

CATO INSTITUTE POLICY FORUM

THE LAW AND POLITICS OF MEDICAL MARIJUANA

Tuesday, March 27, 2001

Featuring:

Alan Bock,

*Author, Waiting to Inhale: The Politics of Medical Marijuana;*

and

Kevin Zeese,

*President, Common Sense for Drug Policy;*

The Cato Institute

F.A. Hayek Auditorium

1000 Massachusetts Avenue, NW

Washington, D.C.

## PROCEEDINGS

TIMOTHY LYNCH: Good afternoon and welcome to the Cato Institute. My name is Tim Lynch and I'm the director of Cato's Project on Criminal Justice. This afternoon we're going to be discussing the politics and law of medical marijuana, but before I introduce our first speaker I want to take a moment to lay something of a foundation for our discussion this afternoon. In my view, historians 50 years from now are going to look back on this period and they're going to say that the drug war in America peaked in November of 1996. That was the moment in time when things really began to change. If you go to the Web site of the DEA [the Drug Enforcement Agency], the officials there are already acknowledging that the whole complexion of the drug policy debate changed when voters in California and Arizona went to the polls in November of 1996 and approved an initiative legalizing medical marijuana. That event marked the first time that we moved to de-escalate the drug war in America. Since 1996 several other states have joined California and Arizona in passing medical marijuana laws: Oregon, Nevada, Maine, Alaska, Washington state and voters right here in the District of Columbia have passed initiatives legalizing medical marijuana. Last year the Hawaii state legislature passed a medical marijuana bill and that bill was signed into law by that state's governor.

The federal government, however, continues to threaten both doctors and patients with jail if they dare to possess or distribute marijuana. A recently departed drug czar, Barry McCaffrey, went to California in 1996 to lobby against that initiative as it was coming up for a vote and he made a number of arrogant statements, among other things, he said, "We should not expect patients to make decisions for themselves about which kinds of medicines are going to alleviate the symptoms of the diseases which they're suffering from." McCaffrey said that the federal government was in a much better position to make those kinds of decisions.

Now tomorrow the Supreme Court is going to hear arguments in *United States v. Oakland Cannabis Buyer's Club*, and the issue in that case is whether juries in federal court can consider a medical necessity defense in cases where a person is being prosecuted on marijuana charges. The medical necessity defense is allowed in the state courts in the states that have already passed these medical marijuana initiatives. A person who is being prosecuted on marijuana charges in those places can raise a medical necessity defense. They can say: I'm suffering from this illness; I'm not smoking marijuana to get high; I'm doing it to alleviate my symptoms. Patients who have AIDS, glaucoma

and cancer report that marijuana helps alleviate the symptoms they're suffering from.

To shed additional light on the meaning of tomorrow's case, we have invited two speakers to address the politics and law of medical marijuana. Our first speaker is going to address the politics of medical marijuana. Alan Bock has just published a new book entitled "Waiting to Inhale," which chronicles the story of the California ballot initiative. Mr. Bock has been with the *Orange County Register* for more than 20 years. He is presently a senior editorial writer with that newspaper and he also has two weekly columns: one with WorldNetDaily and the other with AntiWar.com. Mr. Bock has authored several other books including "Ambush at Ruby Ridge," a widely respected account of that awful incident. Please welcome our first speaker Mr. Alan Bock.

ALAN BOCK: I'm going to talk a little about the politics, but I'm also going to talk a little about the people who make up the social movement behind medical marijuana. What got me thinking about it, particularly, was that I was reading one of the amicus briefs from one of the anti-drug organizations that was filed with the Supreme Court on behalf of government and they made a point of saying that what we're against is crude marijuana. We

think it's especially troublesome that a patient should use crude marijuana and they had a little footnote explaining why they were going to use the word "crude" marijuana throughout their brief. Saying that this was a plant with a number of chemical components and of uncertain quality and origin. So I guess, the question that I would want to ask is would they be happier with refined marijuana?

And the reason I want to ask that question is because it's here. Or at least it's here in California. I talked to a guy named Robert Schmitt [sp?] who runs an outfit out of Petaluma [sp?] called Genesis:129 and that's the book in the Bible that says that the Lord has given you all these plants for your use, please use them. And I met him at a conference in Chapman University in Orange California where Barry McCaffrey was the featured speaker and he came up to me and said, "You know I've got the answer to all of Barry McCaffrey's problems." Because McCaffrey had given his usual, "Well, you know, you don't cure an illness by having a patient smoking a big doobie, that's just not medicine." And he said, "We don't do that. Well, we don't smoke here -- we vaporize." And vaporizing is taking crude marijuana, putting it in a glass bowl, applying a heat gun to it and sucking through a breath apparatus (it looks like a bunch of test tubes to me) and it doesn't burn, but some of the THC and

other things are inhaled into the lungs. It creates much less smoke and much less aroma. He says it's used rather effectively in a hospital setting because it doesn't create the kind of commotion and side effects within the hospital. "Oh, you can smell that down the hall -- can't ya?"

The other thing he showed me was a refined syrup. Now I don't know how they take the entire marijuana plant and turn it into a syrup, but you know I guess that chemically it's not all that tough to do. But they've got this thing that's about the viscosity of motor oil in different colors that's refined from the entire cannabis bud. So it has all of the ingredients that are in crude marijuana, but it's refined. And that produces less smoke, less smell, and a much more concentrated thing so the patients can titrate it more easily -- so basically one hit and you've had it.

