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## A Gateway to Future Problems: Concerns about the State by-State Legalization of Medical Marijuana

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A Gateway to Future Problems: Concerns about the State-by-State Legalization of Medical Marijuana

PAUL LEWIS\*

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## INTRODUCTION

Before 2009, every American presidential administration had been uniform in its policy of consistently enforcing the nation's drug laws. Pursuant to federal law, possession, use, or cultivation of any drug deemed illegal by Congress was, universally, a prosecutable offense. Notwithstanding this unwavering policy, throughout the 1990s and early 2000s, the marijuana industry continued to grow, and several states legalized medicinal marijuana despite the standing federal prohibition. Moreover, President Barack Obama, shortly after taking office, broke precedent with his predecessors when he put forth a policy of non-enforcement through a publicly released memorandum authored by the then Deputy Attorney General, David Ogden, (hereinafter Ogden Memo or Memo) "provid[ing] clarification and guidance to federal prosecutors in states that have enacted laws authorizing the medical use of marijuana."<sup>1</sup> In this Memo, Ogden discouraged expenditure of "limited investigative and prosecutorial resources" on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."<sup>2</sup> Following the release of this Memo, many more states have enacted legislation that would legalize medical marijuana, and accordingly, during the Obama administration, the medical marijuana industry has demonstrated incredible growth. Furthermore, it is projected to continue to grow exponentially over the next five years.

Based on this considerable increase in medical-marijuana-related activity following the release of the Ogden Memo, it is reasonable to conclude that much of the medical marijuana industry's growth can be attributed to a reliance on this Memo. In this article, I will argue why such broad reliance lays a dangerous path—for the states which have already legalized medical marijuana, for the states that are in the process of legalizing medical marijuana, for the 1.3 million people currently working in the industry, and for

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<sup>1</sup> Memorandum For Selected United States Attorneys from Deputy Attorney General David Ogden to United States Attorneys (Oct. 19, 2009) [hereinafter Ogden Memo], available at <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

<sup>2</sup> *Id.*

all who will soon join it. To make my case, I first explain why the Ogden Memo has no real ability to constrain individual Assistant United States Attorneys' (AUSAs') charging decisions, given the difficulty of imposing internal checks on their prosecutorial discretion, especially in this context. Next, I argue that the Ogden Memo also lacks legal authority that can be relied upon by medical marijuana defendants whose activities were in compliance with their state medical marijuana laws, as has already been demonstrated by the District of Southern California's decision in *U.S. v. Stacy*<sup>3</sup> Further, the Memo does not restrain other federal governmental authorities from imposing non-criminal sanctions upon individuals, even when their behavior complies with their own state's medical marijuana laws. Additionally, even if the Ogden Memo has indeed succeeded in constraining federal prosecutorial activity in this arena to some degree, there is no reason to believe that the Memo will continue to do so after the completion of Obama's second term.

In the final section of this article, I turn to the very notion of the Executive Branch's releasing of a policy of non-enforcement of a federal law upon an entire category of crime, such as that described in the Ogden Memo. I argue that it is a questionable use of prosecutorial discretion, pursuant to the Executive Branch's law-enforcement obligation described in the United States Constitution.<sup>4</sup> I explain my concern that, if left unchecked, the Ogden Memo will set a precedent which allows the Executive Branch to effectively veto any standing United States criminal law by simply deciding not to enforce it. Ultimately, I fear that this extreme use of prosecutorial discretion—specifically, the shirking of a Constitutional obligation on the part of the Executive Branch and, therefore, the threatening of Congress's ability to create valid federal criminal law<sup>5</sup>—could have grave consequences for the validity of the federal government's

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<sup>3</sup> 734 F. Supp. 2d 1074, 1079–80 (S.D. Cal. 2010).

<sup>4</sup> U.S. CONST. art. II, § 3 (“[The Executive Branch] shall take care that the laws [are] faithfully executed.”).

<sup>5</sup> Legal positivists, such as John Austin, believe that laws require a sovereign to impose sanctions for violations of law in order for that law to be legitimate. *See generally* J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832). *See also* Robert S. Summers, *On Identifying And Reconstructing A General Legal Theory Some Thoughts Prompted By Professor Moore's Critique*, 69 *CORNELL L. REV.* 1014, 1035 (1984) (stating Austin's conception of law focused on “duty-imposing rules backed by sanctions”) [hereinafter Austin].

delicate balance of powers and the corresponding obligations that flow therefrom.

