Private-sector Drug Warriors sought a "roll back"

California and U.S. Officials Conspired to Block Prop 215

At secret meetings in Sacramento and Washington, plans were formulated to deny Californians access to medicinal cannabis. Here is the evidence prosecutors would not allow into the record at the Mikuriya hearing.

By Patrick McCartney

It was no secret, in the summer and fall of 1996, that California law enforcement officers were leading the opposition to the medical marijuana initiative, Proposition 215. Orange County Sheriff Brad Gates headed Citizens for a Drug Free California, the official No-on-215 campaign committee; 57 of the 58 district attorneys urged a "No" vote; and Attorney General Dan Lungren wrote the "No" argument in the Voters Guide, warning that the new law would "exempt patients and defined caregivers" from legal sanction.

After the medical marijuana initiative passed (by a 56-to-44 margin, creating Health & Safety Code Section 11362.5), the opponents had a fundamental choice: try to block full implementation, or accept the will of the voters.

Many in law enforcement chose the obstructionist approach. Numerous documents obtained by this reporter from state and local agencies, and litigants in the *Conant v. McCaffrey* case, reveal California officials committing acts of covert opposition to the new state law —including appeals for federal legal intervention to undermine it.

In a recent interview, former California Attorney General Dan Lungren defended the post-215 actions of California law enforcement, insisting that his office exercised its best judgment in devising a "narrow interpretation" of the landmark measure. Although Lungren admitted that it was his Constitutional duty to uphold state law against a federal challenge, he would not acknowledge that dealings between his staff and federal authorities had a contrary purpose.

He now says that his goal was to reconcile the state and federal laws. "You don't go looking for conflict" with federal law," Lungren said. "You try and resolve conflict, you try and see where the laws can work in conjunction with one another."

The AG's "Narrow Interpretation"

On November 6, 1996 —the day cannabis became legal for medical use in California— Lungren faxed a memo to every district attorney, sheriff and police chief in the state, summoning them to an "emergency all-zones conference" in Sacramento Dec. 3 to discuss the new law.

Lungren's Nov. 6 memo identified a number of factors that officers should consider in determining if probable cause for an arrest existed when evaluating an individual's claim of medicinal use.

The memo advised police to look for the usual kinds of evidence that established illicit trafficking, including observed sales, the quantity and packaging of marijuana, the presence of cash or pay-owe sheets, evasive tactics, the presence of scanners or weapons, and the suspect's criminal history.

Although the Nov. 6 memo referred to the police establishing probable cause before arresting a medical cannabis user, it also suggested an interpretation of the initiative that would eliminate the need to prove probable cause: "The proposition may create an affirmative factual defense in certain criminal cases."

If the Compassionate Use Act merely provided those who used cannabis as

Former Attorney General Dan Lungren is the Republican candidate for Congress in California's heavily Republican 3d District. He had been out of electoral politics since 1998, when he ran for Governor and got only 39% of the vote aginst Gray Davis.

medicine a defense in court, nothing would prevent police and prosecutors from arresting and charging as usual.

In the Nov. 6 memo, Lungren promised the California law-enforcement community that he would consult with federal officials "to determine how they will enforce federal law." In a CNN "Crossfire" appearance Nov. 20, Lungren added that he was conferring with federal officials so "that we would all be on the same page."

In his public statements Lungren attacked the wording of the medical marijuana initiative —as if the obstacles to implementation were technical, and the fault of the authors. "This thing is a disaster," he told the *Los Angeles Times* immediately after it passed. "We're going to have an unprecedented mess."

Lungren said the new law would lead to "anarchy and confusion."

The San Francisco *Chronicle* quoted Lungren as saying the new law would lead to "anarchy and confusion," and he promised to "use every legal avenue to fight it."

Lungren's fellow Republican, Governor Pete Wilson —who had vetoed medical-marijuana bills passed by the state legislature in 1994 and '95— also denounced the wording of the new law. "It is so loose it is a virtual legalization of the sale of marijuana," declared the governor.

Meanwhile, back in Washington...

At the Office of National Drug Control Policy in Washington, director Barry McCaffrey was hearing from outraged drug warriors and politicians. Unless he contained the fallout from the California and Arizona initiatives, the drug czar risked being grilled about who "lost" California. The easiest target to blame was financier George Soros, who contributed heavily to both state initiatives. Without professional signature drives funded by Soros, Prop 215 would not have qualified for the ballot in 1996, nor would a reform measure in Arizona.

"It's not paranoia on my part," McCaffrey told A.M. Rosenthal, an influential New York Times editor alarmed by the success of the medical-pot initiatives. "I see [the vote in California and Arizona] not as two medical initiatives dealing with the terminally ill; I see this as part of a national effort to legalize drugs, starting with marijuana, all over the United States."

Soros, added McCaffrey, was "at the heart and soul of a lot of this."

Comparing Soros to a pornographer, Rosenthal asked McCaffrey to denounce him, encouraging right-minded people to shun the billionaire financier.

On Nov. 14, 1996, nine days after California and Arizona voters approved medical-marijuana laws, delegations of law enforcement officials from the two states met with federal drug officials in the nation's capital.

The officials were not seeking "to implement a plan to provide for the safe and affordable distribution of marijuana to patients…"

A review of the agenda and notes from the meeting suggests that the officials were not seeking, as the California measure directed them, "to implement a plan to provide for the safe and affordable distribution of marijuana to patients…"

Instead, police and prosecutors from the two states asked for federal help in killing the medical marijuana measures.

The California delegation represented a broad cross-section of the state's law-enforcement establishment. Four key members of Lungren's staff were at the first and largest of the meetings. Career prosecutor Thomas F. Gede was Lungren's special assistant and relayed his views. Senior Assistant AG John Gordnier would write the department's principal analysis of the initiative and later issue a series of "Updates" to California law enforcement.

Special Agent Robert S. Elsberg wore two hats, representing the California Peace Officers Association and the California Chiefs of Police Association. Special Agent Thomas J. Gorman, the opposition spokesman during the campaign while still on the AG's payroll, attended on behalf of the 7,000-member California Narcotics Officers Association. Before the election, Gorman had written "Marijuana is NOT Medicine" for the CNOA and the AG's Bureau of Narcotic Enforcement.

