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WASHINGTON vs. WASHINGTON (AND COLORADO):

WHO SHOULD DECIDE ABOUT MARIJUANA?

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**PARTICIPANTS:**

Moderator:

JONATHAN RAUCH  
Visiting Fellow  
The Brookings Institution

**Panelists:**

MICHAEL GREVE  
Professor, George Mason University School of Law  
Visiting Scholar, American Enterprise Institute

ANGELA HAWKEN  
Associate Professor of Public Policy  
Pepperdine University

TROY EID  
Lawyer, Greenberg Traurig, Denver  
Former United States Attorney, District of Colorado

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## P R O C E E D I N G S

MR. RAUCH: Welcome, everybody. Thank you very much for coming. My name is Jonathan Rauch. I'm a guest scholar in governance studies here at Brookings. It's very good of you to come on a cold day when so much else is going on in Washington.

Some of you may have heard that two states have legalized marijuana. The news may have trickled out that Washington and Colorado did this in November. There has been some discussion of the implications that may have on drug policy. Today we're going to try to put your heads, as well as our own, in a different space and think about the powerful implications of this.

I'm a fan of short introductions -- the thank yous and the bios and not much else, but I'll make a slight exception today. After thanking first, of course, all of you; second, our panelists, a true A-team, two of whom came from out west to be here today; third, our partner in organizing this session, the Washington office on Latin America; and not least, the donors who made this session possible, including Peter Lewis, to whom we're very grateful.

The reason this is, we think, a very good moment to put this dialogue on a separate track is that we are now in a period of ferment on Federalism; that is state-Federal relations, the likes of which I would argue we've not seen perhaps since the New Deal. We've got a number of hot button issues that are raising fundamental questions and all being waged, not only as issues about what the right decision should be, but also about who gets to make the decision. Immigration is one of those issues were the Federal Government is

asserting that the states need to follow the Fed's policy and have had a mixed outcome in the Supreme Court with that so far. Another is the Defense of Marriage Act, gay marriage, where the states are asserting that the Feds must follow a state policy. That is before the Supreme Court this term. A third is Obamacare where the states refuse to follow Federal policy and sued for the right to do that and won a mixed holding from the Supreme Court.

In the midst of all this you have a Supreme Court which is itself very much influx.

Everybody come on up. There are some seats in the front. Don't be shy.

The Supreme Court is very much influx in its Federalism. That area of law is unsettled in a way that it has not been for a very long time, and in the midst of all of that, as if that weren't enough, talk about putting a cat among pigeons. Two states legalize marijuana. And this is, more than any of the previous policies, a direct confrontation with Federal policy. And they did it moreover by referendum-- lopsided votes of the public.

Now, a parameter for our discussion is -- I think it's going to say -- none of these comments are rehearsed so I don't know what people will say but I think we're probably all going to agree that Federal policy as a matter of law is supreme here. I don't think that's in question. What is in question is what is wise for the federal government to do in this situation and what is wise for the states to do because more of them will be considering marijuana, and what is wise for Congress to do and the Supreme Court where ultimately I think a lot of this is

going to play out one or another.

So we want to talk about wisdom rather than law, and we want to talk about power rather than pot, though there will be plenty of pot in this discussion. And we want to talk partly about what's going to happen in the next few months when key decisions are going to be made. And those are going to ricochet through the other states and Congress and the courts. It's really going to be fun.

To guide us to the fun we have a panel of some remarkable experts. I'll introduce them in alphabetical order and reverse speaking order. Troy Eid, who is down at my far left here, is a lawyer with the Denver office of Greenberg Traurig, an international law firm. He joins us from Denver, for which we're very grateful. He was the United States' attorney for the District of Colorado from 2006 to 2009. He is a former member of the Narcotics and Drug Trafficking Subcommittee of the Attorney General's Advisory Committee. He's an adjunct professor at the University of Colorado School Of Law, and not immaterially, he has been honored for distinguished public service by among others the Drug Enforcement Administration, the Federal Bureau of Investigation, and the Secret Service. He's going to help us understand law enforcement options and how to balance this power equation to get it right.

Michael Greve, next to him, is a professor at George Mason University School of Law and a visiting scholar at the American Enterprise Institute and the co-founder and former director of the Center for Individual Rights, which is a public interest law firm. Perhaps most on point today he is in

my view probably the country's single most creative and synoptic thinker on state federal relations with a book on the subject from 1999 called *Real Federalism: Why It Matters, How It Could Happen*. And a very important book on the same subject published just last year called *The Upside Down Constitution*.

Finally, Angela Hawken, who is to my immediate left, is associate professor of economics and policy analysis at Pepperdine University. She has come to us all the way from California on the red-eye. Thank you so much for that. She studied at the Rand Graduate School, with a research interest focus on drugs, crime, and corruption.

We have some seats in the front all you guys. We've got at least four that I can count. Six, seven, eight. Eight or nine seats. So come on up and join us.

Angela led the statewide cost benefit analysis of California's Alternative Drug Sentencing Initiative. She is the co-author of two very relevant books -- *Drugs and Drug Policy: What Everyone Needs to Know*, published recently by Oxford and very much on point, and *Marijuana Legalization: What Everyone Needs to Know*. She is going to help us understand some of the implications of drug policy implications on what's happening. Our panelists will talk for about 10 minutes each, say whatever they want to say, and we'll probably then go straight to questions, though perhaps with a bit of dialogue along the way.

Angela, do you want to kick it off?

MS. HAWKEN: Thank you. Thank you, Jonathan, and to

Brookings for the opportunity to be here today.

When we think about the implications of what's happening in Colorado and Washington and marijuana legalization more generally, it's very important to distinguish marijuana from the legalization of other drugs. Get away from the ideological trap that we find ourselves falling into so quickly. Marijuana is different. Marijuana legalization is a much smaller step in terms of policy reform than legalizing any of the other drugs would be.

Over the last generation, about a third of Americans have lived in states that have decriminalized marijuana, and in other states, law enforcement has often been so lax that when we ask in surveys whether you live in a state that's decriminalized or not, most respondents don't even know. So this is, in terms of the overall drug picture, a much smaller step than it would be if we considered legalizing any of the other, harder drugs. So it's a much more gentle nudge in that direction.

In terms of actual marijuana legalization, what the states actually do matters, and unfortunately in this case, marijuana legalization got onto the books in Colorado and Washington through an initiative process. That doesn't allow for a whole lot of careful design. What it doesn't allow for is a whole lot of change once we started to figure out how the world works post-legalization. It's like someone asking for directions in Vermont and the answer being, well, if you wanted to go there, I wouldn't start here. And that's where we are.

So we have very little wiggle room on those states to now shape policy in a positive direction, and we're operating in an information vacuum

because no other jurisdiction in the world has legalized marijuana. In the world. Not even the Netherlands. So we are in uncharted territory and we're not going to be able to learn from our lessons as quickly as we'd like to in Washington. And so if I really wanted, as a policy analyst, to study a well conceived legalization regime, the last thing I'd want is a policy on the books through a ballot initiative, but that's what we have. This is where we're at.

If the experiments in Washington and Colorado are allowed to proceed -- the question mark remains -- we'll learn a great deal about marijuana that we don't know now. There is still a lot of speculation. Sometimes the speculations are wild. And little is known on both sides of the debate. There are important unknowns, such as what happens to drug use when we legalize? What are the patterns? Do we see dramatic increases? And if there is a dramatic increase, does it persist over time?

Typically, there are dramatic changes around policy intervention anyway. No matter what you implement, things move. And things only typically start to settle down in year three or year four post-intervention. Are we going to have the patience to wait and see what happens when this shakes down? What's going to happen to dependency in those states and to problem use? Does the age of initiation change? Are kids going to start earlier? Are they going to use more? And what's going to happen to those children? People will care.

What's going to happen to drunk driving? What's going to happen to drug driving? Hugely consequential. One of the most important issues in this debate is what will happen to ER admissions? Will criminal behavior change,

especially around retail stores? What's going to happen in those neighborhoods? Those neighbors will care. And very important, probably more important than all, is the relationship between marijuana and our most dangerous drug of all, and that's alcohol.

Many of us will think very differently about marijuana legalization if marijuana legalization leads to an increase in alcohol use. And how we'd feel about it if marijuana legalization led to a decrease in alcohol use. And we don't know, we're just guessing now. If there are substitutes, that is if we use them together, this is a very different universe than if it complements. If one gets traded out for the other. We're just guessing now about the magnitude of these relationships, and these are extremely consequential in terms of social well-being overall following a major reform like this.

So surely the Federal Government will be concerned with these kinds of outcomes, we'd hope. And if these experiments are allowed to proceed, we'll learn about these important issues and we'll know. And that information vacuum will hopefully be closed.

So as a selfish researcher, I'm really frustrated by lack of knowledge. We're making marijuana policy in the dark. I would like to see these experiments be given a chance -- and I do call them experiments -- to at least play out long enough as to learn. And it's easier to undo an experiment in two states than in many states, and other states will tip. So this is the time to use the language of experimentation.

