

24. The War on Drugs

Congress should

- repeal the Controlled Substances Act of 1970,
- repeal the federal mandatory minimum sentences and the mandatory sentencing guidelines,
- direct the administration not to interfere with the implementation of state initiatives that allow for the medical use of marijuana, and
- shut down the Drug Enforcement Administration.

Ours is a federal republic. The federal government has only the powers granted to it in the Constitution. And the United States has a tradition of individual liberty, vigorous civil society, and limited government. Identification of a problem does not mean that the government ought to undertake to solve it, and the fact that a problem occurs in more than one state does not mean that it is a proper subject for federal policy.

Perhaps no area more clearly demonstrates the bad consequences of not following such rules than does drug prohibition. The long federal experiment in prohibition of marijuana, cocaine, heroin, and other drugs has given us crime and corruption combined with a manifest failure to stop the use of drugs or reduce their availability to children.

In the 1920s Congress experimented with the prohibition of alcohol. On February 20, 1933, a new Congress acknowledged the failure of alcohol prohibition and sent the Twenty-First Amendment to the states. Congress recognized that Prohibition had failed to stop drinking and had increased prison populations and violent crime. By the end of 1933, national Prohibition was history, though many states continued to outlaw or severely restrict the sale of liquor.

Today Congress confronts a similarly failed prohibition policy. Futile efforts to enforce prohibition have been pursued even more vigorously

since the 1980s than they were in the 1920s. Total federal expenditures for the first 10 years of Prohibition amounted to \$88 million—about \$982 million in 2004 dollars. Drug enforcement costs about \$19 billion a year now in federal spending alone.

Those billions have had some effect. Total drug arrests are now more than 1.5 million a year. Since 1989 more people have been incarcerated for drug offenses than for all violent crimes combined. There are now about 400,000 drug offenders in jails and prisons, and more than 60 percent of the federal prison population consists of drug offenders.

Yet, as was the case during Prohibition, all the arrests and incarcerations haven't stopped the use and abuse of drugs, or the drug trade, or the crime associated with black-market transactions. Cocaine and heroin supplies are up; the more our Customs agents interdict, the more smugglers import. And most tragic, the crime rate has soared. Despite the good news about crime in the past few years, crime rates remain at high levels.

As for discouraging young people from using drugs, the massive federal effort has largely been a dud. Despite the soaring expenditures on anti-drug efforts, about half the students in the United States in 1995 tried an illegal drug before they graduated from high school. Every year from 1975 to 2003, at least 82 percent of high school seniors said they found marijuana "fairly easy" or "very easy" to obtain. During that same period, according to federal statistics of dubious reliability, teenage marijuana use fell dramatically and then rose significantly, suggesting that cultural factors have more effect than the "war on drugs."

The manifest failure of drug prohibition explains why more and more people—from Nobel laureate Milton Friedman to conservative columnist William F. Buckley Jr., former secretary of state George Shultz, and former governors Jesse Ventura and Gary Johnson—have argued that drug prohibition actually causes more crime and other harms than it prevents.

Repeal the Controlled Substances Act

The United States is a federal republic, and Congress should deal with drug prohibition the way it dealt with alcohol prohibition. The Twenty-First Amendment did not actually legalize the sale of alcohol; it simply repealed the federal prohibition and returned to the several states the authority to set alcohol policy. States took the opportunity to design diverse liquor policies that were in tune with the preferences of their citizens. After 1933 three states and hundreds of counties continued to practice prohibition. Other states chose various forms of alcohol legalization.

The single most important law that Congress must repeal is the Controlled Substances Act of 1970. That law is probably the most far-reaching federal statute in American history, since it asserts federal jurisdiction over every drug offense in the United States, no matter how small or local in scope. Once that law is removed from the statute books, Congress should move to abolish the Drug Enforcement Administration and repeal all of the other federal drug laws.

There are a number of reasons why Congress should end the federal government's war on drugs. First and foremost, the federal drug laws are constitutionally dubious. As previously noted, the federal government can exercise only the powers that have been delegated to it. The Tenth Amendment reserves all other powers to the states or to the people. However misguided the alcohol prohibitionists turned out to have been, they deserve credit for honoring our constitutional system by seeking a constitutional amendment that would explicitly authorize a national policy on the sale of alcohol. Congress never asked the American people for additional constitutional powers to declare a war on drug consumers. That usurpation of power is something that few politicians or their court intellectuals wish to discuss.

Second, drug prohibition creates high levels of crime. Addicts commit crimes to pay for a habit that would be easily affordable if it were legal. Police sources have estimated that as much as half the property crime in some major cities is committed by drug users. More dramatic, because drugs are illegal, participants in the drug trade cannot go to court to settle disputes, whether between buyer and seller or between rival sellers. When black-market contracts are breached, the result is often some form of violent sanction, which usually leads to retaliation and then open warfare in the streets.

