



State Marijuana Legalization Initiatives: Implications for Federal Law Enforcement

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Summary

Marijuana is the most commonly used illicit drug across the world, including in the United States. In 2012, an estimated 18.9 million individuals in the United States aged 12 or older (7.3% of this population) had used marijuana in the past month. The rate of reported marijuana use in 2012 was significantly higher than those rates reported prior to 2007. Mirroring this increase in use, marijuana availability in the United States has also increased. This growth has been linked to factors such as rising marijuana production in Mexico, decreasing marijuana eradication in Mexico, and increasing marijuana cultivation in the United States led by criminal networks including Mexican drug trafficking organizations.

Along with the uptick in the availability and use of marijuana in the United States, there has been a general shift in public attitudes toward the substance. In 1969, 12% of the surveyed population supported legalizing marijuana; today, more than half (52%) of surveyed adults have expressed opinions that marijuana should be legalized. And, 60% indicate that the federal government should not enforce its marijuana laws in states that allow the use of marijuana.

The federal government—through the Controlled Substances Act (CSA; P.L. 91-513; 21 U.S.C. §801 et. seq.)—prohibits the manufacture, distribution, dispensation, and possession of marijuana. Over the last few decades, some states have deviated from an across-the-board prohibition of marijuana. Evolving state-level positions on marijuana include decriminalization initiatives, legal exceptions for medical use, and legalization of certain quantities for recreational use. Notably, in the November 2012 elections, voters in Washington State and Colorado voted to legalize, regulate, and tax the recreational use of small amounts of marijuana. These latest moves have spurred a number of questions regarding their potential implications for related federal law enforcement activities and for the nation's drug policies on the whole. Among these questions is whether or to what extent state initiatives to decriminalize, or even legalize, the use of marijuana conflict with federal law.

In general, federal law enforcement has tailored its efforts to target criminal networks rather than individual criminals; its stance regarding marijuana offenders appears consistent with this position. While drug-related investigations and prosecutions remain a priority for federal law enforcement, the Obama Administration has suggested that efforts will be harnessed against large-scale trafficking organizations rather than on recreational users of marijuana. In an August 2013 memorandum, Deputy Attorney General Cole stated that while marijuana remains an illegal substance under the Controlled Substances Act, the Department of Justice would focus its resources on the “most significant threats in the most effective, consistent, and rational way.” The memo outlined eight enforcement priorities including preventing the distribution of marijuana to minors and preventing the diversion of marijuana from states where it is legal under state law into other states. Some may question whether state-level laws and regulations regarding marijuana prohibition—in particular those that clash with federal laws—may adversely impact collaborative law enforcement efforts and relationships. Currently, there is no evidence to suggest that the operation of these collaborative bodies will be impacted by current state-level marijuana decriminalization or legalization initiatives. Data from the U.S. Sentencing Commission seem to indicate a federal law enforcement focus on trafficking as opposed to possession offenses. Of the federal drug cases with marijuana listed as the primary drug type (28% of total drug cases sentenced), over 98% involved a sentence for drug *trafficking* in 2012.

A number of criminal networks rely heavily on profits generated from the sale of illegal drugs—including marijuana—in the United States. As such, scholars and policymakers have questioned whether or how any changes in state or federal marijuana policy in the United States might impact organized crime proceeds and levels of drug trafficking-related violence, particularly in Mexico. In short, there are no definitive answers to these questions; without clear understanding of (1) actual proceeds generated by the sale of illicit drugs in the United States, (2) the proportion of total proceeds attributable to the sale of marijuana, and (3) the proportion of marijuana sales controlled by criminal organizations and affiliated gangs, any estimates of how marijuana legalization might impact the drug trafficking organizations are purely speculative.

Given the differences between federal marijuana policies and those of states including Colorado and Washington, Congress may choose to address state legalization initiatives in a number of ways, or choose to take no action. Among the host of options, policymakers may choose to amend or affirm federal marijuana policy, exercise oversight over federal law enforcement activities, or incentivize state policies through the provision or denial of certain funds.

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Introduction

Marijuana is the most commonly used illicit drug across the globe, including in the United States.¹ In 2012, an estimated 18.9 million individuals in the United States aged 12 or older (7.3% of this population) were current (past month) users of marijuana.² The rate of reported marijuana use in 2012 was significantly higher than those rates reported prior to 2007.³ Consistent with this increase in use, the past decade has seen a decline in youth perceptions of risk tied to smoking marijuana once a month or even more frequently, such as 1-2 times per week.⁴ Youth also perceive that obtaining marijuana—if they desire it—is relatively easy.⁵ Indeed, marijuana availability in the United States has increased, according to the National Drug Intelligence Center. This increase has been linked to factors such as rising marijuana production in Mexico, decreasing marijuana eradication in Mexico, and increasing marijuana cultivation in the United States led by criminal networks including Mexican drug trafficking organizations.⁶

The uptick in availability and use of marijuana in the United States is coupled with a general shift in public attitudes toward the substance. In 1969, 12% of the surveyed population supported legalizing marijuana; today, more than half (52%) of surveyed adults feel that marijuana should be legalized. In addition, 60% indicate that the federal government should not enforce federal laws prohibiting marijuana use in those states that allow for its use.⁷

Marijuana is currently listed as a Schedule I controlled substance under the Controlled Substances Act (CSA).⁸ This indicates that the federal government has determined that

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.⁹

¹ According to the World Drug Report 2012, “[c]annabis is the world’s most widely used illicit substance ... and consumption is stable.” United Nations Office on Drugs and Crime, *World Drug Report 2012*, June 2012, p. 2. Hereinafter UNODC, *World Drug Report 2012*. Of note, while worldwide cannabis consumption is stable, it is increasing in the United States.

² Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings*, September 2013, p. 1. Hereinafter, Results from 2012 NSDUH.

³ Between 2007 and 2012, the proportion of individuals aged 12 or older who were “current” users of marijuana ranged from 5.8—7.3% of this population.

⁴ Results from 2012 NSDUH, p. 66. For this study, “youth” are individuals 12 to 17 years of age.

⁵ *Ibid.*, p. 68. Nearly half of surveyed youth indicated that obtaining marijuana would be “fairly easy” or “very easy” to obtain if desired.

⁶ U.S. Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2011*, Product No. 2011-Q0317-001, August 2011. Hereinafter, NDTA, 2011. The 2011 NDTA is the most recent threat assessment.

⁷ Pew Research Center for the People & the Press, *Majority Now Supports Legalizing Marijuana*, April 4, 2013.

⁸ For more information on the CSA, see the text box below.

⁹ 21 U.S.C. §812(b)(1).

Controlled Substances Act (CSA)

The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹⁰ It regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. Under the CSA, there are five schedules under which substances may be classified—Schedule I being the most restrictive.¹¹ Substances placed onto one of the five schedules are evaluated on

- actual or relative potential for abuse;
- known scientific evidence of pharmacological effects;
- current scientific knowledge of the substance;
- history and current pattern of abuse;
- scope, duration, and significance of abuse;
- risk to public health;
- psychic or physiological dependence liability; and
- whether the substance is an immediate precursor of an already-scheduled substance.

U.S. federal drug control policies—and specifically those positions relating to marijuana—continue to generate debates among policymakers, law enforcement officials, scholars, and the public. Even prior to the federal government’s move in 1970 to criminalize the manufacture, distribution, dispensation, and possession of marijuana,¹² there were significant discussions over marijuana’s place in American society.

While the federal government maintains marijuana’s current place as a Schedule I controlled substance, states have established a range of views and policies regarding its medical and recreational use. As of September 2013, 20 states and the District of Columbia allowed for the *medical use* of marijuana in some capacity.¹³ In the November 2012 elections, voters in Washington State and Colorado voted to legalize, regulate, and tax small amounts of marijuana for *recreational use*. These latest moves have spurred a number of questions regarding their potential implications for related federal law enforcement activities and for the nation’s drug policies on the whole.

