

Document: SCOTUS Confronted With Racist and Discriminatory Histor...

SCOTUS Confronted With Racist and Discriminatory History of Cannabis Criminalization

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Body

In a landmark appeal that could change U.S. drug policy forever, nine amicus briefs were filed with the U.S. Supreme Court demanding that the federal statute that criminalizes marijuana, the Controlled Substances Act (CSA), be declared unconstitutional.

The briefs supported the grant of certiorari in *Washington v. Barr*, in which former NFL player and current cannabis business operative Marvin Washington claims that the CSA is unconstitutional by blocking patient access to the medication and sits in contradiction with the U.S. government's own statements.

Although 38 U.S. states and territories have legalized the use of cannabis for medical reasons, the federal government classifies cannabis as a Schedule I drug with "no accepted medical use." As a result, people who depend upon treatment with cannabis cannot legally enter onto federal land, cannot travel by air or other federally regulated modes of transportation, and may be arrested and federally prosecuted for engaging in activity not authorized under the CSA. Even absent criminal prosecution or conviction, individuals and organizations engaged in marijuana-related activities, including participants in the state-legal cannabis industry, risk collateral consequences arising from the federal prohibition of marijuana.

As of this writing, amicus briefs were filed by NORML; the American Journal of Endocannabinoid Medicine, a publication led by Dr. Ethan Russo; the International Cannabis Bar Association; Athletes for Care; the National Cannabis Industry Association (NCIA) (with The Arcview Group); The Last Prisoner Project; Americans for Safe Access; and the Minority Cannabis Business Association. Additionally, U.S. Reps. Earl Blumenauer (D-OR), Tulsi Gabbard (D-HI), Jared Huffman (D-CA), Barbara Lee (D-CA), Alan Lowenthal (D-CA), Mark Pocan (D-WI) and Jamie Raskin (D-MD) filed a joint amicus brief in support of Washington.

As argued in one of the amicus briefs before the U.S. Supreme Court on behalf of advocacy groups focusing on "dismantling systemic discrimination in the cannabis industry," the historical record, as evidenced below, reveals that discrimination against people of color and anti-war protesters were driving

forces in the decision to treat cannabis as a Schedule I narcotic.

In 1970, President Nixon urged Congress to enact legislation classifying medications and other substances under separate schedules according to their medical utility, alleged dangerousness, and addictive potential. At Nixon's insistence, Congress adopted the CSA just one month after it was introduced. At the request of the Nixon Administration, Congress placed cannabis under Schedule I, despite the Subcommittee on Public Health having simultaneously confirmed that:

There is almost total agreement among competent scientists and physicians that marihuana is not a narcotic drug like heroin or morphine ... [and to] equate its risks ... with the risks inherent in the use of hard narcotics is neither medically or legally defensible.

Drug Abuse Control Amendment-1970: Hearings Before the Subcomm. on Public Health and Welfare, 91st Cong. 179 (1970).

An affidavit provided to Petitioner from Roger Stone, another Nixon Administration alumnus, explained that Nixon did not seek to criminalize cannabis pursuant to the CSA out of concern for public health (Pet. App. 420a-426a). As stated in the brief, "in criminalizing cannabis, Nixon believed he had devised a seemingly neutral basis upon which to target protestors and persons of color-his perceived enemies-without raising constitutional concerns." Hoping to support criminalization, the Nixon administration formed a commission under the chairmanship of Raymond Shafer, a former Republican Governor of Pennsylvania, to establish the dangers of cannabis "as a means to prosecute persons of color and anti-war protesters." (Pet. App. Brief 218a-219a; Pub. L. No. 91-513, 84 Stat. 1281). The Shafer Commission concluded that cannabis was not as dangerous as perceived and even recommended decriminalization of cannabis. "National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding," at iv (1972). The Nixon Administration, however, summarily rejected the Shafer Commission Findings, and urged Congress to criminalize cannabis under the CSA to pursue its agenda.

As set forth in the petition and amici, statements from the infamous Nixon tapes, and the following entry in the diary maintained by H.R. Haldeman, Nixon's Chief of Staff, evidence the discriminatory purpose for the criminalization of cannabis: "[Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to [do so]." N.Y. Times, Assoc. Press, "Haldeman Diary Shows Nixon Was Wary of Blacks and Jews" (May 18, 1984).

Additionally, Petitioner and amici highlight a quote from John Ehrlichman, Nixon's Domestic Policy Chief and one of his closest advisors, who similarly acknowledged that the Nixon Administration urged enactment of the CSA to oppress anti-war protestors and persons of color:

We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

N.Y. Daily News, A. Edelman, "Nixon Aide: 'War on Drugs' Was Tool to Target 'Black People'" (March 23, 2016).

As the Minority Cannabis Business Association argued in its amicus brief:

[A]n invidious discriminatory purpose can and should be inferred from the totality of the relevant facts outlined above. The findings of the Shafer Commission demonstrate that there is no plausible basis for classifying cannabis as a Schedule I drug under the CSA. Moreover, the statements and testimony of former Nixon Administration officials establish that the classification was based on an invidious discriminatory purpose. As such, the classification violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Due to the compelling examples of bias set forth in the Petition, Petitioners were permitted to proceed with their action in the district court, and as of the date of this writing, the U.S. Supreme Court is to consider the request for certiorari. If the court accepts the appeal, it could pave the way to federal legalization of cannabis for the first time since it was outlawed in 1937.

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