
ASA MEMORANDUM

TO: MEMBERS OF THE U.S. SENATE COMMITTEE ON THE JUDICIARY AND STAFF

FROM: CAREN WOODSON, AMERICANS FOR SAFE ACCESS (ASA)

SUBJECT: NOMINATION OF MICHELE LEONHART; ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION (DEA)
CONFIRMATION HEARING TENTATIVELY SCHEDULED FOR WEDNESDAY, NOVEMBER 17, 2010

DATE: 11/12/2010

Americans for Safe Access (ASA) is the nation's leading non-profit advocacy organization dedicated to advancing safe and legal access to cannabis solely for therapeutic use and research. To advance our mission, ASA employs a multi-faceted strategy that includes public education, impact litigation, grassroots advocacy, and direct lobbying. We work with all levels of government to support policies that create and improve access to medical cannabis for patients and their care providers. ASA has over 30,000 active members with chapters and affiliates in more than 40 states.



On behalf of our members, especially in the states that have adopted Compassionate Use Laws, ASA has prepared this memo to detail some of our concerns with the nomination of Michele Leonhart to head the Drug Enforcement Administration (DEA). During the past 15 years of her service with the DEA, Ms. Leonhart has participated in a gradual and uninterrupted enforcement campaign specifically designed to undermine the effective implementation of state medical cannabis programs. Despite these heavy-handed tactics, fourteen states and the District of Columbia have adopted laws to control and regulate the use and distribution of cannabis to qualified individuals in accordance with state and local laws. In fact, more than a quarter of the total population of the United States lives in a state that has adopted medical marijuana laws.

Negotiating the growing divide between state and federal medical marijuana laws will be among the domestic policy challenges facing the next DEA Administrator. In October of 2009, the Obama Administration's Deputy Attorney General, David Ogden, issued a memorandum (DAG Memo) to U.S. Attorneys discouraging the use of federal resources to prosecute individuals who are in "clear and unambiguous compliance" with their state compassionate use law.¹ In spite of this, ASA has tracked more than 30 federal enforcement raids in California, Colorado, Hawaii, and Nevada, since the memo was issued.

The DEA should do more to reconcile the conflict between state and federal laws, but ASA questions whether Ms. Leonhart possesses the leadership necessary to facilitate this change. The Senate Judiciary Committee should examine her record and use the hearing process to determine whether she is committed to a process of engagement with Congress and state officials to develop a comprehensive medical marijuana strategy that respects state law and facilitates safe access to marijuana for therapeutic use and research.

Career Highlights

Ms. Leonhart has a long record of service with the Drug Enforcement Administration. This record includes specific involvement with an aggressive campaign to undermine the implementation of these duly-enacted state laws. Shortly after California voters adopted Proposition 215: The Compassionate Use Act, a ballot measure that received 55% support, Ms. Leonhart was appointed first as the Special Agent in Charge (SAC) of the DEA's San Francisco Field Division and then the Los Angeles Division where she executed a

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handful of enforcement raids on bona-fide medical marijuana patients in northern California who were using marijuana in strict accordance with state law.

In 2004, Ms. Leonhart was confirmed as President George W. Bush's choice for Deputy Administrator. As an integral part of the DEA management team, Ms. Leonhart was responsible for dramatic and unprecedented level of enforcement actions. Under her leadership, the DEA conducted more than 200 raids on medical cannabis patients and caregivers, primarily in California. Many of these raids employed "shock and awe" tactics involving coordinated simultaneous paramilitary assaults on multiple locations with heavily armed agents. These raids have been widely criticized by media, state and local officials, and members of Congress.

In 2007, shortly after Ms. Leonhart was appointed the Acting Administrator, ASA began tracking new tactics designed to interrupt state programs. The DEA, in collaboration with US Attorneys, initiated a campaign of intimidation aimed at property owners in California. Hundreds of landlords throughout the state were sent official letters threatening them with criminal prosecution and civil asset forfeiture if they continued to lease commercial property to medical marijuana patient collectives.

As the acting administrator, Ms. Leonhart ignored the opinion and recommendation of the DEA's own administrative law judge and singlehandedly blocked legitimate research efforts designed to meet accepted scientific standards while denying a growing scientific consensus about the medical benefits of marijuana. Worse still, Ms. Leonhart has failed to adequately manage DEA's response to a longstanding petition to reschedule marijuana which was submitted to the agency in 2002.