This report provides a background on federal marijuana policy as well as an overview of state trends with respect to marijuana decriminalization and legalization—for both medical and recreational uses. It then analyzes relevant issues for U.S. federal law enforcement as well as for

¹⁰ P.L. 91-513; 21 U.S.C. §801 et. seq. For more information on the CSA, see CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh, and CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

¹¹ Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the Attorney General (through the Drug Enforcement Administration), the Secretary of Health and Human Services, or by petition by any interested person. 21 U.S.C. §811(a). Congress may also change the scheduling status of a drug or substance through legislation.

¹² 21 U.S.C. §812 and §841. For more information, see the section, “Background on Federal Marijuana Policy.”

¹³ National Conference of State Legislatures, *State Medical Marijuana Laws*, September 2013, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx>. These states include Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Of note, Maryland is not included in the 20 states, but Maryland allows medical marijuana to be used as a legitimate legal defense for patients and caregivers only. In addition, Maryland has established a limited compassionate use program for research purposes.

the criminal organizations involved in producing, distributing, and profiting from the black market sale of marijuana. This report also outlines a number of related policy questions that Congress may confront. Of note, it does not discuss the legal issues associated with state-level initiatives to legalize marijuana for recreational use.¹⁴

Background on Federal Marijuana Policy

Until 1937, the growth and use of marijuana was legal under federal law.¹⁵ The federal government *unofficially* banned marijuana under the Marihuana Tax Act of 1937 (MTA; P.L. 75-238).¹⁶ The MTA imposed a strict regulation requiring a high-cost transfer tax stamp for every sale of marijuana, and these stamps were rarely issued by the federal government.¹⁷ Shortly after passage of the MTA, all states made the possession of marijuana illegal.¹⁸

The Controlled Substances Act (CSA), enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513), placed the control of marijuana and other plant, drug, and chemical substances under federal jurisdiction regardless of state regulations and laws. In designating marijuana as a Schedule I controlled substance, this legislation *officially* prohibited the manufacture, distribution, dispensation, and possession of marijuana.¹⁹

As part of the CSA, the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, was established to study marijuana in the United States.²⁰ Specifically, this commission was charged with examining issues such as

(A) the extent of use of marihuana in the United States to include its various sources of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use;

(B) an evaluation of the efficacy of existing marihuana laws;

(C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;

(D) the relationship of marihuana use to aggressive behavior and crime;

¹⁴ For information on legal issues surrounding the Colorado and Washington laws regarding recreational marijuana, see CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh.

¹⁵ States regulated marijuana but did not begin to ban it until after 1937.

¹⁶ Congressional testimony indicated that marijuana, while it was a problem in the Southwest United States starting in the mid-1920s, became a national menace in the mid-1930s (1935-1937). See statement by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27, 1937.

¹⁷ Charles F. Levinthal, *Drugs, Society, and Criminal Justice*, 3rd ed. (New York: Prentice Hall, 2012), p. 58.

¹⁸ In *Leary v. United States* (395 U.S. 6 (1968)), the MTA was overturned by the U.S. Supreme Court as a violation of the Fifth Amendment's privilege against compelled self-incrimination.

¹⁹ 21 U.S.C. §812 and §841. Of note, growing a marijuana plant is considered *manufacturing* marijuana.

²⁰ The commission was composed of two Members of the Senate, two Members of the House, and nine members appointed by the President of the United States. President Nixon appointed Raymond Shafer as the Commissioner.

(E) the relationship between marihuana and the use of other drugs; and

(F) the international control of marihuana.²¹

The Shafer Commission, in concluding its review, produced two reports: (1) *Marihuana: A Signal of Misunderstanding*, and (2) *Drug Use in America: Problem in Perspective*.²²

In its first report, the Shafer Commission discussed the perception of marijuana as a major social problem and how it came to be viewed as such.²³ It made a number of recommendations, including the development of a “social control policy seeking to discourage marihuana use, while concentrating primarily on the prevention of heavy and very heavy use.”²⁴ In this first report, the Shafer Commission also called the application of the criminal law in cases of personal use of marijuana “constitutionally suspect” and declared that “total prohibition is functionally inappropriate.”²⁵ Of note, federal criminalization and prohibition of marijuana was never altered, either administratively or legislatively, to comply with the recommendations of the Shafer Commission.

In its second report, the Shafer Commission reviewed the use of all drugs in the United States, not solely marijuana. It examined the origins of the drug problem in the United States, including the social costs of drug use, and once again made specific recommendations regarding social policy. Among other conclusions regarding marijuana, the Shafer Commission indicated that aggressive behavior generally cannot be attributed to marijuana use.²⁶ The Shafer Commission also reaffirmed its previous findings and recommendations regarding marijuana and added the following statement:

The risk potential of marihuana is quite low compared to the potent psychoactive substances, and even its widespread consumption does not involve social cost now associated with most of the stimulants and depressants (Jones, 1973; Tinklenberg, 1971). Nonetheless, the Commission remains persuaded that availability of this drug should not be institutionalized at this time.²⁷

²¹ P.L. 91-513, §601(d).

²² National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, First Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1972. Hereinafter, First Report of the Shafer Commission; and National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, Second Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1973. Hereinafter, Second Report of the Shafer Commission.

²³ The commission stated that three factors contributed to the perception of marijuana as a major national problem including “[1] the illegal behavior is highly visible to all segments of our society, [2] use of the drug is perceived to threaten the health and morality not only of the individual but of society itself, and [3] most important, the drug has evolved in the late sixties and early seventies as a symbol of wider social conflicts and public issues.” First Report of the Shafer Commission, p. 6.

²⁴ First Report of the Shafer Commission, p. 134.

²⁵ Ibid., pp. 142-143.

²⁶ Second Report of the Shafer Commission, p. 158.

²⁷ Ibid, p. 224. In this statement, the Shafer Commission cites the following studies: R.T. Jones, *Mental Illness and Drugs: Pre-Existing Psychopathology and Response to Psychoactive Drugs*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, 1973 and J.R. Tinklenberg, *Marihuana and Crime*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, Unpublished, October 1971.

At the conclusion of the second report, the Shafer Commission recommended that Congress launch a subsequent commission to reexamine the broad issues surrounding drug use and societal response.²⁸ While a number of congressionally directed commissions regarding drugs have since been established,²⁹ no such commission has been directed to review the comprehensive issues of drug use, abuse, and response in the United States. Going forward, policymakers may debate the utility of a complete re-examination of federal drug policy or, more narrowly, federal marijuana policy.

Trends in States

Over the past few decades, some states have deviated from an across-the-board prohibition of marijuana. Evolving state-level positions on marijuana include decriminalization initiatives, legal exceptions for medical use, and legalization of certain quantities for recreational use.

Decriminalization

Marijuana *decriminalization* differs markedly from *legalization*. A state decriminalizes conduct by removing the accompanying criminal penalties; however, civil penalties remain. If, for instance, a state decriminalizes the possession of marijuana in small amounts,³⁰ possession of marijuana still violates state law; however, possession of marijuana within the specified *small amount* is considered a civil offense and subject to civil penalty, not criminal prosecution. By decriminalizing possession of marijuana in small amounts, states are *not legalizing* its possession. In addition, as these initiatives generally relate to the *possession* (rather than the manufacture or distribution) of *small* amounts of marijuana, decriminalization initiatives do not conflict with federal law enforcement's priority of targeting high-level drug offenders, or so-called "big fish."

Decriminalization initiatives by the states do not appear at odds with the CSA because both maintain that possessing marijuana is in violation of the law. For example, individuals in possession of small amounts of marijuana in Massachusetts—a state that has decriminalized possession in small amounts—are in violation of both the CSA and Massachusetts state law. The difference lies in the associated penalties for these federal and state violations. Under the CSA, a person convicted of simple possession (1st offense) of marijuana may be punished with up to one year imprisonment and/or fined not less than \$1,000.³¹ Under Massachusetts state law, a person in possession of an ounce or less of marijuana is subject to a civil penalty of \$100.³²

In recent years, several states have decriminalized the possession of small amounts of marijuana; however, some of these states, such as New York, continue to treat possession of small amounts of marijuana as a criminal offense under specific circumstances. In New York, the possession of small amounts of marijuana is still considered a crime when it is "open to public view." In 2010,

²⁸ Second Report of the Shafer Commission, pp. 410-411.

²⁹ See, for example, the President's Media Commission on Alcohol and Drug Abuse Prevention and the National Commission on Drug-Free Schools.

