



***END GAME: A PROPOSAL TO PRESERVE RULE OF LAW AND  
END THE FEDERAL-STATE CONFLICT OVER MARIHUANA***

John J. Coleman, Ph.D.  
President  
Drug Watch International, Inc.

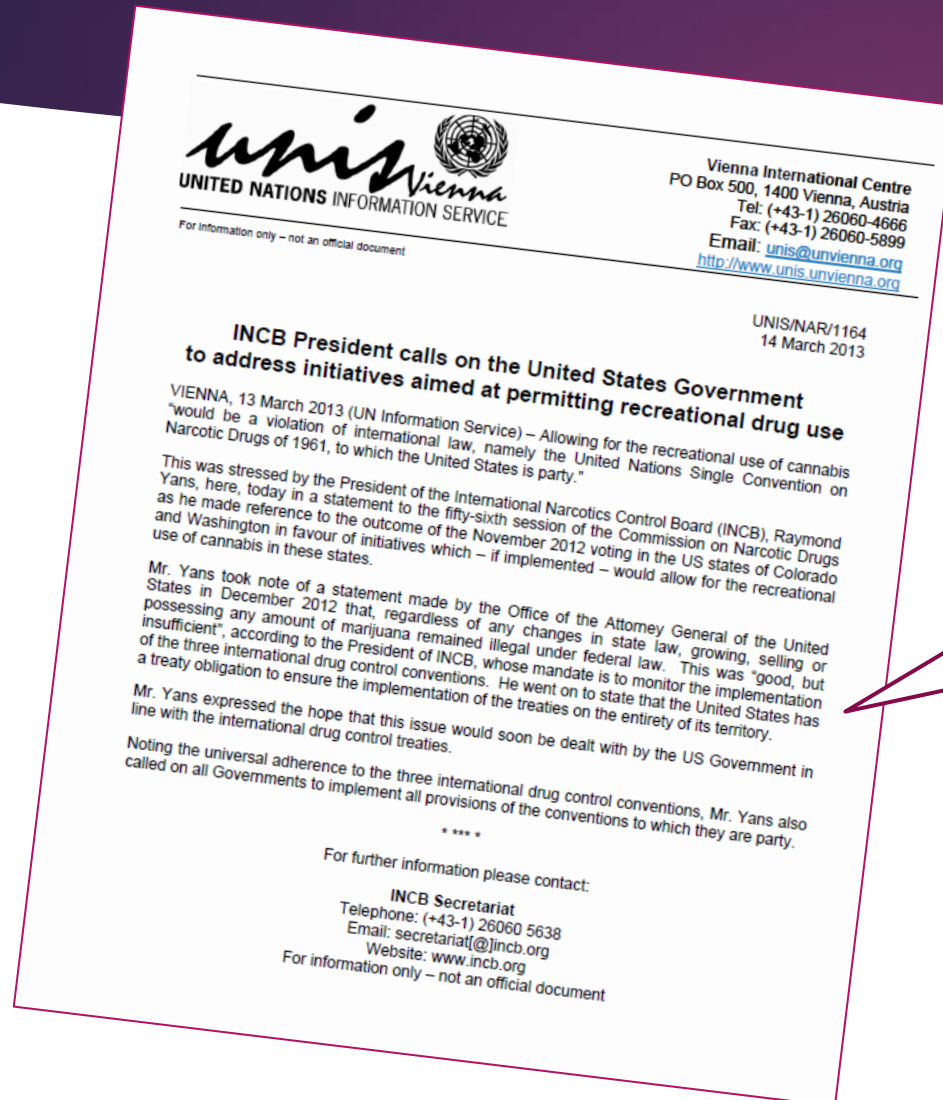
# Brief History of U.S. Marihuana Laws

- ▶ 1937: U.S. enacts Marihuana Tax Act
- ▶ 1961: U.S. is a signatory to U.N. Single Convention (“The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.” – Art. 28)
- ▶ 1970: U.S. enacts Controlled Substances Act
- ▶ 1996: California voters pass Proposition 215 legalizing *medical marihuana*
- ▶ 1996-2013: Twenty states & D.C. enact *medical marihuana* laws
- ▶ 2012: Colorado and Washington *legalize* marihuana in direct positive conflict with federal law
- ▶ 2013: U.S. Justice Department declines to challenge CO & WA:

“Based on assurances that those states will impose an appropriately strict regulatory system, the Department has informed the governors of both states [*Colorado & Washington*] that it is deferring its right to challenge their legalization laws at this time.”<sup>1</sup>

<sup>1</sup>. Department of Justice, Office of Public Affairs, August 29, 2013: “Justice Department Announces Update to Marijuana Enforcement Policy” (available at: <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>).

