



# From 'Reefer Madness' to the War on Drugs to Legal Recreational Marijuana

## How Safe are N.J. Residents from Federal Enforcement?

By Anthony M. Fassano and John C. Connell

In April 2022, the first recreational marijuana retail stores opened in New Jersey. However, the process that led to this point was anything but smooth. New Jersey is one of 19 states (as well as Washington, D.C., and Guam) to legalize recreational marijuana for adults. Thirty-seven states, Washington, D.C., Guam, Puerto Rico, and the U.S. Virgin Islands allow medical marijuana use. This development would be impossible to imagine by U.S. citizens at various times during the 20th century.

## Historical Background

The first major movement to criminalize marijuana occurred over 100 years ago. In 1910, there was a revolution in Mexico, which resulted in many immigrants entering the United States. The same prejudices and fears that have always been present when there is large-scale immigration into the United States led to a backlash against this wave of immigrants, and this antipathy extended to the immigrants' traditional intoxicant: marijuana. The drug was also negatively associated with the Black jazz scene, which was in its beginning stages in New Orleans at the time.

As a result of these prejudices, 29 states outlawed marijuana by 1931. There was also a push to criminalize marijuana on the federal level, which led to the passage of the Marijuana Tax Act of 1937. This law ostensibly taxed the sale of the



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drug, but practically speaking, it essentially outlawed it throughout the country. Twenty years later, Congress passed the Boggs Act, which increased the penalties for all drug offenses, including marijuana, and began treating marijuana like any other narcotic drug. This was followed by the Narcotic Control Act of 1956, which further increased penalties for drug offenses. Many states followed suit, passing what became known as "little Boggs Acts," and stiffening the penalties for drug offenses, sometimes more harshly than provided by federal law.

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## Decriminalization

The following decades saw the pendulum swing back to more leniency toward marijuana use. During the Kennedy and Johnson administrations, with marijuana use widespread among white, middle-class young adults, there was a push for a reevaluation of the law. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which differentiated between marijuana and other narcotics. There were even advocates for decriminalization of marijuana, including President Carter.

However, this movement would end with the 1981 election of President Reagan and the War on Drugs. During the Reagan Administration, Congress passed three major pieces of drug legislation that resulted in stiffer penalties for marijuana possession, cultivation, and trafficking.

## Medical Marijuana

This trend continued into the late 1990s. During this time, there was support for allowing marijuana use, at least as a treatment for patients suffering from a variety of ailments, like chronic pain, nausea associated with chemotherapy treatment, glaucoma, and many other conditions.

In 1996, California was the first state to approve the use of medical marijuana under the Compassionate Use Act, known as Proposition 215. Other states followed suit. In 2000, Hawaii became

the first state to legalize medical marijuana through an act of the Legislature. In 2014, with a number of states having legalized or decriminalized medical marijuana, Congress attached the Rohrabacher-Blumenauer Amendment to its annual omnibus spending bill.<sup>1</sup> This amendment prohibited the Department of Justice from spending funds to prosecute individuals using medical marijuana in compliance with state law. This amendment has been a part of all omnibus spending bills passed by Congress since. Today, the majority of states have legal medical marijuana.

## Recreational Marijuana

Legal recreational marijuana has lagged behind legal medical marijuana, but it has followed a similar trajectory. In 2012, Washington and Colorado became

the first states to legalize recreational marijuana. Both states did so via ballot initiative. In the next 10 years, a number of other states took steps to legalize, or at least decriminalize, recreational marijuana or, in some cases, Cannabidiol (CBD) oil, which is an extract from marijuana.

### **New Jersey's Approach**

New Jersey has followed the path toward legalization. Medical marijuana has been legal in this state since January 2010.<sup>2</sup> In 2017, Gov. Phil Murphy campaigned for legalizing recreational marijuana and handily won the governorship. In the 2018-2019 legislative session, there were attempts to pass a law to legalize recreational marijuana. Those efforts failed, but advocates successfully lobbied to put an initiative on the ballot in November 2020 in support of a state constitutional amendment. By a solid majority, the ballot initiative passed.<sup>3</sup>

Three months later, in February 2021, Murphy signed enabling legislation into law.<sup>4</sup> In the subsequent months, the Cannabis Regulatory Commission processed applications for dispensaries and, on April 21, 2022, the first 13 retail dispensaries in the state opened their doors.<sup>5</sup>

### **The Conundrum Created by Federal Regulation**

With all of the state-level efforts underway, it is easy to forget that marijuana is still listed as a Schedule I narcotic (the same category as cocaine and heroin) by the federal government. When California voters approved the ballot measure to legalize medical marijuana, California law was in direct conflict with federal law. This conflict made its way to the United States Supreme Court in 2005 in *Gonzalez v. Raich*.<sup>6</sup> In that case, the Court upheld the constitutionality of the federal statute prohibiting marijuana on the ground that the Commerce Clause gives Congress the power to regulate marijuana. As explained above, other

states including New Jersey followed California's lead, legalizing medical marijuana, and now recreational marijuana, despite the fact that the federal law is still on the books and the United States Supreme Court upheld the law just 17 years ago.

