



FEDERALLY SPEAKING



by Barry J. Lipson

Number 30

Welcome to **Federally Speaking**, an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a “heads up” to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 30th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

A CORPLAW® COMMENTARY

THE STRANGE CASE OF THE GANJA GURU. The lighted fag “in his hand shone upon his eager, stooping face, and told me at a glance that something was amiss. 'Come, Watson, come!' he cried. 'The game is afoot.'” With apologies to Sherlock Holmes and Sir Arthur Conan Doyle, this is how the “*The Strange Case Of The Ganja Guru*” could have started here. But as this case, like *The Strange Adventure of the “Abbey Grange,”* has too much substance (controlled and/or otherwise) to be confined to the limiting format of *Federally Speaking*, and as it deals with the more expansive and mind bending subject matter of right and might, of ganja, dagga, hif and the like, of **Federal and State sovereignty**, of **interstate and intrastate commerce**, of **California Proposition 215**, and of the intrastate medical use of **Federally controlled substances**, it is being appended hereto as a separate “*Corplaw® Commentary.*” Somehow this invokes images reminiscent of the “**Ashcroft Directive,**” reported in the January and May 2002 *Federally Speaking* Columns (Nos. 11 and 16), also dealing with **Federal and State sovereignty**, the **Controlled Substances Act**, 21 U.S.C. Sections 801 et seq., the intrastate medical use of **Federally controlled substances**, and that time the **Oregon Right to Die Statute**. But to help tie this all nicely together in a hempen rope, please see the attached *Corplaw® Commentary*.

LIBERTY'S CORNER

DOJ THWARTS ABA! The *American Bar Association (ABA) eJournal* reports that the **U.S. Court of Appeals for the District of Columbia Circuit**, reversing in relevant part the **Order of U.S. District Judge Gladys Kessler**, has gone “against an ABA resolution urging the government to release the names and whereabouts of detainees, especially foreign nationals kept in undisclosed locations.” *Center For National Security Studies, Et Al., V. U.S. Department Of Justice*, No. 02-5254 & No. 02-5300 (CA DC, June 17, 2003). This, advised the *ABA eJournal*, at a time when a **DOJ Inspector General's Report** on the detainees' treatment released earlier this month raises questions about the detainees' treatment, however. Critics say the **Report** reveals the abuses they feared, **including denial of counsel**” (emphasis added; for a re-cap of the **DOJ IG Report** see *Federally Speaking*, No. 29). Here, “various ‘public interest’ groups” had “brought this **Freedom of Information Act (FOIA)** action against the **Department of Justice (DOJ or government)** seeking release of information concerning persons detained in the wake of the September 11 terrorist attacks, including: their names, their attorneys, dates of arrest and release, locations of arrest and

detention, and reasons for detention.” According to the two judge majority, “the **courts** must defer to the **executive** on decisions of **national security**. . . . It is not within the role of the **courts** to second guess **executive** judgments made in furtherance of that branch’s proper role.” Circuit Judge Tatel disagrees: “Disregarding settled principles governing the release of government records under the **Freedom of Information Act**, 5 U.S.C. § 552 *et seq.*, this **court** holds that the government may keep secret the names of hundreds of persons whom it has detained in connection with its investigation of the September 11, 2001 terrorist attacks without distinguishing between information that can, in **FOIA**’s words, ‘reasonably be expected to interfere’ with the investigation *and information that cannot*. 5 U.S.C. §552(b)(7)(A). While the government’s reasons for withholding *some* of the information may well be legitimate, the court’s *uncritical deference* to the government’s vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government’s case, eviscerates both **FOIA** itself and the principles of openness in government that **FOIA** embodies. . . . For all its concern about the *separation-of-powers* principles at issue in this case, the **Court** violates those principles by essentially *abdicating its responsibility* to apply the law as **Congress** wrote it. I dissent.” (Emphasis, in part, added.)