The primary concern of states will be whether the pot from



Washington and Colorado will flood the rest of the country, a reasonable concern. Colorado and Washington may become the warehouse for the other 48 states. Supremacy Clause aside, it does not seem reasonable to expect the federal government to allow Colorado to create a system that profoundly affects the other states. So the price of Federal acquiescence should be minimizing out-of-state consequences.

And when it comes to legal marijuana affecting residents in other states, the media tends to obsess about pot tourism. You hear mostly about pot -- I think it makes for more fun press. You mostly read about the kids going off to the mountains to smoke pot, but pot moving towards people is equally important. In other words, across state lines. Pot moving in both directions is important, but people moving towards the pot that's coming in for the tourism, somehow it attracts more of the stories. And so this is going to be extremely influential in shaping how the general public regards marijuana legalization, because that's the press they'll be reading. And especially if and when, it is a matter of time, the subjects in those stories will include children.

The Federal Government might want to show some effort to stop pot tourism promotion. Even if it can't really stop it, it needs to make a gesture towards trying to stop promotion. If Feds make a good faith effort to stop tourist promotion -- stop the promotion of pot tourism and it happens anyway, they can just say it's a hard thing to do. But if they don't get involved and try to stop the promotion of pot tourism it looks as though they're condoning it, and that would be a bad thing. So movements in both directions across state lines as well as

into the states through pot tourism are equally important.

You might expect to see an effective ban on marijuana sellers promoting out-of-state use or non-resident use. For example, the Department of Justice might say if you advertise out-of-state, either by pot going to people or people coming to pot, if you advertise and we find that you're involved, we don't care how big you are or where you are or whether you are complying with your state's rules, we're coming to get you. The Department of Justice might want to prioritize enforcement issues on that sort of promotion. They could target private promoters, as well as states that aren't bothering to do the restraint on their promoters.

The Federal response will be watched very closely by Colorado and Washington states, but they'll also be watched very closely by other states that are considering their own marijuana reforms. What about these states? Massachusetts, California, Oregon, Nevada, Maine. It's not a question of if they'll legalize, it's when. And there's now some very compelling evidence to suggest that they'll be legalizing relatively soon in short order. So the language of experimentation becomes a problem now. Multiple experiments make it much easier to turn the boat, fewer experiments make it much harder to turn the boat around. We have to think about how to handle that.

What do the aversions of those laws look like and how will they be influenced by how the Federal response looks now? Don't think the well-healed advocacy groups that are very much responsible for drafting these ballot initiatives -- don't think they aren't paying attention. What they'll note is that the

federal government is going to have a much harder time thwarting legalization in Colorado than in Washington. Why? Because the Colorado initiative is so loosely written. It's much easier to crack down on legalization when there is strong regulation in place.

So the easiest way to legalize marijuana if you want to get the Federal Government off your back is to simply repeal your marijuana laws and have no regulations in place. That's a perverse situation. An aggressive federal response could stimulate more loose versions of marijuana legalization with even fewer protections for the groups of people we care about, like our children.

On the other hand, Federal agencies could use their discretion to shape the markets in a way that offers more protection. They could use selective enforcement; make sure they go after the target -- the marijuana-related businesses that are advertising or aren't imposing a minimum price; who aren't testing for mold or pesticides or the other yucky things we'd rather keep out of those products.

So we have a lot to learn about marijuana. It will be fascinating to see whether that learning is allowed to take place. So far, the Federal Government has given very little indication of how it plans to proceed aside from a few pro-forma statements from the Department of Justice and, of course, the president's interview on TV. So let's take advice from Betty Davi: buckle up. It's going to be a bumpy ride.

MR. RAUCH: Thank you. Just a few clarifying points.

It may be worth noting that the on-the-ground issue here is that

although Federal law prohibits marijuana, the Feds do not have the manpower to enforce that, except at a high level; is that correct?

MS. HAWKEN: This is why with the more regulated regimes are much harder to control because, in Colorado there is now growth for personal use. There's no way you can control that. How do you have the manpower to do that? If you're in a state that allows a limited number of licenses and very clear criteria for how you can set up a shop and a shop that is only dedicated to selling marijuana products, like in Washington state, it's so easy to figure out who you're going after when you send out a couple of hundred letters, and you're done. And, as you were describing in some of the articles you've written on this, send out letters to the landlords. Say, you're going to go after the landlords for renting out space.

So in a very clear regulatory environment it's so much easier to shut down a shop than it is in a more loose environment. And certainly, the Colorado version of a law makes the law enforcement side of this much more challenging.

MR. RAUCH: And so the next thing a state could do is simply repeal, right? And say, well, if you're going to crack down on our regulatory system if we legalize, we'll legalize without a regulatory system and do what you can.

MS. HAWKEN: You might notice that I think some of the initial advocates were relatively rebellious by nature. I mean, marijuana users describe themselves as rebels. If anything, I think some of them have a distaste for this

becoming legal because now they're abiding with the laws of man. So I think what there is a very aggressive response. You're going to tap into the rebellious spirit and you are going to see much more aggressive versions of the law. And by that I mean versions that are just repealed.

MR. RAUCH: It's interesting. What we are seeing here is in some ways the breakdown of a Federal-state law enforcement partnership in which the Feds rely very heavily on the states which leads us to Michael Greve, who will give us some broader context in what we're seeing unfold here.

MR. GREVE: Right. I'm against partnerships and I'll explain why.

There is a sort of tempting Federalism perspective on this which says something along the following lines, and Angela alluded to this. Look, this signals the resilience and the resurgence of American Federalism because states have divergent preference this year. There's no reason to distrust the local political process. And so, let states experiment and hurrah for Federalism. I don't think that's necessarily wrong but I want to, in the spirit of the panel, complexify this a little and make a few quick points.

The first one is this: look, a perennial problem of American Federalism is how to stabilize political experimentation and compartmentalize policy competition along state lines and the reasons are always the same -- the spillovers just kill you. So under the current regime, Federalism, experimentation can take place only to the extent that the Feds don't enforce the laws, and that's somewhat problematic. On the other hand, if you decriminalize marijuana at the Federal level, you won't be able to contain the flood of marijuana into states that

don't want it. You can't do so as a practical matter, I think and Angela knows much more about that than I do, but I know you can't do so as a constitutional matter because once marijuana is just another article of commerce, states can't ban the import. So maybe in that situation you'd still need a Federal law along the following lines.

The transportation or importation into any state for delivery or use of marijuana in violation of the laws thereof is hereby prohibited. I didn't make that up; that's the Webb-Kenyon Act and section 2 of the 21<sup>st</sup> Amendment dealing with liquor and what those things try to do is to allow states that don't want booze in their states to remain dry and maybe you need something like that. You see something along the same lines or similar lines at any rate with respect to gay marriage. What Dumont tries to do in part is compartmentalize gay marriage along state lines and that isn't going so well either. And what you have to ask the apostles of state experimentation seems to be in those kinds of circumstances is always, look, are you really in favor of a decentralized solution or is this just a strategy of island hopping towards your favorite solution? We don't ask that question often enough but maybe one of these days we will. That's my first point.

My second point, I think, and third point are much more important, at least to me. There's a preoccupation in the land with the question of the breadth of federal powers. How far does federal power extend under the Enumerated Powers doctrine? How far do the commerce laws reach with respect to criminalizing possession? That was, of course, the question in the

Reich case, and I'm not going to reargue that here, or even try, because my question is about the depth of the Federal power or what Madison called "The national operation of Federal power." Assuming Congress has a power, in what form can it exercise that power and act on states? And that's a hugely important question, especially if the Enumerated Powers reach as far as they do today.

And so allow me two minutes of Con Law 101 on the basic constitutional structure. The first basic rule is, and Jonathan alluded to this, is that within its enumerated powers reach, Congress can preempt states any day it wants because federal law trumps and any and all state law. That's the basic order of the Supremacy Clause. And that's implicated in the dope debate, but not in a very interesting way. State laws provide or may provide a safe harbor against local prosecution under state law but not, of course, immunity against Federal law. I recognize there's an Arizona state court ruling to the opposite effect, but I think that's no good and plainly wrong. That's the first proposition on preemption.

The second proposition is that for that federal preemption and supremacy must take the form of a prohibition. That is to say either a direct regulation of product conduct -- don't smoke dope -- or as in true preemption, cases of direct or implied prohibition against certain forms of state conduct. As an example, no state shall go anywhere near the rates, routes, and services of airline carriers. That's preemption, that's prohibition.

To put this the other way around and to put it in the terms in which the Supreme Court has put it, the Federal Government may not commandeer

states. That is to say it cannot compel state legislatures to enact laws, that's *New York vs. United States*, and it cannot compel state officers to execute Federal laws, that's *Prince vs. United States*.

What's obvious here is the obvious implication with respect, or the most immediate implication with respect, to the dope question is that, look, no state has to criminalize marijuana just because the Feds do, and no state had to enforce Federal laws or prohibitions, although state courts, of course, are still required to do so.

Now, it turns out that that sounds trivial but I think it plays itself out in hugely important context, much more important in their own way than the marijuana context. So here's an example: One of these days the Supreme Court will decide whether it wants to grant, or not, in the second go-round of a case called *Bond vs. United States*. It arose over basically a marital dispute. She, the wife, smeared a chemical on a doorknob and the car door of her rival and this resulted in a thumb burn. And this woman was then prosecuted by state officials in Pennsylvania under a Federal law that implements the Chemical Weapons Convention. And the question in this case is whether the Federal law is even constitutional. I don't think so, but the Third Circuit said yes. But even while saying yes, all of the judges on the Third Circuit said what do you people there at the local level think when you enforce these kinds of Federal laws? You don't have to.