He called me just a few weeks ago and said, "We've done it. We've done it. We've put this stuff inside a gelcap and people can take it orally." There is no smoking, there is none of that stuff that all these people say they object to and the patients report that they actually like it better because it's a completely controlled dose; they know exactly what they're getting; they don't have to guess as to what the effects are once they've

had a couple of weeks of experience with it, and a lot of patients prefer that. Some of the patients still prefer to smoke, some still prefer to vaporize, but a lot of patients really like this gelcap that has the concentrated entire medical marijuana in it. Not just the synthetic THC that the government has approved.

What's happening is the underground is doing the frontier research. And maybe it's always been that way. Maybe it was that way when alternative medicine such as herbs, Chinese medicine, acupuncture and various other things managed to get a foothold in the United States. It started out as an underground movement way ahead of the respectable people, way ahead of the establishment, way ahead of the legal system. They are doing research at the University of California now. They just started a three-year program and in three years they may find out what the underground knew three, four or five years ago. But that will be a good thing because then it will have the imprimatur of the University of California on it.

Tim talked about November 1996 possibly being the high water mark of the drug war and I think in terms of public support that might turn out to be true. Although in terms of numbers of arrests and amount of money spent on the drug war we haven't

seen much slacking off. We may be about to get involved in Columbia to continue it and I'm not sure how we'll get out of that if we do get into it. I think a lot of people in the country had the impression that Prop 215 in California sprang out of the head of George Soros the way Venus was born out of the head of Zeus -- instant, fully grown, and fed only by money and a smart advertising campaign. I've been reporting on California politics for about the last 20 years and it wasn't quite that way. There was a lot of preliminary movement that built up to that and I want to talk a little bit about that to let you know that it didn't just happen overnight and it didn't just happen because somebody decided to spend a lot of money.

You can go back to the 1970s for a fair amount of interest in the medical properties of marijuana, and a lot of people thought that it was going to be legalized for medical use early on in the 1970's. There was a conference at Asilomar in California and the National Institute of Drug Abuse in 1975 where most of the participants at that time were sure that it was going to be legalized for medical use because a number of legitimate medical properties and uses had been documented pretty well. Not just anecdotally, but in some controlled studies -- not enough controlled studies, but some. And it was about that time that Edward Brecker [sp?] in the Consumers' Union put out a

book called "Licit in the Illicit Drugs," which is still a really good source for pretty reliable information on the actual effects of various drugs. Robert Randall, a glaucoma patient in Washington, D.C., found that smoking marijuana, which he started out doing recreationally because he was depressed because he had glaucoma and he was going blind, somehow seemed to open up his vision a little bit so that the gray things that were moving in on him were not quite so wide. He fought it and got a court to authorize that he had a medical necessity to use it. This was in the 1970s (or was it 1979 or 1980?) and formed the Alliance for Cannabis Therapeutics.

In the early 80's when "just say no" was the big thing there was an impression that there wasn't much in the way of a drug reform movement, but there were movements going on. Jack Horror [sp?] with "The Emperor Wears New Clothes," who sort of rediscovered all the uses of hemp for fabric and various other uses, and began documenting those and through the peculiar charisma that he has formed a movement that finally got the attention of the respectable drug reform movement and then was embraced by the respectable drug reform movement. In 1986 in Oregon there was an initiative on the ballot to legalize marijuana for industrial hemp purposes that got 29 percent of the vote in Oregon. There was an initiative on the ballot in Alaska

in 1990 that got 45 percent of the vote. In California in 1990, the authorities put four "spend more money on the drug war initiatives" on the ballot and they all failed. In 1990, there's something called the California Research Advisory Board, which is an adjunct to the attorney general's office, did a pretty good research project on drug policy and recommended that marijuana be legalized entirely and that clean syringes be provided for AIDS patients. The attorney general at the time, John Vandekamp [sp?], who was a Democrat, suppressed the report -- did not release the report -- but it became known after a year or so that the report had been issued. And possibly what really got the medical marijuana movement going on was the AIDS crisis. And particularly in San Francisco, but not only in San Francisco because it became known anecdotally and eventually through a whole lot of experience that a lot of AIDS patients have what's called "AIDS wasting syndrome," where you just don't feel like eating anything, and they smoked marijuana and they got the munchies. Then they started doing it systematically and a bunch of them applied to go on the compassionate independent new drug program that had been established by the federal government in response to Robert Randall's lawsuit, which established a medical necessity defense in U.S. law whereby the government still gives 7.1 pounds per year to eight different patients who were qualified when the program was in existence in the 1980s.

All these strains kind of came together. There was the Hoover Institution at Stanford, which is generally viewed as a conservative organization, had a conference in 1990 on drug policy and brought out people like Lester Greenspoon and Joe McNamara, who used to be the police chief of San Jose, and saw from his experience -- both in San Jose and Kansas City and before that as a New York City cop -- that fighting the drug war from the police standpoint was not something that was a very good investment of taxpayer dollars, and has become a staunch opponent of the drug war and one of the most effective spokesmen of reform. He became a fellow at Hoover and has pushed them in the direction of being fairly pro-active on the drug reform issues.

In November of 1991, San Francisco voters -- and I think the margin was 82 percent -- passed Proposition P, which was an advisory initiative saying that the city should advise the state and the federal government that marijuana should be available for medical uses. It was advisory, it did not have the force of law, but it was an overwhelming majority supporting that. That happened largely because a sort of frenetically gay activist, AIDS activist, pro-marijuana activist guy named Dennis Perone, who has been criticized but he's done some effective things got it on the ballot and did a campaign in San Francisco -- which is

a different kind of place, to be sure -- and 82 percent in any city is a pretty hefty margin. That was followed by several different counties and cities passed similar measures in 1991 and 1992: Marin County, San Luis Obispo, Moreau Bay [sp?], Santa Cruz. Now Marin and Santa Cruz are viewed as liberals and San Luis Obispo's pretty conservative, but this seems to be an issue that when people actually get to thinking about it and learning more about it really cuts across ideological lines pretty well.

