the same thing." Accordingly, he said of the legalization of marijuana in Colorado and Washington that "it's important for it to go forward because it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished."

As is his habit, he nimbly argued the other side. "Having said all that, those who argue that legalizing marijuana is a panacea and it solves all these social problems I think are probably overstating the case. There is a lot of hair on that policy. And the experiment that's going to be taking place in Colorado and Washington is going to be, I think, a challenge." He noted the slippery-slope arguments that might arise. "I also think that, when it comes to harder drugs, the harm done to the user is profound and the social costs are profound. And you do start getting into some difficult line-drawing issues. If marijuana is fully legalized and at some point folks say, Well, we can come up with a negotiated dose of cocaine that we can show is not any more harmful than vodka, are we open to that? If somebody says, We've got a finely calibrated dose of meth, it isn't going to kill you or rot your teeth, are we O.K. with that?"

V—MAGIC KINGDOMS

By Monday night, Obama was in Los Angeles, headed for Beverly Park, a gated community of private-equity barons, Saudi princes, and movie people. It was a night of fund-raisers—the first hosted by Magic Johnson, who led the Lakers to five N.B.A. championships, in the eighties. In the Beast, on the way to Johnson's house, Obama told me, "Magic has become a good friend. I always tease him—I think he supported Hillary the first time around, in '08."

"He campaigned for her in Iowa!" Josh Earnest, a press spokesman, said, still sounding chagrined.

"Yeah, but we have developed a great relationship," Obama said. "I wasn't a Lakers fan. I was a Philadelphia 76ers fan, because I loved Doctor J."—Julius Erving—"and then became a Jordan fan, because I moved to Chicago. But, in my mind, at least, what has made Magic heroic was not simply the joy of his playing." Obama said that the way Johnson handled his H.I.V. diagnosis changed "how the culture thought about that—which, actually, I think, ultimately had an impact about how the culture thought about the gay community." He also talked about Johnson's business success as something that was "deeply admired" among African-Americans—"the notion that here's somebody who would leverage fame and fortune in sports into a pretty remarkable business career."

"Do you not see that often enough, by your lights?" I asked.

"I don't," Obama said.

The Obamas are able to speak to people of color in a way that none of their predecessors could.

Exhibit E

February 20, 2014
HUFF POST POLITICS

Michele Leonhart, DEA Chief, Won't Say Whether Crack, Heroin Are Worse For Health Than Marijuana

The Huffington Post | By Nick Wing
Posted: 06/21/2012 10:50 am Updated: 06/22/2012 10:21 am

Michele Leonhart, the head of the Drug Enforcement Administration, ducked a tough line of questioning from Rep. Jared Polis (D-Colo.) on Wednesday, refusing to answer a number of questions about the comparative health impacts of marijuana and other, harder drugs.

Leonhart was testifying before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Polis, a top congressional advocate for marijuana law reform, took the opportunity to grill the DEA administrator on some specifics about marijuana, which has been decriminalized in some parts of his state and legalized for medical purposes in the rest.

“Is crack worse for a person than marijuana?” Polis asked Leonhart.

“I believe all illegal drugs are bad,” Leonhart answered.

Polis continued, asking whether methamphetamines and heroin were worse for a person's health than marijuana.

“Again, all drugs, they're illegal drugs,” Leonhart started, before being cut off by Polis.

“Yes, no, or I don’t know?” Polis said. “If you don’t know, you can look this up. You should know this as the chief administrator for the Drug Enforcement Agency. I’m asking a very straightforward question: Is heroin worse for someone's health than marijuana?”

Leonhart ducked again, repeating, "All illegal drugs are bad."

Since assuming the head position at the DEA, Leonhart has made controlling prescription drug abuse the top priority, a stance she had laid out so aggressively that it led one Democratic senator to block her confirmation.

Asked by Polis whether prescription drugs were more addictive than marijuana, Leonhart again skirted the question.

"All illegal drugs in Schedule I are addictive," she said, before avoiding a question about whether prescription pills were more harmful than marijuana.

Leonhart has been a controversial figure in the drug policy reform community since she was named acting administrator of the DEA in the wake of her predecessor Karen Tandy's departure.

While her opponents in the marijuana policy reform community were particularly upset at her nomination, due to suggestions that she would ignore an earlier announcement by the Obama administration about making marijuana crackdowns a low priority, she also ran into trouble when reports surfaced that DEA officials had become entangled in a Ponzi scheme.

Despite these concerns, she was eventually confirmed by a unanimous vote in late 2010. Meanwhile, the Obama administration's previous pledge to deemphasize marijuana enforcement appears to have gone by the wayside.

Watch the whole exchange, via Polis' YouTube page:

UPDATE:

Reddit user Glambattista flags a separate exchange from Wednesday's hearing in which Leonhart faces another round of aggressive questioning on marijuana from Rep. Steve Cohen (D-Tenn.).

Below, where medical marijuana has been legalized in the United States:

CORRECTION: In an earlier version of this article, Michele Leonhart's name was misspelled. We regret the error.