The reason why this matters is, you know, the Heritage Foundation has had a Federal overcriminalization work group for the past, I don't



know, 15, 20 years, and it's never gone anywhere. But it might go someplace if local officials could stop themselves from cooperating with the Feds in enforcing these ludicrous Federal laws. Many of them would turn into the press releases that they deserve to be. And if they stop doing so here that will be progress to my mind.

Now, there's a much bigger problem or much bigger implication here and that comes to light if you ask yourself why is it that the United States Constitution has this regime? Preemption, yes; commandeering, no. There's a dissent in the Prince case that addressed this case written by Justice Breyer where Justice Breyer says something along the following lines: Look, many federal systems in the world rely on commandeering, on the execution of federal orders by state officials, and he prominently mentioned the European Union. And they do so second, said Justice Breyer, because it's more federalism-friendly. Because if the feds must enforce their own laws you'll get centralization and the federal government will send hither swarms of officers and you'll get enforcement rigidity, so you'll get precisely the results that federalism is meant to forestall.

There are answers to these questions and I'll give them to you for free. The first thing is that commandeering partnership, intergovernmental cooperation, destroys responsibility and accountability. Look at the EU Did the EU destroy Greece or did Greece destroy the EU? It's probably both but you can't tell and they all blame each other. And the founders didn't need the EU to see these dangers. All of this arises from intergovernmental cooperation and

commandeering. The founders didn't need the EU because they have the example of commandeering in front of them. It was the Articles of Confederation and so they wrote a constitution that prohibits this and makes it very, very difficult in any event.

And the second objection to Justice Breyer, or rather the objection to his second point is, well, if the Feds want to send swarms of officers, let them try. As Angela already suggested, they can't and they won't, and if they do they will have to pay the fiscal and the political price. So I think in a weird way it would actually be great if we had FBI agents in Santa Clara breaking down the doors of gravely ill pot smokers. That will tell people more about the Federal Government than 15 papers from the Cato Institute. (Laughter)

One last point about this, and then I'll end. You see the force of the anti-commandeering rule in something that Jonathan mentioned at the outset, and that is the Affordable Care Act. This seems far removed but it really isn't. If you look at the Affordable Care Act -- there's, by the way, the same preoccupation among Conservatives and Libertarians with the breadth of the federal government's power. How far does the tax power go? How far does the commerce power go? But the mandate that was at issue in that case, in the NFIB case, that's not the engine that drives the Affordable Care Act. The engine that drives that act is the exchanges, the state exchanges which weren't even at issue in that case but will be, I hope.

Here's the way this works: initially, the administration and Congress wanted to commandeer states to establish exchanges. They then

realized that oops, we can't do that because there's the anti-commandeering rule and that will be unconstitutional. So instead, what the act contains is what's called a conditional preemption regime which says that states have a choice. Either you establish an exchange under our orders and in accordance with our desires, or else we will stroll into your state and do it for you. And I think it's great that 18 states or something like that have said "Come on in, let's go." Many of those states, by the way, have also said no to the Medicaid expansion. If you want to do this you, the Federal Government, will take responsibility for the inevitable failure of these regimes. If you want to build this contraption, build it on your own. There are, of course, the usual voices that say, "Oh, come on now, this is destructive of Federalism and it's destructive of health care," and I don't think that's true at all. I think the Federal law, the exchanges, this convoluted structure will crater with or without the state's cooperation. But that's neither here nor there. What matters is the state's insistence on letting the Feds take full responsibility for whatever transpires from this travesty. And that, to my mind, is the states' and federalism's finest moment.

MR. RAUCH: Thank you, Michael.

Let's clarify a little bit the policy implications of what you're saying.

So we have this peculiar situation where Federal law is supreme, but states have the enforcement clout. I gather, although you're quite indirect and hard to read, that you're not a fan of state-Federal partnership. (Laughter) We get that impression. So a lot of the conventional wisdom here is about, well, the Federal Government and the states have got to work something out. It's the

only way to make this work going forward. If in your view they shouldn't work something out, something's got to give, right? Either the Federal law just doesn't get enforced and states *de facto* are in charge, and then it's, what, somebody bar the "Katie bar" the door? Or the Federal Government really does try to enforce and hire all the agents and step in which do you support either of those outcomes or some third that I haven't mentioned?

MR. GREVE: I have no view of the sort of policy implications at all.

MR. RAUCH: I'm not asking about marijuana. I'm asking about --

MR. GREVE: Right. Bring it on. Let the Feds come in.

MR. RAUCH: So the states should do what the states do?

MR. GREVE: Absolutely.

MR. RAUCH: And the Feds, if they want to deal with it can deal with it. If not, then the states will effectively have called the Federal Government's bluff?

MR. GREVE: Yep.

MR. RAUCH: That's accountability.

MR. GREVE: There you go.

MR. RAUCH: Well, Troy Eid, a very important question came up there. We'll hear a lot more about that in the next few months. Spillovers, how you deal with all the messiness coming out of that. Help us understand the choices that law enforcement and the Obama administration makes and how you think they ought to deal with this.

MR. EID: Well, Jonathan, it's good to be here and I want to thank Brookings, and I appreciate being here with Angela and Michael.

This whole thing reminds me of the story -- and I'm just a country lawyer from Colorado -- but the story of the guy who prayed to win the lottery ticket. I mean, he just wanted to win this lottery over and over again and he was constantly asking the Lord, you know, "Would you help me? Would you help me? I've lived a good life, I've never asked you for very much." And years went by. He never won the lottery. Finally, he's down on his knees. "Help me, Lord. I need this money so badly." And finally, the clouds part and a voice comes down from haven. "Saul, Saul, why don't you meet me halfway and just buy a ticket." (Laughter)

And you know, Colorado and Washington just bought a ticket. They bought a ticket to this lottery, and now we have to figure out is this the kind of lottery that's going to be good or bad, or if you don't like lotteries, and I respect that some people don't like them at all, can this be a less bad lottery than it might otherwise be? And think about the winners and losers if you will, because when you design a lottery in the states or anywhere else, you are thinking about a world where you're maximizing public benefits or you're minimizing the untoward effects of the behavior. You might say it's all bad but you might also say, you know, this is an imperfect world; we need the money, we're going to have some payouts. we're going to make some people very, very rich by the way, but we're also going to try to maximize some sort of social value.

So who are the winners potentially and the losers? I know it's too

soon to tell, so take it with a grain of salt. But the big losers here, if they don't step up, is Congress. If ever there were an issue that Congress ought to address it's the marijuana conundrum that we find ourselves confronting. And I say that knowing that I'm in D.C. and everyone will probably say, "Well, you know, there are so many important issues here: the budget crisis, the manufactured fiscal cliff that we all went through, the charade of the fiscal cliff." We'll create a crisis and then we'll somehow save the day through partisan sniping back and forth. I mean, this is a real issue. We need some guidance on this, folks. And Congress is the place to go. This is a democratic discussion to have, and we're having that discussion now at the state level in Colorado, and I applaud my friends for working on this issue. We're talking about all the implementation issues ranging from taxes and how do you, for example, set the right tax level. And have to do a separate vote in Colorado on taxes because thankfully in my state you can't raise taxes unless the people decide that you have a vote to raise them. The legislature can't do that unless we decide as voters, which is great by the way. I love that initiative. We're going to have a debate over this issue and we're going to have a proposed tax on marijuana in my state.

And if you set the tax too high you might have a lot more black market behavior, right? I mean, that's part of the issues that a democracy has to work through. And so why can't Congress be relevant? I mean, are we that cynical that we think they can't be relevant to take on an issue that is so important as this one? And where voters are voting with their feet. In eighteen states now medical marijuana has been approved, albeit there's a problem with

the U.S. criminal code. And now the two states, Colorado and Washington, but then you also have close votes in some other places as you know. Even Arkansas was moving toward some recognition of cannabis. So you're starting to see even in the Deep South there's a sense of some change going on here.

So Congress, number one, could be a loser but there's a chance for them to win. Representative De Getz, Diana DeGette, a Democrat in my state, has joined up with Republican Mike Coffman, and they have a state option bill: let the states opt out. Now, I realize there are a lot of problems with that but, you know, look back to FDR and the 1932 election. That's how he was finally able to merge the wets and the dries and get something accomplished here and begin to move our country towards some understanding of a contentious issue that has ultimately good and bad effects no matter how we sort it out.

So make Congress relevant if they dare to do it. And darn it all, demand that they do it because, what else are they doing, in all seriousness? What else are they doing to help us out in the trenches? The president wins no matter what. He's already won. He got more votes in Colorado, as George Soros said, because of the turnout from this amendment, which by the way dwarfed his own vote in my state which he won unexpectedly. But the president will be vague- he should be vague. The Justice Department, I served there, full disclosure, I hope they'll continue to be vague. They don't need to tell people how they're going to enforce the law. The laws are in the books. Let them have the discretion the Constitution provides. Quit whining about, "Oh, we need Eric Holder to tell us what to do." Stop it. We're Americans. We know they have

prosecutorial discretion. Congress can step up. Don't whine about the administration. This is ridiculous. The president has already won.