Background and Context

Clinical research demonstrates that marijuana can safely and effectively alleviate chronic and neuropathic pain, control spasticity in multiple sclerosis, stimulate appetite in wasting syndrome, relieve intraocular pressure in glaucoma, and reduce the nausea associated with chemotherapy.² By and large, the use of cannabis in these clinical trials has been associated with a few mild side-effects, and it is worth noting that an acute lethal overdose of cannabis has never been reported. In fact, it was the finding of a DEA administrative law judge that cannabis is one of the safest therapeutic substances known.³

There are at least two clear results from this emerging data. First, an ever increasing number of physicians are exercising their constitutional right to recommend the use of cannabis to their patients. It is estimated that as many as 7,000 physicians have provided oral or written recommendations for the use of cannabis to some 400,000 qualified individuals. Secondly, an increasing number of states are exercising their power to adopt laws that permit the limited use of cannabis for medical purposes.

Since 1996, fourteen states⁴ and the District of Columbia have adopted medical marijuana compassionate use laws. Roughly 90 million Americans or just over one-quarter of the total population of the United States lives in a state that authorizes qualified persons registered with the state to use or provide marijuana for medical purposes. These laws offer protection from arrest and prosecution by state authorities, but considerable disparities exist among these state laws.

For example, California's Compassionate Use Act (Proposition 215) leaves determination about the appropriate therapeutic use of cannabis to the professional judgment of board-certified physicians, while other states narrowly restrict the use of cannabis to a specific list of medical conditions. Some state laws provide civil protections for qualified individuals, but in many states individuals who use cannabis for therapeutic purposes suffer pervasive discrimination in healthcare benefits, employment, child custody, housing, health care, public accommodation, and the like. A few states have established production and distribution systems to ensure qualified individuals have access to medical cannabis from licensed distributors, but the majority of states force qualified individuals to acquire or cultivate cannabis themselves or with the assistance of a designated caregiver.

In many states, medical cannabis dispensing collectives or centers have emerged as a community-based response that provides a secure, consistent place for qualified persons to acquire medical cannabis. These facilities are usually regulated by state or local governments and provide a controlled environment for safe distribution. California, Colorado, Oregon, Michigan, Maine, New Mexico, Rhode Island, New Jersey, and the District of Columbia are each working to effectively regulate the distribution of medical cannabis for those individuals qualified to use cannabis.

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Some state programs are proving more efficient than others. In many states, doctors and patients remain confused or fearful about the nature and extent of the law and are particularly concerned about federal enforcement. In other states, local authorities (often bolstered by federal task forces) have resisted the changes in state law and the resulting actions of qualified patients and their designated caregivers. The news media has covered these changes and conflicts with a mix of responsibility and hyperbole, but in none of these states has the sky fallen or public health been compromised. Generally, the medical cannabis “experiment” has been successful when and where it has been properly implemented by state and local governments.

Nonetheless, the possession, production, and distribution of cannabis, even for therapeutic purposes, remain prohibited under federal law. As a result, no matter how scrupulous their compliance with state law and local ordinance, qualified individuals and their providers remain vulnerable to federal enforcement raids, arrest, and prosecution.

The Failure of Interference and Obstruction

When California voters adopted their compassionate use law in 1996, Ms. Leonhart was at-the-ready when federal officials threatened to revoke the prescribing privileges of any physician who provided a recommendation to their patients for medical use. In response, a group of doctors led by HIV/AIDS specialist Dr. Marcus Conant filed for an injunction in federal court, contending that such a policy violated their freedom of speech. The court agreed and the government was enjoined from penalizing physicians who recommend the medical use of cannabis. Specifically, the court ruled that physicians have a First Amendment right to make recommendations, but may not aid or abet patients in actually obtaining cannabis.⁵ On appeal, the Ninth Circuit Court of Appeals held that federal authorities could not punish or threaten to punish a physician merely for recommending cannabis to his or her patients.⁶

Instead of then working with the states to harmonize state and federal laws, Ms. Leonhart initiated a campaign of intimidation designed to disrupt the operation of valid state and local laws. In 2001, within weeks of the tragedy of September 11, the Department of Justice in conjunction with the DEA launched a series of paramilitary-style enforcement raids on individuals and collectives authorized by the state to use or provide medical cannabis⁷. Even where local officials and governments were seeking in good faith to regulate access to cannabis, the federal government chose instead to interfere—prosecuting and imprisoning individuals and seizing their property.