[Mikuriya had called Gorman the day after Prop 215 passed with questions about its implementation. Gorman mentioned the meeting coming up on Nov. 14. He also said he was glad the No-on-215 campaign was over, implying that it had been an unpleasant assignment. Mikuriya notified Rep. Ronald Dellums's office that he wanted to participate in the upcoming meeting, which would be hosted by the Drug Czar. Dellums asked that Mikuriya be invited, but no such courtesy was extended.]

Joining the attorney general's contingent were representatives from three of California's most powerful law-enforcement associations: Santa Clara D.A. George Kennedy of the District Attorneys Association; Seal Beach Police Chief Bill Stern of the Chiefs of Police Association; and Santa Barbara Sheriff Jim Thomas and Stanislaus Sheriff Les Weidman of the Sheriffs Association.

Also attending was Orange County Sheriff Brad Gates, who came with a handout from Stu Mollrich, the campaign specialist employed by the No-on-215 campaign. The Gates/Mollrich proposal listed strategies to overturn the California and Arizona voter initiatives.

"Private lawsuits against these initiatives should be filed unless the federal government takes immediate action."

"Determine the powers of the federal government to preempt 215 and 200."

"Have law enforcement organizations in each state work with the federal government to implement the strategy."

"A new political force is needed to fight Soros and his associates. It must be national and ongoing."

Gates saw a role for himself in the new national campaign. He promoted the idea of a new initiative to rescind Proposition 215 —a trial balloon that would deflate when polling found California voters had little appetite to revisit the issue. Gates would later seek $3 million from the Robert Wood Johnson Founda-

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District Attorney Terence Hallinan of San Francisco outside the Sacramento hotel where Attorney General Dan Lungren convened an "Emergency All-Zones Meeting" of California police chiefs, sheriffs and DAs. Lungren proposed a "narrow interpretation" of the marijuana law that called for continued arrests and prosecutions.

Hallinan said that San Francisco was involving its Department of Pubic Health in implementing the new law, and advised his colleagues to do the same in their counties.

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tion to fund a similar project.

Welcoming the California and Arizona delegations were two-dozen federal officials representing the Office of National Drug Control Policy, the Drug Enforcement Administration, the Department of Justice, Health and Human Services, Education, Transportation, Treasury and the National Academy of Sciences. Four U.S. senators, including California's Dianne Feinstein, sent aides to the meeting.

Also sitting in on the meeting were representatives of several private anti-drug groups – the Partnership for a Drug Free America, the National Center on Addiction and Substance Abuse at Columbia University, and the Community Anti-Drug Coalitions of America (CADCA), the federal government's most heavily subsidized, "private" anti-drug organization. Joining them was Paul Jellinek, vice president of the Robert Wood Johnson Foundation, the largest private funding source in the war against illicit drug use.

McCaffrey hosted the event, opening the discussion with prepared remarks entitled, "A National Strategy in Face of the Expanding Legalization Effort."

The retired four-star general said he did not believe that many doctors would start recommending pot to their patients. Federal law had not changed, he reminded the participants, so enforcing existing law should be a simple task. In notes Elsberg took, he wrote that McCaffrey "wants the state to proceed and not wait for a coordinated action."

McCaffrey said he was not going to rush into unwarranted actions, but preferred to observe the political fallout from the state measures before taking additional steps. "He inferred [sic] that by waiting approximately one year we could sort through and think through the issues," Elsberg noted.

Perhaps it was no coincidence that a little more than a year later the Clinton administration would file civil lawsuits against six California cannabis dispensaries. The strategy targeted the only public supply of marijuana available to qualified patients, and by choosing the path of civil litigation, the federal strategists avoided the risk and potential embarrassment of a jury trial.

The California delegation had come specifically to ask the feds to overturn the law they had so bitterly opposed.

The first state-federal powwow included three principal topics, according to Elsberg's notes.

• California and federal law-enforcement policy as a result of Proposition 215;

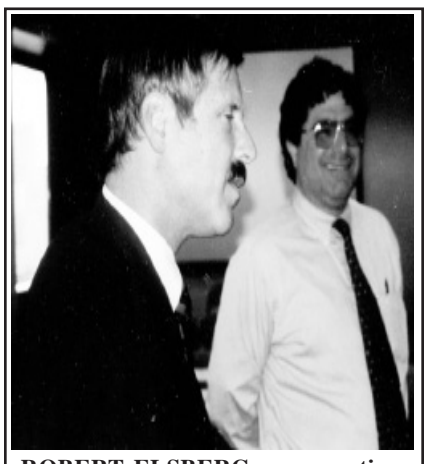
• Potential legal and legislative challenges to Proposition 215; and

• How to fight the new political war against drug legalization in America.

Nowhere in the agenda is reference made to the explicit conflict between state and federal laws or the implications for California police and prosecutors.