In 1993, 1994, and 1995 the state legislature in California passed again advisory resolutions in favor of medical marijuana, formally asking the federal government to reschedule marijuana. Take it off Schedule 1, which is the most restrictive schedule and basically amounts to outright prohibition, and allow it to be either prescribed or recommended by doctors. In each of those years, there were several different activists involved there, Henry Mellow [sp?] who was a Democratic state senator from San Francisco proposed it in 1993, Milton Marks [sp?] who was a liberal Republican senator from San Francisco did it in 1994, John Vasconsellos [sp?] from the San Jose area in 1995 was the chief sponsor. But it got people like Gill Ferguson [sp?] from Newport Beach who was viewed as the leader of the cavemen, the most right-wing Republican in the legislature, also supported it because he'd taken the time to read Judge Francis

Young's opinion in 1988, which recommended that marijuana be re-scheduled, and he brought along a bunch of other conservatives. So it was passed by bipartisan majorities in all three of those years, and all three of those years Governor Pete Wilson vetoed it. So in a way that's some of the background to how Prop. 215 got on the ballot in 1996, because three years in a row the legislature passes a resolution, three years in a row the Governor vetoes it, the activists look around and say, "Well, the only way we're going to get this thing done is through the initiative process." And we can talk a little bit more about some of the ins and outs about why they did it the way they did, what they wrote and some of the problems that have ensued as a result. Buy the book; that tells the whole thing.

What I'm saying is that there was a political movement in favor of medical marijuana of several years standing in California before Prop. 215 passed. And to my way of thinking there's no question that George Soros and several other wealthy people coming in with fairly large piles of money at crucial times was the key to getting it on the ballot and getting it passed. It probably wouldn't have gotten on the ballot with strictly grassroots efforts in 1996 without that extra impetus. By the time it was on the ballot, medical marijuana had been a political issue in California for at least five years. There had been nu-

merous newspapers stories and all kinds of pro and con debates. It was not a matter of a bunch of rich financiers coming in here and doing a slick ad campaign and fooling California voters. Most California voters had had a chance to think about it, had had an opportunity to have discussions with their friends and neighbors, and they knew what they were doing. They wanted to create an exception for people who have a recommendation from a licensed physician to use marijuana therapeutically. They knew the distinction. All the polls showed that maybe one-third of Californians were in favor of full legalization, two-thirds opposed full legalization, but at least two-thirds were in favor of medical legalization. Voters are capable of making those distinctions. I don't think they're that dumb. And while money is the mother's milk of politics and very important in politics, just last year we had a proposition where the proponents of a thing to liberalize the two-thirds vote for passing a school bond issue outspent the opponents 23 to one and lost. So, yes, money is crucial, but money does not buy initiative elections -- at least not every time. And it was not the money and the slick advertising that made Californians do this. This is a considered opinion and it's been repeated in other states after all the officials came in and say, "Well, the voters were hornswoggled and we're not going to let that happen again," and it happened again and again and again.

And it happened in part because there is no grassroots opposition to medical marijuana anymore. None that I can find. It's almost all law enforcement and public officials. They get very excited about it. They bring in the attorney generals and former presidents and say, "It would be a terrible mistake if you voters did this" and the voters are saying, "Yeah, yeah, yeah," and vote they way they want to. In some ways they've hornswoggled themselves because in the early 80s when the whole "just say no" thing was getting started, almost anytime that a parent stood up in a city council meeting or a school board meeting and said, "You know I'm really concerned about the availability of drugs," the feds were on them immediately like white on milk saying, "Well, how can we help you get your grassroots organization supported here. Here we've got some federal money, we've got some grants, we've got some experts to come in and help you write your statements." And they all became sort of "kept" shills of the federal government. You really need a certain amount of genuine passion to do politics and the drug war doesn't have that anymore or at least not very much. At least not on the grassroots level from what I'm able to see. I think I'll stop here and let Kevin talk a little bit and I think this is a group that is going to want to talk to.

LYNCH: Our second speaker is a well-known drug policy expert and he's going to address the law of medical marijuana. Kevin Zeese is the president of Common Sense for Drug Policy, and if you read political opinion magazines like *National Review*, *The New Republic*, or *The Weekly Standard* you have doubtless seen his organization's hard-hitting, one-page advertisements against the drug war that are very, very well done. Kevin earned his law degree from the George Washington law school and he's been active in the drug reform movement for most of his professional career. He has litigated a variety of drug policy related issues, including the medical use of marijuana, the use of the military in domestic law enforcement and the drug testing of government employees. Kevin has authored or co-authored including "The Drug Testing Legal Manual" and "Drug Law: Strategies and Tactics." I should also mention that the Web site of Kevin's group is a goldmine of information for anyone interested in drug policy research. Please welcome our second speaker, Mr. Kevin Zeese.

