Iowans for Medical Marijuana

The Iowa Medical Cannabidiol Act of 2017 (and the elephant in the room we don't want to talk about)

June 26, 2017

On April 22, 2017, the Iowa legislature passed the Medical Cannabidiol Act, H.F. 524. The Medical Cannabidiol Act of 2017 was signed into law on May 12, 2017, by Governor Terry E. Branstad.

Section 9(1)(a) of the Act, Iowa Code § 124E.5(1)(a) (2017), authorizes the Iowa Department of Public Health to license "up to two medical cannabidiol manufacturers to manufacture and to possess, cultivate, harvest, transport, package, process, or supply medical cannabidiol within this state."

What the Medical Cannabidiol Act of 2017 fails to mention is whether growing marijuana to manufacture cannabis products is consistent with existing federal law. Penalties for growing cannabis are quite severe, with penalties ranging from 5 years in prison to a possible life sentence and fines ranging from $250,000 to $50 million.[1]

While Iowa House Speaker Linda Upmeyer has suggested that federal policy might continue to overlook state medical marijuana programs under the Trump Administration, recent statements from the United States Attorney General, Jeff Sessions, have indicated otherwise.[2]

Recent rulings from the Supreme Court of Colorado highlight this inconsistency. *Coats v. Dish Network*, 350 P.3d 849, 850 (Colorado 2015) ("an activity such as medical marijuana use that is unlawful under federal law is not a 'lawful' activity under section 24-34-402.5"); *People v. Crouse*, 388 P.3d 39, 43 (Colorado 2017) ("Consistent with our holding in *Coats*, then, we again find that conduct is 'lawful' only if it complies with both federal and state law.")

Federal Law

Federal law does not prohibit the medical use of marijuana. Federal law depends upon the classification a controlled substance is placed in. Initial

placement of marijuana was decided by Congress in 1970, but current placement of marijuana is an administrative process under federal law.[3]

Initial Classification of Marijuana by Congress

The Controlled Substances Act of 1970, Public Law 91-513, created the National Commission on Marihuana and Drug Abuse to study marijuana abuse in the United States. While the Controlled Substances Act was being drafted in a House committee in 1970, Assistant Secretary of Health Roger O. Egeberg had recommended that marijuana temporarily be placed in Schedule I, the most restrictive category of drugs, pending the Commission's report. See 21 U.S.C. § 812(c), Schedule 1(c)(10) (1970). On March 22, 1972, the Commission's chairman, Raymond P. Shafer, presented a report to Congress and the public entitled "Marihuana, A Signal of Misunderstanding," which favored ending marijuana prohibition and adopting other methods to discourage use.

Federal Administrative Process

Congress authorized the Attorney General to keep the classifications current. The Attorney General of the United States, in conjunction with the Secretary of Health and Human Services, may add substances to, transfer substances between, or remove substances from the classifications. See 21 U.S.C. § 811(a) (1970). The Drug Enforcement Administration is delegated by the Department of Justice to perform this function, in conjunction with the Food and Drug Administration which is delegated by the Department of Health and Human Services for this purpose. See 21 U.S.C. § 811(b) (1970).

Federalism

The U.S. Constitution, as well as the Iowa Constitution, divides our government into three branches. The legislative branch makes the laws. The executive branch enforces the laws. The judicial branch resolves questions about the constitutionality of a law and can overrule a law in whole or in part. The judicial branch can also enforce corrective action if the executive branch (an administrative agency or the chief executive) does not interpret the law correctly.

Federalism is the other fundamental principle in our dual system of government. The states gave up some of their authority in order to form the federal union and the federal union must respect the individual

sovereignty of the states. In every situation, the question is how much state authority has been removed and how much has been retained. When Congress makes a law, Congress may, or may not, explain clearly where the lines are drawn.

