# Highly Uncertain Times: An Analysis of the Executive Branch's Decision To Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws

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## Introduction

Fourteen of the fifty states in the United States and the District of Columbia have enacted legislation legalizing the possession, cultivation, and use of marijuana for the treatment of certain illnesses.[1] However, the possession, cultivation, and use of marijuana is illegal under federal law,[2] carrying maximum prison sentences ranging from one year to life in prison and maximum fines ranging from one thousand to eight million dollars (depending upon the

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1. These states include Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont. The Nat'l Org. for the Reform of Marijuana Laws, *Active State Medical Marijuana Programs*, http://www.norml.org/index.cfm?Group_ID=3391 (last visited Feb. 6, 2010). Maryland has decriminalized the possession of less than one ounce of marijuana by individuals who can demonstrate, as an affirmative defense, that their use of marijuana is out of medical necessity. *Id.*

2. 21 U.S.C. § 841(a) (2009).

amount of marijuana at issue and the circumstances underlying the conviction).[3]

On June 6, 2005, the United States Supreme Court held in *Gonzales v. Raich* that federal laws criminalizing the possession, cultivation, and use of marijuana by intrastate growers and users of marijuana for medical purposes were constitutional under the Commerce Clause of the Federal Constitution.[4] *Gonzales v. Raich* made it clear that individuals who possessed, cultivated, and used marijuana in compliance with state medical marijuana laws did so at the risk of prosecution by federal law enforcement officials for violation of federal law. Emboldened by the Court's decision in *Gonzales*, the Executive Branch under President George W. Bush increased its investigation and prosecution of medical marijuana patients, cultivators, and dispensaries from late 2005 through early 2009.[5]

On March 18, 2009, however, United States Attorney General Eric Holder stated that

> the [Executive Branch's] policy is to go after those people who violate both federal and state law. To the extent that people do that and try to use medical marijuana laws as a shield for activity that is not designed to comport with what the intention was of the state law, those are the organizations, the people, that we will target.[6]

Following this shift in enforcement policy regarding medical marijuana by the Executive Branch under President Barack Obama, the number of medical marijuana patients and dispensaries began to dramatically increase in the states that had enacted legislation legalizing the possession, cultivation, and use of marijuana for the

3. 21 U.S.C. §§ 841(b), 844(a) (2009).

4. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

5. Americans for Safe Access, *Federal Cases*, http://www.safeaccessnow.org/article.php?list=type&type=184 (last visited Feb. 6, 2010).

6. Josh Meyer & Scott Glover, *Medical Marijuana Dispensaries Will no Longer be Prosecuted, U.S. Attorney General Says*, L.A. TIMES, Mar. 19, 2009, *available at* http://articles.latimes.com/2009/mar/19/local/me-medpot19; *see also* Devlin Barrett, *Attorney General Signals Shift in Marijuana Policy*, Mar. 18, 2009, http://abcnews.go.com/Politics/wireStory?id=7114447; David W. Ogden, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, Oct. 19, 2009, *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

treatment of certain illnesses.[7] A survey of medical marijuana dispensaries in these states concluded that requests for medical marijuana increased between 50% and 300% since President Obama took office on January 20, 2009.[8]

Section I of this Comment analyzes the constitutionality of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws. As detailed in Section I, the change in the Executive Branch's enforcement policy regarding medical marijuana is a questionable use of prosecutorial discretion given the separation of powers in the Federal Constitution and the United States Supreme Court's holdings in *United States v. Batchelder* and *Wayte v. United States*. Section II of this Comment analyzes the impact of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws. As detailed in Section II, the Executive Branch's revised enforcement policy regarding medical marijuana provides individuals with a false sense of security in relying upon compliance with state medical marijuana laws given the imprimatur of the Executive Branch, the possibility of a legal challenge to the Executive Branch's revised enforcement policy regarding medical marijuana, and the length of the statute of limitations with respect to violations of the federal laws prohibiting the possession, cultivation and use of marijuana. In conclusion, I urge Congress to pass, and President Obama to sign into law, legislation consistent with the Executive Branch's revised enforcement policy regarding medical marijuana in order to ensure the constitutionality of such enforcement policy. In the meantime, I urge states that have enacted medical marijuana laws to highlight the risks of relying upon compliance with such laws despite the change in the Executive Branch's enforcement policy regarding medical marijuana.

7. Brian Alexander, *Medical Marijuana Requests Climb Sky High*, Apr. 15, 2009, http://rss.msnbc.msn.com/id/30217044/. President Obama had previously indicated during his campaign for presidency that he did not support the use of federal resources to circumvent state medical marijuana laws. Stephen Dinan & Ben Conery, *DEA Pot Raids Go on; Obama Opposes*, WASH. TIMES, Feb. 5, 2009, *available at* http://www.washingtontimes.com/news/2009/feb/05/dea-led-by-bush-continues-pot-raids/.