KEVIN ZEESE: Thank you very much Tim, and thanks for putting this on and organizing it. Thanks to Cato for organizing it as well. I'm going to speak briefly because I can see in the audience there are some people that you will want to hear from who may know parts about this that I don't know. Jeff Jones in the

front here is the person who is the cause of this litigation. He ran the Oakland dispensary that's the subject of the lawsuit. Keith Stroup with NORML, his group starred the medical marijuana petition back in 1972, so he's been doing this for a long time. I see Elvi Museekenback [sp?] who is one of the eight medical marijuana patients and she gets it legally and has been doing it for about 20 years. And also I see, I think, Chuck Thomasson [sp?] in the back with the Marijuana Policy Project, so there are a lot of experts in the room and so my opinion is one of many and I think you'll get some additional opinions in the question and answer session.

I guess the one point I want to leave you with, if there's one, and I'll talk about other issues, but the major point I want to leave you with is that no matter what the Supreme Court does the medical marijuana movement has already won. There's no way that the federal government can put this genie back in the bottle. Medical marijuana is here to stay, that's been true for many years already and every time the federal government fights against it they make that more true. I was involved in litigating medical marijuana issues when I was with NORML back in the late 70s and throughout most of the 80s and every time we would be involved in a case or file an appeal, no matter how it turned out it resulted in media coverage, media attention and seriously

ill Americans learned through that process that marijuana was a medicine that could, in many cases, save their lives. And they learned that marijuana was a weed that they could grow outdoors, indoors, in their attic, in their basement, in their closet. So the idea that you can tell people not to grow something that can save your life is absurd. It becomes more absurd as the political realities that Alan described become true as voters put their imprimatur on the medical use of marijuana then patients become more emboldened, their friends, their allies, their loved ones become more willing to help them and as a result the genie gets out of the bottle further. So the federal government really can't do much to stop medical marijuana.

In fact, this case is really a narrow one. It's not one that is going to throw out the California medical marijuana law no matter what it does. No matter how this case results, medical necessity will still be a defense in medical marijuana cases in California under state law. That will be a reality no matter what happens. All we're looking at in the case is a very narrow issue and that's the issue of whether or not the medical necessity defense applies to federal prosecutions of marijuana dispensaries. It's a very narrow issue and it's even more narrow than that because already under federal law a judge has the power to decide that medical necessity can't be raised in a

case. For example, in the Peter McWilliams case and the Todd McCormick case, which many of you may have heard of, where they were growing several thousand marijuana plants for what they thought was medical use, they wanted to raise the defense of medical necessity. The judge ruled as part of a motion *in limine*, pretrial motion, that they could not raise that defense. So they were forced to go to trial and not allowed to tell the jury any of the realities of what they thought they were doing for medical purposes. Peter couldn't tell about his own illnesses -- his AIDS; his cancer could not be mentioned. So a judge already had that power and that forced them, by the way, into pleading guilty. There was no trial to that case.

All the Supreme Court is doing is a very narrow thing and if the Supremes were smart enough to rule in favor of medical necessity, I think that would probably force the federal government to start getting sensible. Start to develop a way to really have safe access to marijuana in some kind of a regulated format, probably similar to the way we have prescription drugs. But if the Supreme Court, instead, rules against medical marijuana, what they're going to do is make the problem of the federal government worse. There are two predictable things that will happen, I'm sure and there are many unpredictable things that we can't foresee, but of the two predictable things there

are: First, some people will stand up and continue to dispense marijuana medically and force the federal government to challenge them. They will probably narrow their distribution to a smaller amount to make their case stronger; make it more sympathetic and if the federal government decides to persecute those people it will not be good news for the federal government. It will not be good news for the federal government to be pushing an AIDS patient or a loved one of an AIDS patient or a cancer patient or their loved one into a federal court. That won't be a scene they want to see. And I think that is one very possible outcome. Martyrdom may be a possibility; conflict will be a certainty and as a result again -- more publicity, more tension to weed you can grow in your closet that can save your life and the genie gets further out of the bottle. The second thing that is possible is that the people who are involved in distributing medical marijuana will disperse and it will be much harder to see, to find. There will be thousands of medical marijuana dispensaries rather than a dozen or two and so it will be less easy for the federal government to target people and a thousand gardens blooming puts the genie out of the bottle even further. So again, if the federal government gets aggressive and refuses to recognize medical necessity, the victory of medical marijuana becomes more definite.

I think the other thing about this case that I want to get across to you is how it is kind of symbolic of the extremism of drug warriors: How they are willing to go to such lengths to persecute people who are seriously ill. One thing I learned in doing medical marijuana litigation was that this is not a joke. This is not a front for people who want to use medical marijuana for fun. This is real. These are patients who are suffering; they are going through seriously debilitating and life threatening illnesses. The multiple sclerosis we're talking about creates the kind of muscle spasms that can throw people out of a wheelchair. That's what kind of muscle spasms we're talking about. It creates the kind of crippling that keeps people in bed and yet if you talk to neurologists and MS patients what you find is that in all the MS clubs and support groups in the country they are all sharing and distributing marijuana medically because marijuana for some MS patients -- not for all, but for many MS patients -- ends the crippling. There are people who are crippled in bed and I remember testimony of an MS patient who was crippled in bed, couldn't get up for months and a friend came over and they shared a joint and she found herself walking across a room to get something to drink without even thinking about it. And what these patients find is that they use marijuana intensely initially to get over the crippling and then they just use it occasionally to keep at that level. Or you

talk to a cancer patient or their parent who takes their child to the chemotherapy treatment and the child is suffering, frightened of their treatment, doesn't want to go to it, leaves it and doesn't eat for days, vomits even though there is no food in his stomach, vomiting so violent he vomits up his intestines, but then the child is exposed -- I'm talking about a child here and I'm taking that position specifically because these are some of the real cases that have happened -- to marijuana as a medicine and you find the kid smiling in the waiting room waiting for chemotherapy. You find them looking for a sub sandwich on the way home from the chemotherapy treatment. You find the kid, rather than up in his room with the door closed and towels under the door so the smell of food doesn't get into his room, you find him sitting downstairs at the dining room table with his family. And so these are the real life-threatening, real debilitating, and sense-threatening illnesses. I know Elvi would tell you that if it hadn't been for marijuana she'd be blind. These are real issues and so it shows how far the drug warriors are willing to go in order to make war in order to try to enforce the unenforceable drug laws.