³⁰ Typically one ounce or less, but the amount varies from state to state.

³¹ 21 U.S.C. §844.

³² MGL c.94C, s.32L; and MGL c.40, s.21D. This is a civil penalty for offender eighteen years of age or older. An offender under the age of eighteen must also complete a drug awareness program.

nearly 55,000 individuals in New York State were arrested for criminal possession of marijuana in the fifth degree,³³ a misdemeanor in New York State.³⁴

Medical Marijuana Exceptions

In 1996, California became the first state to amend its drug laws to allow for the medicinal use of marijuana. As mentioned, 20 states and the District of Columbia allow for medicinal use of marijuana but do so in various ways.³⁵ For example, while some states exempt qualified users of medical marijuana from state prosecution, others specifically authorize and regulate medical marijuana.³⁶

The CSA does not distinguish between the medical and recreational use of marijuana. Under the CSA, marijuana has “no currently accepted medical use in treatment in the United States,”³⁷ and states’ allowance of its use for medical purposes appears to be at odds with the federal position. Federal law enforcement has investigated, arrested, and prosecuted individuals for medical marijuana-related offenses regardless of whether they are in compliance with state law. However, as discussed in the section on “Enforcement Priorities,” federal law enforcement emphasizes the investigation and prosecution of growers and dispensers over the individual users of medical marijuana.

Recreational Legalization

In contrast to marijuana *decriminalization* initiatives wherein civil penalties remain for violations involving marijuana possession, marijuana *legalization* measures remove all state-imposed penalties for specified activities involving marijuana. Until 2012, the recreational use of marijuana had not been legal in any U.S. state since prior to the passage of the CSA in 1970. The CSA explicitly prohibits the cultivation, distribution, and possession of marijuana for *any* purpose other than to conduct federally approved research. In November 2012, citizens of Colorado and Washington voted to legalize, regulate, and tax small amounts of marijuana for recreational use.³⁸

- Washington Initiative 502 legalizes the possession of small quantities of marijuana by individuals over the age of 21.³⁹ It also establishes various restrictions and requirements for licensing the production, processing, and retail of marijuana, and it directs the Washington State Liquor Control Board to adopt procedures for the issuance of licenses by December 1, 2013. In addition,

³³ N.Y. Pen. Law. §221.10.

³⁴ Memo (in Lieu of Testimony) of Harry G. Levine, Queens College, CUNY, “Regarding Marijuana Possession Arrests in New York, 1977-2010,” June 15, 2011.

³⁵ National Conference of State Legislatures, *State Medical Marijuana Laws*, September 2013, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx>.

³⁶ For a broader discussion of state medical marijuana laws, see CRS Report R42398, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, by Todd Garvey.

³⁷ 21 U.S.C. §812(b)(1).

³⁸ For more detail regarding both Washington Initiative 502 and Colorado Amendment 64, see CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh

³⁹ Individuals may possess up to one ounce of dried marijuana, 16 ounces of marijuana infused product in solid form, or 72 ounces of marijuana infused product in liquid form.

Washington Initiative 502 imposes an excise tax on each marijuana sale. Of note, the initiative also specifies that the operation of a motor vehicle while under the influence of marijuana remains a crime.⁴⁰

- Colorado Amendment 64 amends the Colorado Constitution to establish that it is not a state offense for an individual over the age of 21 to possess, use, display, purchase, consume, or transport one ounce of marijuana. Individuals may also possess, grow, process, or transport up to six marijuana plants. In addition, Amendment 64 allows any individual over the age of 21 to grow small amounts of marijuana for personal use, but specifies that marijuana may not be consumed “openly and publicly or in a manner that endangers others.” Colorado Amendment 64 charges the Colorado Department of Revenue with adopting regulations necessary for implementation by July 1, 2013.⁴¹

Legalization initiatives in Colorado and Washington reflect growing public support for the legalization of marijuana. As noted, just prior to passage of the CSA in 1970, 12% of surveyed individuals aged 18 and older felt that marijuana should be made legal. In 2013, more than half (52%) of surveyed U.S. adults expressed that marijuana should be legalized.⁴²

Enforcement Priorities: A Focus on Traffickers

Federal law enforcement has generally tailored its efforts to target criminal networks rather than individual criminals;⁴³ its stance regarding drug (particularly marijuana) offenders appears consistent with this position. In the years since the enactment of the CSA and the establishment of the U.S. Drug Enforcement Administration (DEA), federal counter-drug efforts have largely been focused toward traffickers and distributors of illicit drugs, rather than the low-level users of illicit substances.⁴⁴

After some states began to legalize the medical use of marijuana, the Department of Justice (DOJ) reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of how individual states may change their laws and positions on marijuana.⁴⁵ DOJ has continued to enforce the CSA in those states, and federal agents and U.S. Attorneys have

⁴⁰ Washington Initiative 502, http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

⁴¹ Colorado Amendment 64, [http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bddd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/\\$FILE/Amendment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf](http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bddd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Amendment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf). On July 1, 2013, the Colorado State Licensing Authority adopted emergency rules which “established a robust regulatory structure for retail marijuana designed to protect public safety and prevent diversion of retail marijuana to minors.” See Colorado Department of Revenue, *Retail and Medical Marijuana Rulemaking Announcement*, July 23, 2013, p. 1, <http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251633708470>. The permanent rulemaking process for retail marijuana in Colorado is currently ongoing.

⁴² Pew Research Center for the People & the Press, *Majority Now Supports Legalizing Marijuana*, April 4, 2013.

⁴³ Congressional testimony has indicated that DOJ is enhancing its focus on drug trafficking and transnational organized crime, among other national security and criminal priorities. See Statement of Eric H. Holder, Jr., Attorney General, before the U.S. Congress, House Committee on the Judiciary, *Oversight of the U.S. Department of Justice*, 113th Cong., 1st sess., May 15, 2013.

⁴⁴ Arrests for marijuana possession offenses are largely made by state and local police.

⁴⁵ United States Attorney’s Office, “Statement From U.S. Attorney’s Office on Initiative 502,” press release, December 5, 2012.

arrested and prosecuted medical marijuana producers (growers) and distributors for violations of federal drug laws regardless of their compliance with state laws.

DOJ has clarified federal marijuana policy through several memos providing direction for U.S. Attorneys in states that allow the medical use of marijuana. In the so-called Ogden Memo of 2009, Deputy Attorney General David Ogden reiterated that combating major drug traffickers remains a central priority and stated:

[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the [Justice] Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.⁴⁶

In a follow-up memorandum to U.S. Attorneys, Deputy Attorney General James Cole restated that enforcing the CSA remained a core priority of DOJ, even in states that had legalized medical marijuana. He clarified that "the Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."⁴⁷

In his memo, Deputy Attorney General Cole warned those who might assist medical marijuana dispensaries in any way. He stated that "persons who are in the business of cultivating, selling or distributing marijuana, *and those who knowingly facilitate such activities* [emphasis added], are in violation of the Controlled Substances Act, regardless of state law."⁴⁸ This has been interpreted by some to mean, for example, that building owners and managers are in violation of the CSA by allowing medical marijuana dispensaries to operate in their buildings.⁴⁹ Deputy Attorney General Cole further warned that "those who engage in transactions involving the proceeds of such activity [cultivating, selling, or distributing of marijuana] may be in violation of federal money laundering statutes and other federal financial laws."⁵⁰ This warning may be one reason why medical marijuana dispensaries have had difficulty accessing bank services.⁵¹

In an August 2013 memorandum, Deputy Attorney General Cole stated that while marijuana remains an illegal substance under the Controlled Substances Act, the Department of Justice

⁴⁶ Deputy Attorney General David W. Ogden, *Memorandum for Selected United States Attorneys*, U.S. Department of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Washington, D.C., October 19, 2009.

⁴⁷ Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011. Hereinafter *Cole Memo*.

⁴⁸ *Ibid*.

⁴⁹ Jennifer Medina, "U.S. Attorneys in California Set Crackdown on Marijuana," *New York Times*, October 8, 2011, p. 10.

⁵⁰ *Cole Memo*.

