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## Trials & TRIBULATIONS

### Will federal courts play role in marijuana legalization?

With the influx of states voting-in or enacting laws to legalize marijuana for medical and, in some cases, recreational use, it may appear that the legalization of marijuana on a national level is imminent. President Obama has also pardoned or commuted the sentences of hundreds of individuals serving time in federal prison for low level drug crimes, many of which relate to marijuana.

A recent decision from the United States District Court for the Western District of New York (Wolford, J.) reminds us, however, that any change in federal drug policy on marijuana is likely far off, and will require action by the DEA or Congress — neither of which appears to be forthcoming. See *United States v. Green*, No. 14-CR-6038, Dkt. No. 199 (W.D.N.Y. Dec.r 7, 2016).

Currently, marijuana is classified as a Schedule I controlled substance under the Controlled Substances Act (CSA). 21 U.S.C.A. § 801, et seq. Pursuant to the CSA, a Schedule I controlled substance must have (1) a “high potential for abuse,” (2) “no currently accepted medical use in treatment in the United States,” and (3) a “lack of accepted safety for use ... under medical supervision.” *Id.* Schedule I drugs cannot be legally prescribed by a physician and federal crimes related to these drugs carry steep penalties. The Drug Enforcement Administration (DEA) has been delegated the authority by the attorney general to classify or reclassify drugs. The most recent petition to reclassify marijuana was denied by the DEA on Aug. 12, 2016. *Green*, at 6-7, 21; 81 Fed. Reg. 53688-01 (August 12, 2016).

In *Green*, two defendants accused of participating in a “narcotics conspiracy” to possess and distribute “a mixture and substance containing a detectable amount



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of marijuana” filed a motion to dismiss their indictments on constitutional grounds, contending that the federal government’s marijuana classification is “irrational and unconstitutional” given the broad support for medical marijuana at the state level. *Green*, at 4.

The *Green* defendants specifically requested that the court conduct an evidentiary hearing to “consider the medical field’s current assessment of marijuana’s efficacies,” with the ultimate goal of presenting evidence relating to the accepted medical use of marijuana, such that the court would find the classification irrational and unconstitutional and dismiss their indictments. *Id.*

Although appearing novel, the *Green* decision identifies similar attempts by defendants across the nation, all of which have been rejected. *Id.* at 10 (citing, among other cases, *United States v. Pickard*, 100 F. Supp. 3d 981, 988 (E.D. Cal. 2015)). Indeed, the governments’ response brief identifies dozens of cases in which criminal defendants have raised constitutional claims relating to the classification of marijuana under the CSA. See 14-CR-6038, Dkt. No. 106, at pp. 14-17.

The *Green* decision is of interest, however, because of the court’s framing of the constitutional question, which, if adhered to by other courts, foreshadows a long wait in Congress on this politically charged issue.

Courts that have considered this issue have been in agreement that a rational basis review is required. See 14-CR-6038,

Report and Recommendation at 6-11. However, other courts have routinely framed the issue as whether it is “rational for Congress or the DEA to continue to conclude that there is no acceptable medical use for marijuana[.]” considering the criteria for classifying a drug under Schedule I — (1) a high potential for abuse; (2) a lack of any accepted medical use; and (3) absence of any accepted safety for use in medically supervised treatment. See *Green*, at 18 (citing, for example *Pickard*, 100 F.Supp.3d at 1006-1009).

The *Green* Court, however, rejected this disjointed reading of the statute, finding that the appropriate inquiry is “not whether it is reasonable to conclude that the specific criteria in the statute have been met, but, rather, whether there is any conceivable basis that might support the classification.” *Green*, at 18. The court then easily concluded that Congress had a rational basis for classifying marijuana as a Schedule I controlled substance, citing the DEA’s Aug. 12, 2016 denial of a petition to reschedule marijuana which lists various conceivable risks to public health and safety, despite evidence of approved medical use. *Id.* at 21.

The *Green* Court’s Decision represents judicial restraint in an era of increased criticism of the judiciary for overstepping its role in government. As the court wrote, “if the Court were to accept Defendants’ invitation to conduct an evidentiary hearing to evaluate the rationality of marijuana’s scheduling, it would be travelling a precarious road towards judicial arrogance.” *Id.* at 2.

So, getting back to the initial question — will federal courts play a role in the legalization of marijuana? The answer

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appears to depend on how courts frame the constitutional question and whether they are willing to enter into the political fray. As medical marijuana becomes more mainstream, one can envision a court finding that all three statutory criteria must be met and that it is irrational to conclude that there is no accepted medical use for marijuana. If, however, courts continue to demonstrate judicial restraint, any change must await DEA or Congressional action. Considering the most recent pronouncement on marijuana from the DEA came just months ago, reclassification is not

likely to happen soon.

Of course, the incoming Trump administration will also play a role in determining federal drug policy; it is anyone's guess which side the Trump administration will ultimately favor. President-elect Trump has publicly stated that he supports the use of medical marijuana. (Trump stated that he was "in favor of medical marijuana 100%" and "Marijuana is such a big thing. I think medical should happen — right? Don't we agree? I think so. And then I really believe we should leave it up to the states.")

Yet, his nomination of Sen. Jeff Sessions, a staunch opponent to the marijuana

legalization effort, as attorney general suggests that efforts to enforce federal marijuana laws may increase in next four years.

If the federal government returns to a policy of aggressively enforcing federal marijuana laws, more and more courts may be asked to weigh in on a highly political national debate. It will certainly be interesting to see if any federal court will dare to enter the political ring.

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