8. Alexander, *supra* note 7.

## I. The Constitutionality of the Executive Branch's Decision To Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws

Under the Federal Constitution, Congress has the power to regulate interstate commerce and make all laws that are necessary and proper for the execution of Congress' powers.[9] Congress expressly relied upon its power to regulate interstate commerce in 1970 when it enacted the Controlled Substances Act, the statute criminalizing the possession, cultivation, and use of marijuana and other substances under federal law.[10] On the other hand, the Federal Constitution stipulates that the Executive Branch is responsible for executing the laws of the United States.[11] Congress has also specifically directed each United States attorney to prosecute all offenses against the United States (including violations of the Controlled Substances Act) within his or her district.[12]

Due to the scarcity of the Executive Branch's resources, however, federal regulators cannot investigate and prosecute every detected federal crime. The Executive Branch must exercise discretion in selecting which alleged violations of federal law to investigate and prosecute, and which alleged violations of federal law to ignore due to scarcity of resources.[13] On June 4, 1979, the United States Supreme Court in *United States v. Batchelder* affirmed the broad prosecutorial discretion of the Executive Branch, holding that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."[14] However, the Court in *Batchelder* also held that the use

9. U.S. CONST. art. I, § 8, cl. 3, 18 (stating that Congress has the power to "regulate commerce . . . among the several states" and "make all laws which shall be necessary and proper for carrying into execution the foregoing powers"); *see* McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (holding that "necessary" in Article I, Section 8, Clause 18 of the Federal Constitution should be read broadly to include all means which are appropriate in order for Congress to implement its constitutionally established powers); *see also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that activity which "exerts a substantial economic effect" on interstate commerce can be regulated by Congress pursuant to Article I, Section 8, Clause 3 of the Federal Constitution).

10. 21 U.S.C. § 801 (2009).

11. U.S. CONST. art. II, § 3 (stating that the President "shall take care that the laws be faithfully executed").

12. 28 U.S.C. § 547 (2009).

13. Michael E. O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 231 (2003).

14. United States v. Batchelder, 442 U.S. 114, 124 (1979).

of prosecutorial discretion by the Executive Branch is not "unfettered" and is subject to "constitutional constraints."[15]

Furthermore, on March 19, 1985, the Court in *Wayte v. United States* expanded upon the rationale underlying the broad prosecutorial discretion of the Executive Branch, noting that:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[16]

Given the separation of powers in the Federal Constitution and the Court's holdings in *Batchelder* and *Wayte*, the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws is a questionable use of prosecutorial discretion. The Executive Branch's revised enforcement policy regarding medical marijuana is in clear contravention with the Controlled Substances Act, under which Congress criminalized the possession, cultivation and use of marijuana under federal law without any exception for individuals in compliance with state medical marijuana laws.[17] Congress has repeatedly considered but failed to pass legislation that would permit the possession, cultivation and use of marijuana by individuals in compliance with state medical marijuana laws under the Controlled Substances Act.[18] More importantly, Congress has repeatedly rejected amendments to appropriations bills that would prohibit the

15. *Id.* at 124–25.

16. Wayte v. United States, 470 U.S. 598, 607–08 (1985).

17. *See* 21 U.S.C. §§ 841(a)–(b), 844(a) (2009).

18. *See* H.R. 5842, 110th Cong. (2008); H.R. 2087, 109th Cong. (2005); H.R. 2233, 108th Cong. (2003); H.R. 2592, 107th Cong. (2001); H.R. 1344, 107th Cong. (2001); H.R. 912, 106th Cong. (1999); H.R. 1782, 105th Cong. (1997).

use of appropriated funds to the United States Drug Enforcement Agency and the United States Department of Justice to prevent states from implementing laws that authorize the possession, cultivation and use of marijuana for medical purposes.[19] Consequently, the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws is a clear subversion of the legislative process that can only be justified as a valid use of prosecutorial discretion by the Executive Branch.[20]

Although the Court's analysis in *Batchelder* was focused on an alleged violation of the Equal Protection and Due Process Clauses of the Federal Constitution by the Executive Branch through its use of prosecutorial discretion, the Court left open the possibility of other "constitutional constraints" on the prosecutorial discretion of the Executive Branch.[21] The separation of powers in the Federal Constitution, which grants Congress the power to regulate interstate commerce and make all laws that are necessary and proper for the execution of Congress' powers and makes the Executive Branch responsible for executing the laws of the United States,[22] has a strong likelihood of being one of the additional "constitutional constraints" on the prosecutorial discretion of the Executive Branch. If presented with the question regarding the constitutionality of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws, there is a strong likelihood that a federal court would call into question the Executive Branch's use of prosecutorial discretion to bypass the legislative process and enact enforcement policy consistent with legislation that had been proposed but rejected by Congress.