⁵¹ John Ingold, "Last Bank Shuts Doors on Colorado Pot Dispensaries," *The Denver Post*, October 1, 2011; Jonathan Martin, "Medical-Marijuana Dispensaries Run Into Trouble at the Bank," *The Seattle Times*, April 29, 2012.

would focus its resources on the “most significant threats in the most effective, consistent, and rational way.”⁵² The memo outlined eight enforcement priorities for the Department of Justice:

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.⁵³

These priorities are to guide U.S. Attorneys and federal law enforcement to focus their resources and efforts on those who interfere with any of these priorities, regardless of state law.⁵⁴ In an interview with ABC News, President Obama noted that “[it] would not make sense from a prioritization point of view for us to focus on recreational drug users in a state that has already said that under state law that’s legal.”⁵⁵

Of note, under the Supremacy Clause of the U.S. Constitution,⁵⁶ state laws that conflict with federal law are generally preempted and therefore are void.⁵⁷ However, courts have generally not viewed the relationship between state and federal marijuana laws in such a manner.⁵⁸ Further, Congress did not intend that the CSA should displace all state laws associated with controlled substances.⁵⁹

⁵² James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>, p. 1.

⁵³ *Ibid.*, pp. 1-2.

⁵⁴ *Ibid.*, p. 2.

⁵⁵ “Marijuana Not High Obama Priority,” *ABC Nightline*, December 14, 2012.

⁵⁶ U.S. Const., Art. VI, cl. 2.

⁵⁷ See, for example, *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (“[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress”).

⁵⁸ For a full discussion of federal preemption of state law in the context of drug laws, see CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh

⁵⁹ 21 U.S.C. §903 (limiting the preemptive scope of the CSA to only those state laws that create a “positive conflict” with federal law). For more information, see CRS Report R42398, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, by Todd Garvey.

Selected Counter-Drug Trafficking Efforts

As the Department of Justice (DOJ) has continued to focus its counterdrug efforts on large production and trafficking organizations, this section provides snapshots of selected federal law enforcement efforts to counter drug trafficking and associated criminal networks. The majority of these programs and initiatives are not drug type-specific, but rather focus on countering the manufacturing (including growth), transportation, and sale of illegal drugs in the United States. In addition, many federal counter-drug law enforcement efforts—including those discussed in this section—involve collaborations or partnerships with state and local law enforcement and include efforts to combat a vast range of illicit activities carried out by criminal networks.

High Intensity Drug Trafficking Areas (HIDTA) Program

The HIDTA program provides assistance to law enforcement agencies—at the federal, state, local, and tribal levels—that are operating in regions of the United States that have been deemed as critical drug trafficking regions.⁶⁰ The program aims to reduce drug production and trafficking through four means: (1) promoting coordination and information sharing between federal, state, local, and tribal law enforcement; (2) bolstering intelligence sharing between federal, state, local, and tribal law enforcement; (3) providing reliable intelligence to law enforcement agencies such that they may be better equipped to design effective enforcement operations and strategies; and (4) promoting coordinated law enforcement strategies that rely upon available resources to reduce illegal drug supplies not only in a given area, but throughout the country.⁶¹ There are 28 designated HDTAs in the United States and its territories. On the whole, the HIDTA program is administered by the Office of National Drug Control Policy (ONDCP) within the White House. However, each of the HIDTA regions is governed by its own Executive Board. A central feature of the HIDTA program is the discretion granted to the Executive Boards to design and implement initiatives that confront the drug trafficking threat in each HIDTA region. Of note, “[m]ultiple HIDTA task forces may make up an overarching HIDTA enforcement or investigative initiative.”⁶²

- In May 2013, 21 individuals were arrested for their alleged roles in two overlapping drug trafficking rings—one distributing marijuana and the other, powder and crack cocaine. This case was investigated by the FBI, Madison-Morgan County (AL) HIDTA Task Force, as well as other federal, state, and local law enforcement agencies.⁶³

⁶⁰ Congress created the HIDTA program through the Anti-Drug Abuse Act of 1988 (P.L. 100-690, §1005(c)). For more information on the program, see Office of National Drug Control Policy (ONDCP), *High Intensity Drug Trafficking Areas (HIDTA) Program*, <http://www.whitehouse.gov/ondcp/high-intensity-drug-trafficking-areas-program>. As of June 2011, the HIDTA program provided support for 670 initiatives nationwide. These ranged from enforcement initiatives involving multi-agency investigation and prosecution activities to drug use prevention and treatment initiatives.

⁶¹ 21 U.S.C. §1706(a)(2).

⁶² Office of National Drug Control Policy, *High Intensity Drug Trafficking Areas Program Report to Congress*, June 2011, p. 169. As of June 2011, the HIDTA program provided support for 670 initiatives nationwide. These ranged from enforcement initiatives involving multi-agency investigation and prosecution activities to drug use prevention and treatment initiatives.

⁶³ U.S. Attorney’s Office, “Twenty-One People Arrested in Huntsville-based Drug-Trafficking Conspiracy,” press release, May 23, 2013.

Organized Crime Drug Enforcement Task Force (OCDETF) Program

The OCDETF program targets—with the intent to disrupt and dismantle—major drug trafficking and money laundering organizations. Federal agencies that participate in the OCDETF program include the Drug Enforcement Administration (DEA); Federal Bureau of Investigation (FBI); Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); U.S. Marshals; Internal Revenue Service (IRS); U.S. Immigration and Customs Enforcement (ICE); U.S. Coast Guard (USCG); the 94 U.S. Attorneys Offices; and DOJ’s Criminal Division. These federal agencies also collaborate with state and local law enforcement on the task forces. There are 11 OCDETF strike forces around the country as well as an OCDETF Fusion Center.⁶⁴ The OCDETFs target those organizations that have been identified on the Consolidated Priority Organization Targets (CPOT) List, which is the “most wanted” list for leaders of drug trafficking and money laundering organizations. For FY2012, 14% (707 cases) of active OCDETF investigations were linked to valid CPOTs, and an additional 5% (267 cases) were also linked to Regional Priority Organization Targets (RPOTs).⁶⁵

- In January 2013, an OCDETF operation in the Dallas-Fort Worth, TX, area resulted in the indictment of 20 individuals for their alleged roles in a marijuana trafficking conspiracy. The conspiracy reportedly involved distributing and selling drugs as well as laundering the monetary proceeds. The OCDETF investigation led to the seizure of over 600 marijuana plants, 25 pounds of hydroponic marijuana, 10 vehicles, and 5 firearms.⁶⁶

Domestic Cannabis Eradication/Suppression Program (DCE/SP)

The DEA has indicated that “[m]arijuana is the only major drug of abuse grown within the U.S. borders.” As one of its efforts to stop the growth of this illegal substance, the DEA funds the DCE/SP—a nationwide law enforcement program targeting the cultivation of marijuana by drug trafficking organizations.⁶⁷ The DCE/SP was involved in the eradication of 3,631,582 cannabis plants that had been cultivated at 6,470 outdoor grow sites and 302,377 plants that had been cultivated at 2,596 indoor sites in 2012.⁶⁸ Of note, there are no concrete data to delineate the proportion of domestically grown marijuana cultivated by drug trafficking organizations—separately from gangs or lone growers—nor are there reliable data on the amount cultivated by specific criminal networks.

- In October 2012, the DEA (through the DCE/SP) and Arizona Department of Public Safety eradicated over 4,500 marijuana plants across four separate grow sites in Arizona. Each of these grow sites “had its own irrigation system powered by a pump that emitted water through an underground watering drip system.”⁶⁹

⁶⁴ U.S. Department of Justice, *FY2014 Interagency Crime and Drug Enforcement, Congressional Budget Submission*.

⁶⁵ *Ibid.*, p. 27.

⁶⁶ United States Attorney’s Office, “Federal Grand Jury Indicts 20 in Marijuana Trafficking Conspiracy,” press release, January 18, 2013.

⁶⁷ For more information, see <http://www.justice.gov/dea/ops/cannabis.shtml>.

⁶⁸ Drug Enforcement Administration, *2012 Domestic Cannabis Eradication/Suppression Statistical Report*.

⁶⁹ Drug Enforcement Administration, “Over 4500 Marijuana Plants Eradicated near Wenden, Arizona: Four Separate Growers Discovered,” press release, October 3, 2012.