ALSO ON HUFFPOST:

Exhibit F

Congress of the United States
Washington, DC 20515

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

February 12, 2014

Dear Mr. President:

We were encouraged by your recent comments in your interview with David Remnick in the January 27, 2014 issue of the New Yorker, about the shifting public opinion on the legalization of marijuana. We request that you take action to help alleviate the harms to society caused by the federal Schedule I classification of marijuana.

Lives and resources are wasted on enforcing harsh, unrealistic, and unfair marijuana laws. Nearly two-thirds of a million people every year are arrested for marijuana possession. We spend billions every year enforcing marijuana laws, which disproportionately impact minorities. According to the ACLU, black Americans are nearly four times more likely than whites to be arrested for marijuana possession, despite comparable marijuana usage rates.

You said that you don't believe marijuana is any more dangerous than alcohol: a fully legalized substance, and believe it to be less dangerous "in terms of its impact on the individual consumer." This is true. Marijuana, however, remains listed in the federal Controlled Substances Act at Schedule I, the strictest classification, along with heroin and LSD. This is a higher listing than cocaine and methamphetamine, Schedule II substances that you gave as examples of harder drugs. This makes no sense.

Classifying marijuana as Schedule I at the federal level perpetuates an unjust and irrational system. Schedule I recognizes no medical use, disregarding both medical evidence and the laws of nearly half of the states that have legalized medical marijuana. A Schedule I or II classification also means that marijuana businesses in states where adult or medical use are legal cannot deduct business expenses from their taxes or take tax credits due to Section 280E of the federal tax code.

We request that you instruct Attorney General Holder to delist or classify marijuana in a more appropriate way, at the very least eliminating it from Schedule I or II. Furthermore, one would hope that that your Administration officials publicly reflect your views on this matter. Statements such as the one from DEA chief of operations James L.

Capra that the legalization of marijuana at the state level is "reckless and irresponsible[1]" serve no purposes other than to inflame passions and misinform the public.

Thank you for your continued thoughtfulness about this important issue. We believe the current system wastes resources and destroys lives, in turn damaging families and communities. Taking action on this issue is long overdue.

Sincerely,

Earl Blumenauer
Member of Congress

Steve Cohen
Member of Congress

Sam Farr
Member of Congress

Raúl Grijalva
Member of Congress

Mike Honda
Member of Congress

Jared Huffman
Member of Congress

Barbara Lee
Member of Congress

Zoe Lofgren
Member of Congress

Alan Lowenthal
Member of Congress

James P. McGovern
Member of Congress

[1] http://www.washingtonpost.com/national/dea-operations-chief-decries-legalization-of-marijuana-at-state-level/2014/01/15/17af548a-7e38-11e3-9556-4a4bf7bcbd84_story.html

James P. Moran
Member of Congress

Beto O'Rourke
Member of Congress

Jared Polis
Member of Congress

Mike Quigley
Member of Congress

Dana Rohrabacher
Member of Congress

Jan Schakowsky
Member of Congress

Eric Swalwell
Member of Congress

Peter Welch
Member of Congress

Exhibit G

WHITE HOUSE

Obama Says Easing Marijuana Restrictions a Job for Congress

Implies he might support doing so, but doesn't say so explicitly

By Zeke J Miller @zekejmiller | Jan. 31, 2014 | 327 Comments

Correction appended, Jan 31., 2014

ASSOCIATED PRESS

President Barack Obama

President Barack Obama says in a new interview that that it's up to Congress to remove marijuana from the federal government's list of the most serious narcotics, implying but not explicitly saying that he might support such a move.

In an interview with CNN that aired Friday, Obama was pressed on recent remarks he made to the *New Yorker* that marijuana is no more dangerous than alcohol, and on whether he would push to remove pot from the Drug Enforcement Agency's list of so-called "schedule I" narcotics.

"First of all, what is and isn't a Schedule I narcotic is a job for Congress," Obama said.

"I stand by my belief, based, I think, on the scientific evidence, that marijuana, for casual users, individual users, is subject to abuse, just like alcohol is and should be treated as a public health problem and challenge," Obama added. "But as I said in the interview, my concern is when you end up having very heavy criminal penalties for individual users that have been applied unevenly, and in some cases, with a racial disparity."

The DEA is required to make determinations, Obama said, but based on laws passed by Congress. A spokesman for the White House Office of National Drug Control Policy tweeted Wednesday that the attorney general can reclassify marijuana after a scientific review, but that it was "not likely given current science."

But Obama wouldn't specifically back congressional action to remove the schedule I classification for marijuana in the interview.

The drug is already treated differently than other drugs in the schedule I category. It is decriminalized for medical purposes in almost two-dozen states, and Colorado and Washington state recently became the first to allow it for recreational use. The Obama administration has cautiously allowed those two states to move forward in implementing their new recreational pot markets, while warning that it will react swiftly if the drug finds its way across state lines or into the hands of minors.