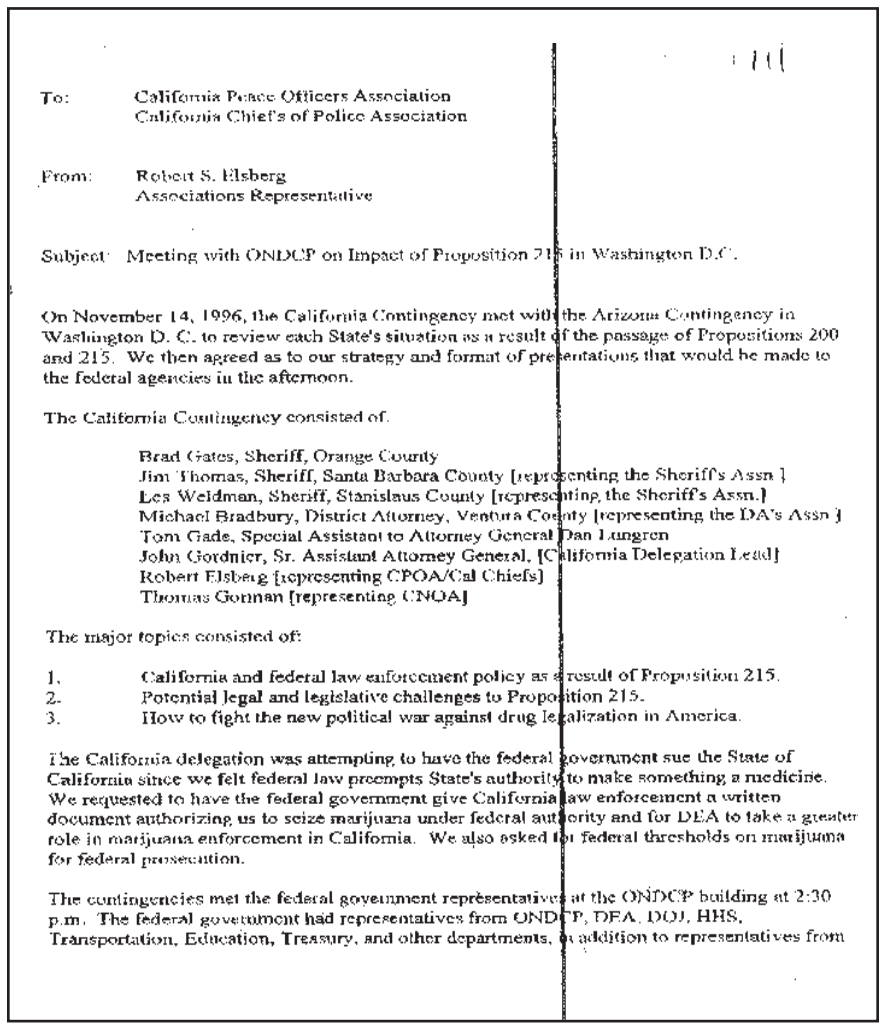
As Lungren said in our recent interview, he had taken an oath to uphold the U.S. Constitution as well as the California Constitution. "You attempt to determine how you can uphold Prop. 215 within the context of the California law, but also within the context of the U.S. Constitution," Lungren stated. "I don't see any conflict with that."

Yet according to Elsberg, the California delegation had come specifically to ask the feds to overturn the law they had so bitterly opposed. "The California delegation was attempting to have the federal government sue the State of California since we felt federal law preempts State's authority to make something a medicine," Elsberg notes. "We requested to have the federal government to give California law enforcement a written document authorizing us to seize marijuana under federal authority and for DEA to take a greater role in marijuana enforcement in California."



ROBERT ELSBERG, representing the California Peace Officers Association and the Chiefs of Police Association, wrote a nine-page memo describing a meeeting in Washington (page one is at right). "We requested... the federal government to give California law enforcement a written document authorizing us to seize marijuana under federal authority and for DEA to take a greater role in marijuana enforcement in California," according to Elsberg.

Photo was taken in April, 1998, at the first meeting of the Attorney General's Task Force on Medical Marijuana. In background is Nathan Barankin, Attorney General Bill Lockyer's press secretary.



To: California Peace Officers Association
California Chief's of Police Association

From: Robert S. Elsberg
Associations Representative

Subject: Meeting with ONDCP on Impact of Proposition 215 in Washington D.C.

On November 14, 1996, the California Contingency met with the Arizona Contingency in Washington D. C. to review each State's situation as a result of the passage of Propositions 200 and 215. We then agreed as to our strategy and format of presentations that would be made to the federal agencies in the afternoon.

The California Contingency consisted of:

Brad Gates, Sheriff, Orange County
Jim Thomas, Sheriff, Santa Barbara County [representing the Sheriff's Assn.]
Les Weidman, Sheriff, Stanislaus County [representing the Sheriff's Assn.]
Michael Bradbury, District Attorney, Ventura County [representing the DA's Assn.]
Tom Gade, Special Assistant to Attorney General Dan Lungren
John Gordnier, Sr. Assistant Attorney General, [California Delegation Lead]
Robert Elsberg [representing CPOA/Cal Chiefs]
Thomas Gonnan [representing CNOA]

The major topics consisted of:

1. California and federal law enforcement policy as a result of Proposition 215.
2. Potential legal and legislative challenges to Proposition 215.
3. How to fight the new political war against drug legalization in America.

The California delegation was attempting to have the federal government sue the State of California since we felt federal law preempts State's authority to make something a medicine. We requested to have the federal government give California law enforcement a written document authorizing us to seize marijuana under federal authority and for DEA to take a greater role in marijuana enforcement in California. We also asked for federal thresholds on marijuana for federal prosecution.

The contingencies met the federal government representatives at the ONDCP building at 2:30 p.m. The federal government had representatives from ONDCP, DEA, DOJ, HHS, Transportation, Education, Treasury, and other departments, in addition to representatives from

"(Gede) indicated that there was a sense of urgency because we need guidelines for law enforcement, the public and doctors," Elsberg observed.

District Attorney Michael Bradbury of Ventura County called for a federal-state partnership so that local police could avoid any civil liability for enforcing federal law.

"(Bradbury) wants DEA to reassure state that California should still enforce federal law," noted ONDCP lawyer Wayne Raabe in minutes he took at the meeting. "Biggest problem is no one knows at what point medical marijuana becomes illegal for distribution. Can't wait six months for an answer."

Much of the discussion by the private anti-drug officials who attended the meeting focused on how to prevent the medical-marijuana campaign from succeeding in other states.

"We must protect the other 48 states and rollback in California and Arizona," said CADCA Executive Director Jim Copple, according to Raabe. "We are taking it very seriously."

The private anti-drug officials identified money as the essential ingredient in any publicity campaign attacking new initiatives. Copple said CADCA, the Johnson Foundation and the Center for Alcohol and Substance Abuse at Columbia University, run by former drug czar Joseph Califano, could provide the money and expertise to respond to the threat posed by additional medical-marijuana measures.

As the discussion over strategies to defeat the reformists continued, the vice president of the Robert Wood Johnson Foundation recognized the political nature of the meeting.

"The other side would be salivating if they could hear prospect of feds going against the will of the people," said Paul Jellinek of the Robert Wood Johnson Foundation

"The other side would be salivating if they could hear prospect of feds going against the will of the people," said Paul Jellinek according to Raabe's clipped notes.