The states could win big. We have a robust debate in Colorado right now going on. I talked about taxes. We need to talk about issues like potency and consumer protection. What to do about young people. All these specifics are the product now of a debate that's going on with the governor's task force. A lot of good people from different parties. We'll make our way. You know, we can wait for the feds or we can actually stand up and do what we do, which is run our own lives. And we're going to do as much of it as we possibly can. And we'll see ultimately what happens with that. But states and federalism really could gain.

Federal law enforcement. My friends, I served with you. You win. You absolutely win. You're more important than ever because, regardless of how this marijuana discussion goes, we have tremendous drug issues that will come with it. There will be a black market. My friends in the DEA are going to have to take on that challenge as they do so effectively today; not just here but around the world. There are international implications. Look at Mexico. They're having a discussion now on marijuana decriminalization; much less popular, by the way, in terms of polls in Mexico than it is in the United States. But they've had so much carnage in that country. Sixty thousand dead by some estimates over the last six years. Twenty-five percent of what the cartels supposedly make in Mexico comes from selling marijuana to the United States.

So our friends in the DEA, those who support them elsewhere in



the Federal Government and law enforcement and those task forces that Michael talked about at the state and local level, they have plenty of work to do. They need our support. They're doing a great job. They'll be even more relevant in the future as they deal with the scourge of prescription drugs, which is a whole another matter we could talk about. When are we going to get serious, truly serious, about that threat and many other threats that we face?

And then finally, you know, as we look forward, the people. Do the people win or do the people lose? You know, one president said, and I have to quote this quote, "We cannot possibly imagine a successful form of government in which every individual citizen would have the right to interpret the Constitution according to his own convictions, beliefs, and prejudices; chaos would develop."

That was Dwight Eisenhower during the Little Rock School crisis. And you know, we have to recognize this tension between the need to uphold Federal law and make it relevant and on the other hand to recognize that people want change. And sometimes they're impatient for change and sometimes, in our society, there's a reason for them to be impatient for change. And so as we look forward, the best way to honor the Constitution is to have everyone do their jobs. We'll do the best we can at the state level. We could use some help. We know Congress could help us. They could help us today; I pray they will help us. They should do their job and they can set the law and we can begin to have a discussion about how to deal with this new lottery that we've all created. Thank you.

MR. RAUCH: Thank you, Troy.

Again, let's clarify a little bit what the options are here. Paint a couple of worlds for us. You wrote a very interesting article arguing that there's a need for congressional action. Walk us through why that's important. Give us briefly one world in which Congress essentially does nothing, remains preoccupied. When you say is it really possible that Congress would do nothing, stay gridlocked and preoccupy itself with harmful trivia all the time, I hope that was a rhetorical question.

MR. EID: Oh, of course. Please forgive me.

MR. RAUCH: But walk us through a world where Congress does nothing and we're relying on Federal prosecutorial discretion, policy set by the White House, possibly unset by the next White House. Compare that with a world where Congress steps up and acts in terms of the practical implications of each.

MR. EID: Well, it's a big question and just a very brief answer. Cops need clear rules, we expect that of them. They've got to be able to follow the law as they know it. They're not law professors and they shouldn't be. And we've got to be able to have some clear direction as to what to do. We've got now two states that are purported to opt out of the Federal criminal code. That's a problem. We've got the other states that are medical marijuana states that have in effect done the same thing and then we've seen enormous change by the way in medical marijuana. And my state, Colorado, we passed it in 2000. For a number of years it was very slow getting started and then suddenly, when

the state really announced that they were going to allow the regulation to proceed, let the dispensaries flourish, and the Feds did nothing. They really did nothing and I was there so I know. I was part of the doing nothing.

By the time we ended up, in the last four years leading up to the direction, or the election, rather, we had a tremendous increase in dispensaries. In Denver we had more dispensaries than Starbucks' heading into this election. We had a tremendous reduction in the age of the average user from an average of the mid '50s when the initiative was first passed in the year 2000, to 28 years old by the time of the election this past year. So basically what happens is that the states will be that they will be experimenting, just as Angela said. And unless we have some clear direction as to how this should develop, what we do in Colorado is going to drive and Washington will drive a lot of behaviors in a lot of other states. Surrounding states that don't want this, I mean, just as in Prohibition, they should be able to have their own laws and decide to not have it. But, you know, how do we expect the DEA and local drug control task forces to be able to contend with that kind of a problem? And internationally, we're going to be affecting both Canada and Mexico and other parts of the world. So we've got to get some direction.

MR. RAUCH: What is Congress's specific value added here?

MR. EID: Well, they could do two things. I mean, number one, they could definitely clarify as in the case of an opt-out that it's possible for states under certain conditions to go their own way but then there would have to be some national consideration of what these issues are that I just described.

The other thing is medical marijuana. It's about time that we did a pharmaceutical clinical trial; isn't it? I mean, we ought to actually have some exemption that lets those who are experts in scientific medicine determine what the values are, what the potency should be, and so on; what is the medical value, and be able to take it through a clinical trial if it has medicinal value and then how do you dispense it properly? Should it be dispensed through private businesses or should it be dispense through pharmacies, and so on, like we do with other medicine? We haven't had that discussion and we definitely need Congress to look at that issue as well.

MR. RAUCH: Michael, do you think there's a role for Congress?

MR. GREVE: I think that's a theoretical question because I think Congress is out of the ballgame on just about everything and has no intention to go back. There are a million issues under Dodd-Frank that it ought to revisit; a million issues under the Affordable Care Act that it ought to revisit. There's a million issues here, there, and everywhere, and the reality is we live in an executive state and Congress is impotent, and that's not going to change.

MR. RAUCH: So in practice, the world we live in is one in which this is going to be a policy made up by the states interacting with the White House and suing each other?

MR. GREVE: Yeah. Not suing each other, but in a very messy policy environment. And I just want to sort of add one thing to this, and I don't know whether Troy and I disagree on this. You see this more and more frequently that the administration, precisely because it knows that Congress

won't do anything, makes policy by official announcements of nonenforcement. So we're going to have our own *de facto* dream act which Congress refuses to enact by administrative nonenforcement. That's a very clear example of the dynamics here. And you might see the same thing in drug enforcement. We're not going to enforce it, period, because Congress won't enact a law to that effect. I find that sort of to go much beyond the ordinary exercise of administrative and executive discretion in law enforcement. It's policymaking by nonenforcement, which is, to my mind, in the teeth of Congressional statutes. To the contrary there are real policy difficulties with that but there are also real Constitutional problems with that. It's just sort of one more sign of dysfunction.

MR. RAUCH: It's not the way things were supposed to work.

Angela, if that's the environment we're talking about, in practice Congress stays out and you get a vacuum in which there's a lot of back-and-forth. Is that a stable enough environment to have the kind of experiments that need to happen?

MS. HAWKEN: I'm going to befriend experiments. I'm going to take Mike along for a second. He implied that essentially if you're pro-experimentation in this regard you have an agenda and you try to reach some objective. I'm not pro-legalization or anti-legalization; I'm pro-good public policy, and you can't make good public policy in an information vacuum, and we need these experiments.

As I mentioned earlier, I don't think we can have a good experiment in one year and then the Feds walk in. I think we need a long

enough timeline, and if it's going to be stable enough to give us the time to make these experiments be worth something, that's going to be another question. And I think the timeline priority is three or four years, especially with the major criminal justice reform like this. Nothing looks in year one and two the way it looks in year three and four.

You know, I'm not a lawyer but I, in a way, don't mind the wink and a nudge and saying, "Okay, we'll stay out of your backyard on the following conditions..." And I think there can be the non-enforcement subject to a long list of constraints subject to you minding your manners in other states; making sure this doesn't spill over into states that don't want it to come into. Make sure you're not promoting, make sure you keep your own use in check, make sure dependency is kept in check, make sure there are resources for people who do become dependent, and they will. So make sure your state is responding responsibly in this environment where we are still unclear what's going to happen. But give them a little time to figure it out.

MR. RAUCH: Yeah. And wait till they start putting appropriations riders on it.

Well, I have two pieces of good news for the audience. One for those of you who are still standing in the back and would like to take a load off your feet, we do have seats in the front. Come on in. The other piece of very good news is that I'm on the panel.

Before we go to questions I want to throw in a few comments of my own, because, as Monty Python once said, "Now for something completely

different.”

I’m going to bring in what seems to be a side issue, briefly. As Henry VIII said to Anne Boleyn, “I won’t be keeping you long.” But this is not a side issue.

I want to talk for just a minute about the lessons of what I think is perhaps one of the great public policy successes of the last 10 years, or at least public process successes, and that’s the gay marriage debate, which is a debate I know a lot about because from the day it started I’ve been advocating going through that as a state level issue and not nationalizing that issue. And it turns out to be surprisingly relevant here, and I just wanted to take a minute to get you all thinking about that and the lessons we learned from them.