As the raids continued, two women in California filed suit in federal court to prevent further enforcement raids on individuals acting in accordance with their state medical cannabis law. They won an injunction from the Ninth Circuit Court of Appeals but in 2005, the U.S. Supreme Court reversed that decision in *Gonzales v. Raich*⁸, ruling that federal law enforcement officials can prosecute medical marijuana patients regardless of their compliance with state medical marijuana laws.⁹

Following the Supreme Court’s decision in *Raich*¹⁰, federal agencies intensified their enforcement actions. Under Ms. Leonhart’s direction between 2007 and 2008, national advocates recorded an unprecedented number of DEA enforcement raids against individuals authorized by state law to use or dispense medical cannabis. The Department of Justice is currently seeking to prosecute dozens of these individuals.¹¹

Despite pointed questions from members of the U.S. House Judiciary Committee¹² and requests from local policymakers¹³ to halt enforcement raids in deference to local authorities, Ms. Leonhart chose to expand the DEA’s efforts to undermine implementation of state law. In 2008, she collaborated with U.S. Attorneys throughout California to threaten hundreds of property owners with prosecution and asset forfeiture if they continued to lease commercial space to medical cannabis dispensing collectives. Specifically, the letters ordered property owners to attend meetings at which the U.S. Attorney delivered an ultimatum: evict the collectives or face imminent federal prosecution and asset forfeiture.

Federal enforcement activity has not been restricted to California, despite public perceptions to the contrary. Federal law enforcement agents raided the offices of a medical cannabis advocacy group in Washington State that was supplying hundreds of authorized individuals with starter seedlings.¹⁴ The DEA also threatened New Mexico state officials with federal prosecution if they proceeded to implement a state-run medical cannabis distribution program.¹⁵ And, in an unprecedented effort to interfere with state law, a federal

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grand jury subpoenaed the confidential medical records of individuals enrolled in the Oregon Medical Marijuana Program. A federal court later voided the subpoena.¹⁶

However, these heightened federal enforcement efforts and prosecutions have not deterred the distribution of medical cannabis in California or other states. On the contrary, more state and local governments are adopting regulations to control and regulate medical cannabis dispensing collectives in an effort to ensure safe, consistent access and to fully comply with state law.

In the absence of leadership by Congress or administrative agencies, state and local regulations are the key to preventing abuse of state medical cannabis laws and protecting eligible individuals, their care providers, and the local community. Federal enforcement tactics, such as threatening property owners with asset forfeiture and paramilitary-style raids that place citizens in harm's way, undermine state and local authority and jeopardize the integrity of state law.

New Direction, Same Enforcement

During the 2008 Presidential Campaign medical cannabis patients and activists secured promises from the entire field of Democratic Presidential hopefuls.¹⁷ In fact, then-Senator Obama provided statements at numerous Town Hall Meetings and other speaking engagements that he "would not have the Justice Department prosecuting and raiding medical marijuana users. It's not a good use of our resources."¹⁸

Nonetheless, within days of President Obama's inauguration, the DEA, still under the direction of Michele Leonhart, executed a raid on a medical cannabis dispensing collective in California.¹⁹ Advocates and state policymakers were outraged and demanded an explanation of the broken campaign promise. Within weeks, more DEA raids occurred and the media jumped on the story²⁰, enough to prompt a question about the new President's policy from the White House Press Corps and the following response from a White House spokesman:

"The president believes that federal resources should not be used to circumvent state laws, and as he continues to appoint senior leadership to fill out the ranks of the federal government, he expects them to review their policies with that in mind."²¹

Five days later, the DEA conducted another raid in Ft. Bragg, California.²² Again, advocates, policymakers, and members of the media demanded answers, and in his first press conference, U.S. Attorney General Eric Holder was questioned directly about the raid activity. Attorney General Holder stated that President Obama's campaign promises were "now American policy."²³ However, in August and September, the DEA conducted or participated in dozens of raids across the state of California.²⁴

On October 29, 2009, then-Deputy Attorney General David Ogden issued a memorandum to U.S. Attorneys entitled "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana" to provide "guidance on resource allocation and federal priorities..."²⁵ Specifically, the memo discourages the use of federal enforcement resources to investigate individuals who are in "clear and unambiguous compliance with state law" regarding medical cannabis. The memo also notes that the commission of crimes not related to medical cannabis should not be ignored.

