March 1, 2011  BY-HAND

House Health, Human Services & Elderly Affairs Committee
Legislative Office Building Room 205, 33 North State Street
Concord NH 03301-6328

RE:  Marijuana for Medicinal Purposes, HB0442

Dear Chair Reagan and Committee Members:

I appreciate the opportunity to present testimony concerning HB0442, to permit the use of marijuana for medicinal purposes. I support this compassionate reform of the state's criminal law which the bill's preamble-findings recite as already adopted by 15 states (Maine and Vermont, as well as RI, NJ, MI, MT, CO, NM, AZ, NV, CA, OR, WA, HI and Alaska) and the District of Columbia. More than twenty years ago, federal administrative law proceedings found nontoxic marijuana (there is no human toxic dose) to be "one of the safest therapeutic substances known to man," and more than 60 U.S. and international health organizations (including the American Public Health Association, the Federation of American Scientists and HealthCanada) support patient use of medicinal marijuana under a physician's supervision. Despite the failure to override the Governor's veto of the legislature's adoption of medical marijuana use in 2009, that policy remains an improvement over the status quo and deserves reenactment.

I am an attorney in practice for more than thirty years, and a drug policy researcher and reform advocate for nearly twenty-five years. I have worked as an assistant agency counsel to the Mass. Department of Correction, a full-time state trial and appellate criminal public defender, in my own law firm, and as a partner in a general litigation practice. Since 2007 I have served as vice-chair to the Massachusetts Bar Association’s Drug Policy Task Force, a multi-disciplinary group of lawyers, clinicians, educators and prison administrators which issued a comprehensive report on reforming state drug policy in 2009, unanimously endorsed by the state bar’s board of directors. I now have a solo practice primarily as a contractor to the state public defenders office where I concentrate on defending murder appeals, and helping to train and support private attorneys certified to be appointed to mental health cases (defending patients in civil commitment and coercive anti-psychotic medication petitions) and post-conviction criminal appeals.
I have volunteered to travel to this hearing, to discuss two topics: Federalism, including the impact of federal drug prohibition on state law reforming prohibition to protect medical authorization, distribution and use; and, a law enforcement perspective on the national experience with state medical marijuana reform in the 15 states allowing medical use over 15 years.

**Federalism: Federal Prohibition Versus State Tolerance Laws**

State legislators considering the reform or rejection of federal marijuana prohibition should not fear federal intervention with the state or municipal adoption of local prohibition exceptions to improve health and safety, by enacting new state laws tolerating medical use of marijuana at variance with federal prohibition. The precedent of 14 states’ laws authorizing medical marijuana shows the viability of state law dramatically inconsistent with federal law. Since 2009, federal prosecutors have formally adopted a policy of tolerance of medical use in compliance with state law, with the U.S. Attorney General's guidance to local U.S. Attorneys to forebear from using federal law enforcement to interfere with medical use and distribution in “unambiguous” compliance with state medical use laws (U.S. Justice Department's “Odgen Memo,” issued October 19, 2009 [http://www.justice.gov/opa/documents/medical-marijuana.pdf](http://www.justice.gov/opa/documents/medical-marijuana.pdf)).

Also, the four decades of active federal resistance to administrative efforts to reschedule marijuana to permit its medical use, and applications for federal research permits (to support rescheduling) continue under the Obama Administration: Despite the comprehensively documented findings of administrative law judges working for the U.S. Justice Department's Drug Enforcement Administration (DEA) supporting both rescheduling and research permits, the DEA has rejected those findings or refused (in some cases for four years) to act on research permits. Accordingly, state reforms are the only way to protect safe patient access to effective medicine.

The federal system of dual sovereignty contemplates differing social policies among the federal government and the states, to determine the best way to treat national problems, with
differing jurisdictions’ experimentation with variant policies serving as “laboratories of democracy” for the benefit of all Americans. Under the U.S. Constitution’s Supremacy Clause and the Tenth Amendment, the federal government can seek a judicial order to “preempt” (render unenforceable or suspend) state law which positively interferes with conduct federal law explicitly promotes; federal laws or agencies cannot, however, coerce (“commandeer”) state agencies or legislators into enforcing federal law prohibitions.