In his remarks, DEA Administrator Tom Constantine allowed that federal grand juries would be used to indict major traffickers, and that actions to remove doctor's licenses would be taken "where appropriate" as a deterrent. California doctors were advised of this threat by McCaffrey and U.S. Attorney General at a nationally televised press conference on Dec. 30.

Constantine also urged conference participants to lobby members of the Senate Judiciary Committee, which had scheduled a December 2 on the new marijuana laws.

At that event, five witnesses denounced the initiatives and only one, Marvin Cohen, treasurer for Arizonans for Drug Policy Reform, defended them.

McCaffrey warned that the measures would "send the wrong message to our children," and threaten to "undermine our National Drug Control Strategy." Lest anyone believe that he had "lost" the California and Arizona elections, McCaffrey enumerated the actions he took during the campaigns. They included contacting 166 business leaders soliciting support for the opposition campaign, meeting with editorial boards and giving 35 interviews. On his two visits to the battleground states, McCaffrey had conducted eight press conferences and attended four political rallies.

Sheriff Gates told the senators that the authors of Proposition 215 had written "irresponsible loopholes" that would allow cannabis clubs to operate with impunity.

"And they cannot claim that the legislature will close the loopholes – it can't," the Orange County sheriff testified. "Because this is a ballot initiative and contains no provisions for amendment by the legislature, another vote of the people would be required to close the loopholes and that could not happen for at least two years."

Gates urged the senators to launch a federal challenge to California's law.

"I strongly believe that the federal government should assert its authority, through the federal courts, and sue to have the two state propositions overturned on the grounds of federal supremacy," Gates said. "Only then will we regain the ability to enforce a national drug policy."

Lungren's "Emergency" Meeting

Lungren's "emergency all-zones conference," held on Dec 3 in a ballroom at the Sheraton Grand in Sacramento, was an expanded version of the annual meeting the California District Attorneys Association holds every December. Among the 300 attendees were 27 of the state's district attorneys, 22 sheriffs, and 15 police chiefs. Accompanying them were another 145 peace officers and prosecutors representing 60 cities and 55 of California's 58 counties.

Also present, according to the sign-in roster, were more than two dozen agents and administrators from Lungren's office; eight representatives of the Governor's Office of Criminal Justice Planning, which administers federal anti-drug money; five officials with the Office of Emergency Services; and representatives of various other law-enforcement agencies and associations, including the Department of Alcohol & Drugs, the California Highway Patrol, the Western States Information Network, the California State University Police Department, California State Sheriffs

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Association, Board of Corrections, Bureau of Prison Terms and, of course, the 7,000-member California Narcotics Officers Association.

Sitting in on the gathering was a small contingent of federal law enforcement from the Sacramento region, including Assistant U.S. Attorney Nancy Simpson of the Eastern District, and DEA agents Stephen C. Delgado and Ron Mancini.

The public and advocates for medical marijuana were excluded. Journalist Fred Gardner, accompanying San Francisco District Attorney Terence Hallinan, was escorted out of the banquet room as the proceedings began.

No speaker defended the new law, although Hallinan took the floor during a question period to say it could work.

No speaker on the two scheduled panels defended the new law, although Hallinan took the floor during a question period to say it could work. He advised his law enforcement colleagues to transfer responsibility for implementing it to their county health departments.

The day's first panel spelled out how local police and prosecutors should respond to the new law. District Attorney Mike Capizzi of Orange County, once the nominal co-chair of the opposition campaign, advised the assembled prosecutors that they could still charge medical users with offenses not specifically exempted by the initiative. In fact, he added, they could still prosecute offenses named in the measure.

"There's no reason to concede" charges of possession for sale or furnishing marijuana, Capizzi told the gathering. One handout at the meeting summarized the impact of Proposition 215 on existing Health & Safety Code sections.

Attorney Diana L. Field summarized Capizzi's position in a memorandum to the California Police Officers Association. "In the meantime, the view of the Orange County District Attorney's Office is that police and prosecutors should continue to provide vigorous enforcement of the laws as written," Field informed the association's 3,600 members.

To this day Dan Lungren maintains that Prop 215 only created an affirmative defense, not a bar to prosecution.

The linchpin of the state response that day was "Proposition 215: An Analysis," written by Senior Deputy A.G. John Gordnier. The 13-page opinion effectively advised police and sheriffs to continue arresting medical users. The new law would not protect a medical user from either arrest or prosecution, according to Lungren's top aide —as if voters intended patients to go to jail and defend themselves in court in order to use their medicine.

Gordnier cautioned, however: "Because of the language of Section 11362.5 (b)(1)(B), some defense counsel will contend that the statute is an exemption from prosecution as to patients and caregivers."

To this day Dan Lungren maintains that Prop 215 only created an affirmative defense, not a bar to prosecution. The authors may have intended it to protect patients from arrest and prosecution, he said, "but the choice of language went the other way."

The disdain of law enforcement for medical marijuana was exemplified by the distribution at the All-Zones meeting of "Say It Straight," a paper prepared by CADCA, asserting "There are over 10,000 scientific studies that prove marijuana is a harmful addictive drug. There is not one reliable study that demonstrates marijuana has any medical value…" And "The harmful consequences of moking marijuana include, but are not limited to the following: premature cancer, addiction, coordination and perception impairment, a number of mental disorders, including depression, hostility and increased aggressiveness, general apathy, memory loss, reproductive disabilities, and impairment to the immune system …"

As one of the final acts of the All Zones Meeting, Lungren appointed a "Proposition 215 Working Group" that would include state narcotics officers, district attorneys, sheriffs – and federal Assistant U.S. Attorney Simpson and two DEA agents.

Another Meeting in D.C.

Two California law-enforcement officials attended a second meeting in Washington on December 6, 1996, while others participated by teleconference. Although federal officials have provided no minutes from the meeting, a memorandum issued by the drug czar's office recounted the goals adopted and actions taken by the interagency working group and the delegations from California and Arizona.

According to the memo, federal officials wanted to reaffirm the authority of the Food and Drug Administration to approve new medicines; to research the possible violation of international drug treaties; and to link funding for local law enforcement to a state's compliance with federal drug laws. In addition, federal agencies would seek to "blunt the negative consequences" of the state initiatives, "including obtaining the repeal of Propositions 200 and 215 and other 'medical marijuana' or similar provisions already passed in other states."

