

Patrick McCartney 1948 -2016

The reporter who exposed the plot to contain Prop 215

Journalist Patrick McCartney died of a heart attack in November 2016 at his cabin in Truckee. He was 68 and had no history of heart trouble. Family and friends were stunned and terribly saddened.

For many years, almost alone among US journalists, McCartney recognized the importance of the medical marijuana movement and made it his beat. A skilled researcher, he used the Freedom of Information Act to expose the conclave held in Washington, DC, at which the containment of Proposition 215 was planned.

McCartney learned that only nine days after the new law was passed in 1996, California law enforcement leaders, federal officials, and strategists from Prohibitionist NGOs were secretly conspiring to undermine the will of the voters!

He broke the story in O’Shaughnessy’s, Autumn 2004. They give Pulitzers for less.

His revelations, excerpted here, are highly relevant today. —Fred Gardner

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), opponents of the new law had a fundamental choice: try to block implementation, or accept the will of the voters.

Many in law enforcement chose the obstructionist approach. 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.



The AG’s ‘Narrow Interpretation’

At 12:01 a.m. on November 6, 1996, the day cannabis became legal for medical use in California, Lungren’s office 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 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 Lungren referred to the police establishing probable cause before arresting a medical cannabis user, he 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.”

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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 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

Robert Elsberg retired after 35 years of state employment and became “Legislative Chairman” for the 7,000-member CA Narcotic Officers Association. He described his career on LinkedIn:

“Beginning in the 1960s, and up to mid 2011, employed by the CA Department of Justice. As a member of DOJ, I had a variety of assignments... I worked undercover, led teams of agents on law enforcement endeavors, oversaw a countywide drug task force, sought out, detected and dismantled illicit controlled substance laboratories, helped create and became the first Commander of the Campaign Against Marijuana Planting (CAMP) statewide enforcement task force. Senior Special Agent in Charge of the San Francisco division for the Attorney General’s Bureau of Narcotic Enforcement and worked in that capacity for approximately 12 years until my retirement. I drafted California legislation and helped implement it into law.”

Helpful note-taker



ROBERT ELSBERG (LEFT) took notes as Drug Warriors planned how to sabotage California’s medical marijuana law, and wrote a nine-page memo for the CA Police Chiefs and Peace Officers Associations. (Photo taken in April, 1998, at a meeting of the Attorney General’s Task Force on Medical Marijuana. At right is Nathan Barankin, press secretary to Bill Lockyer, who had succeeded Dan Lungren as AG.)

authors. “This thing is a disaster,” he told the Los Angeles Times immediately after it passed. “We’re going to have an unprecedented mess.”

[It was a self-fulfilling prophecy by Lungren, McCartney observed. The decision to keep arresting and prosecuting marijuana growers and sellers would uphold high prices and make producers and distributors targets for robbery and even murder.]

Meanwhile, back in Washington, D.C.

The meeting on November 14, 1996, was hosted by the Office of National Drug Control Policy’s Gen. Barry McCaffrey and ONDCP attorney Wayne Raabe *[whose notes McCartney obtained]*.

High-ranking officials from the Drug Enforcement Administration, the Department of Justice, Health and Human Services, Education, Transportation, Treasury and the National Academy of Sciences took part. Four U.S. senators, including California’s Dianne Feinstein, sent aides to the meeting.

Also present was Paul Jellinek, vice president of the Robert Wood Johnson Foundation, the largest private funding source in the war against illicit drug use, and representatives from 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.

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. He, too, took notes.

Special Agent Thomas J. Gorman, who had been the spokesman for the “No-on-215” campaign (while still on the AG’s payroll) attended on behalf of the 7,000-member California Narcotics Officers Association (CNOA). Before the election Gorman had a written set of talking points called “Marijuana is NOT Medicine” for the CNOA and the AG’s Bureau of Narcotic Enforcement.

Joining the AG’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.