It also shows how warped our priorities have gotten. The reality is that drug abuse is a health problem with social and economic consequences. That's what drug abuse really is and you

don't see anywhere in there a role for police. Police aren't health professionals, they're not social service providers, they're not economists, they're not job trainers. Those are the real solutions to real drug addiction problems. And when it's not a drug addiction problem, when it's an occasional use problem -- getting away from medicine or medical use, for a second here, when it's someone who is an occasional, recreational, non-medical user using it in ways that doesn't upset their lifestyle -- making them into a criminal, taking away their job, putting them in jail -- it's counterproductive. So whom does the drug war help? The reality is that what the medical marijuana issue shows, I think, is a snapshot of how we need to be making health and not war. We need to begin to recognize that these drug issues should be treated as health issues. That when it comes to medical use of these substances, whether it's marijuana or other drugs that are prohibited, pain killers for many, even in some cases whether it's an addict who needs heroine or methadone, these are decisions that should not be made by narcotics police. These decisions are made between a doctor and their patient.

This medical marijuana issue doesn't just unravel the drug war, and it unravels it more every time the law enforcement fights it. We praise God for Barry McCaffrey and his reaction to Proposition 215. If he had been calm, cool and thoughtful

and said we're going to allow research, we're going to allow a certain number of patients to get marijuana medically, there would be no issue. The conflict created the issue, so we thank him for that. But not only does it undo the drug war, it also relates to the bigger issue of what is the government's role in doctor-patient relationships. I think a lot of support for medical marijuana in California -- while it was also tied to marijuana, because surveys show something that one out of three Californians either had used marijuana medically or knew somebody who had used marijuana medically, so that people had a lot of personal experience with marijuana as a medicine, so every time the drug czar or a law enforcement guy got up and said it's a fraud, it's a fake, one out of three Californians knew from their own personal experience that wasn't true. And you can't just undo that personal experience with a law enforcement spokesperson. That personal experience just overrode anything that the police would say. The medical marijuana issue seems like a small issue, but in reality because of the reaction the federal governments become a big issue. It's become a big issue not just for drug policy reform and treating drugs as a health issue and not as a law enforcement issue, but also its become a big issue as part of the broader debate on doctor and patient relationships and what the government's role in that is.

So, while I'm going to go to the Supreme Court hearing tomorrow and hear what they have to say, I know in my heart of hearts that no matter what they do, this is a battle that we've already won. Thank you all very much.

LYNCH: We're going to open it up to your questions now. I have two requests: When I call on you, please wait a moment. We have a microphone that will come down to you so that everybody can hear your question. Second, before you ask your question, please identify yourself and any affiliation that you may have. We'll take some questions now.

ANNE GARRIN (ASSOCIATED PRESS): This question is for Mr. Zeese. Can you talk a little bit more about the practical effects of the Supreme Court ruling if the Court looks at the 1970 law and says it's pretty clear that it's a Schedule 1 drug, there's no medical necessity defense, what actually happens to the Oakland Cannabis Club, what happens to others like it? Are they going to be one that, as you say, defies the government and actually goes out and continues to dispense? Will anyone take that risk of federal prosecution?

ZEESE: After I come, we should probably ask Jeff that question, because, you know, he's involved in that club. After the Su-

preme Court rules, nothing happens unless the federal government takes the next step. And the next step is to take legal action, either civil or criminal -- civil to try to close the clubs down or criminal to try to prosecute the proprietor of the dispensaries. And we don't know what they're going to do. We don't know if the compassionate conservative -- or maybe it's compassion for conservatives -- president is going to take those kinds of actions, or whether he's going to instruct his attorney general to let the vote stand and leave the seriously ill alone. If they decide to take action and civilly or criminally proceed, then the decision will come to the clubs what to do. If I were their attorney, I would advise two things: I would advise that they break the clubs down into smaller operations so that they are dispersed and more defensible, so that they don't each have hundreds and hundreds of patients, but may have dozens of patients, so that when it gets to a legal challenge they have a better public image to raise and also face less of a risk in a prosecution. But I expect that you will see, I've been to the Bay Area and other parts of California many times, and there's no question that a very strong cannabis culture has developed in those areas. And people feel like they've won this, the electorate, and they've won this with their local district attorneys, and they're going to stand up and fight. So I think you

will see that kind of a conflict if the government decides to proceed.

MS. AUDIENCE PARTICIPANT (UNIDENTIFIED): It sounds to some degree like you would advise the clubs to go underground -- I mean become smaller units that are harder for the federal government to find and would be less attractive targets, presumably. But doesn't that sort of undermine the whole point of having something like the Oakland Cannabis Club as a, you know, "Here it is, folks; it's out in the open." It's something you can look at and see that it isn't scary.