The memo's tacit recognition that cannabis has legitimate medical applications and that allowance should be made for patients whose physicians have advised them to use it marks a significant policy departure from previous administrations. Although the memo does not have the force of law, it did appear to ease the conflict between the federal law enforcement officials and state-authorized individuals who use or provide cannabis for therapeutic use.

In the months that followed, ASA noted a decline in federal enforcement action that undermines state and local law. But to the extent that anyone assumed that the federal government "will not" continue enforcement in medical cannabis states, that was a false sense of security. Another series of DEA raids in Colorado and California were conducted in the weeks surrounding the Obama Administration's decision to nominate Michele Leonhart to head the agency.²⁶

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In total, ASA has confirmed more than 30 DEA enforcement raids in California, Nevada, Colorado, and Hawaii since the DAG Memo was issued. More than 20 patients and providers have been arrested and the federal government is currently prosecuting more than a dozen individuals presumed to have been acting in strict compliance with state law.

Reconciling the Conflict

These continued enforcement actions illustrate the problem with the Obama Administration's "easement" policy: the law itself is unchanged and the policy is inconsistently enforced. Worse still, federal policy provides no legal protection to individuals authorized to use or provide cannabis in accordance with state law. Even the most seriously ill individuals are prevented from presenting evidence in federal court about their medical conditions, their doctor's advice, or their compliance with state law—all but guaranteeing conviction.

Yet the intent of the memo appears clear. If you are in compliance with your state's medical cannabis laws, federal resources should not be used to disrupt your activity or to send you to prison. Since compassionate use laws vary among the states, ASA believes that whether an individual is compliant with his or her state's particular law is best determined by local officials and, if necessary, the state courts. Federal preemption of a state's legislative intent, judicial review and interpretation, and local regulation surely falls outside the scope of "an efficient use of limited federal resources," the stated rationale for the DOJ's new policy on medical cannabis cases.

Regardless of whether you agree or disagree with state law, the status quo is not sustainable and requires change. The next DEA Administrator will be challenged with negotiating the growing divide between state and federal law and the situation will grow worse as more states adopt regulations to control the cultivation and distribution of marijuana for medical purposes. The science and policy concerning the use of marijuana for medical purposes should no longer be confused or obscured by the separate debate concerning the legalization of marijuana for recreational use. It is important that the next Administrator possess the leadership necessary to facilitate change and the commitment to work with all parties create a national strategy to support safe and legal access to marijuana solely for therapeutic use and research.

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¹ *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, David Ogden, Deputy Attorney General. Oct. 19, 2009. <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

² Center for Medicinal Cannabis Research. (2010). *Report to the Legislature and Governor of the State of California presenting findings pursuant to SB847 which created the CMCR and provided state funding*. San Diego, CA. http://www.cmcrc.ucsd.edu/CMCR_REPORT_FEB17.pdf

³ US Department of Justice, Drug Enforcement Agency, "In the Matter of Marijuana Rescheduling Petition," Docket #86-22]. Sep. 1988.

⁴ The 14 states include: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington, DC

⁵ *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997). http://www.safeaccessnow.org/downloads/Conant_Ruling.pdf.

⁶ *Conant v. Walters*, 309 F.3d 629 (2002). <http://safeaccessnow.org/downloads/conantwalters.pdf>.

⁷ On Sep. 28, 2001, DEA agents raided the home and office of California physician Dr Mollie Fry and her husband, attorney Dale Schafer. Agents seized the confidential medical records of her 6000 patients. Fry and Schafer were tried and convicted for growing 100+ plants over three years and sentenced to 5 years mandatory minimum in federal prison. *San Francisco Chronicle*: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/11/13/MN190086.DTL>. On Oct. 25, 2001, DEA agents raided the Los Angeles Cannabis Resource Center, which provided services to nearly 1,000 seriously ill people, the majority of whom were living with HIV/AIDS or cancer. The LACRC operated out of a building in West Hollywood that the city had helped buy; the building was seized by the federal government through civil asset forfeiture. *Los Angeles Times*: <http://tinyurl.com/2adld7w>.