THE DASTAR TRILOGY

WAS DASTAR DASTARDLY? The U.S. Supreme Court has recently handed down, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No.02-428, 539 U.S.____ (June 2, 2003), an interesting (in the “may you live in interesting times” Chinese curse sense) and fun decision, delving into such areas as *Coca-Cola* passing off *Coke* as *Pepsi*, plagiarizing plagiarists, and the eternal “search for the source of the Nile,” which is reported on here in “*The Dastar Trilogy*.” Trilling? Thrilling? We will leave that for you to decide. What is of concern in this part of our trilogy is whether Dastar was: A dastardly dark star in the Fox Universe; A poor hen in the fox house; A commercial star just carrying out business as usual; Or none of these? As the **High Court** relates this tale, in 1995 “Dastar purchased eight beta cam tapes of the *original* version of the *Crusade* television series, which is in the **public domain**, copied them, and then edited the series” and “released a video set entitled *World War II Campaigns in Europe*.” The full name of ‘*Crusade*’ was *Crusade in Europe* and was based on “I Like Ike” Eisenhower’s book of the same name. Doubleday, the book’s publisher “registered it with the **Copyright Office** in 1948, and granted exclusive television rights” to Fox. “Fox, in turn, arranged for Time, Inc., to produce a television series, . . . and Time assigned its **copyright** in the series to Fox.” However, in 1977 Fox let this Times TV **copyright** “timeout,” though in 1975 or 1976 the book’s publisher had “renewed the copyright on the book as the ‘**proprietor of copyright in a work made for hire**’.” As added twists, the **Ninth Circuit** has “held that the **tax treatment** General Eisenhower sought for his manuscript of the book created a triable issue as to whether he intended the book to be a **work for hire**, and thus as to whether Doubleday properly renewed the **copyright** in 1976;” and in 1988, Fox had “reacquired the television rights in General Eisenhower’s book, including the exclusive right to distribute the [public domain] *Crusade* television series on video and to sublicense others to do so.” So, what do you think? Did Dastar act dastardly? The **High Court**, apparently, did not think his hands were dirty enough not to hand him the victory in this case, finding, as you will learn in parts two and three, that since Fox “did not renew the **copyright** on the *Crusade* television series, which expired in 1977, leaving the television series in the public domain,” Dastar’s actions were lawful. However, the **Court** did note in footnote 2, that the “**copyright** issue is still the subject of litigation, but is not before us. We express no opinion as to whether petitioner’s product would **infringe a valid copyright** in General Eisenhower’s book,” such as, presumably, by the *Campaigns* video quoting verbatim, without attribution, “likely” liked passages from Ike’s book.

DASTAR: THE IP SOCIAL COMPACT. “A CAREFULLY CRAFTED BARGAIN.” “The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to **Authors** and **Inventors** the exclusive Right to their respective Writings and Discoveries. . . .” So says the **U.S. Constitution (Art. I, §8, Clause 8)**. Known to **authors** as the “**Copyright Clause**” and to **inventors** as the “**Patent Clause**,” it is the basis of our **Intellectual Property Social Compact (“IP Social Compact”)** with

them. Recently the **U.S. Supreme Court** in *Eldred v. Ashcroft*, 537 U. S. 186, 208 (2003), while upholding **Congress’** extension of the time period of the **copyright monopoly**, confirmed that the words in this **IP Social Compact** “for limited times” meant that “**Congress may not** ... created a species of perpetual **patent** and **copyright**” (*Dastar Corp. v. Twentieth Century Fox Film Corp.*, No.02-428, 539 U.S.____ (June 2, 2003), emphasis added; see also *Federally Speaking*, No. 24). Now, in *Dastar*, the **High Court** has further clarified the **rights** and **limitations** applicable to “Authors and Inventors” under this **IP Social Compact**. In the words of the **Supreme Court**: “The rights of a **patentee** or **copyright holder** are part of a *carefully crafted bargain*” (*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U. S. 141, 150.151 (1989)), the “purpose” being “to reward manufacturers” and authors with a “period of exclusivity ... for their innovation in creating a particular device” or work (citing *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U. S. 23, 34 (2001); and, in general, “unless an intellectual property right such as a patent or copyright protects an item, *it will be subject to copying*. *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U. S. 23, 29 (2001),” emphasis added. Thus, if not so protected, or “once the patent or copyright monopoly has expired, the public may use the invention or work *at will* and *without attribution*” or ascribing as to source, for the “right to copy, and to copy without attribution, once a **copyright** has expired, like the right to make (an article whose **patent** has expired), including the right to make it in precisely the shape it carried when **patented**, *passes to the public*. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, 230 (1964); see also *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 121.122 (1938).” *Dastar, supra*; emphasis added.