# International Reaction by United Nations INCB



“He went on to state that the United States has a treaty obligation to ensure the implementation of the treaties on the entirety of its territory.”<sup>1</sup>

<sup>1</sup>. Statement, dated March 2013, by Raymond Yans, President, United Nations International Narcotic Control Board calling on U.S. to halt marijuana legalization in CO & WA.

# Domestic Reaction to DOJ Decision

**Ex-DEA heads urge Holder oppose marijuana ballots**

BY ALEX DOBUZINSKIS  
LOS ANGELES | Fri Sep 7, 2012 9:03pm EDT

15 COMMENTS | [Tweet](#) 43 | [Share](#) | [Share this](#) | [Email](#) | [Print](#)



U.S. Attorney General Eric Holder during a meeting at the White House in Washington, July 26, 2012.  
CREDIT: REUTERS/LARRY DOWNING

**RELATED NEWS**

- Former DEA heads urge Holder to speak out against pot ballots
- Federal court blocks Texas voter ID law
- Denver bans outdoor advertising for medical pot shops

(Reuters) - Nine former heads of the U.S. Drug Enforcement Administration urged Attorney General Eric Holder on Friday to take a stand against possible legalization of recreational marijuana in three western states, saying silence would convey acceptance.

The former officials said in a letter sent on Friday that legalization would pose a direct conflict with federal law.

**CBSNEWS** Video US World Politics Entertainment Health Money


By STEPHANIE CONDON / CBS NEWS / August 29, 2013, 8:36 PM

## Obama administration won't sue Colorado or Washington state over pot laws

67 Comments / [Shares](#) / [Tweets](#) / [Stumble](#) / [Email](#) More +

Updated at 2:55 p.m. ET

Nearly a year after Washington state and Colorado voted to legalize recreational marijuana, the Obama administration announced on Thursday that it won't sue the states to comply with federal laws, though it reserves the right to in the future.



Play VIDEO

**W.H. says prosecuting marijuana users "not the best use" of resources**

The administration also issued **new guidelines for all U.S. attorneys** on the dynamic issue of marijuana law, recommending that they only focus on prosecuting major cases. Specifically, the Justice Department laid out eight high-priority areas for enforcement, including preventing the distribution of marijuana to minors, preventing revenue from marijuana sales from going to criminal enterprises, and preventing marijuana possession or use on federal property.

In effect, the Obama administration is -- for now -- letting states carry out their experiments with loosening marijuana regulations.



# A Nation of Laws?

- ▶ Regardless of one's personal feeling about marihuana control, the current government policy undermines America's *rule of law* tradition.
- ▶ It also undermines and confounds the concept and tradition of *federalism*, i.e., the relationship between individual states and the federal government.
- ▶ Very narrow but important legal grounds when federal laws trump state laws in conflict:
  1. U.S. Constitution: Article VI (Supremacy Clause)
  2. Treaties: 1961 United Nations Convention on Narcotic Drugs
  3. Statutory Preemption: e.g., Title 21, U.S. Code, §903; *Application of State Law*



# Refusal to Enforce Federal Law Encourages State Complicity in Unlawful Marihuana Trade

- ▶ States have ventured far beyond simply “decriminalizing” or removing state sanctions for producing, possessing and distributing marihuana.
- ▶ By referenda, voter initiatives, and/or legislation, 20 states and the District of Columbia have authorized commerce in marihuana in clear and unambiguous violation of federal law.
- ▶ According to *Thomson Reuters Westlaw*, as of 9/22/13, 40 states and the District of Columbia have proposed marihuana use laws [20 states and D.C. have actually enacted them]; 13 states have proposed or enacted laws permitting recreational/nonmedical use of marihuana [two states, CO & WA, have actually enacted them]; and 10 states have not proposed or enacted any legislation authorizing the use of marihuana.<sup>1</sup>

1. “Legalizing Pot Could Save California Hundreds of Millions Every Year, State Says.” Reid Wilson. *The Washington Post*, December 27, 2013.