Federal authorities would also "provide guidance and assistance to law enforcement in California and Arizona," the memo stated without spelling out what the assistance might include.

The memo described actions by Sheriff Gates to recruit political and corporate support for repealing Proposition 215 through a competing initiative in 1998. The memo also cited Mollrich's effort to create a national organization to fight other "legalization" campaigns, and the hiring of the Orange County law firm of Rutan and Tucker to study the prospects of overturning the California measure by a lawsuit.

In the analysis paid for by CADCA, the firm's lawyers concluded that an attempt by Congress to preempt the initiative under the Supremacy Clause "may be met with significant hurdles." The attorneys advised that it would be easier for Congress to amend the Controlled Substances Act to prohibit physician "recommendations" than to overturn the medical-marijuana measure on its own.

Allowable Quantity

The final piece of Lungren's policy toward medical marijuana came two months later on February 2, 1997, when his Bureau of Narcotics Enforcement issued the "Peace Officer Guide: Compassionate Use Act of 1996." In a fateful discussion of patient qualifications, the guideline relied on narcotic-agent arithmetic to declare most medical users guilty of growing and possessing too much medicine:

"Note: One marijuana plant produces approximately one pound of bulk marijuana. One pound will make approximately 1,000 cigarettes.

"Therefore, one can argue that more than two plants would be cultivation of more than necessary for personal medical use.

"Health and Safety Code Section 11357 provides that any amount less than 28.5 grams should be deemed for personal use. Generally, one gram will make two marijuana cigarettes; quantities over this amount may be more than necessary for personal medical purposes."

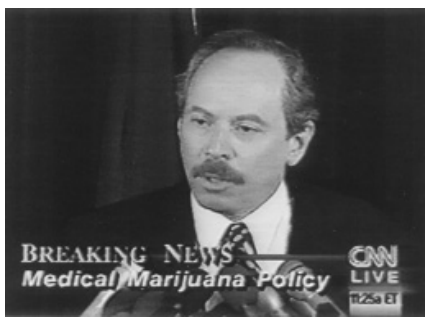
Lungren gave authority to arrest and prosecute close to 100 percent of medical users

In a single stroke, Attorney General Lungren's office had given the authority to police officers to arrest close to 100 percent of medical users, and for district attorneys to prosecute them. The analysis also paved the way for the prosecution of the cannabis dispensaries springing up around the state, by declaring that only individuals could meet the law's definition of a primary caregiver.

The appearance of cannabis clubs after the election especially bothered Lungren. As far as he was concerned, Proposition 215 did not authorize anyone to sell marijuana. When asked recently if he believed that voters intended patients to be subjected to arrest and prosecution, Lungren avoided a direct answer by posing a different question during our interview.

"I don't believe, if you ask me that question, whether the people who voted for it expected that there would be cannabis buyers clubs around the state," Lungren said. "There was no mention whatsoever about that. And I suspect had there been in the initiative, the initiative would have gone down."

But media coverage during Prop 215 campaign had focused on Dennis Peron's San Francisco Cannabis Buyers Club, which Lungren made the object of statewide attention during the campaign when he ordered the Bureau of Narcotics to raid and close it on August 4, 1996.



FEDERAL OFFICIALS whose staffs met with California law enforcement agents in December 1996 to plan opposition to medical marijuana included Attorney General Janet Reno, NIDA chief Alan Leshner, and HHS Secretary Donna Shalala. At the 12/30/96 press conference Reno threatened to prosecute doctors who approve cannabis use. Leshner said "more research is needed" (while Prohibition continues). Shalala said marijuana use could not be medical because it is "wrong."

The "affirmative defense" strategy

A leading faction of the drug policy reform movement did not object as law enforcement sought to limit implementation of the Compassionate Use Act, "We have much more to fear from Peron right now than we do the police," said Bill Zimmerman, the professional consultant who replaced Peron as Prop 215's campaign manager, to a Los Angeles *Times* reporter. Zimmerman had drafted the ballot argument that presented Prop 215 as an affirmative-defense-only —the basis for ongoing arrests. In an appearance on CNN two weeks after the election, Zimmerman reiterated the point.

"What Proposition 215 does is create a medical necessity defense for people arrested for marijuana," Zimmerman said. "Anybody in California can still be arrested for marijuana."

Lungren met privately with federal officials twice in Washington after the All-Zones Meeting to discuss and coordinate their response to Proposition 215 was already in place. The gist of his "narrow interpretation" was relayed to law enforcement officers throughout California by their professional associations and through official channels.

"We will continue to provide vigorous enforcement of the Health and Safety laws as written," declared Fresno Sheriff Steve Magarian in a January 28, 1997, training bulletin. "This means that we will continue to arrest and seek prosecution … where warranted by the evidence, with the onus on any defendant claiming an affirmative defense … to affirmatively prove that defense."

In the action plan he released on December 30, 1996, McCaffrey made the policy explicit."State and local law enforcement officials will be encouraged to continue to execute state law to the fullest extent by having officers continue to make arrests and seizures under state law, leaving defendants to raise the medical-use provisions of the proposition only as a defense to state prosecution."

The affirmative-defense strategy allowed opponents of medical marijuana to achieve what they couldn't on election day –the ability to continue arresting and charging people as if Proposition 215 had never passed.

Never before had the successful implementation of a new law been so dependent on the good will of its opponents. And never before had that good will been so absent.

MedBoardWatch.com *from page 2*

In the year and a half that I have been attending quarterly DMQ meetings, my colleagues and I have witnessed some disturbing things, which have been recorded and transcribed for *O'Shaughnessy's*.

At the May, 2003 meeting, held in Sacramento, I and others expressed concern that most of the doctors known for doing cannabis consultations had been investigated and that none of the complaints had come from patients —all had come from law enforcement, as far as we knew.

David Thornton, who was then Chief of Enforcement, responded that there were only nine investigations of doctors involving cannabis approvals, and that not all the complaints had come from law enforcement. The Board asked him to check and confirm the facts at the July meeting.

Thornton must have known that he wouldn't be present at the July meeting, having already retired.