ZEESE: I think what you'll see also in the Supreme Court decision is wiggle room for what is legal and what's not. A community-based dispensary is one thing, a cooperative is another thing, five or six patients banding together is another thing, or someone who is a consultant who goes around and visits people who are growing marijuana for themselves or for a handful of other people is another approach. I think there will still be gray areas in the law of activities that would still be defensible and therefore, I'd say, legal under federal law. And so there will still be some out in the open, and there will be some people who are willing to face the conflict. So I think you'll see a combination of underground, gray area legality, and people

seeking conflict to kind of raise the point to a higher degree.  
Do you want to comment on that question?

BOCK: A little bit on the facts on the ground in California. The Oakland case came before the Supreme Court because after several state level efforts thinking about, you know, how are we going to close down these clubs that have opened up in the wake of Proposition 215? Dan Lungren, who was then attorney general and later ran for governor of California, asked the feds to come in and get not a criminal case but a civil injunction against the thing. So, in fact, the issue before the Supreme Court is even narrower than has been discussed. It isn't whether there's a medical defense in a criminal prosecution -- they can skirt that issue if they want -- they simply have to decide whether a district judge has the equitable discretion to issue an injunction that allows for medical necessity patients who meet a four-pronged test to have cannabis distributed to them in a fairly systematic way.

And so the district judge amended the injunction at the behest of the 9th Circuit Court in order to allow for this medical necessity defense, and in the Oakland brief they say there's like 14 out of thousands of members who would actually meet the federal test. But the California law is still on the books, and

it is not before the Supreme Court. And in fact, there's a provision in the California constitution that says that it shall be illegal for any official of California not to enforce a law on the grounds that it's in conflict with federal law unless and until that has been decided by a federal court. And it hasn't been challenged in federal court. That challenge has not been brought, so California law stays the same, whatever the Supreme Court decides, over the next several months. California law allows for medical use of marijuana with the recommendation of a licensed physician.

There are cannabis clubs operating very opening throughout California, mostly in the Bay Area, but some in southern California, too, and that will continue to be the case. I don't know, what strategies are they going to do? There are all kinds of strategies that the clubs or cooperatives can adopt, and under state law, none of them have been brought, and this was the only effort by the federal government to try to close them down. We'll see.

KENNETH TOTTER, HOWARD UNIVERSITY: I'd like to commend the Cato Institute for putting on this forum and it sort of projects the principal stance that its libertarianism is on, or is symbolic of. The question I ask is this, though: Isn't the real

problem here the slippery slope question? You've all been very persuasive and convincing in what you're saying and I suspect that if you legitimize this, then how can you stop decriminalization of marijuana altogether, and are you willing to address that, and isn't that what's really behind the federal government in this and all other law enforcement agencies that oppose medical marijuana?

ZEESE: Yes, no question, that's why it's the Drug Czar out front and not the Secretary of Health and Human Services. I mean, this is certainly a drug war/drug enforcement issue, and they are very fearful that there will be thousands and thousands of medical marijuana patients using marijuana openly, and then the public will get exposed to that and see marijuana as not the evil weed that they portray it as. I'm not sure whether that's an accurate scenario on their part, a legitimate fear on their part. I could easily see a scenario where, give in on medical marijuana, and that's the end of it. Sometimes we don't give in on a simple issue like this, and you end up hurting yourself more.

It's kind of like during alcohol prohibition, there was an effort to repeal prohibition of beer and wine, but the prohibitionists refused. In the end, they lost vodka and gin and

bourbon. If they had compromised on beer and wine, that may have been the end of it. I think that, as I said in my opening comments, the fact that they keep fighting us on medical marijuana makes us actually stronger on our broader agendas. They are actually hurting themselves and helping us. But I do think you're right: It is about their fear that this is a slippery slope that leads down to ultimate marijuana policy reform. You know, of course, my hope is that it does -- I do think we need to stop arresting 750,000 people a year for marijuana offenses. That's a silly waste of resources, it doesn't do any good, and spending my money the way I don't want it spent. And so I'd like to move away from marijuana prohibition, but that's a separate issue. Right now cocaine, for example, legal as a medicine, it's a Schedule 2 drug. But cocaine prohibition continues, and that's true with other drugs as well. I think you can have a medical drug and a non-medical drug and different approaches to both, but you're right, that is their fear.

LYNCH: Alan, do you want to address that?

BOCK: Well, I believe it is their fear, and I wonder how rational the fear is. I have a whole chapter on why the resistance is so fierce, and I'm not sure that I came up with the answer. Part of it is fear that this is the camel's nose under

the tent that makes the whole drug war go away eventually. I think part of it is actually believing . . . I had a short interview with Barry McCaffrey one time, and I posited to him the possibility that, you know, why didn't you just set up a little regime, where you would have strictly controlled, medical distribution of marijuana once this thing had passed, and you'd get all these sympathetic patients, you people who come into court in wheelchairs and with walkers, and you get these people out of the picture, and then you could really fight the drug war. And he said, "But they're all fakes!" And I think they really believe that, that they are all fakes. Kevin is right, that the more they resist, the more powerful the movement becomes. It really is a shame, and it's really a sad commentary on our society that that resistance is so strong, because there really are suffering people who could get some relief in a fairly easy and cheap way. I mean, McNeill and Lehrer had a thing last night had a thing that said there are 44,000 to 88,000 deaths per year due to medical mistakes, and last year there were zero deaths due to marijuana consumption. What are our priorities here?