Contextual Analysis

The Medical Cannabidiol Act of 2017 says marijuana has medical use in the state of Iowa (for making an extract) and there is an outdated federal regulation that says marijuana has no medical use in the states. It might seem like a simple question of who has the greater authority, a state or a federal administrative agency. But, Congress can authorize a federal administrative agency to interfere with state law, so the analysis starts with the question of whether Congress authorized the Attorney General to interfere with state medical marijuana laws.

To begin the analysis, federal courts have determined that accepted medical use of a controlled substance in the United States can exist without federal interstate marketing approval.

> *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987):
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> We add, moreover, that the Administrator's clever argument conveniently omits any reference to the fact that the pertinent phrase in section 812(b)(1)(B) reads "*in the* United States," (emphasis supplied). We find this language to be further evidence that the Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.
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> *Grinspoon v. DEA*, 828 F.2d 881, 887 (1st Cir. 1987):
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> Unlike the CSA scheduling restrictions, the FDCA interstate marketing provisions do not apply to drugs manufactured and marketed wholly intrastate. Compare 21 U.S.C. § 801(5) with 21 U.S.C. § 321 (b), 331, 355(a). Thus, it is possible that a substance may have both an accepted medical use and safety for use under medical supervision, even though no one has deemed it necessary to seek approval for interstate marketing.

This may seem like a dumb question, but how do we know whether medical use of marijuana has been accepted? After the ruling in *Grinspoon*, the federal courts and the administrative agency began to address this question.

> *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 939 (D.C. Cir. 1991):
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> The difficulty we find in petitioners' argument is that neither the statute nor its legislative history precisely defines the term "currently accepted medical use"; therefore, we are obliged to defer to the Administrator's interpretation of that phrase if reasonable.
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> *Marijuana Scheduling Petition*, DEA Docket No. 86-22, 57 Fed. Reg. 10499 (March 26, 1992) 10506:
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> Clearly, the Controlled Substances Act does not authorize the Attorney General, nor by delegation the DEA Administrator, to make the ultimate medical and policy decision as to whether a drug should be used as medicine. Instead, he is limited to determining whether others accept a drug for medical use. Any other construction would have the effect of reading the word "accepted" out of the statutory standard.

The answer as to who decides whether a substance has accepted medical use was conclusively determined by the federal courts in 2006.

> *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006):
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> The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.

State Law

The Iowa Medical Cannabidiol Act of 2017, H.F. 524, Section 5(6), Iowa Code § 124E.2(6) (2017), defines "medical cannabidiol" as "any

pharmaceutical grade cannabinoid found the plant Cannabis . . . that has a tetrahydrocannabinol level of no more than three percent . . .” The Act specifically authorizes cultivation and harvesting of marijuana plants for the purpose of manufacturing medical cannabidiol. See H.F. 524, Section 9(1)(a), Iowa Code § 124E.5(1)(a) (2017).

Because states determine “accept” medical use, marijuana plants “specifically authorized” for medical use are “accepted” for medical use within the meaning of the federal Controlled Substances Act.

The Elephant in the Room

H.F. 524 fails to remove marijuana from Iowa schedule 1, which says marijuana has no accepted medical use in treatment in the United States. Iowa Code § 124.204(4)(m) (2017); Iowa Code § 124.203(1)(b) (2017).

This housekeeping matter has been overlooked and it can have tragic consequences. The Iowa Senate bill that passed by a vote of 45-5 on April 17, 2017, included the Iowa Board of Pharmacy’s recommendation on February 17, 2010, that marijuana should be removed from Iowa schedule 1. This was carelessly stripped out of the House version. The House version, H.F. 524, wasn’t publicly available until 3:00 a.m. on the morning after the day the legislature was scheduled to adjourn for the year. It was passed in the Iowa House at 5:30 a.m. and in the Iowa Senate at 6:30 a.m. This was not a carefully thought out, or carefully deliberated, process.