# Refusal to Enforce Federal Law Encourages State Complicity in Unlawful Marihuana Trade

- ▶ The twenty states and District of Columbia are facilitating the commission of federal marihuana crimes by (among other things):
  1. Issuing business permits and occupational licenses to commercial marihuana dealers;
  2. Establishing labeling requirements and health and safety standards for the manufacture of marihuana products and the cultivation of marihuana;
  3. Issuing site approvals and building permits for marihuana dispensaries and retail shops;
  4. Issuing certificates of incorporation for businesses engaged in marihuana commerce;
  5. Issuing permits that authorize the production of marihuana;
  6. Imposing and collecting state and local taxes on marihuana sales;
  7. Establishing and managing registries of patients, caregivers, and prescribers *authorized* to produce, prescribe, dispense, and/or possess marihuana;
  8. Amending state statutes to permit possession, sale, and distribution of marihuana;
  9. Revising state drug paraphernalia laws to exclude “marihuana accessories.”

# Unresolved Conflict between State and Federal Drug Laws has Domino Effect

- ▶ Bar associations are troubled by this unresolved conflict. Given the unlawful status of marihuana under federal law, a typical lawyer-client relationship in a state-authorized marihuana enterprise risks being in conflict with the rules of professional conduct:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>1</sup>

<sup>1</sup>. ABA Model Rules of Professional Conduct (2004); Rule 1.2(d) (available at: [http://www.law.cornell.edu/ethics/aba/current/ABA\\_CODE.HTM](http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM)).



# Unresolved Conflict between State and Federal Drug Laws has Domino Effect

- ▶ Certified Public Accountants also face potential conflicts with their ethical rules if they provide services to a client engaged in a state-authorized marihuana enterprise that violates federal law:  
  
“If information or a complaint is received that alerts the Ethics Division that a member provided services to a client whose business violated federal law, such information or complaint may give rise to an ethics investigation and possible sanction pursuant to Rule 501, which prohibits a member from committing an act discreditable to the profession.”<sup>1</sup>
- ▶ The roles of the CPA or attorney in providing services to clients in marihuana businesses are further complicated by federal banking laws that prohibit banks from doing business with drug traffickers or handling proceeds of the illicit drug trade. As a result, marihuana businesses are “cash-only” enterprises.<sup>2</sup>

1. “An Issue Brief on State Marijuana Laws and the CPA Profession.” May 16, 2013, published by the Colorado Society of CPAs, The American Institute of CPAs, and the Washington Society of CPAs (available at: [http://www.aicpa.org/Advocay/State/Documents/MarijuanaCPAsIssueBrief\\_05162013.pdf](http://www.aicpa.org/Advocay/State/Documents/MarijuanaCPAsIssueBrief_05162013.pdf)).

2. A recent report in The Wall Street Journal states that the Justice Department is “drafting legal guidance” to clarify how banks can do business with “newly legal marijuana businesses in states like Colorado.” (“Justice Department to Clarify Bank-Marijuana Company Transaction Rules.” by Devlin Barrett, *The Wall Street Journal*, Jan. 6, 2014.)

# Unresolved Conflict between State and Federal Drug Laws has Domino Effect

- ▶ Like attorneys and CPAs, physicians in states where marijuana is authorized for medical purposes face similar ethical issues. This concern was addressed in a recent commentary in the *American Journal of Psychiatry*:

“Medical marijuana laws have challenged the way physicians practice medicine by asking them to recommend to their patients the use of a schedule I illegal drug of abuse with no scientific approval, dosage control, or quality control. Several medical societies, including APA, the American Medical Association, and the American Society of Addiction Medicine, have considered the medical marijuana movement and oppose it. The American Society of Addiction Medicine specifically recommended that ‘its members and other physician organizations and their members reject responsibility for providing access to cannabis and cannabis-based medications until such time as they receive marketing approval from the FDA.’”<sup>1</sup>

<sup>1</sup>. Kleber HD, & DuPont RL. (2012). Physicians and Medical Marijuana. *Am J Psychiatry*, 169(6), 564-568.