ADAM KURLIN, HOWARD UNIVERSITY LAW SCHOOL: I looked at the \_\_\_\_\_ petition, I haven't looked at all the other pleadings -- this is to either of you -- and I talked to Jerry Allman, who I think is arguing the case tomorrow in San Francisco, in January

when he was mulling over exactly how to put the brief together. We talked about whether or not, given the narrow issues as to how the case could be framed, as to whether or not they were going to raise the issue that was raised in one of the trial courts below that the federal government simply doesn't have jurisdiction over locally grown marijuana by local doctors and whether or not *Lopez* in any way impacts whether that issue is in the briefs and is going to be raised at all. That would be another way, like the home run, to basically have the Court say, under these narrow circumstances the federal government just doesn't have jurisdiction over locally grown marijuana prescribed by local doctors. Is that in the brief?

BOCK: Yes, it is.

ZEESE: But it's not a question, really, that the Court accepted.

BOCK: It isn't necessarily the question that the Court accepted, but as you know, the Court has a certain amount of latitude to decide what it's going to do once it gets the case. I talked to Bob Rache, who was also involved in writing the brief, and they pretty much threw the kitchen sink into that brief, you know. They've got the question of whether a federal judge has

equitable discretion under the Controlled Substances Act to craft an injunction that allows for medical use. If the Court accepts that, then that pretty much legitimizes medical use throughout the country, I think. I'm not sure, but I think that's what it would do. But they also have, you know, the interstate commerce thing: This is strictly happening in California, and why is the federal government messing with this here? They have Ninth and Tenth Amendment arguments as to what is the proper balance between the federal and the state governments in terms of regulating health and safety, and they have also the arguments as to what kind of harm is involved. The government brief is just basically the Controlled Substances Act doesn't allow for medical necessity, that's it.

KURLIN: It would be interesting to see whether the Court broadens . . .

BOCK: They also argue that if Congress had meant to preclude a medical necessity defense when it wrote the Controlled Substances Act, it would have had to put it in there, and it would have had to be part of the legislative history, and it wasn't.

MR. AUDIENCE PARTICIPANT (UNIDENTIFIED): I just wanted to follow up. Did the government on the commerce clause issue, did they respond?

BOCK: Yes, it was grounded.

ZEESE: Exactly. There's no need to, I'd be surprised if the Court reaches for that. They might, I mean there has been some progress on it. You're right about *Lopez* and there's some progress on the commerce clause issue. We certainly have broadened the commerce clause beyond its original intent. I'm kind of fearful that if the medical marijuana issue is where it gets raised, we may actually slow some of that progress, because I don't think the Court is that sympathetic to drug cases. Although, you know, you have also an interesting mix of judges in that Court. You've got a couple judges from Arizona, where there has also been a vote on medical marijuana, so who knows that will happen? But I'd be surprised if they go beyond the medical necessity issue.

MR. AUDIENCE PARTICIPANT (UNIDENTIFIED): (Unintelligible)

LYNCH: On the question of federal authority, I would refer everybody to this Cato Institute book that we published last year,

*After Prohibition.* My colleague Roger Pilon has a chapter which lays out the constitutional arguments pointing out that there is really no authority in the Constitution for the federal government to be waging a drug war. When you go back and look at history, people need to be reminded that we had to amend the Constitution to have a war on alcohol -- alcohol prohibition. We amended the Constitution to authorize the federal government to wage that war. But the Constitution was never amended to wage the drug war.

MR. AUDIENCE PARTICIPANT (UNIDENTIFIED): That being said about the alcohol prohibition actually had an amendment to focus on a repeal, we're dealing in a sense with a layered onion with the Controlled Substances Act, and just lining out a little bit of a probing question in the end. We had a 1970 Controlled Substances Act passed after Timothy Leary challenged the marijuana tax to the Supreme Court and won some limited fault on the marijuana tax act in 1969. So, the genie was out of the bottle for a few months. Then they put the Comprehensive Controlled Substance Act together which, in a compromise legislatively, stuck a Schedule 1 status on it without any fact finding mission to say it's dangerous, and these are the reasons, this is what's behind it, on a temporary basis, for up to a year or two, while the presidential blue ribbon panel of Richard Nixon was put to-

gether, which was known as the Schaffer Commission. That came out with a report in 1972, which was shelved, that said it was benign -- that the worst think about it is that you go to jail for using it in our society, that it's not something that's benign as a substance, that it's potent and it has an effect, but that the long-term effect isn't what is a jail cell to a person. Having that all said, what would be the ability to change that? I was at a high school case day in Langley where a DEA agent was there, coincidentally enough, to talk about this issue in a special interest group section. He said that he wasn't in charge of scheduling, that the DEA does not schedule substances. Maybe that's correct in some sense, but their petition for rescheduling, and they are the ones that make those decisions. Just Monday of last week, a political decision in my case, the DEA motivated a petition that had been pending for six years, and killed it, and said it's not worthwhile. So we're dealing with an onion that's 31 years old. And for 28 of those years, we've had it in conflict with whether or not it's rightfully there. How can we get at the middle of it to expose that it's really rotten, and that there's no ability for it to survive? That's the question that I have.