Dastar: COPYRIGHT OR RIGHT TO COPY? So that’s the “*carefully crafted bargain*” embodied in the **IP Social Contract!** But does that really mean that **Federal** law actually lets authors “*plagiarize*” the non-copyrighted works of others? So held the **High Court** in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No.02-428, 539 U.S.____ (June 2, 2003), as it could not find that **§43(a) of the Lanham Act** “created a species of perpetual **patent** and **copyright**, *which Congress may not do*. See *Eldred v. Ashcroft*, 537 U. S. 186, 208 (2003). **Section 43(a) of the Lanham Act** prohibits actions like **trademark infringement** that deceive consumers and impair a producer’s goodwill. It forbids, for example, the **Coca-Cola Company’s** passing off its product as **Pepsi-Cola** or reverse passing off **Pepsi-Cola** as its product.” But, “reading **§43(a) of the Lanham Act** as creating a cause of action for, in effect, *plagiarism*, the use of otherwise unprotected works and inventions without attribution, would be hard to reconcile with our previous decisions. ... And of course it was neither Fox nor Time, Inc., that shot the film used in the *Crusade* television series. Rather, that footage came from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified Newsreel Pool Cameramen. If anyone has a claim to being the *original* creator of the material used in both the *Crusade* television series and the *Campaigns* videotapes, it would be those groups, rather than Fox. *We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries*. ... In sum, reading the phrase ‘**origin of goods**’ in the **Lanham Act** in accordance with the **Act’s** common-law foundations (which were *not* designed to protect *originality* or *creativity*), and in light of the **copyright** and **patent** laws (which *were*), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” Emphasis, in part, added. “*Federally Speaking*,” the answer, thus, appears to be “yes,” provided you duly attribute those parts of a **copyrighted** work exhibiting that author’s ‘**originality** or **creativity**.’” Accordingly, it would seem that you need not attribute a quote from the public domain *St James Bible* to anyone, even if taken from a new copyrighted work. Not to the author of this new work! Not to St. James! And not even to the Supreme Being! So attribution, No! Divine Retribution, question mark? Professorial or “Professitorial” retaliation, you bet!

FED-POURRI™

HATCH: THREE BYTES AND YOUR FRIED! Under traditional **Muslim law** a thief would have a hand chopped off for the same crime that under **Western Law** he would have some time stolen from his life (“a theft for a theft”). The former would be considered illegal under the **U.S. Constitution** as “**cruel and unusual punishment**.” The latter would be acceptable as “punishment befitting the crime,” which is the true

meaning of the biblical concept of “an eye for an eye.” (Before this biblical “ethical advance” it was “a life for an eye.”) **U.S. Senator** Orrin Hatch (R-Utah), Chair of the **U.S. Senate Judiciary Committee**, seems to want to return to pre-biblical and/or traditional Muslim concepts; at least as far as the dastardly white collar crime of **Federal Copyright Infringement** is concerned. According to Hatch, “destroying their computer ... may be the only way you can teach somebody about copyrights.” In modified pre-biblical/traditional Muslim terms, if the technique or technology would be available, this is how Senator Hatch’s **“Hatchet Plan”** would work: A music thief goes to grab copyrighted sheet music, gets a mild slap or shock on the wrist, and is told “naughty naughty.” He tries it a second time, gets a stronger blow or shock and is told “this is your final warning.” He tries it once more and his hand is chopped off or disintegrated. Substitute “music download” for “sheet music” and “computer” for “hand” and you have the **Hatchet Plan**. While the two warnings are a nice modern touch, this would be a giant step backwards in the ethical development of **Western law**, not to mention the lack of **constitutionally** required **“due process,”** which requires, with or without warnings, “conviction before execution,” and trial by a real life judge and jury, and not by a computer program or technology. But, even putting aside the lack of **constitutionally**, it is clear that the frying of costly computer equipment of **“de maximus”** value would be an “unbefitting” punishment for the alleged theft by an individual of electronic bytes of relatively **de minimus** value. This plan was proposed by Hatch in response to a computer industry representative’s assurance before the **Senate Judiciary Committee** that: “No one is interested in destroying anyone’s computer,” to which Committee Chair Hatch responded: “I’m interested.” Please be assured, this author will not fry you if you copy from this **copyrighted** column (though a credit line would be nice and should be given). Also, **who pays us** to pass their electronic waves transporting such music through our air space, homes, property and person?