At the November 2003, meeting held in San Diego, Thornton's successor, Joan Jerzak handed Board members a page headed "Medical Marijuana Investigations" with three columns: "Source," "No. of Patients," and "Status." According to this skimpy list, which Jerzak described as "data," four of the nine sources were "LE," three were "Non-LE" and two were "Non-LE and LE." The list contained no specifics and no documentation, yet the Board members perused it without comment. Evidently they don't hold their Chief Investigator to the same standards as California physicians.

"Just to kind of give you a nutshell of what the source column is," Jerzak explained, "The first case was a non-law-enforcement source. Those tend to be a school principal, a mother, a spouse, those kind of sources..."

No one on the Board questioned this illogical bracketing of school administrators and loving kin.

No one on the Board questioned this illogical bracketing of school administrators and loving kin. [That very week a South Carolina high school principal had directed the local police to search the student body with drug-sniffing dogs, at gunpoint. No drugs were found.]

Jerzak said that her staff's extensive review of the files indicated "there may be six to 10 other cases that might not be on this list. And I'll tell you that since 1997, if we're talking about nine or 19 cases out of 50 or 60,000 complaints that came in... we're talking about a very small number of cases."

Diminishing *Conant*

Jerzak had invited Deputy AG Mary Agnes Matyszewski, to explain the meaning of the U.S. Supreme Court's recent decision not to review the *Conant v. Walters* case. "One thing I want to make you aware of," said Matyszewski, "the holding is very limited. It's only for a doctor's ability to discuss marijuana with his patient as an option. In fact, what the court specifically held in its language is that if in making a recommendation the doctor intends the patient to use it as a means of obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then the doctor would be guilty of aiding and abetting the violation of federal law and he would be subject to federal prosecution and possible surrender of his license. So the holding that is allowed right now is very narrow. Merely, a doctor is allowed to discuss it with his patients, nothing more."

A Board member started to ask, "So you can't give them the—"

"No," declared Matyszewski, "because you do run the risk of violating federal law... All that decision said was you can talk to your patient about it. But once you get over into the area of recommending, writing a prescription, you do run afoul of the federal policy."

Medical Board Counsel Nancy Vedera and Senior Assistant AG Carlos Ramirez flank David Bearman, MD, whose attempt to address the medical board on the subject of cannabis therapeutics was cut short at the November 2003 meeting.

Dr. Bearman Silenced

The public comment session began and David Bearman's name was called. [See story on page 2.]

No sooner had Bearman handed his prepared statement to the chairman, Ronald Wender, MD, than Senior Assistant Attorney General Carlos Ramirez announced, "There is an an ongoing case against this doctor."

Bearman: I don't intend to talk about the case.

Wender: Is there anything in your handout that deals with your case?

Bearman: Maybe.

Wender: I would ask that Mr. Ramirez look at it to make sure that it doesn't.

Bearman took a seat at the table facing the Board members and began recounting his impressive resume. "I have a unique combination of experience in the area of substance abuse treatment and prevention and quality assurance. I have worked for the US Public Health Service. I ran the student health service here at San Diego State for a number of years. I was a health officer —director of a county health department. Most important, I have a long history in quality assurance. I was the medical director and director of the health services department of the oldest Medi-Cal managed care program in the state, the Santa Barbara Regional Health Authority. And for 14 years I ran the quality assurance program and the peer review program, which has received accolades and recently won a national award...

"I'm here to talk to you about medicinal cannabis and one thing that is related to my case, is that when you assess people for quality assurance, there ought to be a quality problem —it shouldn't just be because a recommendation was made for the medicinal use of cannabis... it seems a waste of tight state resources for the Medical Board to initiate physician investigations which are non-quality-based fishing expeditions. An investigation of quality of care triggered by things like complaints from a forest ranger that a doctor has talked to a patient about cannabis do not seem to be appropriate."

By this point both Ramirez and MBC counsel Nancy Vedera were hovering over Bearman like bailiffs. "You're getting into issues of your case," Wender warned.

Bearman responded, "Well, let me just say 'when the complaint is from a law enforcement official.' Okay? It doesn't make any difference what that law enforcement official is. When an investigation is done under color of quality issues when there's no real reason to do so, it uses up the medical board's credibility and it deters you from your bona fide quality-assurance role. You may be having a credibility problem of inconsistency between your staff's words and their actions. On the one hand there was a quote in the paper from the AG's office that the medicinal-cannabis-related physician investigations were not about cannabis but about quality...

Vedera (cutting in): Okay, you have a pending case before the board. We cannot have you address the panel.

Bearman: Excuse me, but I'm quoting a statement that was in the newspaper. Isn't that a matter of public record? What does a quote from the newspaper have to do with my case?

Wender: We will have to keep you within the confines of what our legal counsel says is legitimate for you to do... I'm not trying to cut you off, because we want public comment. But there are very specific rules which pertain to what can be discussed when there is someone with a case pending before the board because, again, members of this particular group will be on a panel that will...

Bearman: But I'm not discussing my case.

Vedera: You'll have the opportunity to put on your defense at the hearing on your case.

Bearman: I strongly object to this being characterized as my talking about my case. I am not talking about my case.

Vedera: You're talking about an investigation.

Bearman: No, I'm talking about the Board's staff, and I'm sorry if that upsets you. [Bearman was actually referring to a statement by Attorney General Lockyer's spokesperson Hallye Jordan.]

Wender granted Bearman "a couple of more minutes... as long as it doesn't have any inkling as to a case that is before the Board."

Bearman: It's really hard for me to understand how... discussing a quote in a newspaper from your staff which, as far as I know, had nothing to do with me, how that has to do with my case?...

Ramirez: Again, your honor —I mean, Dr. Wender— there is an ongoing investigation in this matter and I'm concerned that the comments that are made here will compromise the Board's ability to in the future deliberate on the doctor's case if it gets this far.

Wender: We have to abide by our legal counsel's advice...

Bearman: I have the distinct feeling that I am making both the Board and your staff uncomfortable, and that was not my intention. Nor was it my intention to discuss the specifics of my case... Maybe I shouldn't have come in the first place. Believe me I would not have driven five and a half hours through rush hour traffic in Los Angeles to come here. I have lots of other things in my life to keep me occupied.