Marijuana, gay marriage, what could these two things possibly have in common? Actually, a lot, both specifically and generally. Specifically, they are both very controversial moral issues, a point I’ll come back to. They break down heavily along generational lines. They’re both issues on which there was once a strong national consensus, which is now broken down. We see regional disparities between the more Libertarian West and the more judgmental South. We see rapidly changing public opinion on both gay marriage and marijuana. We’ve seen both of these issues in the last couple of years reaching a tipping point where just above 51 percent of the population calls for a policy change, and that’s new. They’re both being waged primarily through referendum, like it or not, through remote legislation. And they are, both in the United States and to a large extent in the world, completely untested policies that

the public is being asked to digest.

They are also similar in a broader sense which I'd like to point out, which is what they're also what I call "*de facto* social issues." A social issue is a moral values issue, right? It's an issue on which people are divided not along policy lines of, you know, should the tax rate be 35 percent or 25 percent, but along issues of right and wrong, good and evil. These are very difficult issues to compromise on as we know from the abortion debate which is the granddaddy of them because you're talking about fundamental values.

One of the changes that we've seen in politics in the past few years is that more and more issues that are not inherently social value issues are acting as if they were - immigration is one of those. That's become a law and order issue on the right. It could be an issue about how many green cards, how much border enforcement is cost effective. It's about our people obeying the law on one hand and on the other hand compassion and human rights.

Obamacare has also turned in many ways into a social issue. The right at least views it as a moral question about are we going to have a Socialist country or not. Not a health policy question.

Gay marriage is a social policy question. It's not just like, you know, can first cousins marry? It's fundamentally do you approve of homosexual conduct or not? What is your view of the Bible? What is your view of tradition? What is your view of human rights and equality? Things that are very hard to compromise on. And now marijuana, which I would argue also behaves as drug policy as well as a social policy issue; a social value issue to a large extent.



President Obama and the administration have said, you know, "We're going to deal with this as a legal issue. We're going to do what the law tells us." Unfortunately, as you've been hearing, the law isn't all together clear on this. There's going to be a lot of tussling over the law. Drug policy doesn't settle it handily either, partly because as Angela said what we're talking about is making decisions in a vacuum without having information yet.

How do you handle these very contentious social issues so that you can reach a point where the country reaches a stable, more or less, common sensible outcome without a 50 year culture war of the kind that we've seen on abortion.

Here's where I think gay marriage offers a very important lesson. It puts me, to some extent I suppose, in disagreement with Michael. I think it's been a complete success. Now, it's not a success if you're a gay person and you're a married gay person, as I am, and you're married in D.C., and every time you commute home to Virginia your marriage magically disappears. That's not satisfactory to us. It's equally unsatisfactory if you believe, as many Conservatives do, that we should have one national marriage policy against same sex marriage and you want a constitutional amendment to ban it. However, I would argue that this has, in fact, been a huge success for the country as a whole, for our politics, and indeed, for gay marriage, because it does four things very well.

First, the policy of delegation of the states which is -- I should have said clearly this is how we've handled gay marriage. Federal Government

has taken almost no action. It's all been done at the state level primarily. First, it adduces information. States have had a chance to try the policy to see what happens. We know whether the sky falls or not. We know whether divorce rates go up and down. What happens with kids and so on.

We're starting to get that information, which leads to the second. You're much better at managing risk if you don't have to bet the whole country up front on one outcome or the other. You manage risk more intelligently that way. That also allows, very important politically, for adaptation and flexibility. We don't have a national consensus on marriage, and we don't have a national consensus on marijuana. And my view, in fact, is we won't on either of those issues, have anything like an encompassing consensus any time soon, though I think we'll get there. In the meantime, you need a policy. You don't want to set in concrete a policy which time very quickly undermines because it's not sustained by public opinion. Delegating these matters to the states is a very good way to keep the policy at a level where it can adapt to changing public opinion as it has been doing on gay marriage.

Finally, delegating the policy gives you time to build a consensus. If the Supreme Court were to come in now and order same sex marriage, which is in fact before it this very term, it would preempt a national debate that I think has to happen about what is the right policy here. That debate has a long way to go and I have argued that gay people benefit very, very significantly from letting it unfold.

Marijuana, I think, is similar in all of those respects. I think that

from the point-of-view of wisdom set aside law, the Federal Government ought to view what the states are doing not as a threat, but as an opportunity. An opportunity first to adapt to changing public opinion without betting the whole country or putting all policy on an inflexible footing where ultimately it just crashes down because the people aren't with you anymore.

Second, a chance to find out what works and what doesn't work. Ask some of the questions that, Angela points out, we really need to get answers to if we're going to do this right. I think some of our allies in the prosecution of the drug war overseas would also love to see us develop a sustainable and workable policy.

Third, not least important, launch a discussion that's been frozen in amber for now 20 or 30 years by the Federal drug war over what exactly marijuana policy and drug policy should look like. This is an opportunity to start that debate and it would be a pity if we don't have it.

Having said all that, it is important to note a distinction between the gay marriage debate and the marijuana debate. It was easy for gay marriage. Marriage has been a state level issue since actually before the time of the Constitution; going back to Colonial days, marriage was state issued. That's made it very easy and natural for the Federal Government to step back and just let states go their separate ways. Hasn't made it politically uncontroversial but it's made it natural.

On drug policy, the Federal Government has been the primary actor for what, a century now, remains the primary actor, and it would be a real

change of direction and not a natural thing at all for the Federal Government to say "You know what, we're going to see this territory to state level experimentation." That in itself would be a major shift in direction, and not a particularly easy one to perform.

So with that as a caveat, we've got, what, 35 minutes. We've got some extraordinary people in the audience. If the RSVP list is any guide, we have representatives of foreign governments that are very directly involved in drug enforcement. We've got people from the Drug Enforcement Administration, we've got the White House Office of Drug Control Policy. We may have others judging from the RSVP list. So let's go to all of you.

We have on microphone -- oh, by the way, I'm sorry, I forgot to mention, we also have a Twitter hashtag. The Twitter hashtag is #BIMJ, that stands for Brookings Institution Marijuana, in case you're wondering. If you tweet us a question, it will be brought to me if it's any good at all, and we'll get it into the discussion; if it's not a good question, don't bother.

So there's a roving mic, and let's see who will break the ice.

I cannot resist a man who raises a cowboy hat in order to ask his question.

Let's go first to the cowboy.

MR. WOOLDRIDGE: Thank you. Howard Wooldridge, co-founder of LEAP, Law Enforcement against Prohibition. I'm concerned with this panel and the one before I saw in October and the lack of discussion on public safety. From my perspective, 18 years as street cop, marijuana prohibition

reduces greatly public safety. A couple years ago there was a Senate hearing. Two hundred thousand children live in the home of a sexually abusive parent or guardian, because my profession is only arresting two percent of the people who have child cyber porn in their home.

As a police officer, I know we spend about 10 million hours to arrest about 800,000 people for marijuana. What is never captured in the statistics is when we're searching in a car and there's no marijuana found, it's not captured with statistics, you know, nationally, so we're spending millions and millions of hours chasing this green plant. We're flying around in helicopters as opposed to catching the pedophiles in a chat room, for example. And during my 18 years, I went to zero. Zero calls for service generated by the use of marijuana. Alcohol use generated about 1,300, including homicide, suicide, rape, child abuse, et cetera.

One of the things I would like the panel to discuss is are you talking to street level cops, especially those who have no skin in the game? They're retired, they're not trying to protect a hide-a-grant, a burn grant, good overtime, et cetera, to determine how much police resources are put into cashing a green plant.

MR. RAUCH: Very good. Why don't we take a couple since we've got a mic in the vicinity. There was a gentleman in the row behind you on the aisle, I think.

SPEAKER: Thank you. I'm from one of those governments that you mentioned; the Netherlands.

MR. RAUCH: I think the context was even the Netherlands.

SPEAKER: I was going to say that the United States is rapidly becoming a more liberal country than the Netherlands on issues such as gay marriage but also as legalizing marijuana, because we only decriminalize it and not legalize it as was rightly mentioned. But I would like the panel to address the international implications a little more, when the Federal Government would decide to leave these states, leave the acts in the states in the books because it's a clear violation of international obligations by the United States. They ratified several treaties which don't allow for legalization in any way of marijuana. If the United States decides not to enforce these acts and these international obligations, what would the effects abroad be? You've always asked other countries to obey by these international treaties. If you stop doing that yourself, could that mean that eventually other countries that produce the drugs decide not to live up to their treaty obligations and what kind of effect would that have? So I'd like you to address that. Thank you.

MR. RAUCH: Yes, thank you. Why don't we do those two? Actually, I was hoping that you would tell us how this affects our obligation.

Who wants to talk about resource diversion? Any comments there? Should we take that?

MR. EID: You know, I would just say in terms of cops on the street, I appreciate the point of view. In Colorado, I think our debate is relevant to what you're saying. Number one, the main issue that we have is to determine when someone is driving while under the influence of drugs or DUID, what is that

standard going to be and how are we going to test people in a way that complies with their civil rights but, of course, has that overriding effect of addressing public safety? We had a lot of testimony. We had a lot of speaking out pro and con from law enforcement throughout that campaign in Colorado about public safety implications and whether moving toward legalization was better or worse than the status quo. You know, I appreciate your point. I would tell you as someone who has worked a lot of my own career in law enforcement in prosecution, there's disagreement. I mean, I've heard passionate disagreement on this issue from a lot of people I respect.