⁸ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁹ The holding did not, however, invalidate states' medical marijuana laws under the doctrine of preemption. States remain free to provide protection from criminal sanction and access to medical marijuana for critically ill citizens.

¹⁰ *Gonzales v. Raich*, 125 S Ct. 2195 (2005)

¹¹ "Photo Essay: Hollywood Medical Marijuana DEA Raid." Zach Behrens, LAist. Photos by Shay Sowden. July 27, 2007.

http://laist.com/2007/07/27/medical_marijuana_dea_raids.php.; "Feds Raid L.A. Medical Marijuana Clinics." Keach Hagey, CBS News. July 26, 2007. <http://www.cbsnews.com/stories/2007/07/26/national/main3098913.shtml>.; "Feds Raid 11 Medical Marijuana Clinics." Dan Collins, CBS News. Jan. 18, 2007. <http://www.cbsnews.com/stories/2007/01/18/national/main2369758.shtml>.; "DEA Raids 10 Los Angeles Medical Marijuana Clinics." Associated Press via Fox News. July 26, 2007. <http://www.foxnews.com/story/0,2933,290852,00.html>.

¹² Conyers, John. "Letter to DEA Administrator Michele Leonhart." Apr. 29, 2008. Available at, http://www.safeaccessnow.org/downloads/Conyers_DEA_Letter.pdf

¹³ Conyers. "Letter to DEA."

¹⁴ "Agents raid medical marijuana advocacy office," *Seattle Post-Intelligencer*. Jan. 18, 2007. http://www.seattlepi.com/local/300191_potbust18.html.

¹⁵ "Governor Bill Richardson Urges Bush Administration to End Heartless Medical Marijuana Policy," Press release, New Mexico Governor Bill Richardson. Aug. 17, 2007. http://www.governor.state.nm.us/press/2007/august/081707_02.pdf.

¹⁶ "Feds strike medical pot growers". Nick Budnick, *The Portland Tribune*. Aug. 3, 2007.

http://www.portlandtribune.com/news/story.php?story_id=118609925649231700. See also, "Ruling protects Pot Patients". Anne Saker, *The Oregonian*. Sept. 5, 2007. <http://www.safeaccessnow.org/article.php?id=5010>.

¹⁷ "Federal Raids Against Medical Marijuana to End if Democrat Elected." Steven Edwards, *Wired Magazine*. Aug. 10, 2007. <http://www.wired.com/wiredscience/2007/08/federal-raids-a/>

¹⁸ Obama Campaign Event, Nashua, NH. Aug. 21, 2007. http://www.youtube.com/watch?v=GUze-oYsswI&feature=player_embedded.

¹⁹ "DEA Raids Dispensary, Exploits Transition as President Obama Takes Office," ASA Press release. Jan. 22, 2009. <http://www.safeaccessnow.org/article.php?id=5654>

²⁰ "DEA pot raids go on; Obama opposes," *Washington Times*. Feb. 5, 2009. <http://www.washingtontimes.com/news/2009/feb/05/dea-led-by-bush-continues-pot-raids/>

²¹ Id.

²² "DEA Raid Has Pot Clubs Worried," Ryan Grim, *Huffington Post*. Feb. 16, 2010. http://www.huffingtonpost.com/2010/02/16/dea-raid-has-pot-clubs-wo_n_464598.html.

²³ "Ban on medical pot cases quickly lifted" Scott Glover, *Los Angeles Times*. Mar. 07, 2009.

<http://articles.latimes.com/2009/mar/07/local/me-medpot7/2>

²⁴ "DEA Raid Has Pot Clubs Worried," Grim.

²⁵ *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, David Ogden, Deputy Attorney General. Oct. 19, 2009. <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

²⁶ "Owner who bragged of large medical-pot operation jailed in DEA raid," John Ingold, *Denver Post*. Feb. 13, 2010.

http://www.denverpost.com/ci_14393797. "Medical-pot advocates riled over federal raid of Denver lab," John Ingold, *Denver Post*. Jan. 29, 2010. http://www.denverpost.com/news/ci_14290771.

"Medical marijuana in basement lands man in jail," Jace Larson, KUSA. Feb. 23, 2010. <http://www.9news.com/news/article.aspx?storyid=132606&catid=339>

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