Comparing Classifications

A careful reading of both the state and federal drugs laws reveals that we don’t put plants with medical use in schedule 1.[4]

Marijuana has Medical Use in 46 States

Since 1996, four years after the DEA issued it interpretive rule in 1992, thirty states have accepted the medical use of marijuana, and another sixteen states have accepted the medical use of marijuana extract (cannabidiol), bringing the total to 46 out of 50 states that now depend on access to marijuana for medical use or for making extracts for medical use. In addition, DC, Puerto Rico, and Guam have accepted the medical use of marijuana.

Continued placement of marijuana in schedule 1 is both prohibitive and unlawful.

Conclusion

As the Supreme Court of Colorado has shown, state law must explain how it complies with existing federal law. Failure to address classification of marijuana in H.F. 524 leaves Iowa patients at risk of losing access to cannabidiol, and puts growers at risk of federal penalties up to life in prison and fines up to $50 million. The legislature must address this matter when it reconvenes in 2018.

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[1] Federal Penalties

21 U.S.C. § 841(b)(1)(A)(vii) (2017) 1000 kilograms (2204.62 pounds / 1.10231 tons) or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight $10/50 million — 10 years to life in prison
21 U.S.C. § 841(b)(1)(B)(vii) (2017) 100 kilograms (220.462 pounds / 0.110231 tons) or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight $5/25 million — 5 to 40 years in prison
21 U.S.C. § 841(b)(1)(C) (2017) 50 to 99 kilograms or 50 to 99 plants $1/5 million — up to 20 years in prison
21 U.S.C. § 841(b)(1)(D) (2017) less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, $250,000/$1 million — up to 5 years in prison

[2] Media Reports

March 27, 2017, KGLO Radio, Mason City, Iowa, "Upmeyer says legislators working on medical marijuana issue."
June 13, 2017, The Cannabist, an edition of the Denver Post, Denver, Colorado, "Jeff Sessions has asked Congress to allow him to prosecute medical marijuana providers."
June 16, 2017, Globe Gazette, Mason City, Iowa, "Sessions wants flexibility to prosecute Iowa medical marijuana program."
June 23, 2017, Quad City Times, Davenport, Iowa, "Editorial: Jeff Sessions eyes pot crackdown on Iowa, Illinois."

[3] Federal Classifications

Schedule 1 21 U.S.C. § 812(b)(1) (2017) no medical use and high potential for abuse without consideration for physical or psychological dependence.
Schedule 2 21 U.S.C. § 812(b)(2) (2017) medical use with high potential for abuse with physical dependence and high psychological dependence.
Schedule 3 21 U.S.C. § 812(b)(3) (2017) medical use with low to moderate physical dependence and high psychological dependence
Schedule 4 21 U.S.C. § 812(b)(4) (2017) medical use with physical dependence and psychological dependence less than schedule 3
Schedule 5 21 U.S.C. § 812(b)(5) (2017) medical use with physical dependence and psychological dependence less than schedule 4

[4] Classification Comparisons

Schedule 1 Iowa Code § 124.204(4)(m) (2017) Marijuana
Schedule 2 Iowa Code § 124.206(2)(a)(1) (2017) Raw Opium Iowa Code § 124.206(2)(a)(7) (2017) Codeine Iowa Code § 124.206(2)(a)(10) (2017) Hydrocodone Iowa Code § 124.206(2)(a)(13) (2017) Morphine Iowa Code § 124.206(2)(c) (2017) Opium Poppy and Poppy Straw
Schedule 3 Iowa Code § 124.208(5)(a)(1) (2017) Codeine Iowa Code § 124.208(5)(a)(2) (2017) Codeine Iowa Code § 124.208(5)(a)(3) (2017) Hydrocodone Iowa Code § 124.208(5)(a)(4) (2017) Hydrocodone Iowa Code § 124.208(5)(a)(5) (2017) Hydrocodone Iowa Code § 124.208(5)(a)(7) (2017) Opium
Schedule 5 Iowa Code § 124.212(2)(a) (2017) Codeine Iowa Code § 124.212(2)(b) (2017) Hydrocodone Iowa Code § 124.212(2)(e) (2017) Opium