Well, one thing we have to do now is come up with a standard that will protect people who come and visit our state and drive on the roads so that people know that there's going to be a safe system for them, and we're not sure yet how to do that. Our legislature has that as job one now in the new session that starts this next week in Colorado, and I think your point of view, your input would be really valuable in our state.

MR. RAUCH: You were against legalization in Colorado; is that right?

MR. EID: Yeah. I mean, I hope everyone knows I was opposed to it. I also publicly predicted it wouldn't pass, so my credibility is nil. (Laughter)

MS. HAWKEN: Well, I have to say I supported it and I predicted it would pass.

Following on the law enforcement comment again, I think as a researcher I hate to say this, but this is why we want experiments. From these

experiments we can figure out if resource allocation makes a difference. And I speak to cops all the time and they are completely divided on that issue. Some believe the sky will fall and others believe this is the beginning of a new era where we can smartly allocate our resources and we'll see a reduction in crime. I don't know how that's going to shake loose because I'm not an advocate and I'd like to see the data before I make up my mind. And give us a couple of years.

MR. RAUCH: And it's not clear it shakes out the same way in every jurisdiction; right?

MS. HAWKEN: No.

MR. RAUCH: Different places could handle this quite differently.

MR. EID: That's right.

MR. RAUCH: How about international? This is a tough one, right? Because there's no easy answer on this. It's already the case that the states and the Federal Government are at different places on this issue. Nothing changes any time in the future unless we can imagine a world where public opinion swings back and we go back to a single 50-state policy. So what do we do about international obligations in that context?

MR. EID: Well, this is another example as to why you can't just let the states do their own thing with no Congressional leadership here. You're going to have to consider issues like the gentleman from the Netherlands said. And if you just stand back, and this, with all due respect, is different from gay marriage, it's not a crime to marry somebody. Some states won't recognize it but nobody is criminalizing that. And this is why Congress has got to lead. We live



in this netherworld now where you've got law enforcement resources in the tens of millions devoted to a policy that states have said we want no part of. We have got to get some leadership, and internationally this is key. We're going to be affecting the Netherlands and affecting a lot of other places. We have obligations that those of us in the state, whether we voted for it or against it, we did not consider that. I just want to say with all due respect to my fellow Coloradans, I don't think anybody thought about the Netherlands when we voted either up or down on this thing. (Laughter)

MR. RAUCH: Sorry. What if Michael Greve is right and Congress isn't stepping in? What happens with these international --

MR. EID: He's usually right in my experience.

MR. RAUCH: Yeah. Unfortunately, in this case he probably is. So what happens?

MR. GREVE: Well, I don't know the specifics of the treaties at issue, right? But this is, in fact, another one of these sorts of Federalism issues that you mentioned at the beginning that will come to the forefront. Our international obligations by and large don't bind the states. This is true of our counselor obligations even and it is true in this regard, too. That is to say if we, the United States, bind ourselves internationally not to decriminalize marijuana, they'll bind the Federal Government but the state governments are the state governments and the answer to foreign countries. Unless there is something in the treaties that we committed to, the answer is sorry.

MS. HAWKEN: I think this is an uncomfortable issue for the

United States. I think we spend so much time wagging our fingers at other countries that violate treaties, international treaties, so I think this is going to be an uncomfortable issue for the United States.

There is some chatter and I might have to have some help from the audience getting the countries right. So the 1972 treaty binds 184 countries and there is precedent now. I think there might be of one -- was it a Latin American country -- that denounced the resolutions and then they immediately reiterated a reservation about cocoa?

SPEAKER: Bolivia and cocoa leaf.

MS. HAWKEN: Bolivia and cocoa leaf. So there is some precedent if that goes through and there's no objection to that that the U.S. could -- is it not going to happen?

SPEAKER: The U.S. has objected but it will go through.

MS. HAWKEN: What could happen is the U.S. could essentially do the same thing: could denounced that resolution and immediately re-ratify with the reservation about marijuana. So there is some -- it's not as though we're in completely unchartered territory; yes.

MR. RAUCH: Let's take -- yes, let's take a couple of more. Do we have a mic? Oh, Twitter hashtag reminder for those of you out there in Twitterland, #BIMJ.

Let's go to -- there's a gentleman in the very, very back. Let's be democratic. Thank you. Yes.

MR. STROMBERG: My name is Drew Stromberg with Students

for Sensible Drug Policy. My question is for Mr. Eid. First off, thank you so much for your comments today. I commend you for taking a pragmatic approach here.

I was wondering if you would clarify what your ideal kind of congressional solution to this would be because it sounds like you're advocating for more of the way that the Federal Government regulates alcohol, which leaves it up to the states. Is that correct?

MR. EID: I think that's a fair statement. And just very briefly, I like the concept of an opt-out bill. As I mentioned, Representative Diana DeGette has one. I think that's a good approach. There should be some minimal requirements though with that I think. We need protections for young people. You've got to have a workable standard for DUID. We're going to have to respect whatever national agreements are in place and so on. But yeah, that's the approach I would take. I'm not troubled by the fact that some states might decide to go in a different direction on this issue. And to be real clear, while I oppose Amendment 64 in Colorado, you know, my position is that Congress should be doing this. I have written elsewhere and talked elsewhere. Congress needs to have this discussion now and start stepping up to the plate, reflect the changing attitudes that many people have on this issue, figure out what to do about drug abuse and so on as they go, but come up with some political compromise that reflects reality in a way that we do not I think today in our national public policy.

MR. RAUCH: Thank you.

Let's take -- do we have a microphone anywhere closer to the

front? Let's -- why don't we come up front here and knock off -- we've got Garrett Mitchell. We've got a gentleman in a red tie. We'll take three. Also, the gentleman with his two fingers up.

MR. MITCHELL: Thanks very much. I'm Garrett Mitchell and I write the *Mitchell Report*. And I want to ask a question that follows, in a sense, from the first one that was asked about law enforcement's perspectives. And I'll direct it to Troy but if others can comment, that's great, too.

In the hearings and the conversation in Colorado around the legalization, what were the perspectives that you heard from the sort of public health/social services community on this issue?

MR. EID: Well, Mr. Mitchell, that's a great question.

MR. RAUCH: Let's round up a few.

MR. EID: It really is.

MR. RAUCH: The gentleman in the red tie.

SPEAKER: I'm an economist, which means I'm in favor of more liberal drug policies. At least, I'm not aware of any economist who isn't. I'm also a retired CI analyst, which means I don't use any illegal drugs myself. But I got interested in marijuana policy 40 years ago in grad school. I was persuaded by the argument that it's less dangerous than alcohol or tobacco which is something Professor Hawken and all of her co-authors agree on. It was also a time when there were major marijuana commissions in the U.S. and several other countries, all of which recommended more liberal policies, and only the Netherlands followed the advice of its drug experts. And in the U.S., we still can't get

marijuana out of Schedule 1 of the Controlled Substances Act, even though it clearly doesn't meet any of the three criteria for being in Schedule 1.

So my question is how is drug policy so immune to common sense?

(Laughter)

MR. EID: Good luck on that.

MR. RAUCH: All right. There was a gentleman here.

MR. TOOMEY: Thank you. I'm Francisco Toomey, I'm a Colombian-American economist also. For 25 years I studied illegal drugs in Latin America and a year ago I was nominated and I was elected. I'm one of the 13 members of the United Nations International Narcotics Control Board.

When you say it's true that the United States doesn't have to comply with international treaties, the problem internationally, is that the international drug control regime is our creation. It was created by the United States. So internationally, this is going to have great repercussions. I don't know exactly what it will have but this is not neutral. In the words, can the United States simply say "Tough luck?" We are going to have to confront today Japan, Russia and Sweden, for example, who are perhaps the three most aggressive prohibitionists now globally. In Latin America, in three days, on the 12<sup>th</sup>, that's the deadline for the vote on the readmission of Bolivia who is supplying to make legal cocoa. So five days ago, as of the 5<sup>th</sup>, there were five countries that objected formally" the United States, the United Kingdom, Canada, Italy, and Sweden. So what we see is a contradiction in policies, and from the Latin

American point of view what we see simply is what Latin America calls the “double morals” of the United States. And that is going to have consequences in terms of, not only on the war on drugs in Latin America, but the credibility of American policies. So what we’re doing in Colorado and Washington is not just domestic policy, it’s American international policy.

MR. RAUCH: Thank you. I think we can take two of those as comments rather than questions unless you all have something to add. But the first one, in terms of the public health perspectives in Colorado, there was a clear question.

MR. EID: Yeah. Just very briefly, Mr. Mitchell, and I apologize for jumping the gun, I’d just say that we didn’t have that debate. And the reason we didn’t, and Angela mentioned this, this was an initiative. There were no hearings. We have something called the title board where you have to frame your question that people vote on, but that’s it. And so to answer your question, we really did not have a discussion on public health benefits.