## I. BACKGROUND

### A. Origins of the War on Drugs

President Richard Nixon officially declared a “War on Drugs” in 1971.<sup>6</sup> Some would even argue that this federally-waged “war” had begun even before that time.<sup>7</sup> In 1965, Congress passed the Drug Abuse Control Amendments Act, which created the Bureau of Drug Abuse Control within the Food and Drug Administration.<sup>8</sup> Then, in 1968, Lyndon Johnson established the Bureau of Narcotics and Dangerous Drugs, later referred to as the Drug Enforcement Agency (DEA), which absorbed the Bureau of Drug Abuse Control in 1973, and which was under the umbrella of the Department of Justice (DOJ).<sup>9</sup>

Beginning in 1969, the Drug War crossed the border into foreign policy when efforts to limit drug smuggling from Mexico culminated in “Operation Intercept,” which effectively resulted in a shutdown of the Mexico-United States border.<sup>10</sup> On the domestic front, President Richard Nixon had previously signed the Comprehensive Drug Abuse Prevention and Control Act into law, which established a new categorization system for drug regulation and thereby became the new basis for federal drug policy.<sup>11</sup> Most notably for the purposes of this article, Title II of this Act, commonly referred to as the “Controlled Substances Act” (CSA),

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<sup>6</sup> Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 435–439 (2010).

<sup>7</sup> *See id.*

<sup>8</sup> *See* Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 286 (2010).

<sup>9</sup> *See id.*

<sup>10</sup> *See* Matthew S. Jenner, Note, *International Drug Trafficking: A Global Problem with a Domestic Solution*, 18 IND. J. GLOBAL LEG. STUD. 901, 912 (2011). The operation only lasted two weeks because of the massive complications it caused, but thereafter Mexico agreed to more aggressively attack marijuana trade. *Id.*

<sup>11</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§801–971 (2006); Boldt, *supra* note 8, at 286.

divides all drugs into five “schedules,” based on whether the particular drug has a currently accepted medical use, and it imposes restrictions accordingly.<sup>12</sup> The statute reflects a determination that marijuana has no medical benefits, thereby placing it in “schedule I,” where it remains today.<sup>13</sup> Nixon also created the National Commission on Marijuana and Drug Abuse, whose sole purpose was to study marijuana use and abuse in the United States.<sup>14</sup> Therefore, it did not come as a huge surprise when the President declared drug use to be “Public Enemy Number One” in June of 1971.<sup>15</sup>

Early on in the government’s response, the DEA established itself as the agency in the driver’s seat of the intensifying Drug War with respect to the investigation of, and efforts to control, the domestic drug trade.<sup>16</sup> As the years passed, however, public support for the Drug War, as well as the intensity from Washington, began to dwindle.<sup>17</sup> Accordingly, the aggressive anti-drug rhetoric of previous administrations diminished significantly during the presidencies of Gerald Ford and Jimmy Carter.<sup>18</sup> However, with the election of Ronald Regan, and, subsequently, that of George H.W. Bush, the Drug War again gained momentum in the 1980s, as Congress passed three key statutes, each designed with the intention of bolstering the breadth and enforcement of the nation’s drug laws.<sup>19</sup>

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<sup>12</sup> See 21 U.S.C. §§ 801–971; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491–492 (2001).

<sup>13</sup> *Id.* (citing 21 U.S.C. §§ 801–971).

<sup>14</sup> See EFFECTIVE DRUG CONTROL: TOWARD A NEW LEGAL FRAMEWORK 14 (King County Bar Ass’n, 2005) [hereinafter EFFECTIVE DRUG CONTROL], available at <http://www.kcba.org/druglaw/pdf/effectivedrugcontrol.pdf>.

<sup>15</sup> See Boldt, *supra* note 8, at 286; NPR.ORG, *Special Series: The Forgotten War on Drugs*, [hereinafter *Forgotten War*], <http://www.npr.org/templates/story/story.php?storyId=9252490> (last visited Sept. 29, 2014).