Border Enforcement Security Task Force (BEST): Tunnel Task Force

The Border Enforcement Security Task Force (BEST) initiative,⁷⁰ led by ICE within the Department of Homeland Security (DHS), is a series of multi-agency investigative task forces that aim to identify, disrupt, and dismantle criminal organizations posing significant threats to border security along the northern border with Canada and the Southwest border with Mexico as well as within Mexico.⁷¹ While the BEST initiative broadly targets criminal networks, tailored task forces have been established to target specific threats; in order to focus efforts on criminal networks exploiting the U.S.-Mexican border via underground tunnels (which have been primarily used to smuggle marijuana), ICE established the first tunnel task force in San Diego in 2003.⁷² The task force was created as a partnership between ICE, DEA, and the U.S. Border Patrol, along with state law enforcement and Mexican counterparts. The tunnel task force was incorporated into ICE's BEST initiative in 2006 in order to further enhance multilateral law enforcement intelligence and information sharing. Since 1990, over 150 tunneling attempts have been discovered along the U.S.-Mexican border.⁷³

- In November 2011, the San Diego tunnel task force uncovered a sophisticated cross-border tunnel connecting a warehouse in Otay Mesa, California, with one in Tijuana, Mexico. The tunnel was 612 yards long and equipped with reinforced walls, wooden floors, lighting, and electric rail cars. Authorities seized over 32 tons of marijuana worth about \$65 million on the streets.⁷⁴ This was the second tunnel uncovered in the San Diego area in two weeks.

Prosecutions and Convictions Data

In its drug-related investigations and prosecutions, federal law enforcement has focused more efforts on investigations of criminal networks and drug traffickers and has generally placed less emphasis on going after individuals for simple drug possession.⁷⁵ Data from the U.S. Attorneys' case filings follow these patterns. As illustrated in **Figure 1**, of the 13,942 drug cases filed in FY2012 with the U.S. Attorneys, nearly 20% (2,761) were OCDETF cases.⁷⁶ The remaining 11,181 non-OCDETF drug cases can be broken down between what the U.S. Attorneys categorize as drug dealing and drug possession cases; of these non-OCDETF cases, 99% (11,041) of cases

⁷⁰ Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), *Border Enforcement Security Task Force (BEST)*, <http://www.ice.gov/best/>.

⁷¹ Other agency participants include U.S. Customs and Border Protection, Drug Enforcement Administration, ATF, FBI, USCG, and the U.S. Attorneys Offices, and state and local law enforcement. The Mexican law enforcement agency Secretaría de Seguridad Pública is a partner along the Southwest border. As of March 2013, there were 35 BEST units located in the United States, including its territories, and Mexico.

⁷² Department of Homeland Security, "Testimony of Executive Associate Director James A. Dinkins, Immigration and Customs Enforcement, Before the Senate Caucus on International Narcotics Control, "Illegal Tunnels on the Southwest Border," press release, June 15, 2011. In March 2012, a tunnel task force was established in Nogales, Arizona, to respond to an increasing number of tunnels detected in that area.

⁷³ Ibid.

⁷⁴ U.S. Immigration and Customs Enforcement, "Highly Sophisticated Cross-Border Drug Tunnel Discovered Near San Diego: Investigators seize nearly \$65 Million Worth of Marijuana, Arrest 6 Suspects," press release, November 30, 2011.

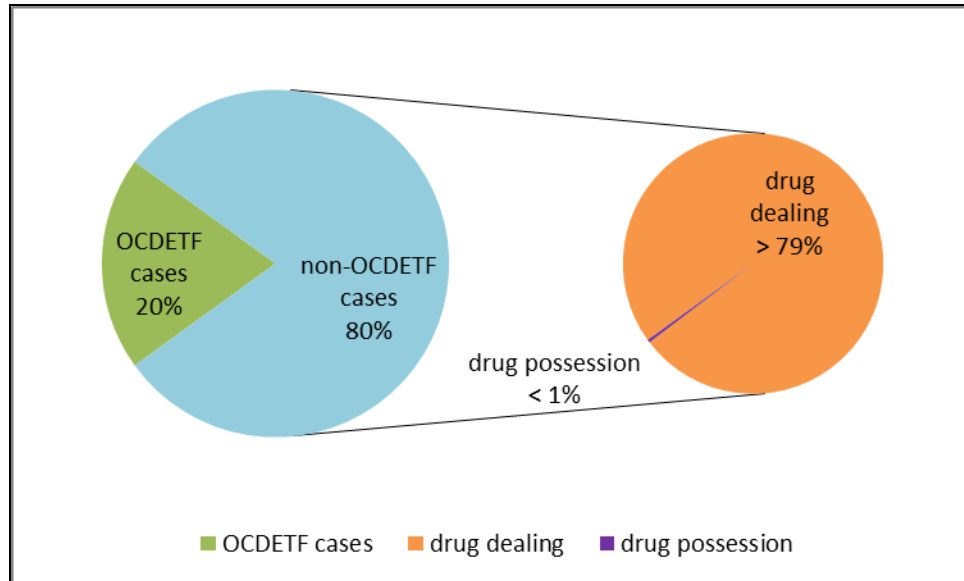
⁷⁵ Simple possession is defined, and its penalties are outlined, in 21 U.S.C. §844.

⁷⁶ Executive Office of the United States Attorneys, *United States Attorneys' Annual Statistical Report: Fiscal Year 2012*, p. 36.

filed were for *allegations* of drug dealing rather than drug possession.⁷⁷ While these data suggest a general prioritization of drug trafficking cases over cases of possession, they do not detail trends in investigations and prosecutions of cases involving specific drug *types* such as marijuana.

Figure 1. Drug Cases Filed with U.S. Attorneys

FY2012



Source: CRS presentation of data from the Executive Office of the United States Attorneys, *United States Attorneys' Annual Statistical Report: Fiscal Year 2012*, p. 36.

Note: OCDETF cases involve drug trafficking. The U.S. Attorneys categorize the non-OCDETF cases as either “drug dealing” or “drug possession.” There is no available information, however, on the specific statutory offenses included in each of these two categories.

The U.S. Sentencing Commission⁷⁸ data provide more nuanced information relating to federal drug prosecutions resulting in convictions and sentences, including for those cases involving marijuana-related offenses.⁷⁹ Of note, these data only reflect information on the *primary offense* for which any given offender was sentenced.

- Of the 75,867 cases from FY2012 with sufficient information for Sentencing Commission analysis, nearly 34% of the cases (25,712) were determined to be drug cases. Moreover, the vast majority of these drug cases (32% of the total FY2012 caseload) were drug trafficking cases.⁸⁰

⁷⁷ Ibid.

⁷⁸ The Sentencing Commission is an independent body charged with promulgating guidelines for federal sentencing. For more information on the guidelines, see archived CRS Report RL32766, *Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options*, by Lisa Seghetti and Alison M. Smith.

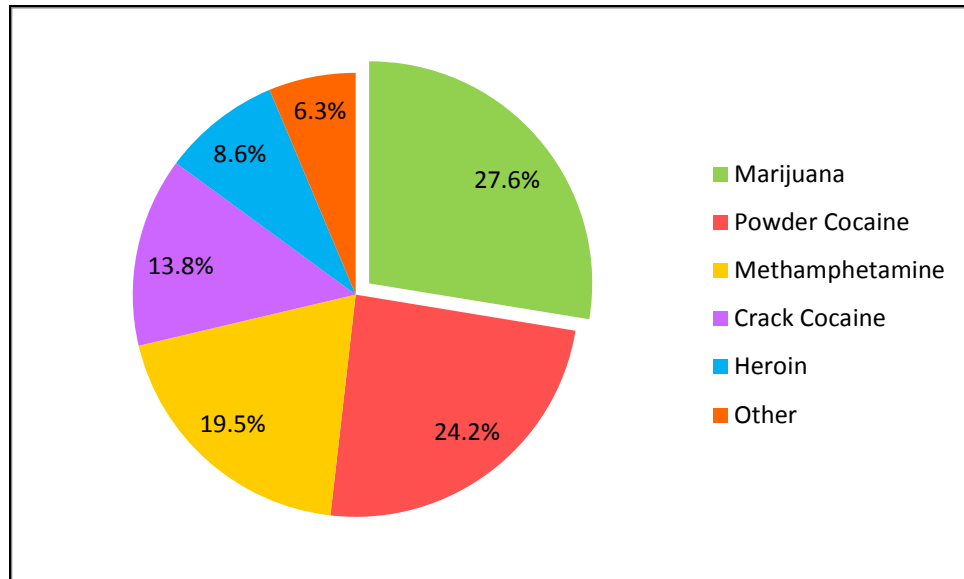
⁷⁹ The Sentencing Commission has data on 84,173 cases in which an offender was sentenced in federal court in FY2012. Of these cases, 75,867 had sufficient information available for the Sentencing Commission to analyze. U.S. Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, Figure I.