When there is a conflict between federal and state law, the Supremacy Clause dictates that state law must give way. But in practice, both the executive and legislative branches can take actions that prevent the enforcement of federal law.

As a matter of prosecutorial discretion, the Department of Justice can choose whether to prosecute people who

result, many financial institutions choose to forgo working with the cannabis industry altogether. According to a recent survey, only 518 of almost 5,000 U.S. commercial banks reported working with the industry in 2021.

Congress, of course, has the power to repeal the law making marijuana illegal. But it can also use its spending power to render the law effectively void, even though it remains on the books. In fact, at least with regard to medical marijuana, Congress has done so by including the Rohrabacher-Blumenauer Amendment with the passage of every omnibus spending bill since 2014. Congress could

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use recreational marijuana in compliance with the law of the state in which they are located. As a matter of policy, Attorney General Merrick Garland has indicated that enforcement of federal marijuana laws against those acting in compliance with state law is an inefficient use of federal resources. Thus, even though someone using marijuana in a state that allows it is technically committing a federal crime, that person will not be prosecuted. However, this policy could change if a new administration or a new attorney general decides to take a different enforcement approach.

Further, federal law burdens businesses in the cannabis industry. Although it is arguably not illegal for a financial institution to work with businesses in the industry, federal reporting requirements for suspicious and illegal (under federal law) can expose financial institutions to great risk and high reporting costs. As a

continue to take this action, and even decide to expand it to those using recreational marijuana in accordance with State law. However, like the executive action described above, subsequent congresses could undo this move.

Also, will the amount of time that passes with the use of legal recreational marijuana affect the decision of federal officials who may otherwise want to start federal marijuana prosecutions? At this point, there are over a dozen recreational marijuana dispensaries in New Jersey, with more applications pending. The companies involved made a significant investment in time and money into their businesses relying on their businesses being legal. Actors in other states where recreational marijuana has been legal for longer no doubt have even higher investments involved. Would this reliance make a federal official, anxious to begin prosecutions, hesitate? Should it?

And does the manner in which the states arrived at legal recreational marijuana make a difference? Some states, including New Jersey, resorted to direct democracy on the issue because the state Legislature failed to act. As a result, legal recreational marijuana is now enshrined in the New Jersey Constitution. And this ballot initiative overwhelmingly passed with over two-thirds of the vote. But would the fact that the citizens of the state have directly spoken on this issue affect federal officials debating whether to enforce the federal law? Should public opinion, which has trended in the direction of increased support for legal marijuana, and which led to the passage of ballot initiatives as in New Jersey, matter?

### Conclusion

The answer to these questions is “it depends.” Business reliance on the current state of the law and direct democra-

cy could influence federal decision-makers, but this influence would likely mean very little to a federal official who believes strongly that the federal law should be enforced. There is certainly no mechanism in place to prevent the federal official from changing the policy and beginning federal prosecutions.

This issue is especially relevant today. With the country increasingly polarized, the large number of state trifectas (one party in control of both state legislative houses and the governorship), and Congress unable to pass legislation on a number of important issues, the possibility that a state could pass laws conflicting with federal law, or of federal officials sympathetic to conflicting state law, electing not to enforce federal law. One’s view on this potential problem may depend on one’s attitude toward the underlying substantive issue: advocates of legal marijuana may support federal efforts to refrain from enforcing federal

law. However, those individuals may view differently the same action by federal officials regarding a different substantive issue, such as gun control, same-sex marriage, or immigration. ■

### Endnotes

1. See, e.g., Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, §537, 133 Stat. 13, 138 (2019).
2. N.J.S.A. 24:61-1 *et seq.*
3. N.J. Const. (1947), Art. IV, § 7, ¶13
4. N.J.S.A. 24:61-31 *et seq.*
5. Henry Savage, *Where You Can Buy Recreational Marijuana in New Jersey*, Philadelphia Inquirer, April 25, 2022, [inquirer.com/philly-tips/where-to-buy-legal-cannabis-nj.html](https://www.inquirer.com/philly-tips/where-to-buy-legal-cannabis-nj.html) (last accessed July 28, 2022)
6. 545 U.S. 1 (2005).

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