<sup>16</sup> Yung, *supra* note 6, at 437–40. Note that the DEA is also heavily involved in enforcement on an international level. See UNITED STATES DEPARTMENT OF JUSTICE, *DEA International Training*, <http://www.justice.gov/dea/ops/Training/IntTraining.shtml> (last visited Sept. 29, 2014).

<sup>17</sup> See EFFECTIVE DRUG CONTROL, *supra* note 14, at 26; Yung, *supra* note 6, at 437–40.

<sup>18</sup> Boldt, *supra* note 8, at 287.

<sup>19</sup> *Id.* at 287–88.

In 1984, Congress passed the Comprehensive Crime Control Act, which added a series of new drugs to the list of previously prohibited substances, and the Act also introduced new laws allowing prosecutors to seize assets of alleged drug offenders (prior to conviction).<sup>20</sup> Subsequently, in 1986, Congress passed the Anti-Drug Abuse Act, which addressed widespread concern about crack cocaine, by introducing mandatory minimum sentences, along with other harsher penalties.<sup>21</sup> Lastly, in 1988, Congress passed the Anti-Drug Abuse Act, which further increased mandatory drug penalties<sup>22</sup> and created the Office of National Drug Control Policy, the head of which has the unofficial title of “Drug Czar.”<sup>23</sup>

Rhetorically, the 1980s also saw a concerted government effort to inform the public about the dangers of drug use. Specifically, the Regan Administration introduced the “Just Say No” slogan, which became a national rallying cry for anti-drug proponents.<sup>24</sup> In 1987, the Partnership for a Drug Free America<sup>25</sup> released a well-known advertisement analogizing a cracked egg to a brain under the influence of drugs, which was subsequently named one of the top 100 best commercials of all time by TV Guide.<sup>26</sup> Additionally, other public and private entities joined the fight during this era, including the Drug Abuse Resistance Education (“DARE”) program, originally a Los Angeles-focused organization that later became national.<sup>27</sup>

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<sup>20</sup> See H.R.J. Res. 648, 98th Cong. (1984); Boldt, *supra* note 8, at 287–288.

<sup>21</sup> See H.R. 5484, 99th Cong. (1986); Boldt, *supra* note 8, at 287–288.

<sup>22</sup> See H.R. 5210, 100th Cong. (1988); Boldt, *supra* note 8, at 287–288.

<sup>23</sup> Boldt, *supra* note 8, at 287–288; See EFFECTIVE DRUG CONTROL, *supra* note 14, at 27.

<sup>24</sup> Yung, *supra* note 7, at 437–40.

<sup>25</sup> The Partnership at Drugfree.org, formerly known as the Partnership for a Drug-Free America is a New York City-based non-profit organization which runs campaigns against teenage drug and alcohol abuse in the United States. See THE PARTNERSHIP AT DRUGFREE.ORG, <http://www.drugfree.org> (last visited Sept. 29, 2014).

<sup>26</sup> See Erika Alexander, *Famous fried eggs: Students debate effectiveness, accuracy of well-known anti-drug commercial*, CNN STUDENT BUREAU (Dec. 6, 2000), <http://edition.cnn.com/fyi/interactive/news/brain/brain.on.drugs.html> (last visited Sept. 29, 2014).

<sup>27</sup> Yung, *supra* note 7, at 437–40.

## B. Modern Legislative and Judicial Approaches to the Marijuana “Problem”

Throughout the entire federally-waged Drug War, spanning from the 1960s through today, federal law has not distinguished between medicinal and recreational uses of marijuana, as it has consistently deemed both to be expressly forbidden.<sup>28</sup> In fact, lawmakers have repeatedly refused to change marijuana’s status under the Controlled Substances Act, a step that would allow the substance to legally be used for medicinal purposes.<sup>29</sup> Perhaps even more significantly, Congress has repeatedly rejected amendments to appropriation bills that would prohibit the DOJ from using funds to prevent states from implementing laws that authorize the possession, cultivation, and use of marijuana for medical purposes.<sup>30</sup> Additionally, two significant Supreme Court decisions, *Gonzalez v. Raich*, and *U.S. v. Oakland Cannabis Buyers’ Coop*, have indicated that legislative regulation of marijuana is solely within the power of the federal government, and that federal courts may not carve out exceptions to the CSA for individuals who claim a dire medical need for marijuana.<sup>31</sup>

In the 2001 case *Oakland Cannabis Buyers’ Coop*, the Court considered a California statute that created an exception to California laws prohibiting the possession and cultivation of

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<sup>28</sup> See Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 635 (2011).