Now, I have read a lot of this literature and I commend Angela for her good work in this area, but we don’t know about marijuana in terms of its medical benefits. Everyone here needs to admit that. Once it goes through a pharmaceutical trial and we actually have the FDA go through all the tests, then we’ll know, and we’ll know how to dispense it and when to use it. But this idea that we somehow know so much more about it, that we know about alcohol and we can come them, is false. We do not know. We have got to figure it out though. We have an obligation now. We have tens of thousands of people in my

state with medical cards that get medicine from places like the boulevard, not far from where we live, with a guy with a sandwich board jumping up and down saying "Prescriptions, no doctor required!" I mean, that's the world we live in. The hypocrisy of this world that we live in where we don't trust medicine and science to help us figure out what the answer should be.

MR. RAUCH: And that's to go to a point you made earlier. That's a process that takes years, if not decades, understanding public health ramifications; right? So we're just at the very beginning of a very long road here.

MR. GREVE: Can I just --

MR. RAUCH: Yeah.

MR. GREVE: I propose something both of you said. I'm not against experimentation. I'm actually vehemently in favor of it, right? My point was simply on an earlier occasion, it is fiendishly difficult to stabilize it. So to take the gay marriage example, I totally agree with you. So far this process has worked tolerably well, right? But it is also the case that we may not get enough time to run actual experiments because, you know, half of the Gay Rights community, understandably enough, runs around with the Equal Protection Clause and the Due Process Clause in their hip pockets. And if it doesn't go fast enough, then they're going to jump the gun on this, right? And you have the problem that it isn't totally similar in the marijuana situation, but I agree with you. I mean, you need some comparators, some states that don't go down that road, right? And you don't want a process that sort of willy-nilly overwhelms the country and where states that might be holdouts then say, you know, it's not

worth the trouble. The enforcement costs are too high. Whatever. And so that's my point: how hard it is to stabilize compartmentalized policy solutions.

MR. RAUCH: Stability is asking for a lot. Pacing is the issue there. Getting this haste in a way that lets you unfold it. What's happened on gay marriage, which is really interesting, is although I think nine states now have legalized it, a much larger number of states amended their constitutions to forbid it, and the end result of that, although, you know, people in the debate feel strongly one way or the other, an end result of that is to wall off a certain number of states or it's going to be very hard to run the experiment at a very rapid pace unless the Supreme Court decides to. And it would be interesting, wouldn't it, if some states decided to pass constitutional amendments saying marijuana is illegal here and you can't change that by initiative or referendum without changing the constitution first.

MR. GREVE: Yeah, that's true.

MR. RAUCH: Something like that might even happen, I don't know. I wouldn't put it past it.

To the gentleman who asked the question about why is it the drug policy is immune to common sense, I'll field that one. My favorite quotation about politics from the late representative Jimmy Burke of Massachusetts years ago said, "The problem with some people is, they think this place is on the level." I only ask that people bear that in mind.

Let's go back to some more of these comments. It looks like most are in the back. We've got three hands up. Do you think we can get all three of



those? Keep your hands up until the mic reaches, you if you don't mind.

MR. CHATTERJEE: My name is Samar Chatterjee from SAFE Foundation.

MR. RAUCH: What's SAFE Foundation?

MR. CHATTERJEE: I would like to point out that my comment or question is regarding the international implications, and I'm glad the gentleman from the Netherlands did point out -- now, I come from a country called India where most people believe that the U.S. plays "Heads I win, tails you lose," or "Might is right," generally. And therefore, it doesn't really follow any international laws itself but forces others through blackmail or bribery to follow them. Given that, it will be good that if this regime breaks down because a lot of countries can go the way they think it is right and do it the way, and I would like to know if that is acceptable to the United States.

MR. RAUCH: Very interesting question. Thank you.

What is SAFE by the way?

SPEAKER: It is attempting to make the world safe, even though it's getting worse.

MR. RAUCH: We had a couple others back there.

MR. DONLAN: Tom Donlan from *Barron's Magazine*. And when you started talking about winners and losers, I was hoping you were going to follow them money.

As this trend plays out will, for example, illegal narco-traffickers convert themselves into profit-making legal narco-traffickers? Will the states be

able to tax the trade enough to make it profitable for the states to want to change for fiscal reasons? Other issues like that, could you address them? I don't even know what they all might be but I'm sure you've given it a good deal of thought.

Thanks.

MR. RAUCH: We had one more in the back I think. Is that person still --

MR. BORDEN: Yes. David Borden with StoptheDrugWar.org. A question for Mr. Eid. Sorry if I mispronounced that.

You commented earlier that you don't think that DOJ should publicly announce a policy toward the marijuana initiatives. I presume you polled that view with regard to medical marijuana also. My question for you as a former DOJ official is, what do you feel should be the internally understood policy if there should be any? And is it possible for there to be a policy or understanding internally that does not ultimately become a matter of public record?

MR. RAUCH: Why don't you start by answering that one.

MR. EID: Well, I'll just answer in reverse order, if I may.

The policy that the DOJ should follow is the law and the U.S. criminal code is what it is. And that's really my answer to you. You have to understand that it is the executive branch's role to faithfully execute these laws, but the fundamental issue is: are we going to allow this or not? And, you know, that's a question fundamental in our democracy I would argue for Congress and not for some appointed official in the executive branch to decide who is not accountable really to anybody other than ultimately, I suppose, the president of

the United States but not accountable to an electorate.

You know, with respect to the gentleman from Barons, you know, I would just say to you that it's an interesting question that you pose, and I was wondering if you could restate it a little bit because I'm not entirely sure that I got all the nuances of it.

MR. RAUCH: Let me take a shot at that. We're going to see, as a result of legalization, all kinds of changes in the drug market potentially. What will those look like? Will illegal money convert to legal operations?

MR. EID: And then enforcement issues, right?

MR. RAUCH: And then enforcement issues.

MR. EID: I think that's a great question, sir. And I would just -- I guess I'd say this. In 1984, the Congress tried to take on the issues of what we now know as the cartels and so on. That was the Drug Control Act of '84. And the idea was we're going to spend our drug resources, enforcement resources, really focused on the big fish. We're going to go after the organizations that actually cause violent crime and that's really going to be our focus. And that is our national policy. I think it's a great policy for us to pursue and it's the mission of the DEA and other agencies that support that effort, including these task forces that were discussed.

And by the way, we'd have nothing in this country without the task forces. No offense to Michael, but, I mean, on the ground. That's what we do. We don't have roving bands of DEA agents everywhere. They're strapped to the hilt and there aren't too many of them. They do a great job but you've got to use

the locals and their expertise and their resources to be able to accomplish anything in terms of dealing with the Drug Control Act priorities of getting organized crime as your main target.

I think that this is why we also need leadership at the federal level. We'll have some experiments. We'll have some data perhaps depending upon how the Feds treat what happens in Washington and Colorado, but we'll eventually have some taxes in place, right? And Washington, of course, has a self-executing tax, 25 percent. A lot of commentators already said that's too high; we're going to see illegal activity. The bottom-line is that law enforcement is going to be dealing with the same kinds of organizations they are now. The experience in Colorado in that regard is illustrative.

Now, I know this is controversial, but I'll just say it: DEA did an analysis in my state of the medical marijuana industry and it is an industry. We have thousands of dispensaries now in my state, and the analysis showed, as was publicly released in 2009, that well over half of all the folks who were involved in dispensaries at that time had prior criminal convictions for serious felonies. And, you know, that was quite explosive when that news leaked out of got out, eventually was disclosed and the media picked up on it. Could folks who had been involved in criminal activity convert themselves into medical caregivers? That is essentially what we're talking about. And the answer is emphatically yes, they do. And we will see that happen now.

So what we're going to have to safeguard, one of the things that is essential nationally is we're going to have a lot of folks who are really good at

drug distribution and understand this industry much better than the mom and pop operators or the privateer hedge fund out in Silicon Valley. They're going to now be focusing on how do we capture as much of this market as possible. This is going to be a tough time for the DEA, for those who support the Justice Department in those operations. So we have got to have a debate about what happens in terms of crime.

The bottom-line is that there is a sense that this will make violent crime go down. I pray that that's true but I'm not at all convinced because until these externalities are addressed, you know, we really won't know. And we know that a lot of the folks that are already in the medical marijuana business -- and I'm sorry, there are law abiding people there, too, except they don't follow federal law in one area -- but those industries have, as we've seen in the 18 states, a lot of folk who are "bad guys" and that's just who they are.

MR. RAUCH: Michael.

MR. GREVE: Can I just ask Troy two questions that maybe seem paranoid, but suppose there are local officials that assist the dispensaries or whatever they're called in these states in sort of setting up these things and how to stay clear of state law prohibitions. Is that aiding and abetting under Federal law? Along the same lines or similar lines, and this just shows that I'm a paranoid Libertarian, suppose these dispensaries and, you know, legitimate enterprises under state law put their money, their business accounts, with some bank. Could the Treasury then come along and say, "Tell you what. You're in violation of 15 federal laws, aiding and abetting criminal enterprises, but if you

buy the next Countrywide we'll make it go away?"

MR. EID: I think the answer is yes and yes. (Laughter)

MR. GREVE: I feared that might be the answer.