Our capital city, Washington, D.C., has become known as the "murder capital" even though it is the most heavily policed city in the United States. Make no mistake about it, the annual carnage that accounts for America's still high murder rates has little to do with the mind-altering effects of a marijuana cigarette or a crack pipe. It is instead one of the grim and bitter consequences of an ideological crusade whose proponents will not yet admit defeat.

Third, since the calamity of September 11, 2001, U.S. intelligence officials have repeatedly warned us of further terrorist attacks. Given that danger, it is a gross misallocation of law enforcement resources to have federal police agents surveilling marijuana clubs in California when they

could be helping to discover sleeper cells of terrorists on U.S. territory. The Drug Enforcement Administration has 9,000 agents, intelligence analysts, and support staff. Their skills would be much better used if those people were redeployed to full-time counterterrorism investigations.

Fourth, drug prohibition is a classic example of throwing money at a problem. The federal government spends some \$19 billion to enforce the drug laws every year—all to no avail. For years drug war bureaucrats have been tailoring their budget requests to the latest news reports. When drug use goes up, taxpayers are told the government needs more money so that it can redouble its efforts against a rising drug scourge. When drug use goes down, taxpayers are told that it would be a big mistake to curtail spending just when progress is being made. Good news or bad, spending levels must be maintained or increased.

Fifth, drug prohibition channels more than \$40 billion a year into the criminal underworld that is occupied by an assortment of criminals, corrupt politicians, and, yes, terrorists. Alcohol prohibition drove reputable companies into other industries or out of business altogether, which paved the way for mobsters to make millions in the black market. If drugs were legal, organized crime would stand to lose billions of dollars, and drugs would be sold by legitimate businesses in an open marketplace.

Drug prohibition has created a criminal subculture in our inner cities. The immense profits to be had from a black-market business make drug dealing the most lucrative endeavor for many people, especially those who care least about getting on the wrong side of the law.

Drug dealers become the most visibly successful people in inner-city communities, the ones with money and clothes and cars. Social order is turned upside down when the most successful people in a community are criminals. The drug war makes peace and prosperity virtually impossible in inner cities.

Students of American history will someday ponder the question of how today's elected officials could readily admit to the mistaken policy of alcohol prohibition in the 1920s but recklessly pursue a policy of drug prohibition. Indeed, the only historical lesson that recent presidents and Congresses seem to have drawn from Prohibition is that government should not try to outlaw the sale of booze. One of the broader lessons that they should have learned is this: prohibition laws should be judged according to their real-world effects, not their promised benefits. If the 109th Congress will subject the federal drug laws to that standard, it will recognize that the drug war is not the answer to problems associated with drug use.

Respect State Initiatives

The failures of drug prohibition are becoming obvious to more and more Americans. A particularly tragic consequence of the stepped-up war on drugs is the refusal to allow sick people to use marijuana as medicine. Prohibitionists insist that marijuana is not good medicine, or at least that there are legal alternatives to marijuana that are equally good. Those who believe that individuals should make their own decisions, not have their decisions made for them by Washington bureaucracies, would simply say that that's a decision for patients and their doctors to make. But in fact there is good medical evidence of the therapeutic value of marijuana—despite the difficulty of doing adequate research on an illegal drug. A National Institutes of Health panel concluded that smoking marijuana may help treat a number of conditions, including nausea and pain. It can be particularly effective in improving the appetite of AIDS and cancer patients. The drug could also assist people who fail to respond to traditional remedies.

More than 70 percent of U.S. cancer specialists in one survey said they would prescribe marijuana if it were legal; nearly half said they had urged their patients to break the law to acquire the drug. The British Medical Association reports that nearly 70 percent of its members believe marijuana should be available for therapeutic use. Even President George Bush's Office of National Drug Control Policy criticized the Department of Health and Human Services for closing its special medical marijuana program.

Whatever the actual value of medical marijuana, the relevant fact for federal policymakers is that in 1996 the voters of California and Arizona authorized physicians licensed in those states to recommend the use of medical marijuana to seriously ill and terminally ill patients residing in the states, without being subject to civil and criminal penalties.

It came as no surprise when the Clinton administration responded to the California and Arizona initiatives by threatening to bring federal criminal charges against any doctor who recommended medicinal marijuana or any patient who used such marijuana. After all, President Clinton and his lawyers repeatedly maintained that no subject was beyond the purview of federal officialdom.

President Bush, on the other hand, has spoken of the importance of the constitutional principle of federalism. Shortly after his inauguration, Bush said, "I'm going to make respect for federalism a priority in this administration." Unfortunately, the president's actions have not matched his words. When the Ninth Circuit Court of Appeals ruled that the Controlled Sub-

stances Act could not extend so far as to reach two Californians who grew their own marijuana for medical use and who did not engage in commercial activity or interstate commerce, the Bush administration appealed the case, *Ashcroft v. Raich*, to the Supreme Court. Instead of supporting the Supreme Court's recent landmark rulings that have revived the constitutional principle of federalism, Bush administration lawyers are embracing the arguments of liberal academics. That is, the federal government can pass a law about anything "affecting" interstate commerce, which turns out to be virtually everything.