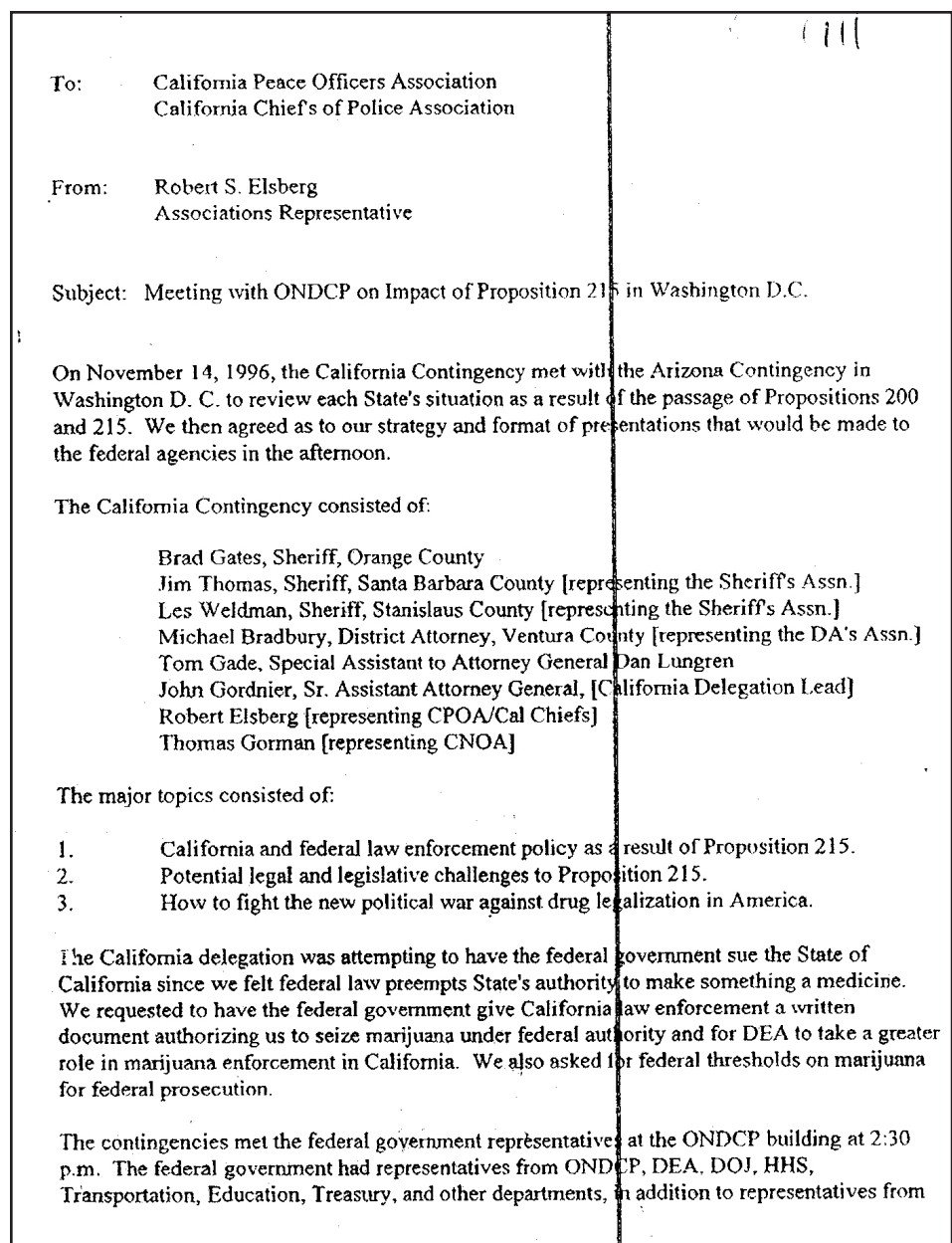
“• Private lawsuits against these initiatives should be filed unless the federal government takes immediate action.

“• 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.”

McCaffrey warned that the measures would “send the wrong message to our
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FIRST PAGE OF MEMO BY ROBERT ELSBERG describes a November 14, 1996 meeting at which California and Arizona law enforcement officials discussed how to enlist federal help in blocking implementation of ballot initiatives prior to a meeting at the Office of National Drug Control Policy (then run by Drug Czar Barry McCaffrey).

Sabotaging Prop 215 *continued from page 65*

children,” and threaten to “undermine our National Drug Control Strategy.” He enumerated the actions he took in opposition to the ballot initiatives in California and Arizona: 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 held eight press conferences and attended four political rallies.

Tod Mikuriya, MD, contends that such involvement by government employees in partisan politics is a violation of a federal law known as the Hatch Act. “The dictionary doesn’t define ‘partisan politics’ in terms of Democratic vs. Republican contests,” says Mikuriya.

“It’s outrageous that taxpayer money is funding political campaigns telling us to vote the way the government wants us to vote.” —Tod Mikuriya, MD

McCaffrey said he did not believe that many doctors would start recommending pot to their patients. Elsberg noted that McCaffrey “wants the state to proceed and not wait for a coordinated action.”

The pow-wow focused on 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.”

According to Elsberg, “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 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.”

On behalf of Lungren, Gede asked the federal government to intervene with a lawsuit. In addition, he asked the DEA to cross-designate some prosecutors and peace officers so they could enforce federal law. “(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.”

“The other side would be salivating if they could hear prospect of feds going against the will of the people.”

As the discussion over strategies to defeat the reformists continued, Jellinek 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,” he said, according to Raabe’s clipped notes.

DEA Administrator Tom Constantine said 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. Cali-

fornia doctors would soon hear this threat from McCaffrey and U.S. Attorney General at a nationally televised press conference on December 30.