⁸⁰ The other 2% of cases categorized as drug cases included offenses described as “protected locations,” “continuing criminal enterprise,” “listed chemicals,” “simple possession,” “acquiring by deception,” and “other.”

- As illustrated in **Figure 2**, of the drug cases for which information on primary drug type was available, 6,992 cases (almost 28%) involved marijuana as the primary drug in FY2012. More drug cases were sentenced in federal court with marijuana as the primary drug type than any other single drug type.⁸¹
- Of the drug cases with marijuana as the primary drug type in FY2012, over 98% involved a drug trafficking sentence.⁸²

Figure 2. Drug Cases Sentenced in Federal Court, FY2012

By Primary Drug Type



Source: CRS presentation of U.S. Sentencing Commission data provided in U.S. Sentencing Commission, 2012 *Sourcebook of Federal Sentencing Statistics*, Table 33.

Notes: “Other” drug types include Oxycodone/Oxycontin, MDMA/Ecstasy/MDA, Hydrocodone, PCP, and steroids, among others.

Implications for Federal Law Enforcement

Federal, State, and Local Cooperation

As experts have noted, “[t]he federal government maintains the power to enforce federal law; however, it cannot compel states to assist in enforcing that law, and the states have no obligation to forbid the same drugs that the federal government forbids.”⁸³ As such, some policymakers may

⁸¹ U.S. Sentencing Commission, 2012 *Sourcebook of Federal Sentencing Statistics*, Figure K. Of the 25,712 cases known to have been sentenced for drug offenses, 25,367 had available information on the primary drug type involved.

⁸² U.S. Sentencing Commission, 2012 *Sourcebook of Federal Sentencing Statistics*, Table 33.

⁸³ John Walsh, *Q&A: Legal Marijuana in Colorado and Washington*, Washington Office on Latin America & Brookings, May 2013, p. 3. For more information on the interplay between state and federal marijuana laws, see CRS Report R42398, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, by Todd Garvey.

question whether the disparity between federal drug laws and those in Washington and Colorado may pose challenges for the operation of collaborative law enforcement efforts and relationships—such as task forces and intelligence fusion centers in which federal, state, and local law enforcement all participate.⁸⁴

If, in a task force setting for example, state and local law enforcement prioritize going after marijuana users over traffickers and other members of criminal networks, there could be reasonable concerns regarding a lack of alignment between the drug enforcement priorities of the participating federal, state, and local agencies. However, most drug-related task forces with federal involvement appear to devote greater energy to identifying and apprehending individuals involved in criminal networks producing, transporting, and selling large quantities of drugs. As such, there is no evidence to suggest that the operation of these collaborative bodies will be impacted by the recreational legalization initiatives in Colorado and Washington.

Examining how task forces have responded to medical marijuana legalization initiatives may provide some insight into how they may operate with respect to recreational marijuana legalization initiatives. Consistent with the Administration's indication that federal law enforcement prioritizes the investigation and prosecution of drug trafficking organizations and criminal networks over low-level drug users, it appears that investigations and arrests relating to medical marijuana follow similar trends. Federal law enforcement press releases suggest that investigations relating to medical marijuana generally target individuals "who are in the commercial business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities ... and will not focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended medical treatment regimen consistent with applicable state law, or their caregivers."⁸⁵

- In January 2013, the owner of two medical marijuana dispensaries in San Diego, CA, was sentenced for his role in distributing marijuana and laundering the proceeds. The investigation, conducted by the San Diego DEA's Narcotics Task Force and Internal Revenue Service (IRS), revealed that these dispensaries were grossing about \$3.5 million each year.⁸⁶
- In May 2013, the owner of a medical marijuana dispensary in Sacramento, CA, was sentenced for his role in growing marijuana and operating the dispensary. The case was investigated by local law enforcement with assistance from the Sacramento HIDTA Task Force.⁸⁷

If federal law enforcement priorities relating to recreational marijuana in Washington and Colorado follow the enforcement priorities regarding medical marijuana in states such as

⁸⁴ Task forces and fusion centers are primary means for federal law enforcement to coordinate and share information with state and local law enforcement. For more information on such cross-cutting efforts, see CRS Report R41927, *The Interplay of Borders, Turf, Cyberspace, and Jurisdiction: Issues Confronting U.S. Law Enforcement*, by Kristin Finklea.

⁸⁵ Drug Enforcement Administration, "Local, State, and Federal Agents Shut Down Two Commercial Marijuana Grow Operations," press release, June 30, 2011.

⁸⁶ Drug Enforcement Administration, "San Diego Man is Sentenced to 100 Months for Running Marijuana Dispensary and Money Laundering," press release, January 24, 2013.

⁸⁷ United States Attorneys' Office, "Sacramento Marijuana Dispensary Operator Sentenced," press release, May 24, 2013.

California, observers may see a focus on investigating marijuana growers and commercial sellers and less emphasis on the individual users of recreational marijuana.

Synthetic Alternatives⁸⁸

Officials began to see synthetic cannabinoids marketed as “legal alternatives to marijuana” in 2008.⁸⁹ Synthetic cannabinoids are substances chemically produced to mimic tetrahydrocannabinol (THC), the active ingredient in marijuana. When these substances are sprayed onto dried herbs and then consumed through smoking or oral ingestion, they can produce psychoactive effects similar to those of marijuana.⁹⁰ They are often sold as herbal incense, and common brand names under which synthetic cannabinoids are marketed are “Spice” and “K2.”

As of November 2012, at least 41 states and Puerto Rico had legislatively banned chemical substances contained in synthetic cannabinoids.⁹¹ In June 2012, Congress passed legislation (the Synthetic Drug Abuse Prevention Act of 2012—Subtitle D of Title XI of the Food and Drug Administration Safety and Innovation Act (P.L. 112-144)) that, among other things, permanently added “cannabimimetic agents” to Schedule I of the CSA.⁹²

The American Association of Poison Control Centers (AAPCC) noted that poison control centers around the country received 5,205 calls about synthetic cannabinoid substances in 2012. In the first eight months of 2013, AAPCC logged 1,821 calls to poison control centers regarding these substances.⁹³

It is currently unclear whether synthetic alternatives will continue to be developed and consumed in an attempt to circumvent federal and state marijuana laws. Policymakers may be interested in following the trends in sales, arrests, calls to poison control centers, and emergency department visits related to synthetic cannabinoids in states that have legalized small quantities of marijuana for recreational use. It is currently unclear what kind of impact—if any—state decriminalization and legalization initiatives may have on the use of synthetic substances.

Legalization Impact on Criminal Networks

A number of criminal networks rely heavily on profits generated from the sale of illegal drugs—including marijuana—in the United States. Mexican drug trafficking organizations control more of the wholesale distribution of marijuana than other major drug trafficking organizations in the United States.⁹⁴ One estimate has placed the proportion of U.S.-consumed marijuana that was

⁸⁸ For more information on synthetic cannabinoids and other substances, see CRS Report R42066, *Synthetic Drugs: Overview and Issues for Congress*, by Kristin Finklea and Lisa N. Sacco.

⁸⁹ NDTA, 2011, p. 36.

⁹⁰ National Conference of State Legislatures, Synthetic Cannabinoids (K2), November 28, 2012, <http://www.ncsl.org/?tabid=21398>.

⁹¹ Ibid.