The Bush administration is also undermining the landmark federalism precedents in Congress and at the state and local levels. Federal police agents and prosecutors continue to raid medical marijuana clubs in California and Arizona. And both of the president's drug policy officials, drug czar John Walters and DEA chief Karen Tandy, have been using their offices to meddle in state and local politics. If it is inappropriate for governors and mayors to entangle themselves in foreign policy—and it is—it is also inappropriate for federal officials to entangle themselves in state and local politics. In the 108th Congress, Reps. Barney Frank (D-MA), Dana Rohrabacher (R-CA), and Ron Paul (R-TX) jointly proposed the States' Rights to Medical Marijuana Act, which would have prohibited federal interference with any state that chose to enact a medical marijuana policy. The 109th Congress should enact a similar bill without delay.

One of the benefits of a federal republic is that different policies may be tried in different states. One of the benefits of our Constitution is that it limits the power of the federal government to impose one policy on the several states.

Repeal Mandatory Minimums

The common law in England and America has always relied on judges and juries to decide cases and set punishments. Under our modern system, of course, many crimes are defined by the legislature, and appropriate penalties are defined by statute. However, mandatory minimum sentences and rigid sentencing guidelines shift too much power to legislators and regulators who are not involved in particular cases. They turn judges into clerks and prevent judges from weighing all the facts and circumstances in setting appropriate sentences. In addition, mandatory minimums for nonviolent first-time drug offenders result in sentences grotesquely disproportionate to the gravity of the offenses.

Rather than extend mandatory minimum sentences to further crimes, Congress should repeal mandatory minimums and let judges perform their traditional function of weighing the facts and setting appropriate sentences.

Conclusion

Drug abuse is a problem for those involved in it and for their families and friends. But it is better dealt with as a moral and medical than as a criminal problem—“a problem for the surgeon general, not the attorney general,” as former Baltimore mayor Kurt Schmoke puts it.

The United States is a federal republic, and Congress should deal with drug prohibition the way it dealt with alcohol prohibition. The Twenty-First Amendment did not actually legalize the sale of alcohol; it simply repealed the federal prohibition and returned to the several states the authority to set alcohol policy. States took the opportunity to design diverse liquor policies that were in tune with the preferences of their citizens. After 1933 three states and hundreds of counties continued to practice prohibition. Other states chose various forms of alcohol legalization.

Congress should repeal the Controlled Substances Act of 1970, shut down the Drug Enforcement Administration, and let the states set their own policies with regard to currently illegal drugs. They would do well to treat marijuana, cocaine, and heroin the way most states now treat alcohol: It should be legal for stores to sell such drugs to adults. Drug sales to children, like alcohol sales to children, should remain illegal. Driving under the influence of drugs should be illegal.

With such a policy, Congress would acknowledge that our current drug policies have failed. It would restore authority to the states, as the Founders envisioned. It would save taxpayers' money. And it would give the states the power to experiment with drug policies and perhaps devise more successful rules.

Repeal of prohibition would take the astronomical profits out of the drug business and destroy the drug kingpins who terrorize parts of our cities. It would reduce crime even more dramatically than did the repeal of alcohol prohibition. Not only would there be less crime; reform would also free federal agents to concentrate on terrorism and espionage and free local police agents to concentrate on robbery, burglary, and violent crime.

The war on drugs has lasted longer than Prohibition, longer than the Vietnam War. But there is no light at the end of this tunnel. Prohibition has failed, again, and should be repealed, again.

Suggested Readings

- Benjamin, Daniel K., and Roger Leroy Miller. *Undoing Drugs: Beyond Legalization*. New York: Basic Books, 1991.
- Boaz, David. "A Drug-Free America—Or a Free America?" *U.C. Davis Law Review* 24 (1991).
- Boaz, David, ed. *The Crisis in Drug Prohibition*. Washington: Cato Institute, 1991.
- Buckley, William F. Jr., et al. "The War on Drugs Is Lost." *National Review*, February 12, 1996.
- Luna, Erik. "The Misguided Guidelines: A Critique of Federal Sentencing." Cato Institute Policy Analysis no. 458, November 1, 2002.
- Lynch, Timothy, ed. *After Prohibition: An Adult Approach to Drug Policies in the 21st Century*. Washington: Cato Institute, 2000.
- Masters, Bill. *Drug War Addiction*. St. Louis: Accurate Press, 2002.
- McNamara, Joseph. "The Defensive Front Line." *Regulation* (Winter 2001): 19–21.
- Nadelmann, Ethan A. "An End to Marijuana Prohibition." *National Review*, July 12, 2004.
- Ostrowski, James. "The Moral and Practical Case for Drug Legalization." *Hofstra Law Review* 18 (1990).
- Pilon, Roger. "The Medical Marihuana Referendum Movement in America: Federalism Implications." Testimony before the House Crime Subcommittee, October 1, 1997.

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