# Unresolved Conflict between State and Federal Drug Laws has Domino Effect

- ▶ At the federal level authorities have not escaped the confusion caused by the unresolved conflict.
- ▶ In 1982, Congress amended the Internal Revenue Code (IRC) to punish drug dealers by denying them business deductions and credits for their unlawful businesses. As a result, unlawful dealers of controlled substances incur federal tax liability on their gross revenues rather than on their net incomes.<sup>1</sup>
- ▶ In 2010, in response to a congressional inquiry, IRS advised that it lacked the authority to grant an exception to this rule for state-authorized marihuana businesses.<sup>2</sup>
- ▶ According to a marihuana entrepreneur, “no business, including ours, can survive if it is taxed on its gross revenue. The IRS is trying to tax us out of business.”<sup>3</sup>

<sup>1</sup>. 26 USC 280E, *Expenditures in Connection with the Illegal Sale of Drugs*. <sup>2</sup>. Leff BM. (2013). “Tax Planning for Marijuana Dealers (Draft). Washington College of Law Research Paper No. 2013-19, American University College of Law, Washington, D.C. <sup>3</sup>. *Ibid.*, citing Al Olson, “IRS Ruling Strikes Fear in Medical Marijuana Industry,” NBCNEWS.com (Oct. 5, 2011).

# Remedy

## End Game Project

- ▶ Civil suits brought by private citizens are permitted by some federal statutes, including civil rights laws, environmental laws, fair housing laws, and the *Americans With Disabilities Act*.
- ▶ Similarly, a provision in the federal *Racketeer Influenced and Corrupt Organization Act* (RICO) permits **any person** injured in his/her business or property by “racketeering activity” to bring a civil suit to recover triple damages and attorneys fees from the wrongdoers.<sup>1</sup>
- ▶ Among qualifying crimes in the RICO statute’s definition of racketeering activity is the “felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in ... the Controlled Substances Act), punishable under any law of the United States....”<sup>2</sup>
- ▶ Marijuana is a **controlled substance** under the *Controlled Substances Act*. Unlawful production, distribution, and possession of marijuana are crimes fitting RICO’s definition of racketeering activity – notwithstanding state laws and policies of the Department of Justice to the contrary.

<sup>1</sup>. See 18 USC 1964(c). <sup>2</sup>. See 18 USC 1961.

# End Game Project: Civil RICO - Theory of Prosecution

- ▶ Congress acknowledged a role for the state in drug control but mandated the supremacy of federal law in the event of a positive conflict (21 USC §903):

## “Application of State law

No provision of this subchapter [*i.e.*, *Controlled Substances Act*] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”<sup>1</sup> [emphasis added]

- ▶ States that have enacted laws authorizing marihuana have done so in positive conflict with 21 USC §903, as well as other provisions of the *Controlled Substances Act*.

<sup>1</sup>. See 21 USC 903, Application of State law.

# Remedy: End Game Project

- ▶ States that have authorized or legalized marihuana for any reason [i.e., medical or recreational use] are not shielded from Civil RICO suits.<sup>1</sup>
- ▶ State *sovereign immunity* does not extend to counties, cities, and municipalities.
- ▶ State officials named in a Civil RICO suit may be held liable for damages:
  - ▶ “The attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.”<sup>2</sup>
- ▶ Some state laws allow counties, cities, and municipalities to decide for themselves whether to authorize marihuana production, sale and possession.

<sup>1</sup>. Personal email communication, 12/13/2013, from Dr. John C. Eastman, Professor of Law, Dale E. Fowler School of Law at Chapman University, Orange, CA, and Founding Director, The Claremont Institute's Center for Constitutional Jurisprudence. <sup>2</sup>. See: Ex Parte Young - 209 U.S. 123 (1908) [Avail: <http://supreme.justia.com/cases/federal/us/209/123/>].



# End Game Project: Civil RICO - Theory of Prosecution

- ▶ RICO prohibits four types of conduct: 1) investing proceeds from a pattern of racketeering in an enterprise; 2) acquiring or maintaining control over an enterprise through a pattern of racketeering activity; 3) conducting or participating in the affairs of an enterprise through a pattern of racketeering activity; and 4) conspiring to do any of these types of conduct.<sup>1</sup>
- ▶ The “enterprise” must be one “engaged in, or the activities of which affect, interstate or foreign commerce.”<sup>2</sup>
- ▶ “Racketeering activity” is defined as: “any act which is indictable under any of the following provisions of title 18, United States Code: ... the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States....”<sup>3</sup>

<sup>1</sup>. 18 USC 1962, as cited by: Pierson PB. (2013). “RICO, Corruption, and White-Collar Crime.” *Temple Law Review*, 85(3), 523-574.

<sup>2</sup>. See 18 USC 1962(b). <sup>3</sup>. See 18 USC 1961 (Definitions).