THE ALIEN TORT CLAIMS ACT OF 1789. “First enacted as part of the **Judiciary Act of 1789**, the ATCA [The Alien Tort Claims Act of 1789] still reads today almost exactly as the **First Congress** drafted it; the version currently enshrined in **Title 28** provides: ‘The **district courts** shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the **law of nations** or a **treaty of the United States.**’ 28 U.S.C. §1350 (1994); *see Judiciary Act* of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77.” Recently, the **U.S Court of Appeals for the Ninth Circuit**, sitting *en banc*, on rehearing, in a 6-5 decision confirmed the current viability of this Act. *Alvarez-Machain v. U.S.*, No. 99-56772, and *Alvarez-Machain v. Sosa*, No. 99-56880 (9th Cir, June 3, 2003). Four of the dissenters, however, expressed concern that: “In so doing, and despite its protestations to the contrary, the majority has left the door open *for the objects of our international war on terrorism to do the same*”(emphasis added). This case involves “the forcible, transborder abduction of a Mexican national, Humberto Alvarez-Machain (‘Alvarez’), by Mexican civilians at the behest of the **Drug Enforcement Administration** (the ‘**DEA**’) ... In an earlier, related proceeding, the **Supreme Court** acknowledged, without deciding, that Alvarez ‘may be correct’ in asserting that his abduction was ‘shocking’ and ‘in violation of general international law principles.’ *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992).” The **Ninth Circuit** held “that Alvarez may pursue civil remedies for actions taken against him more than ten years ago by the **DEA** and its agents” under the **ACTA** and **FTCA** (**Federal Tort Claims Act**, 28 U.S.C. §§ 1346(b)(1), 2671-2680), for “the **DEA** agents here had no authority, statutory or otherwise, to effect an extraterritorial arrest. Nor did their minions across the border, who could no more claim a lawful privilege to arrest Alvarez than could the **DEA** agents themselves under the same circumstances. The **district court** that issued Alvarez’s **arrest warrant** had no jurisdiction to issue a warrant for an arrest in Mexico. *See Fed. R. Crim. P.* 4(c)(2). Accordingly, the **DEA** agents authorized a **false arrest** against Alvarez.” The questions remain, if the government is currently exceeding its authority in the “War on Terrorism,” will and/or should these **Acts** apply?

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THE STRANGE CASE OF THE GANJA GURU

a CorpLaw® Commentary
by Barry J. Lipson

As lawyers we have been taught, “bad facts make bad law.” Conversely, presumptively, “good facts make good law.” But what do “no facts” make? “No law?” That is the *state of the record* in the *Strange Case of Ed Rosenthal*, the notorious pro-ganja author, activist, and self-styled “*Ganja Guru*.”

For us who are not into potting pot plants, pot smoking, or getting potted, and are unfamiliar with such terminology, Ed’s “*Gurudom*” is in the realm of the cannabis sativa plant, called “ganja” in India and Jamaica, “marijuana” and “pot” in North America, “hif” in North Africa, “dagga” in South Africa, “hemp” in the rope industry, “canary seed” or “song bird seed” in the pet store, a “superior herb” in Ancient China (per Emperor Sheng Nun, circa 2737 BC), and “hashish” when referring to the resin of this plant. But, I am sure, these are more “facts” than you want or need for this tale.

The missing facts, however, are most important. For you see, when defense counsel tried to introduce at Ed’s “**controlled substances**” **Federal criminal trial** the “facts,” U.S. District Judge Charles R. Breyer, of the **U.S. District Court for the Northern District of California, San Francisco Division** (*U.S. v. Edward Rosenthal*, Case No. CR-02-0053 CRB), denied Ed’s criminal jury access to these “facts.” This caused the jury to convict on “no facts” or a “lack of facts,” which, I guess, by the above logic, has led to a “no law” or “lawless” conviction.