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19. *See* H. AMDT. 674 (amending H.R. 3093), 110th Cong. (2007); H.AMDT. 1144 (amending H.R. 5672), 109th Cong. (2006); H.AMDT. 272 (amending H.R. 2862), 109th Cong. (2005); H.AMDT. 646 (amending H.R. 4754), 109th Cong. (2004); H.AMDT. 297 (amending H.R. 2799), 108th Cong. (2003).

20. The Deputy Attorney General of the United States Department of Justice sent a memorandum to selected United States attorneys on October 19, 2009, acknowledging the Executive Branch's reliance on prosecutorial discretion to justify the constitutionality of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws. Ogden, *supra* note 6, at 2; *see also* Barrett, *supra* note 6 ("Given the limited resources that we have, our focus will be on people, organizations that are growing, cultivating substantial amounts of marijuana and doing so in a way that's inconsistent with federal and state law.").

21. *See supra* note 15 and accompanying text.

22. *See* U.S. CONST. art. I, § 8, cl. 3, 18; U.S. CONST. art. II, § 3; *McCulloch*, 17 U.S. 316, 421 (1819); *Wickard*, 317 U.S. 111, 125 (1942).

Moreover, the concerns of judicial review with of the exercise of prosecutorial discretion by the Executive Branch raised by the Court in *Wayte* generally do not apply with respect to judicial review of the change in the Executive Branch's enforcement policy regarding medical marijuana. First, judicial review of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws would not undermine prosecutorial effectiveness by revealing the Executive Branch's enforcement policy, delay any enforcement proceeding, or chill law enforcement because the Executive Branch has publicly announced its enforcement policy regarding medical marijuana.[23] Second, the concerns of the Court in *Wayte* regarding judicial review of the strength of a particular case, a particular case's relationship to the Executive Branch's enforcement plan or the general deterrence value of the prosecution of a particular case would not be applicable to judicial review of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws, as such a review (as outlined in Section II below) would relate to the Executive Branch's general enforcement plan regarding medical marijuana rather than the prosecution of a particular case. Finally, although the Executive Branch's enforcement priorities are generally not susceptible to judicial review, the failure of the Executive Branch to investigate or prosecute medical marijuana dispensaries operating openly in major metropolitan areas with publicly available websites (and consequently minimal investigation and prosecution costs) would likely be questioned by a federal court.

Consequently, given the separation of powers in the Federal Constitution and the United States Supreme Court's holdings in *Batchelder* and *Wayte*, the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws is a questionable use of prosecutorial discretion.

## II. The Impact of the Executive Branch's Decision To Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws

As indicated in the Introduction to this Comment, the number of medical marijuana patients and dispensaries in the states that have enacted legislation legalizing the possession, cultivation, and use of marijuana for the treatment of certain illnesses has dramatically

23. *See supra* note 6 and accompanying text.

increased following the change in the Executive Branch's enforcement policy regarding medical marijuana.[24] This increase is directly attributable to the imprimatur of the Executive Branch with respect to medical marijuana. Medical marijuana patients and dispensaries are now comfortable possessing, cultivating, and using marijuana in compliance with state medical marijuana laws without fear of federal investigation or prosecution.

The imprimatur of the Executive Branch with respect to medical marijuana provides individuals with a false sense of security in relying upon compliance with state medical marijuana laws given the possibility of a legal challenge to the change in the Executive Branch's enforcement policy regarding medical marijuana. On December 4, 1882, the United States Supreme Court in *United States v. Lee* established the doctrine of sovereign immunity, which generally prohibits lawsuits against the federal government by private citizens unless Congress has consented to such lawsuit.[25] Because of such immunity, private citizens do not have standing to sue the Executive Branch for failure to enforce the Controlled Substances Act with respect to individuals in compliance with state medical marijuana laws.[26]

Members of Congress, however, may have standing to sue the Executive Branch for failure to enforce the Controlled Substances Act with respect to individuals in compliance with state medical marijuana laws under the doctrine of legislative standing. On June 5, 1939, the United States Supreme Court in *Coleman v. Miller* held that Kansas state senators had standing to challenge the passage of the Child Labor Amendment in the Kansas Senate pursuant to Article V of the Federal Constitution where the Kansas Lieutenant Governor, as the then-presiding officer of the Kansas Senate, cast the deciding vote in favor of the Amendment.[27] The rationale of the Court in *Coleman* for granting standing to the Kansas senators was that the

24. *See supra* notes 7 and 8 and accompanying text.