The ‘Emergency’ Meeting

The Attorney General’s “Emergency All-Zones conference” was held on December 3 in a ballroom at the Sheraton Grand in Sacramento. 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 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. *[This was several years before I joined the ranks of law enforcement myself as the SFDA’s public information officer. —FG]*

Hallinan advised his law enforcement colleagues to transfer responsibility for implementation to their county health departments.

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 implementation to their county health departments.

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 [in the ballot arguments] went the other way.”

The disdain of law enforcement for medical marijuana was exemplified by the dis-



SAN FRANCISCO DISTRICT ATTORNEY TERENCE HALLINAN outside the Sacramento hotel where California DAs, police chiefs, and sheriffs had been summoned to an “Emergency All Zones Meeting” Dec. 3, 1996. Attorney General Dan Lungren laid out his “narrow interpretation” of California’s new medical marijuana law: keep arresting and prosecuting people for cultivation and possession, and let the courts decide if a “medical use” defense applied. Hallinan urged his law-enforcement colleagues to defer to state and county health departments in applying the new law.

tribution 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 smoking 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.

Allowable Quantity

On February 2, 1997, Lungren’s Bureau of Narcotics Enforcement issued the “Peace Officer Guide: Compassionate Use Act of 1996.” Lungren’s Guide 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.”

In a single stroke, Attorney General Lungren had given the authority to police officers to arrest almost all 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.

‘Lungren v. Zonker’

On September 8, 1996, Garry Trudeau called the San Francisco Cannabis Buyers Club, asking to speak to Dennis Peron. Trudeau said he had heard about the recent bust from a New York activist, Dana Beal. Dennis was out but his lieutenant John Entwistle took the call.

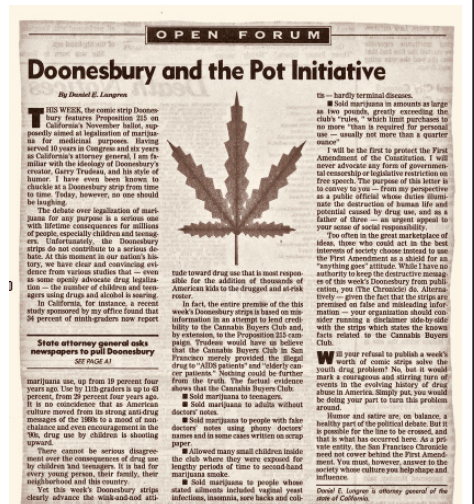
“I understood how important Trudeau’s support would be and I didn’t want to pass up the opportunity to tell him everything I could about the situation. He didn’t need persuading —he wanted information.”

Lynne Barnes then sent the cartoonist a packet of news stories describing the bust of the club and its aftermath.

On Monday, Sept. 30 the *San Francisco Chronicle*, the *LA Times*, the *San Diego Union-Tribune* and many other papers ran a Doonesbury strip in which Zonker’s friend Cornell says, “I can’t get hold of any pot for our AIDS patients. Our regular sources have been spooked ever since the Cannabis Buyers’ Club in San Francisco got raided...”

Attorney General Lungren had urged all California publishers who carried Doonesbury to spike the entire set. “Alternatively,” he suggested in a letter to them, “your organization should consider running a disclaimer side-by-side with the strips which states the known facts related to the Cannabis Buyers Club.”

Lungren attached an op-ed piece listing violations observed by undercover SFPD narcotics officers at the club. They included, “Allowed many small children inside the club where they were exposed for lengthy periods of time to second-hand marijuana smoke. Sold marijuana to people whose stated ailments included vaginal yeast infections, insomnia, sore backs and colitis —hardly terminal diseases. Sold marijuana in amounts as large as two pounds, greatly exceeding the club’s ‘rules.’”



ATTORNEY GENERAL LUNGREN’S OCT. 2, 1996, OP-ED protested California newspapers publishing Doonesbury comic strips about the raid on the SF Cannabis Buyers Club.

Lungren called a press conference for Tuesday, Oct. 1, to reveal evidence that had been assembled against Peron and the San Francisco Cannabis Buyers Club. During the question-and-answer session he got irritated by a question about Doonesbury.

“Skin flushed and voice raised, Attorney General Dan Lungren went head-to-head with a comic strip Tuesday...” is how Robert Salladay began his *Oakland Tribune* story.

The great Don Asmussen in the *San Francisco Examiner* lampooned “Lungren’s War on Comics.” *The New York Times* devoted two full columns to the brouhaha, including a taunt from Peron: “Crybaby Lungren... I think he’s just gone off the deep end. Waaa!”

Polls showed a gradual decline in support for Prop 215 ending October 1. Lungren had Peron arrested Oct. 5 on charges that included conspiracy to distribute marijuana —one more effort to make the vote a referendum on the proprietor of the San Francisco Cannabis Buyers Club and his right to operate.