State law permitting conduct banned by federal law does not protect private citizens from federal law enforcement (this protection currently exists, however, as a matter of federal prosecutorial discretion pursuant to the Odgen Memo), but the existence of inconsistent federal law does not displace state law enforceability: Private citizens complying with state tolerant law are protected from state law enforcement (which must comply with state law, even if state agents might prefer federal intolerant policy to state tolerance policy).

State agencies remain free to regulate and permit its citizens to cultivate, distribute and use marijuana pursuant to state law despite such conduct being contrary to federal prohibition. Federal agencies and courts cannot commandeer state agencies or law enforcement into enforcing federal law, particularly when federal law prohibition contradicts state law tolerance. State and municipal regulators can enforce compliance by medical marijuana dispensaries with local zoning and licensing laws, however, despite federal prohibition. There is no preemptive conflict between federal prohibition and state medical use tolerant laws, because permissive state regulatory law does not require conduct which federal law prohibits.

A tolerant state law may make violations of federal law more likely, particularly by removing state agents from implementing prohibition policy consistent with federal law. The lawful federal response from the reduction of state law prohibition enforcement through the adoption of state tolerance laws, however, is to increase federal law enforcement by hiring more federal law enforcement agents, prosecutors, criminal defenders, judges and prison guards; federal “commandeering” of state
agencies, requiring a state to suspend its own prohibition-tolerant laws -- and by negative implication, thereby enforce federal prohibition in conflict with state tolerance laws -- is illegal under the Tenth Amendment.

Federal experience with state medical marijuana laws provides clear guidance to New Hampshire’s consideration of HB1652 legalizing adult marijuana access and use. During the Bush Administration, federal agents arrested, and federal prosecutors sought prison sentences against medical marijuana cultivators and distributors, several times in California and on rare occasions in other states. Despite federal intervention, the state medical industry (and derivative state tax revenues) grew.

Though out California and the other medical-tolerant states, however, dispensaries flourished and proliferated. Not only did patients benefit from improved health by safe access in secure settings to more effective medicine: States and municipalities profited from excise taxes on the consumer purchases of plant medicine and income taxes on the wages of dispensary operators and employees. Because federal prohibition relies on state law enforcement to conduct 95% of the arrests and prosecutions, federal law enforcement can only threaten its randomly (actually, politically-vocal advocates of prohibition reform) chosen targets; without state cooperation, which federal law cannot compel, marijuana use is far too widespread and inherent in American culture to be effectively prohibited by federal resources alone.

Accordingly, New Hampshire is free to adopt laws to regulate and tax medical marijuana cultivation, distribution, purchase, possession and use. Citizens may find themselves at risk of federal arrest and prosecution even if compliant with state law, although practically, only politically active cultivators and distributors would be likely targets of federal law enforcement. Under current state-federal prohibition hegemony, however, marijuana use and distribution is virtually undisturbed; state law medical-legalization simply would allow tax collection, safer patient access, and peaceful dispute adjudication, rendering far safer (and more valuable to the state) a preexisting state industry.
Law Enforcement Perspective on State Medical Marijuana Reform

Federal criminal justice and public health statistics demonstrate that reduced state law enforcement (studying decriminalization in states for all adult users, not just medical) does not increase use or access (Institute for Social Research, Monitoring the Future, Occasional Paper 13; Marijuana Decriminalization: The Impact on Youth 1975-1980. The University of Michigan, Ann Arbor, 1981). Furthermore, removing patients and licensed suppliers from the non-medical “black-market” reduces illegal demand and distribution, providing the further benefit of allowing law enforcement to prioritize the investigation and suppression of violent and property crime.

Authorizing local medical distribution commerce also will generate tax revenues to fund enhanced law enforcement and fund anti-crime measures such as improved educational and housing resources. Given the popularity of protecting medical use and access (81% nationally, according to the ABCNews/Wash.Post poll dated January 15, 2010), protecting patients and doctors from law enforcement will not only comply with the will of the people, but also avoid disrespect for law enforcement by ending their interference with sympathetic patients and their compassionate care providers.

I appreciate this opportunity to testify today, and I urge you to give serious consideration to HB0442.

Sincerely,

Michael D. Cutler