ZEESE: How do we end the War on Drugs? I know, I'm just joking. You know, it's interesting that at the time that the

Schaffer came out with its report, the Dutch had a commission called the Bane Commission. And unlike the U.S., the Dutch actually followed the recommendations of their commission. It had pretty much the same recommendations as ours did. The Schaffer Commission, really, I guess you could give it credit for the word "decriminalization," came from them. They also not only allowed decriminalization of possession, they also allowed decriminalization of non-profit transfers. And so the Dutch followed their expert commission. And in 1976 they began allowing the sale of small amounts of marijuana with kind of a formal decision made by the local governments on allowing that kind of access even though it was still illegal, and they have half the marijuana use rate that we do, you know, 25 years later. They have one-fifth the heroin use, and one-tenth the cocaine use. So they were successful at breaking marijuana from the more dangerous drugs, and they were successful at making marijuana boring for kids. I think it's a slow, long-term process, unfortunately, of re-education, and that's why we do our advertising campaign, that's why we do media events, that's why we get involved in litigation, that's why we do all the kinds of things that we do as far as trying to change those things, and I kind of see the ending of marijuana prohibition, the end of the drug war, as a marathon with hurdles, but I'd be very happy to see it be a sprint. I think with marijuana that's a possibil-

ity. Maybe we're getting close now, maybe we're starting to see voters across the country vote sensibly and way ahead of the politicians. One of the best examples of that is Oregon. Two election cycles ago the legislature by two-to-one voted to make marijuana possession criminal, and in Oregon they have a ballot process where you can challenge legislation in a referendum. People collected signatures and got it on a ballot, and by two-to-one, people said no, the legislature went too far. So two-to-one the politicians said criminalize, and two-to-one the people said decriminalize. So I think the people are ahead of the politicians. We've made a lot of progress, now we've got to get people politically active and make this an issue that's important to them. I think it is an issue that affects every social issue that we have these days, whether it's HIV, whether it's racism, whether it's urban economies, whether it's militarism abroad, the drug issue is affecting so much that I hope we start to see it as a priority issue for more voters.

LYNCH: Well said. Alan, did you want to comment on that?

BOCK: It really is going to be peeling an onion. I think we may be close to a moment, and I think when public sentiment changes on the drug war, it's going to change fairly rapidly, and we're going to see a lot of change in a relatively short pe-

riod of time -- not weeks, but years, but maybe four or five years. I think we're getting close to that moment when the people are saying, you know, the way we've been doing this is really not a very smart way. You had Proposition 36 pass in California this last November; it provides probation and treatment instead of incarceration, specifically rules out incarceration for simple possession of any drug. That's the same thing that Arizona passed in 1996, the same year that California passed Proposition 215. The state legislature looked at that and said, "Oh, no, we can't do that." They didn't know what they were doing. So they passed a series of laws that essentially vitiated the initiative, they called it the interpretations and the implementation thing, and essentially vitiated what the voters had done. And in 1998, the voters said no -- they brought it back to the ballot again and invalidated everything that the legislature had done to try to gut Proposition 200. You know, 36 passed by a 61 percent margin in California. We've had asset forfeiture reform in Utah and Oregon. The idea that anything goes when you're fighting a drug war is definitely not part of the political majority any more. How much farther that's going to go I don't know. I've been working at a newspaper and reading letters to the editor for 20 years, and I still get surprised at what people respond to. We'll write something and I say, boy, that'll get 'em stirred up out there, and we get

nothing. And we'll write some thing that we think is totally inconsequential and we get 50 letters. So, you know, the people are, a single human being is an extremely complex organism, and a whole people is much more complex. I don't know how it's going to go, but I think we're getting close to a moment.

LYNCH: Keith Stroup, here on the aisle.

KEITH STROUP (NORML): Tim, if I can, I'd like to direct the question that was never answered by Jeff, and I think it would be appropriate, if you don't mind, Jeff, the question that was earlier raised by the lady about what's going to happen if the Supreme Court rules in favor of the government. Is the Oakland Cannabis Buyers Club going to continue in business, and is that something you feel comfortable talking about publicly, Jeff?

JEFF \_\_\_\_\_: Aren't you pushy, Keith! I guess I would have to hold on the complete related to that, given the fact that we're still pending that decision, and I don't want to make an assumption about the high court's merit review of this case. That being said, I would feel that we're going to continue with the effort that we have in the past, which is not giving up and having a little perseverance, because the patients that we represent are trying not to give up on life. And that's what we

want to give back to them, a little bit of support in lack of a kind hand from the government, a supportive, compassionate gesture to say, you know, we're not giving up either. I don't know what activity that's going to commence in or scenario that might happen, but we'll be there.

LYNCH: We have time for one more question.

MICHAEL ENGLE: One of the things that I found most surprising in your article was that no one has actually challenged any of these state laws. I was just wondering, who would you have expected to challenge these laws, and why haven't they?

BOCK: Well, you know, you might have expected the Department of Justice to challenge them. You might have, if they felt that federal supremacy was being undermined here. You might have expected some parents' organization, anti-drug organization, to challenge them. But in fact, one of the reasons that they haven't been challenged is that they were written not to be challengeable. The prescription system is a federal system. It was established in the 1930s. The prescription system, under which, you know, you go to your doctor and pay him \$50 so that you can get the ampicillin that you know your kid needs for the ear infection. That's a federally regulation system, and in order to

participate in that system, in order to write prescriptions for controlled substances, doctors have to be federally licensed. So, they did not use the word "prescription" in the initiative, they used the word "recommendation," hoping that that would be enough to say that they are not challenging the federal prescription system, they are using the inherent power of a state government to regulate health and safety in order to set up an alternative system that would exist side-by-side with the prescription system. And apparently that has not been challenged, and nobody has seriously considered challenging it. You know, there's been a lot of loose talk about, well, you know, that's in conflict with the federal law, that's going to have to be voided, but nobody has challenged it. You've got to bring a case before you can challenge it and void it.

LYNCH: I'm afraid we've run out of time, but we're going to be having a reception upstairs in the Cato Wintergarden that you're all invited to. Please give both of our speakers a good round of applause.