These “facts” included that California had adopted **Proposition 215** legalizing the use of **medical marijuana**, and that Ed was acting under **color of State law**. How so? According to the taboo “facts,” Ed was merely participating in the program of the City of Oakland to implement **Proposition 215**. The Oakland City Attorney’s office had provided it’s legal opinion to the City Council that *Federal statute provided immunity from Federal prosecution* for city officials participating in such a **medical marijuana** program, Ed and others were officially “*deputized*” by the City “as **Officers of the City**” so as to make legally sure that they came within such immunity, and Ed’s activities, which were thus sanctioned by the City, were also supervised by the City of Oakland.

The question that immediately comes to mind is: “Was Ed’s conviction “kosher” *de facto*? *De facto*, when jurors learned post-conviction of these “facts”, some promptly “*went on the record*” that they would not have convicted Ed if they had known them beforehand. It would only have taken one of these jurors to have “hung” the jury, not literally, just figuratively. Once a jury is “hung,” the Federal Government could not have gotten a conviction (even for a hanging offense)! A mistrial would occur and the Persecutor (oops! “Prosecutor”) would either give up or have to try the “darn” thing all over again. Can such “facts” be withheld from the jury in a criminal case? Can the “fact” be withheld that the murdered lover was found in the bed of the defendant’s spouse? Or the “fact” that the murdered husband was beating the defendant wife? The introduction of either “fact” can normally cause not just a “hung jury,” but the non-reversible acquittal of a “guilty” defendant!

The next question: “Was Ed’s conviction “kosher” *de jure*? *De jure*, there is the troubling case of *U.S. v. Oakland Cannabis Buyers’ Cooperative*, 532 U. S. 483 (2001), in which Judge Charles Breyer had also been involved, and on which his brother, Justice Stephen Breyer, of course, recused himself. There, in a civil case, the **U.S. Supreme Court** held only that under the wording of the **Controlled Substances Act**, 21

U. S. C. 801 *et seq.*, “**medical necessity** is not a defense to manufacturing and distributing marijuana.” The Majority Opinion did not even mention **Proposition 215**, and, of course, they did not consider any questions of criminal intent.

The Concurring Opinion of Justice Stevens, in which Justices Souter and Ginsburg joined did, however, stresses “the importance of showing respect for the sovereign States that comprise our **Federal Union**. That respect imposes a duty on **Federal courts**, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to ‘serve as a laboratory’ in the trial of ‘novel social and economic experiments without risk to the rest of the country.’ *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). In my view,” Justice Stevens continued, “this is such a case. By passing **Proposition 215**, California voters have decided that seriously ill patients and their primary caregivers should be exempt from prosecution under state laws for cultivating and possessing marijuana if the patient’s physician recommends using the drug for treatment. ... Since 1996, six other States— Alaska, Colorado, Maine, Nevada, Oregon, and Washington— have passed **medical marijuana initiatives**, and Hawaii has enacted a similar measure through its legislature ... [and] then-Governor Bush [had been reported as] supporting state self-determination on **medical marijuana** use. ... Whether it would be an abuse of discretion for the **District Court** to refuse to enjoin those sorts of violations, and whether the **District Court** may consider the availability of the **necessity defense** for that sort of violator, are questions that should be decided on the authority of cases such as *Hecht Co. v. Bowles*, 321 U. S. 321 (1944), and *Weinberger v. Romero-Barcelo*, 456 U. S. 305 (1982).”