Alsup Is The Law

During the public comment session I attempted to correct the record regarding the *Conant* ruling. "I didn't think I would have to set you straight on this, but let me tell you what the Alsup decision did say... The federal government had said that writing a recommendation is allowing patients to break federal law. Judge Alsup said that was not true, there are any number of reasons that a doctor could write that recommendation, only one of which would be to obtain it. He listed several other reasons. Even if a doctor suspects that they may use it to obtain marijuana, there are other uses. They may use it to redress their government for grievances; they can use it to go to another country where it's legal; they can use it to apply to the federal compassionate use program...

"Alsup is the law of the land," I concluded.

To Jerzak, I said, "I know most of the 15 to 20 California doctors who are most knowledgable and outspoken about medical cannabis, who, in spite of legal threats, continue to perform medical cannabis evaluations. I find that they compare

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Deputy AG Mary Agnes Matysczewski was invited to interpret the Conant decision by Enforcement Chief Joan Jerzak.

MEDICAL MARIJUANA INVESTIGATIONS

	SOURCE	NO.OF PATIENTS	STATUS
1.	Non-LE	1	Closed
2.	LE	10-3	On Probation
3.	LE	1	SDT
4.	Non-LE and LE	9-6	Acc filed
5.	Non-LE and LE	20-3	Acc filed
6.	Non-LE	1	Closed
7.	Non-LE	1	Closed
8.	LE	1	Closed
9.	LE	48-15	Acc filed

ENFORCEMENT DIVISION "DATA," accepted uncritically by the Medical Board's Division of Medical Quality, laid to rest charges by pro-cannabis physicians that they had been targetted for investigation by law-enforcement sources —police, sheriffs, and district attorneys— not patients or caregivers. "No. of patients" is broken down into the number cited by complainants and the number ultimately investigated..

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favorably with California physicians in general in terms of safety and caring for patients

"As you know, at least nine of these 15 to 20 doctors have had investigations begun into their practice. So I want to put this in context: it's not nine complaints out of 60,000, it's nine investigations of the 15 or 20 most outspoken. I still contend that almost all of these investigations were initiated by law enforcement, and almost none by complaints from patients or family members. I think a review of Miss Jerzak's audit should be done by somebody independent of the law enforcement part. Some of the physicians should look at that.

"Will medical practice be determined by doctors or the police? Law enforcement has their cultural bias. As I mentioned in my previous testimony, and I checked again yesterday, the website of the CNOA continues to have this untruth, quote: 'There is no justification for using marijuana as a medicine.' This lie is thoroughly contradicted by the federal government's own 1999 Institute of Medicine report."

Graham Boyd, the lead lawyer for the plaintiffs in *Conant v. McCaffrey,* soon confirmed my interpretation of the legal situation. The permanent injunction issued by Judge Alsup is the law of the land. Contrary to Mary Agnes Matyszewski's assertions, the 9th Circuit discussion did not create "governing language" that weakens it. The 9th Circuit could have modified the permanent injunction granted by Alsup, or undone it as requested by the federal government, but instead chose to affirm it. The Medical Board was misinformed.

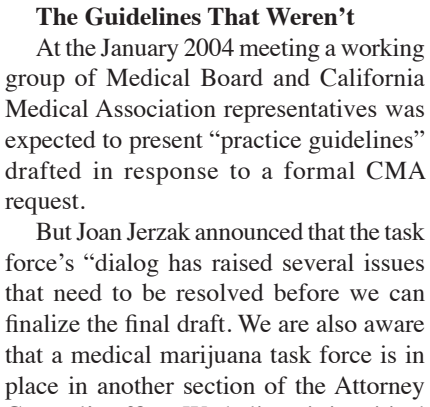
The Guidelines That Weren't

At the January 2004 meeting a working group of Medical Board and California Medical Association representatives was expected to present "practice guidelines" drafted in response to a formal CMA request.

But Joan Jerzak announced that the task force's "dialog has raised several issues that need to be resolved before we can finalize the final draft. We are also aware that a medical marijuana task force is in place in another section of the Attorney General's office. We believe it is critical that any draft that we develop at MBC be shared with the AG's office, and we want to be able to have a monitoring of that other task force."

Board member Linda Lucks said, "I'm very disappointed that we don't have that document today for this committee to review. I wasn't really aware that it was going to be circulated to the AG's office. I really was expecting to have it on the agenda today, so I apologize to Board members and to the public who were expecting to have something to look at... We've been working on this, and working on this, and we came up with a draft document that I think is fair to all the parties... It's just disappointing that we can't at least look at it before it goes to the AG's office."

Jerzak then said, "We are monitoring what is happening in the other AG section. But our own HQE deputy was not involved with some of the early discussions —and we wanted to be able to include a representative from Health Quality Enforcement." In other words, the working group suddenly needed input from not one but two other sources.



CMA representatives Alice Mead and Sandra Bresler would not sign on to the Board's latest statement on "Physicians and Medical Marijuana." The CMA may file an amicus brief in support of Tod Mikuriya's appeal.

Medical Board Executive Director Ron Joseph told the Division of Medical Quality Jan. 30 that he "accepts responsibility" for their not getting revised guidelines governing physicians who approve cannabis use by their patients..

Lucks: "Nobody told me, and I was on the task force. That's what I'm upset about... In good faith, it was supposed to be on the agenda. And it's not. And there are people here from the public who are prepared to discuss it and I was prepared to proudly present a document for review and comments and suggestions and criticism... Sandra Bresler and Alice Mead [CMA representatives] and Ana Facio and Mary Agnes Matyszewski [Deputy AGs] all agreed on a document, and I was very proud of it...."

"I'm sure that we can get a document circulated before the May meeting," said Jerzak. "It's not ready at this point."

Lucks, apparently not realizing that Jerzak had raised a second hurdle, said, "Well, our document is ready —the document that Alice Mead worked on is ready. It just hasn't been vetted, I guess, by the AG's office —or the task force from the AG's office —isn't that what you're saying?"

Jerzak said no, she was "not sure it's in a final stage," citing "some concerns that were raised" about the absence of input from the Health Quality Enforcement unit.