25. United States v. Lee, 106 U.S. 196, 206–07 (1882).

26. Although Congress consented to certain lawsuits against the federal government in 1948 when it enacted the Federal Tort Claims Act, such lawsuits are limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2009). Because a private person cannot be held liable for failure to enforce federal law, the Federal Tort Claims Act would not permit a lawsuit by a private citizen against the Executive Branch for failure to enforce the Controlled Substances Act with respect to individuals in compliance with state medical marijuana laws.

27. Coleman v. Miller, 307 U.S. 433, 450 (1939).

senators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes" with respect to amendments to the Federal Constitution.[28] Nevertheless, on June 26, 1997, the Court in *Raines v. Byrd* held that members of Congress did not have standing to challenge the Line Item Veto Act that was passed by Congress and signed into law by then President William Clinton.[29] The Court's rationale in *Raines* for refusing to grant standing to the members of Congress was that the members "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect; they simply lost that vote."[30]

Under the doctrine of legislative standing established by the United States Supreme Court in *Coleman* and revisited in *Raines*, any United States Congressman who voted for appropriations bills that appropriated funds to the United States Drug Enforcement Agency and the United States Department of Justice for the enforcement of the Controlled Substances Act would have a strong likelihood of obtaining standing with respect to a challenge to the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws. Such Congressmen would be able to demonstrate, as required by the Court in *Coleman*, that the effectiveness of their votes on such appropriations bills has been nullified by the Executive Branch's decision to enact enforcement policy regarding medical marijuana in direct contravention to such bills and in accordance with amendments to such bills that had been proposed but rejected by Congress. Unlike the Congressmen in *Raines*, here Congressmen can directly point to the specific appropriations bills that they voted for and were passed, but nonetheless were nullified by the change in the Executive Branch's enforcement policy regarding medical marijuana.

In addition, despite the current enforcement policy of the Executive Branch with respect to medical marijuana, it should be noted that violations of the Controlled Substances Act are subject to a five-year statute of limitations.[31] The imprimatur of the Executive Branch with respect to medical marijuana also provides individuals with a false sense of security in relying upon compliance with state

28. *Id.* at 438.

29. Raines v. Byrd, 521 U.S. 811, 813–14 (1997).

30. *Id.* at 824.

31. 18 U.S.C. § 3282 (2009).

medical marijuana laws given the possibility of a change to such enforcement policy by the Executive Branch during or after the expiration of the term of President Obama.

Finally, it should be noted that defendants to any future federal prosecution regarding the possession, cultivation, and use of marijuana in compliance with state medical marijuana laws will likely be unable to claim ignorance of the law as a defense, as the Court has repeatedly held that such a defense in untenable in federal court.[32]

## Conclusion

This Comment illustrates that the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws is a questionable use of prosecutorial discretion and provides individuals with a false sense of security in relying upon compliance with such laws given the imprimatur of the Executive Branch, the possibility of a legal challenge to the Executive Branch's revised enforcement policy regarding medical marijuana, and the length of the statute of limitations with respect to violations of the Controlled Substances Act.

In order to ensure the constitutionality of the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws, Congress should pass, and President Obama should sign into law, legislation consistent with the Executive Branch's revised enforcement policy regarding medical marijuana. Such legislation should preferably permit the possession, cultivation, and use of marijuana by individuals in compliance with state medical marijuana laws under the Controlled Substances Act, but at the very least amend appropriations bills to prohibit the use of appropriated funds to the United States Drug Enforcement Agency and the United States Department of Justice to prevent states from implementing laws that authorize the possession, cultivation, and use of marijuana for medical purposes.[33]

Until such legislation is signed into law, states that have enacted medical marijuana laws should warn medical marijuana patients that the Executive Branch's decision to not investigate or prosecute individuals in compliance with state medical marijuana laws is subject

32. *See, e.g.*, United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 563 (1971); Cheek v. United States, 498 U.S. 192, 199 (1991).

33. Similar legislation has been previously considered by Congress. *See supra* notes 18 and 19 and accompanying text.

to legal challenge and could change at any time, and that violations of the Controlled Substances Act are subject to a five-year statute of limitations. In order to maximize the utility of such warnings, medical marijuana dispensaries should be required by states to post a clear description of such warnings in a readily visible manner. Such warnings will help to ensure that individuals in compliance with state medical marijuana laws are aware of the possibility of federal prosecution despite the Executive Branch's revised enforcement policy regarding medical marijuana.

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