<sup>29</sup> 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); Vijay Sekhon, Comment, *Highly Uncertain Times: An Analysis of the Executive Branch’s Decision To Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553, 557 n.18 (2010); see also Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1434–35 (2009) (discussing failed legislative and administrative proposals to reschedule marijuana at the federal level).

<sup>30</sup> See H. Amdt. 674, 110th Cong. (2007); H. Amdt. 1144, 109th Cong. (2006); H. Amdt. 272, 109th Cong. (2005); H. Amdt. 646, 109th Cong. (2004); H. Amdt. 297, 108th Cong. (2003); Sekhon, *supra* note 29, at 557–58 n.19.

<sup>31</sup> See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005); *Oakland Cannabis Buyers’ Coop.*, 532 U.S. at 486.



marijuana.<sup>32</sup> Specifically, the statute held that “[t]hese prohibitions [of cultivation and possession of marijuana] no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient’s medical purposes upon the recommendation or approval of a physician.”<sup>33</sup> The petitioner, Oakland Cannabis Buyers’ Coop, argued that the defense of “medical necessity” should be read into the language of the CSA that prohibits the cultivation or possession of marijuana.<sup>34</sup> The Court disagreed, holding that it “need not decide...whether necessity can ever be a defense when the federal statute does not expressly provide for it. To resolve the question presented in this case, [it] need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act.”<sup>35</sup> The Court further explained that the CSA “does not explicitly abrogate the defense[,] [b]ut its provisions leave no doubt that the defense is unavailable.”<sup>36</sup>

A few years later, the Supreme Court explicitly held that the regulation of marijuana under the CSA fell squarely within Congress’ constitutionally-mandated Commerce Power<sup>37</sup> and ruled that marijuana regulation was undoubtedly within the domain of federal law,<sup>38</sup> thereby rendering it binding on the states pursuant to the Supremacy Clause of the Constitution.<sup>39</sup> In *Raich*, despite the fact that the respondent was indisputably growing and ingesting marijuana for medical purposes pursuant to California law,<sup>40</sup> DEA agents seized and destroyed all of his cannabis plants.<sup>41</sup> In its

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<sup>32</sup> *Oakland Cannabis Buyers’ Coop.*, 532 U.S. at 486.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 490.

<sup>35</sup> *Id.* at 491.

<sup>36</sup> *Id.*

<sup>37</sup> See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . [to] regulate Commerce with foreign Nations and among the several States . . .”).

<sup>38</sup> *Raich*, 545 U.S. at 5.

<sup>39</sup> U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”).

<sup>40</sup> See CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005).

<sup>41</sup> *Raich*, 545 U.S. at 7.

decision, the Court declared that its jurisprudence “establishes Congress's power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”<sup>42</sup> Analogizing the marijuana market to that of wheat<sup>43</sup> because both have a “substantial effect on supply and demand in the national market for that commodity,”<sup>44</sup> the Court also stressed that it need not determine “whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>45</sup> Citing the enforcement difficulties that would inevitably be involved in distinguishing between locally and non-locally grown marijuana, as well as concerns about diversion of locally grown marijuana, the Court had “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”<sup>46</sup>

Despite the fact that all evidence indicates that federal lawmakers have been, and continue to be, adamantly opposed to the legalization of marijuana;<sup>47</sup> that the Supreme Court has held that no

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<sup>42</sup> *See id.* at 17.

<sup>43</sup> The Court relied upon an earlier decision, *Wickard v. Filburn*, 317 U.S. 111 (1942), where, in rejecting the appellee farmer's contention that Congress's admitted power to regulate the production of wheat for commerce did not authorize federal regulation of wheat production intended wholly for the appellee's own consumption, the Court established that Congress can regulate purely intrastate activity that is not itself “commercial.” That is, not produced for sale if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. *Raich*, 545 U.S. at 5 (citing 317 U.S. 111, 127–128 (1942)).

<sup>44</sup> Of course, this analogy is striking because the marijuana market as a whole is illegal under federal law. *See* 21 U.S.C. §§ 801–971. Based on this significant difference between the situation in *Wickard* and the situation in *Raich*, it seems that the Supreme Court could have easily distinguished the two cases. *See generally* *Raich*, 545 U.S. at 57–59 (Thomas, J., dissenting).