MR. EID: No, I mean, those are great points. And this is an issue for us in Colorado now as it's been through the whole medical marijuana experience. What do you do with state officials? We have a whole division in our State Department of Revenue that does marijuana enforcement. That's what they do. I have a high school buddy who is in that division and, you know, she used to be a state trooper and now she's enforcing states' laws that regulate marijuana. She used to do what we call "road kill operations," and she'd seize cars and so on that had marijuana. Now she's actually enabling this because that's what our law requires. Now, of course, federal law doesn't require any of it, so is that aiding and abetting? I don't know. I actually did a case survey and I looked. I've not seen a single Federal prosecution against a state official for doing this, so in a way this gets to the point you raised earlier about these *de facto* policies which I think rob us of our liberty through, you know, discretion that frankly is not rule of law discretion.

MR. RAUCH: I'm guessing a lot of this will be decided by the courts in due course.

MR. GREVE: I think that that's true.

MR. RAUCH: Do we know anything about -- anything at all about likely affects on the market of these kinds of legalizations, the drug market?

MS. HAWKEN: Well, we know that prices will fall and people will

be using more. And we don't know how that will spill over into other behaviors. If they use more and drink more there will be more crime, and if they use more and drink less there will likely be less of it.

Prices will go down. What that means in general -- to what extent, there's been a lot of exaggeration about price levels and tax rates and what we can expect I think on all sides. And who knows, again, we need the experiments to know where this is going to shake loose.

MR. RAUCH: The gentleman in the back made an interesting point, which is so what if treaties fall apart. Maybe Federalism is good at the national level. Maybe it's good at the international level as well. Any thoughts?

MR. EID: Well, you caught us by surprise on that one. That's a tough one. You know, I appreciate the gentleman from the United Nations and so on. I mean, I love my country but ... and the gentleman from SAFE.

You know, we're not out to try to do something bad, we're just focused on ourselves and that's what we were doing when we tackle this issue. So I'm really sorry that other people suffer. We're going to make a lot more foreign policy, too, if we don't get some leadership out of Washington soon that's relevant to actually the people who live, you know, in flyover territory. We'll make a lot more policies like immigration policies as well. Eventually, as we've seen through gay marriage, we'll solve that issue. That will be addressed eventually regardless of what Congress ultimately decides to do. And that's what's going to happen in marijuana.

MR. RAUCH: Michael.

MR. GREVE: I completely agree with that. Look, the constitutional issues which I meant to speak to are one thing, an attitude of “go fly a kite,” you know, displayed on an international scale is a completely different matter. I’m totally against it. All I meant to suggest is that the international treaty obligations don’t confer any rights on the United States government vis-à-vis the states that it would not otherwise have.

MS. HAWKEN: The entire world looks to the United States for leadership on these issues, too, and this could be seen as an opportunity to lead, you know, if the United States acts with some humility in this regard. Two of our states have gone a little wild and we’d like to see what goes on and we’re going to wait, give them a little chance to figure that out, and learn. And we’ll share with you what we learn. And that might allow other countries to start thinking it’s okay to learn, too.

MR. EID: That would require a fairly explicit policy statement by the United States as opposed to an improvisatory approach, so we get back to an earlier tension.

We’ve got about four minutes left and five or six questions. Do you guys want to do a lightning round? Just spit one out. We don’t know if we’ll get to them all but let’s put them all on the table. Let’s do this cluster right here.

MR. FOX: Yeah. I’ll try to make it lightning. My name is Steve Fox. I’m with the Marijuana Policy Project and was one of the lead drafters of the initiative in Colorado. First, hi, Troy. How are you?

MR. EID: Good to see you.



MR. FOX: I just want to address Troy first, very quickly, just what you said about the 2009 --

MR. EID: How bad was it?

MR. FOX: -- policymakers here. Well, it was just outdated. The law that was passed in 2010 mandated background checks for owners of dispensaries, so the owners now are completely felony free and legitimate and we just want policymakers in D.C. to know that.

And that leads into my question that I'll pose, is about the process. And the Obama administration has not attempted to meet with the drafters of the initiative or really any stakeholders in Colorado or Washington and wonder whether you think that's an appropriate way to determine or settle the state federal conflict.

MR. RAUCH: They've been a bit busy lately.

Any others here? The gentleman here. Let's make them quick. If you don't mind, just spit it out.

MR. FRANKLIN: Neil Franklin, director of Law Enforcement against Prohibition.

We hear a lot about leadership. Again, Steve also mentioned something about leadership and special markets. And she talked about how we have an impotent Congress; no leadership there. This is an opportunity for the president, and what is the president's latitude? You know, I know the executive branch, enforcing the laws, but what is the president's latitude and what can he do? What can the White House do? And what should he do? And I'm hoping

these answers get to him.

MR. RAUCH: Let's go to the gentleman with the beard. We also have a couple tweets, right?

MR. SCOTT: Hi. My name is Dillon Scott. I'm with *Governing Magazine*.

I wanted to get back to just the broader federalism issue, which I've talked to several people who have said, much as Jonathan did, that between gay marriage, the Affordable Care Act, and marijuana, we're kind of redefining federalism in a lot of ways or we could be. And so I wanted to just kind of ask you guys - and I know this is sort of intentionally vague but, you know - what are the potential ramifications for our system of government depending on how these various debates play out?

MR. RAUCH: I love how we save the little questions for the end.  
(Laughter)

Let's do a Twitter question.

SPEAKER: Yeah. We've got one from Twitter. Ashley Carey from L.A. is asking how many marijuana states require grading and all encompassing standards for dispensaries statewide and how important is that?

MR. RAUCH: That is how many states grade dispensaries.

So we have 30 seconds. We're not going to be able to give an answer on how we're redefining federalism as a whole but let's come back to that as a lightning round answer of our own. No meeting with the drafters. I'm just going to rule that we don't know why they haven't done that and probably it's not

our place to say if that's a good or bad idea. How much leeway does the administration have to make policy without legislation is a big question. And how does this redefine federalism is another big question.

Let's take both of those two. It's a good opportunity for parting thoughts on what the stakes are here.

MS. HAWKEN: I think no word from Washington, D.C., is just unfair for the states. But having to make major decisions now, the infrastructure of building these systems is expensive to do. They need some idea of what their futures look like and opportunity in a complete vacuum of what Washington's likely response is going to be I think is just unfair. So I'd like to see something out of Washington. What form it takes, I don't know. These men are smarter and know more about this than I do. But how about just a memo that says, you know, this is what we think right now. You know, we're not going to come after you if you do the following kinds of things. These are the things we do care about. This is where we're going to give you a free ride. We're going to give you a little time to figure it out. And then we could do it.

MR. GREVE: I want to add one item to Jonathan's list of policies that have become conflictual or social, as you've mentioned, and have a powerful federalism dimension and that's right to work, which is huge in a lot of ways. And I think you'll be seeing two things over the coming years in American Federalism. One is the states will split on more and more of these issues along sectional lines; right? And second, among some of the states and the federal government and the other states' relations will become more conflictual and I believe that's all

to the good.

MR. RAUCH: Will we see just a complete hodgepodge of different coalitions on different issues or are we seeing a pattern?

MR. GREVE: No. If you look at most of the issues, I don't know, I haven't followed the marijuana thing, but if you look at labor, the environment which is playing out that way, a variety of social and cultural issues, it's always -- and importantly health care which you mentioned -- it's always the same coalitions. There is certain stability there and a huge overlap, and I think that's a terrific thing.

MR. RAUCH: That's very interesting. So what we're seeing is part of this larger process of a kind of --

MR. GREVE: I think so.

MR. RAUCH: -- reallocation, both within the states as well as between states and Federal Government.

Troy, how much leeway does the Obama administration have? You gave an answer which I hear people say which I don't find very satisfactory which is, look, just enforce the Controlled Substances Act. Well, that would be fine if you had two million DEA agents instead of the number you do have, but they have to make some hard choices, right? How much room does the law give them to maneuver?

MR. EID: Well, they'll maneuver as best they can. I mean, I think that what all this shows is that federalism is alive and well. The real action is at the states. We kind of laundered this concept of -- states' rights is a very

tarnished concept in our country for obvious reasons but even the term now is coming to be embraced by a newer generation as something that's positive because you see these controversial social issues as you identify them. They're being addressed at the state level and that's a good thing that's happening here.

The final thing I would say is that, you know, it's easy when you're a middle aged man like me to brew about, oh, my gosh, the rule of law; what are we going to do? But, you know, we've had a lot worse moments than this. You know, we've been through some very tough times as a country. Getting young people involved in the process the way that has happened in my state and other places, it's wonderful to see it happen and I'm very excited about the fact that more people are engaged. I don't agree with all of it but I think the debate is going to be much better, and eventually, I think it will force Congress to become relevant again which will save us.

MR. RAUCH: That would be interesting, wouldn't it? A nice thought. An uplifting thought on which to end is to remember that the Constitution is a mechanism designed to force conflict between actors in and levels of government on an ongoing basis. That's the founder's vision for how you retail flexibility and dynamism in a changing world. And here at Brookings we're so used to panels bemoaning the process, failing, and not working. It's nice to be able to end on a note saying, actually, this is kind of like what the founders thought they were setting up, this kind of tug-of-war.

Thank you all very much for coming. This debate isn't over so come back for the next round and the round after.

(Applause)

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