⁹² Under this act, a cannabimimetic agent is defined as one of five structural classes of synthetic cannabinoids (and their analogues). The act also provided 15 examples of cannabimimetic substances.

⁹³ American Association of Poison Control Centers, *Synthetic Marijuana Data*, (As of August 31, 2013), <http://www.aapcc.org/alerts/synthetic-marijuana/>.

⁹⁴ NDTA, 2011, p. 2.

imported from Mexico at somewhere between 40% and 67%.⁹⁵ While the Mexican criminal networks control the wholesale marijuana distribution of illicit drugs in the United States, they “are not generally directly involved in retail distribution of illicit drugs.”⁹⁶ In order to facilitate the distribution and sale of drugs in the United States, Mexican drug traffickers have formed relationships with U.S. street gangs, prison gangs, and outlaw motorcycle gangs.⁹⁷ Although these gangs have historically been involved with retail-level drug distribution, their ties to the Mexican criminal networks have allowed them to become increasingly involved at the wholesale level as well.⁹⁸ These gangs facilitate the movement of illicit drugs to urban, suburban, and rural areas of the United States. Not only do these domestic gangs distribute and sell the drugs, but they also “provide warehousing, security, and/or transportation services as well.”⁹⁹

- Barrio Azteca is a prominent U.S. prison gang with ties to Mexican drug trafficking organizations. Barrio Azteca primarily generates money from smuggling marijuana, heroin, and cocaine across the Southwest border for the drug trafficking organizations—namely, the Juárez cartel—but they are also involved in other crimes, such as extortion, kidnapping, and alien smuggling.¹⁰⁰

A number of organizations have assessed the potential profits generated from illicit drug sales, both worldwide and in the United States, but “[e]stimates of marijuana ... revenues suffer particularly high rates of uncertainty.”¹⁰¹ The former National Drug Intelligence Center (NDIC), for instance, estimated that the sale of illicit drugs in the United States generates between \$18 billion and \$39 billion in U.S. wholesale drug proceeds for the Colombian and Mexican drug trafficking organizations annually.¹⁰² The proportion that is attributable to marijuana sales, however, is unknown.¹⁰³ Without a clear understanding of (1) actual proceeds generated by the

⁹⁵ Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

⁹⁶ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 18.

⁹⁷ NDTA, 2011, p. 11.

⁹⁸ Wholesale refers to the sale of goods to retailers for resale to consumers rather than selling goods directly to consumers. Retailers, on the other hand, sell goods directly to consumers. Wholesalers tend to sell larger quantities of goods to retailers, who then sell smaller quantities to consumers.

⁹⁹ NDTA, 2011, p. 12. See also, National Gang Intelligence Center, *2011 National Gang Threat Assessment: Emerging Trends*, <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends>.

¹⁰⁰ National Gang Intelligence Center, *2011 National Gang Threat Assessment: Emerging Trends*. See also the U.S. Department of Justice website at <http://www.usdoj.gov/criminal/gangunit/gangs/prison.html>.

¹⁰¹ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, 2013, p. 7.

¹⁰² U.S. Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2009*, Product No. 2008-Q0317-005, December 2008, p.49, <http://www.usdoj.gov/ndic/pubs31/31379/31379p.pdf>. Hereinafter, NDTA, 2009.

¹⁰³ A 2006 Office of National Drug Control Policy figure estimated that over 60% of Mexican drug trafficking organizations’ revenue could be attributed to marijuana sales. However, a number of researchers and experts have questioned the accuracy of this number and provided other estimates of marijuana proceeds. See, for example, Beau Kilmer, *Debunking the Mythical Numbers about Marijuana Production in Mexico and the United States*, RAND Drug Policy Research Center. See also U.S. Government Accountability Office, *Drug Control: U.S. Assistance has Helped Mexican Counternarcotics Efforts, but Tons of Illicit Drugs Continue to Flow into the United States*, GAO-07-1018, August 2007. Another estimate has placed the proportion of Mexican DTO export revenues attributable to marijuana at between 15% and 26% of total drug revenues. See Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, (continued...)

sale of illicit drugs in the United States, (2) the proportion of total proceeds attributable to the sale of marijuana, and (3) the proportion of marijuana sales controlled by criminal organizations and affiliated gangs, any estimates of how marijuana legalization might impact the drug trafficking organizations are purely speculative.

Marijuana proceeds are generated at many points along the supply chain, including production, transportation, and distribution. Experts have debated which aspects of this chain—and the related proceeds—would be most heavily impacted by marijuana legalization. In addition, the potential impact of marijuana legalization in 2 of the 50 U.S. states (complicated by two separate legal frameworks and regulatory regimes) may be more difficult to model than the impact of federal marijuana legalization. For instance, in evaluating the potential fiscal impact of the Washington and Colorado legalization initiatives on the profits of Mexican drug trafficking organizations, the Organization of American States (OAS) has hypothesized that “[a]t the extreme, Mexican drug trafficking organizations could lose some 20 to 25 percent of their drug export income, and a smaller, though difficult to estimate, percentage of their total revenues.”¹⁰⁴

Other scholars have, in estimating the potential financial impact of marijuana legalization, based their estimates on a hypothetical federal legalization of marijuana. Under this scenario, small scale growers at the start of the marijuana production-to-consumption chain might be put out of business by professional farmers, a few dozen of which “could produce enough marijuana to meet U.S. consumption at prices small-scale producers couldn’t possibly match.”¹⁰⁵ Large drug trafficking organizations generate a majority of their marijuana-related income (which some estimates place at between \$1.1 billion to \$2.0 billion) from exporting the drug to the United States and selling it to wholesalers on the U.S. side of the border.¹⁰⁶ This revenue could be jeopardized if the United States were to legalize the production and consumption of recreational marijuana.

Aside from the fiscal impact of U.S. marijuana legalization on drug revenues generated by the criminal networks in Mexico, some have also questioned whether there might be an impact on the levels of drug trafficking-related violence in Mexico. In short, there is no definitive answer to this question, and arguments have been presented to support both the stance that marijuana legalization in the United States could drive violence higher (because of increased competition for the scarce revenues that would be generated from an expected dwindling market of Mexican-produced marijuana) and the position that such legalization could help in reducing drug trafficking-related violence (because the profit motive for entering and dominating the drug trade might be reduced). Either way, “[a]ny changes in cannabis markets will take time to develop and may occur simultaneously with other changes that also affect violence rates in Mexico.”¹⁰⁷

(...continued)

RAND International Programs and Drug Policy Research Center, 2010.

¹⁰⁴ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 41.

¹⁰⁵ Jonathan P. Caulkins, Angela Howken, and Beau Kilmer, “How Would Marijuana Legalization Affect Me Personally?” in *Marijuana Legalization: What Everyone Needs to Know* (Oxford University Press, 2012).

¹⁰⁶ Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

¹⁰⁷ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 43.

The diversification of drug trafficking organizations' illicit activities could also mitigate the impacts they might feel from various levels of marijuana legalization in the United States. While these criminal networks might generate a substantial portion of their proceeds from the growth, production, transportation, and sale of marijuana, they have enhanced their dominance over the market of other illicit substances. Mexican drug trafficking organizations control more of the wholesale cocaine, heroin, and methamphetamine distribution than any other major drug trafficking organizations in the United States.¹⁰⁸ In addition to their drug-related illegal activities, Mexican criminal networks have diversified their operations, adding to their portfolio crimes ranging from kidnapping and extortion to human trafficking and intellectual property rights violations.¹⁰⁹ Profits from these enterprises may help supplement their drug trafficking-related income.

Going Forward: Congressional Options

Given the differences in marijuana policies of the federal government and those of Colorado and Washington, Congress may choose to address state legalization initiatives in a number of ways, or not at all. There are a host of options available to policymakers should they choose to address state-level legalization of marijuana, including affirming federal marijuana policy, exercising oversight over federal law enforcement activities, or incentivizing state policies through the provision or denial of certain funds. Alternatively, Congress may opt *not* to address the policy conflict with state legalization of marijuana.

Federal Marijuana Policy—The Controlled Substances Act

For over 40 years, the federal government's official position, as implied by sustaining marijuana's position as a Schedule I controlled substance under the CSA, has been that marijuana is a dangerous drug with no accepted medical use and a high potential for abuse. Since passing the CSA, Congress has not altered marijuana's status as a Schedule I drug.