"We're going to see what happens in the next nine months in Colorado and Washington," Obama said. "The Department of Justice, you know, under Eric Holder, has said that we are going to continue to enforce federal laws. But in those states, we recognize that we don't have… the resources to police whether somebody is smoking a joint on a corner. And we are trying to provide them structures to make sure that, you know, big time drug traffickers, the spillover effect of the violence, potentially, of a drug trade are not creeping out of this experiment."

Obama has admitted to his own drug use as a student in his memoir, *Dreams From My Father*, writing of using marijuana and "maybe a little blow."

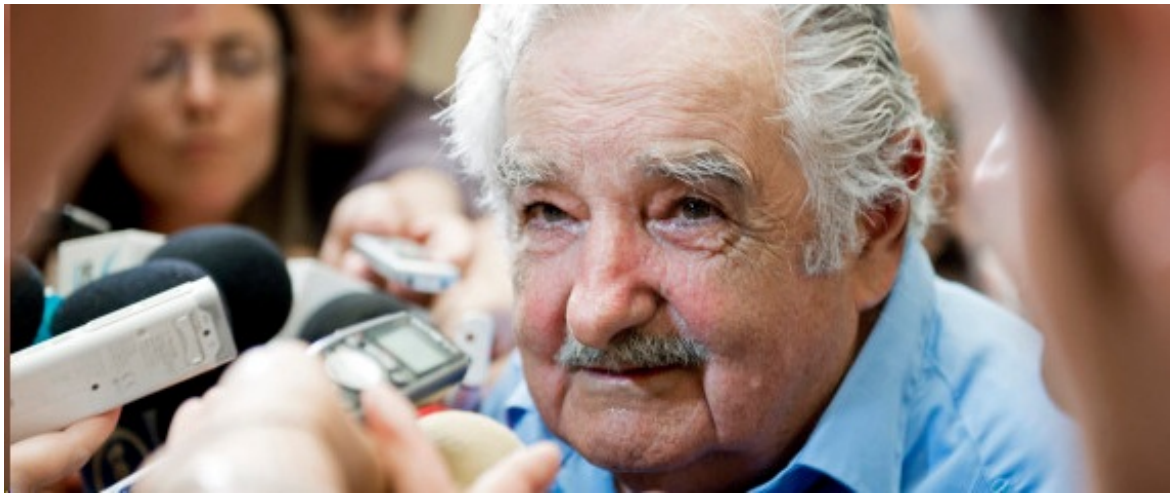
"But I do offer a cautionary note," Obama told CNN. "…Those who think legalization is a panacea, I think they have to ask themselves some tough questions, too, because if we start having a situation where big corporations with a lot of resources and distribution and marketing arms are suddenly going out there peddling marijuana, then the levels of abuse that may take place are going to be higher."

Correction: The original version and headline of this story incorrectly characterized Obama's stance on congressional action to reclassify marijuana.

Exhibit H

Weed-Legalizing President Nominated For Nobel Peace Prize
The Huffington Post

Posted: 02/05/2014 12:30 pm EST Updated: 02/06/2014 10:59 am EST Print ArticleMain Entry



Uruguay's weed-legalizing president will have another shot at winning a Nobel Peace Prize.

José "Pepe" Mujica's name has been submitted again for the prestigious award this year by members of his leftwing political party, the Frente Amplio, as well as a German nongovernmental organization. Mujica's supporters cited the Uruguayan leader's pioneering policy of legalizing the government-controlled production and sale of marijuana to registered users as the main reason for his nomination.

"I'm very thankful to these people for honoring me," Mujica said in Havana, where he was attending a summit of Latin American leaders last week, according to Argentine daily La Nación. "We are only proposing the right to try another path because the path of repression doesn't work. We don't know if we'll succeed. We ask for support, scientific spirit and to understand that no addiction is a good thing. But our efforts go beyond marijuana -- we're taking aim at the drug traffic."

Mujica and those who backed the marijuana legalization policy argued that allowing the sale and consumption of marijuana would take money out of the hands of drug traffickers, and end military enforcement of a prohibitionist drug policy that fails to keep people from smoking weed.

The Drugs Peace Institute, a Dutch NGO, also supported Mujica's candidacy in a letter sent to the committee last month. In addition to his marijuana policies, the NGO praised Mujica's evolution from a leftwing guerrilla into an elected politician, after spending 14 years in prison -- including more than 10 years in solitary confinement, according to The New York Times.

"Instead of becoming filled with bitterness and seeking violent revenge, he became a true democrat and the elected president of Uruguay," the letter says.

Mujica made it among the top 10 finalists for the award last year, garnering the support of the former head of state of the Soviet Union and Nobel laureate Mikhail Gorbachev.

The 2013 Nobel Peace Prize was awarded to the Organization for the Prohibition of Chemical Weapons.

CORRECTION: An earlier version of this article referred to Mikhail Gorbachev as the former head of state of Russia, rather than the Soviet Union.