<sup>45</sup> *See id.* at 19, 22.

<sup>46</sup> *See id.* at 22. In assessing the scope of Congress' authority under the Commerce Clause, the court need not determine whether the regulated activities, taken in the aggregate, substantially affect interstate commerce; it only must determine whether a “rational basis” exists for so concluding. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

<sup>47</sup> *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.

medical exception can be read into the CSA;<sup>48</sup> and that the Supreme Court has granted Congress the sole authority to regulate marijuana (medical or non-medical),<sup>49</sup> a significant (and still growing) number of states have recently reformed their own laws to legalize medical marijuana, beginning with California in 1996.<sup>50</sup> While the specifics of these individual state laws vary, they generally permit a resident to possess, consume, and grow marijuana by obtaining a qualifying diagnosis and recommendation from a licensed physician.<sup>51</sup>

### C. Pre-Obama Executive Branch Response to State Legalization of Medical Marijuana

Even prior to the aforementioned Supreme Court decisions, federal officials vowed to come down hard on the state medical marijuana legalization movement.<sup>52</sup> Specifically, in response to California's 1996 Compassionate Use Act,<sup>53</sup> President Clinton's "Drug Czar," Barry McCaffrey, issued a public statement, which outlined the steps that the federal government would take to prevent states from legalizing medical marijuana.<sup>54</sup> McCaffrey stated that suppliers would be prosecuted; various government benefits would be denied to anyone who used marijuana pursuant to state law; and marijuana-recommending physicians' licenses would be revoked.<sup>55</sup>

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(2001); H.R. 912, 106th Cong. (1999); H.R. 1782, 105th Cong. (1997); *see also* H. Amdt. 674, 110th Cong. (2007); H. Amdt. 1144, 109th Cong. (2006); H. Amdt. 272, 109th Cong. (2005); H. Amdt. 646, 109th Cong. (2004); H.Amdt. 297, 108th Cong. (2003).

<sup>48</sup> *See Oakland Cannabis Buyers' Coop.*, 532 U.S. at 491.

<sup>49</sup> *See Raich* 545 U.S. at 19, 22.

<sup>50</sup> Mikos, *supra* note 28, at 636.

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 637.

<sup>53</sup> *See* CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2014).

<sup>54</sup> *See* Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997) ("Department of Justice's (DOJ) position is that a practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the "public interest" (as that phrase is used in the federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration.").

<sup>55</sup> *See id.*; Mikos, *supra* note 28, at 637–38.

Regarding such revocations, Vanderbilt University School of Law Professor Robert Mikos observed in his article, titled *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, that the states “seem[ed to] anticipate this roadblock.”<sup>56</sup> For example, California’s medical marijuana laws only required a physician’s *recommendation* for attainment of the cannabis, as opposed to a prescription.<sup>57</sup> While this specific distinction did not originally affect the DEA’s crackdown efforts, it was eventually found to be constitutionally significant by the Ninth Circuit in *Conant v. Walters*.<sup>58</sup> According to this Court, a recommendation, unlike a prescription, entails no more than simply discussing marijuana use; it does not necessarily encourage marijuana use.<sup>59</sup> As a result of this statutory distinction, in conjunction with the Ninth Circuit’s decision, the DEA no longer threatens to sanction physicians for recommending marijuana.<sup>60</sup>

The battle against state medical marijuana legalization intensified under the administration of George W. Bush, as Assistant United States Attorneys prosecuted several high-profile medical marijuana suppliers during these eight years.<sup>61</sup> Even more at the front lines of this administration’s crackdown was the DEA, which conducted significant numbers of raids on medical marijuana dispensaries in this period.<sup>62</sup> Through the laws enacted in the 1980s pertaining to asset seizure,<sup>63</sup> the DEA also frequently commenced forfeiture proceedings against landlords who are aware of the fact that their tenants are growing marijuana on their property.<sup>64</sup>

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<sup>56</sup> Mikos, *supra* note 30, at 1466.