# End Game Project: Civil RICO - Theory of Prosecution

- ▶ The commerce in marihuana in 20 states and the District of Columbia constitutes *racketeering activity* as defined by RICO.
- ▶ The operation of marihuana dispensaries/shops that purchase and distribute marihuana constitutes *patterns of racketeering activity* as defined by RICO.
- ▶ Individuals, partnerships, corporations, associations and/or other legal entities, including among the latter state officials, engaged in, or facilitating, the unlawful marihuana trade constitute *enterprises* as defined by RICO.
- ▶ Moreover, the potential predicate offenses, consisting of the basic business of the RICO enterprises, are continuous, related to each other, and, if not halted, pose a threat of future criminal activity.

# End Game Project: Civil RICO - Theory of Prosecution: Pros

- ▶ **Pro:** The openness of the unlawful marihuana commerce in the relevant jurisdictions simplifies identifying patterns of racketeering activity and those responsible for it.
- ▶ **Pro:** Because a Civil RICO case is *civil*, plaintiffs must prove the elements of the crimes charged by only a “preponderance of the evidence,” rather than “beyond a reasonable doubt.”
- ▶ **Pro:** State officials that have enacted laws authorizing marihuana commerce are potential defendants and/or co-conspirators in Civil RICO suits.
- ▶ **Pro:** Operators, owners, and investors in state-authorized unlawful marihuana commerce are potential defendants in Civil RICO suits.
- ▶ **Pro:** *Gonzales v. Raich*, 545 U.S. 1 (2005) upheld the authority of the federal *Controlled Substances Act* to prohibit marihuana produced within a state and in accordance with state law.<sup>1</sup>
- ▶ **Pro:** *Raich* satisfies RICO requirement that the “enterprise” be one “engaged in, or the activities of which affect, interstate or foreign commerce.”<sup>2</sup> [emphasis added]

<sup>1</sup>. *Gonzales v. Raich, et al.*, Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Decided June 6, 2005. <sup>2</sup>. See 18 USC 1962(b).

# End Game Project: Civil RICO - Theory of Prosecution: Cons

- ▶ **Con:** Finding potential plaintiffs who have suffered and can show direct damage to their businesses and/or property by a state-authorized marihuana enterprise operating in violation of federal law.
- ▶ **Con:** Costs – traditional methods for finding plaintiffs, *i.e.*, electronic and print media advertisements, are costly, as are investigating potential claims. Although plaintiffs who prevail in private-party civil RICO suits may recover triple damages and attorneys fees, the upfront costs of litigation may be substantial.
- ▶ **Con:** Unforeseen obstacles to legal theory. Although RICO originally was intended to address organized crime's infiltration of legitimate business, it has been used over the years in many other contexts, including white-collar crime and mail fraud. Use of Civil RICO within the context of the state-authorized marihuana trade as described herein is a novel use of the statute and, as such, would be breaking new and uncharted ground.

# End Game Project: Potential Results

- ▶ A verdict for the plaintiff(s) would require court(s) to find that state-authorized marijuana commerce constitutes unlawful racketeering activity within the meaning of the RICO statute.
- ▶ A verdict for the plaintiff(s) would show that the defendants, including private persons, businesses, investors, and state officials, acted unlawfully as criminal participants in RICO enterprises.
- ▶ Although the private party Civil RICO provision does not provide for injunctive relief, a verdict for the plaintiff(s) might encourage states and the U.S. government to halt this unconstitutional experiment and return to the *rule of law*.
- ▶ Regardless of one's personal feelings about the legal status of marijuana, the *rule of law* tradition is worth protecting when open and clear violations of laws are ignored or tacitly approved by public officials entrusted with the responsibility of enforcing those very same laws.

# Summary

- ▶ All employees and officers of the United States Government – from the President, Members of Congress, and Justices of the Supreme Court – on down to the lowest ranking civilian or military person are bound by oath or affirmation to support the United States Constitution.<sup>1</sup>
- ▶ This affirmative commitment to *rule of law* is essential for preserving an orderly and free society with rights protected by a system of laws that is fairly and consistently enforced.
- ▶ “There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.”<sup>2</sup>
- ▶ This **End Game** proposal attempts to correct one relatively small but important lapse in our *rule of law* tradition.

<sup>1</sup>. See: Article VI, Sect. 3, U.S. Constitution. <sup>2</sup>. U.S. Supreme Court Justice Felix Frankfurter, *United States v. United Mine Workers* (1947).



# Thank You!