In addressing states' most recent legalization efforts, Congress could take one of two general routes. On one hand, Congress could elect to take no action, thereby upholding the federal government's current marijuana policy. On the other hand, Congress could choose to reevaluate marijuana's placement as a Schedule I controlled substance. On this path, Congress could consider a variety of actions. For one, it could once again exercise its authority to establish a policy commission to examine marijuana, its impacts, and the efficacy of current marijuana laws in the United States, just as it did in establishing the Shafer Commission.¹¹⁰ Additionally, Congress could direct the Secretary of Health and Human Services (HHS) and/or the Attorney

¹⁰⁸ NDTA, 2011, p. 8.

¹⁰⁹ Grace Wyler, "The Mexican Drug Cartels Are A National Security Issue," *Borderland Beat*, June 14, 2011, <http://www.borderlandbeat.com/2011/06/mexican-drug-cartels-are-national.html>.

¹¹⁰ In April 2013, H.R. 1635, the National Commission on Federal Marijuana Policy Act of 2013 was introduced in the House. This bill would establish a commission similar in nature to the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, in order to "undertake a comprehensive review of the state and efficacy of current policies of the Federal Government toward marijuana in light of the growing number of States in which marijuana is legal for medicinal or personal use." For more information on congressional commissions, see CRS Report R40076, *Congressional Commissions: Overview, Structure, and Legislative Considerations*, by Matthew E. Glassman and Jacob R. Straus.

General to reevaluate marijuana and its position within the schedules of controlled substances. Of note, the Attorney General—through the DEA, and in consultation with the Secretary of HHS—may reschedule a substance or remove a substance altogether from control.¹¹¹

In addition to establishing commissions and directing additional research, congressional options include legislatively amending the CSA. This could involve keeping—with caveats—marijuana as a Schedule I substance, moving it to a different schedule, or removing it from the schedule altogether. Without altering marijuana’s position as a Schedule I controlled substance on the whole, one option might be to build additional flexibility into existing law. For example, policymakers could amend the CSA to make certain criminal liability exceptions for individuals operating in compliance with state marijuana laws.¹¹²

Upon reevaluation, should Congress determine that marijuana no longer meets the criteria to be a Schedule I substance,¹¹³ it could take legislative action to remove marijuana from Schedule I of the CSA. In doing so, Congress may (1) place marijuana on one of the other Schedules (II, III, IV, or V) of controlled substances or (2) remove marijuana as a controlled substance altogether;¹¹⁴ however, if marijuana *remains* a controlled substance under the CSA under any Schedule, then this would not eliminate the existing policy conflict with Colorado and Washington State. If Congress chooses to remove marijuana as a controlled substance, it could alternatively seek to regulate and tax marijuana. If Congress were to take this route of legalizing and regulating marijuana, and given agencies’ current authorities over controlled and legal substances, one path may then be to transfer jurisdiction over marijuana from the DEA to the ATF for regulation.¹¹⁵

Oversight of Federal Law Enforcement Activities

Review of Agency Missions

In exercising its oversight authorities, Congress may choose to examine the extent to which the carrying out of federal law enforcement missions might be impacted by state initiatives to decriminalize or legalize—either for medical or recreational purposes—marijuana. For instance, policymakers may elect to review the mission of each federal law enforcement agency involved in enforcing the CSA and examine how its drug-related investigations may be influenced by the varying state-level policies regarding marijuana. As noted, federal law enforcement has generally

¹¹¹ 21 U.S.C. §811. In the 113th Congress, H.R. 689, the States’ Medical Marijuana Patient Protection Act, would, among other things, require the Secretary of HHS and DEA Administrator to recommend removing marijuana from Schedule I and relist it.

¹¹² In April 2013, H.R. 1523, the Respect State Marijuana Laws Act of 2013, was introduced in the House. This bill would amend the CSA so that certain provisions related to marijuana (under 21 U.S.C. §801 et seq.) would not apply to “any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marihuana.” Similar provisions are also proposed in H.R. 689.

¹¹³ The criteria are (1) the drug or other substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in treatment in the United States; and (3) there is a lack of accepted safety for the use of the drug or other substance under medical supervision (21 U.S.C. §812(b)(1)).

¹¹⁴ In February 2013, H.R. 499, the Ending Federal Marijuana Prohibition Act of 2013, was introduced in the House. This bill would remove marijuana in any form from all schedules under §202(c) of the CSA among other things in order to “decriminalize marijuana at the Federal level, [and] to leave to the States a power to regulate marijuana that is similar to the power they have to regulate alcohol, and for other purposes.”

¹¹⁵ *Ibid.*

prioritized the investigation of drug traffickers and dealers over that of low-level drug users. Policymakers may question whether these priorities are consistent across states with different forms of drug policies regarding marijuana. Policymakers may question whether federal law enforcement priorities have shifted in states that have altered their marijuana laws and regulations.

Cooperation with State and Local Law Enforcement

With respect to the coordination of federal, state, and local efforts to combat drug trafficking networks and other drug offenders, one issue policymakers may debate is whether or how to incentivize task forces, fusion centers, and other coordinating bodies charged with combating drug-related crimes. Before determining whether to increase, decrease, or maintain funding for coordinated efforts such as task forces, policymakers may consider whether state and local counterparts are able to effectively achieve task force goals if the respective state marijuana policy is not in agreement with federal marijuana policy. Policymakers may choose to evaluate whether certain drug task forces are sustainable in states that have established policies that are either inconsistent—such as in states that have decriminalized small amounts of marijuana possession—or are in direct conflict—including states that have legalized either medical or recreational marijuana—with federal drug policy. For instance, might there be any internal conflicts that prevent task force partners from collaborating effectively to carry out their investigations?

Policy-Linked Funding for States

Congress has long used the provision of monies as a carrot to influence states' policies. If policymakers are interested in affecting states' drug policies, one means may be through some form of policy-contingent funding. For instance, Congress could consider compliance with federal marijuana policy as an eligibility requirement to receive certain federal grant funds. In the past, Congress has exercised its authority to withhold federal grant funds to states in order to achieve agreement with federal policy. For example, under the Sex Offender Registration and Notification Act (SORNA; P.L. 109-248),¹¹⁶ Congress established a set of minimum standards for sex offender registration and notification for all 50 states, the District of Columbia, territories, and federally recognized American Indian tribes. To assure compliance with these standards, SORNA mandated a 10% reduction in annual formula funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program¹¹⁷ for the states, territories, and District of Columbia if these jurisdictions did not substantially implement SORNA by July 27, 2009.¹¹⁸ Congress may choose to establish similar financial penalties to influence states' drug policies or ensure consistency between state-level laws and those outlined under the CSA.

¹¹⁶ Title I of the Adam Walsh Child Protection and Safety Act of 2006.

¹¹⁷ For more information on the JAG Program, see CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by Nathan James.

¹¹⁸ Two extensions were provided, and a final deadline of July 27, 2011 was established. For relevant statutory guidelines and deadlines, see 42 U.S.C. §16924 and §16925. According to the U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office), sixteen states, three territories, and 47 tribal jurisdictions have substantially implemented SORNA. For more information regarding SORNA compliance, see the SMART Office website: <http://www.ojp.usdoj.gov/smart/sorna.htm>. For more information regarding the JAG Program, see the Office of Justice Programs, Bureau of Justice Assistance website, <http://www.ojp.usdoj.gov/smart/sorna.htm>.

Whether or not linking funding to state-level compliance with federal drug policy standards might produce the desired outcomes is unknown. One question that remains is whether Congress could withhold sufficient money from programs such as JAG to provide a true incentive for states to acquiesce to federal drug policy requirements. Might states that legalize and tax marijuana generate enough revenue to offset any losses from grant program funding that Congress might impose? In addition, could states see some savings in criminal justice expenditures from not investigating, prosecuting, and incarcerating low-level marijuana offenders? These savings could also compensate for any losses from congressionally imposed financial penalties.¹¹⁹

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¹¹⁹ A number of other savings or expenditures, such as those in the public health arena, may arise from any possible changes in federal marijuana policy. However, they are beyond the scope of this report.