These *Hecht* and *Weinberger* considerations, as set forth in *Weinberger*, are “considerations applicable to cases in which injunctions are sought in the **Federal courts**” and “reflect a ‘practice with a background of several hundred years of history,’ *Hecht Co. v. Bowles, supra*, at 329, a practice of which **Congress** is assuredly well aware. Of course, **Congress** may intervene and guide or control the exercise of the courts’ discretion, but we do not lightly assume that **Congress** has intended to depart from established principles. *Hecht Co. v. Bowles, supra*, at 329. As the Court said in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946): ‘Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. ‘The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.’ *Brown v. Swann*, 10 Pet. 497, 503’”

But, could Ed really be considered to be a “seriously ill patient” or “their primary caregivers?” We should not, however, need to reach this question today: a) because the *Hecht* and *Weinberger* type considerations are basic and should be generally applicable to Ed’s situation as well; b) because Ed has been criminally prosecuted and not merely civilly enjoined; and c) because the majority opinion in *Oakland Cannabis Buyers, supra*, in the last part of footnote 7, in which all concurred, clearly clarified that we are *not* “**passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress’ power under the Commerce Clause**” (emphasis added). The question is then, “does ‘the Controlled Substances Act exceed... Congress’ power under the Commerce Clause’ here?”

For the purpose of invoking the **Interstate Commerce Clause** of the **U.S. Constitution** to **constitutionally** justify legislating in this area, Congress first made certain “**findings and declarations**,” which are set forth in **Section 801** of the **Controlled Substances Act** (21 U. S. C. 801), to wit, in part:

“(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because--

- (A) after manufacture, many controlled substances are transported in interstate commerce,
- (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
- (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such.”

None of these justifications would appear to be applicable to Ed. His ganja can be clearly “differentiated.” It was grown, produced and distributed in California, under color of California law, and under governmental supervision, for consumption in California by Californians with a medical prescription and therefore, presumptively a medical need for this product. Presumably, there was no intent on Ed’s part to introduce any of his ganja into **interstate commerce** or to use it for any purpose other than pursuant to California law. And if any of this were incorrect, would it not be the **Federal Government’s** job to prove this beyond a reasonable doubt, especially as under “a rule of reason” analysis, it would appear that only **intrastate commerce** was involved here? Even to obtain a “*per se*” **price fixing** conviction one must show that **interstate commerce** was somehow involved. Thus, in this instance, it would appear that so applying this Act here clearly “exceeds **Congress’** power.”

Somehow this is all reminiscent of the “**Ashcroft Directive**,” reported in the January and May 2002 *Federally Speaking* Columns (Nos. 11 and 16; see below). There, the **U.S. Attorney General**, reversing his predecessor’s position, attempted to nullify the Oregon “Right to Die” statute by declaring in the *Federal Register* that medical doctors who prescribe **federally controlled substances** in conformity and compliance with this State law would violate and lose their **Federal Licensure**. Under the Oregon law, if two doctors agree on euthanasia and the patient has less than six months to live, a doctor may prescribe, but not administer, a lethal dose to such a terminally ill adult Oregon State residents, provided that the one planning to die is both able to make health care decisions for him or herself and has voluntarily chosen to die. Judge Robert E. Jones of the **U.S. District Court for the District of Oregon** permanently enjoined the **Attorney General** “from enforcing, applying, or otherwise giving any legal effect to the **Ashcroft Directive**” (emphasis added). Judge Jones found “that the **Controlled Substances Act (CSA)**, 21 U.S.C. Sections 801 et seq., was controlling and that ‘**Congress** did not intend the **CSA** to override a state’s decisions concerning what constitutes legitimate medical practice, at least in the absence of an express **Federal** law prohibiting that practice. Similarly,” he continued, “I conclude that **Congress** never intended, through the **CSA** or through any other current **Federal** law, to grant authority to the **Attorney General** or the **DEA [Drug Enforcement Agency]** to define, as a matter of **Federal** policy, what constituted the legitimate practice of medicine”” (emphasis added). This reasoning also seems applicable to the “*Strange Case of the Ganja Guru*,” doesn’t it?

But it is not all bad news for Ed! Judge Breyer, after several months’ deliberation, sentenced Ed to *only* one day in jail, and then credited him with time served. The Ganja Guru, of course, advises that he plans to appeal. “Even one day is one day too much,” he declared.

Please address your comments, questions and suggestions for future Corplaw® Commentaries columns to Barry J. Lipson, Esquire, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266 (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com). Back issues of the author's Federally Speaking column, referred to above, are available on the website of the United States District Court for the Western District of Pennsylvania: (<http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>).

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