Lucks said, "No one's gotten back to me with any concerns that were raised. I thought it was a done deal."

At this point committee chairman Ron Wender, MD, cut off the discussion.

Deputy Senior AG Ramirez was asked during a break about the AG's medical marijuana task force refered to by Jerzak. He said he didn't know who was on it or anything about it because he was stationed in Los Angeles... Three weeks later Dale Gieringer of Cal-NORML asked the Attorney General himself and reported that the only task force Lockyer knew about was the one headed by Vasconcellos, and they'd been dormant since last summer, when they met on SB-420.

It was apparent that some invisible hand had vetoed whatever practice guidelines the CMA-MBC working group had drafted as of January 2004.

Correcting the Record

I used the public comment session to restate the significance of the *Conant v. Walters* ruling. I distributed an information packet including a letter from Ann Brick, an ACLU attorney involved in the *Conant* case, confirming that the 9th Circuit "specifically held that [s] doctor's anticipation of patient conduct, however, does not translate into aiding and abetting, or conspiracy."

As I was addressing the Board, three lawyers seated behind me were observed shaking their heads and smiling condescendingly. Board member Steve Alexander (who, like Lucks, is a non-MD Gray Davis appointee) took notice and advised the staffers not to "smirk" when members of the public were testifying.

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Bearman Case *from page 2*

the law is not violated or a doctor is not negligent in treatment of his or her patient. Instead, the Medical Board must demonstrate through competent evidence that the particular records it seeks are relevant and material to its inquiry... This requirement is founded in the patient's right of privacy guaranteed by Article I of the California constitution, which the physician may, and in some cases must, assert on behalf of the patient."

The appellate court judges relied on several directly relevant precedent cases. Their ruling amounts to a serious rebuke of the Medical Board. "The declarations included *no facts* [italicized by the judge] even suggesting Dr. Bearman was negligent in Nathan's treatment, that he indiscriminately recommended marijuana, the circumstances under which marijuana may arguably be prescribed for migraines or attention deficit disorder, or that Dr. Bearman in any way violated section 11362.5. The statements regarding Dr. Bearman's possible unethical conduct made by Ranger Just, Investigator Foster, and Dr. Noble are nothing more than speculations, unsupported suspicions, and conclusory statement drawn solely from Dr. Bearman's letter to N. and the simple fact he recommended the use of marijuana."

Judge Rubin noticed that Bearman's letter only approved cannabis use for the treatment of migraine. "The Medical Board further contends," wrote the judge, "Dr. Bearman recommended marijuana for attention deficit disorder, which is not a listed illness in section 11362.5. While Dr. Noble and Investigator Foster stated in their declarations the subpoena was necessary because of this recommendation, it is clear they misread both Dr. Bearman's letter and the statute, which does not limit the use of marijuana to the listed illnesses."

The Medical Board had also argued that N. waived his right of privacy when he showed his letter of approval to the Park Ranger. As precedent they cited a case in which a patient had filed a lawsuit. Not applicable, the appeals court ruled. "This is not a case where N. voluntarily initiated an action placing his medical records at issue. Instead, N. produced Dr. Bearman's letter as evidence that he qualified for... protection against criminal prosecution...

"By passing this law, the voters intended to facilitate the medical use of marijuana for the seriously ill."

—Judge Laurence Rubin

By passing this law, the voters intended to facilitate the medical use of marijuana for the seriously ill. This purpose would no doubt be defeated if, as a condition of exercising the right granted by section 11362.5, a person waived his or her right of privacy simply by producing a physician's written recommendation. Interpreting section 11362.5 as necessitating the waiver of a fundamental right in order to enjoy its protection would, we believe, hinder rather than facilitate the voters' intent."

The appeals court granted Bearman "recovery of costs" —meaning the cost of photocopying his legal briefs. The system provides no recourse for recovery of legal costs when a doctor responds to a Medical Board investigation. Two of Bearman's attorneys worked pro bono, and one gave him a steep discount; nevertheless, the tab will approach $20,000. Bearman hopes to raise it at a benefit victory party in El Capitan Canyon October 17. (The event was originally set for June but postponed due to a fire.)

The Wrong Doctor to Confront

The Medical Board picked the wrong doctor to confront over questions involving quality of care and privacy. For much of his career Bearman was medical director of the Santa Barbara Regional Health Authority, for which he set up quality-assurance and peer-review programs. The agency got a large grant to study "medical data connectivity," which Bearman defines as "sharing medical information over the internet with appropriate protections for confidentiality." That project, he says, made him "even more familiar with the issues relating to privacy and who wanted access to what and who could deny access to what."

Bearman says, matter-of-factly, "The Medical Board overlooked the fact that I was more knowledgeable and experienced in terms of medical quality [than their investigator or consultant]... They're supposed to have your records reviewed by someone who's an expert in your field. Clearly, the people who looked at this didn't know about cannabis, they didn't know about drug-abuse prevention, and they didn't know about quality."

Alexander said that although he was "a product of the '60s," he had never smoked marijuana. He became aware of its medical properties when his father was dying of cancer.

Alexander protested the mysterious disappearance of cannabis from the agenda, which brought Ron Joseph, the Board's Executive Director, hurrying up to the microphone to earnestly "accept personal responsibility," for which he was thanked.

Gov. Schwarzenegger has since named Joseph to head another agency (a promotion). The Board's former chief investigator, Dave Thornton, is the current executive director. My intention is for MedBoardWatch.com to monitor the Board's actions and to make doctors and patients aware of their impact.

Doctors should not be afraid

Doctors should not be afraid to practice medicine.

The Board and numerous expert witnesses are now on record as saying that cannabis is good medicine for a wide range of illnesses.

As I go over transcripts of my colleagues' hearings, I see that the degree of documentation of diagnosis and follow-up becomes the difference between dropping investigations and pursuing them.

In reviewing both my own standards, and those set forth in the Board's July Action Report Statement, I realize what I have always known as a primary care physician: that the doctor who has the best documentation of a patient's illness is their primary care doctor or their specialist. It is logical to conclude, therefore, that the vast majority of California practitioners should be confident about approving their patients' cannabis use, or even recommending it to the uninitiated for whom it might be the most appropriate treatment.

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