<sup>57</sup> *Id.*

<sup>58</sup> See 309 F.3d 629, 639–40 (9<sup>th</sup> Cir. 2002) (Kozinski, J., concurring) (“By speaking candidly to their patients about the potential benefits of medical marijuana, [physicians] risk losing their license to write prescriptions, which would prevent them from functioning as doctors.”).

<sup>59</sup> See *id.* at 638.

<sup>60</sup> See Mikos, *supra* note 29, at 1466–67.

<sup>61</sup> Mikos, *supra* note 28, at 638 (citing Bob Egelko, *Pot Advocate Gets 1 Day in Jail and Gives Judge a Piece of His Mind*, S.F. CHRON., July 7, 2007, at B3 (detailing Bush II Administration’s prosecution of Ed Rosenthal, the so-called guru of ganja)).

<sup>62</sup> See Mikos, *supra* note 28, at 638 (noting that there were almost two hundred raids on medical marijuana dispensaries in CA alone during this period).

<sup>63</sup> See H.R.J. Res. 648, 98th Cong. (1984).

<sup>64</sup> Mikos, *supra* note 29, at 1467.

Ultimately, however, these federal efforts to take down large marijuana suppliers are unlikely to have had a significant impact on the supply or use of marijuana as a whole, as evidence indicates that production of medical marijuana has still surged in the past few decades.<sup>65</sup> Professor Robert Mikos attributes this “fail[ure]” (at least from the perspective of the federal government) to the lack of “substantial barriers to entry in the marijuana market.”<sup>66</sup> Specifically, he explains that marijuana can be produced in any climate; special skills are unnecessary to cultivate the plant; and ample information regarding proper cultivation is readily available online.<sup>67</sup> Due to this relative ease of production, as well as the significant demand for the product, the sub-optimal results of any federally initiated and sponsored crackdown on marijuana seem to demonstrate that the federal government *alone* (without the help of the states) simply lacks the resources to make a dent in this ever-growing industry, notwithstanding the field’s [at best] questionable legality.<sup>68</sup>

#### D. The Obama Administration Tries a Different Approach

In 2009, the Obama administration declared that it would take a political 180-degree turn from the medical marijuana policies of its predecessors, when it announced that it would cease enforcement of the federal ban on medical marijuana.<sup>69</sup> This announcement came by way of multiple individuals through multiple vehicles, starting with the [arguably ambiguous]<sup>70</sup> promises made

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<sup>65</sup> *See id.* (citing JOHN GETTMAN, MARIJUANA PRODUCTION IN THE UNITED STATES 3 (2006), available

at <http://www.drugscience.org/Archive/bcr2/MJCropReport2006.pdf> (estimating that domestic marijuana production surged ten-fold between 1981 and 2006, in spite of ongoing federal and state eradication campaigns; also concluding that marijuana is the largest cash crop in the United States)).

<sup>66</sup> Mikos, *supra* note 29, at 1467.

<sup>67</sup> *Id.*

<sup>68</sup> *See* discussion of Ogden Memo’s authoritative force *infra* Part III.

<sup>69</sup> Mikos, *supra* note 29, at 633.

<sup>70</sup> Stacy, 734 F. Supp. 2d at 1080 (“At best, these statements show that in early 2009, when former President Bush personnel still held key positions in the federal government, the Obama administration did not *anticipate* that it would continue DEA raids of medical marijuana dispensaries complying with state law.”).

earlier by then candidate Barack Obama and concurrent statements from his spokesmen made before the election.<sup>71</sup> Subsequently, almost one year after the 2008 election, came the most significant promulgation of the new President's policy in a highly-publicized memorandum to "Selected United States Attorneys" from Deputy Attorney General David Ogden.<sup>72</sup> The purported purpose of the Ogden Memo was to "provide[] uniform guidance to focus federal investigations and prosecutions in [] States [in which medical marijuana is legal] on core federal enforcement priorities."<sup>73</sup> Citing a commitment to "making efficient and rational use of [the DOJ's] limited investigatory and prosecutorial resources," the Ogden Memo urged federal prosecutors not to enforce the federal marijuana ban against persons who act in "clear and unambiguous compliance" with state medical marijuana laws.<sup>74</sup>

At first glance, as Professor Mikos observes, the Ogden Memo "seemingly represents a ground-breaking shift in federal drug policy...[because] it appears to suspend the federal government's long-standing campaign against medical marijuana."<sup>75</sup> This is the interpretation that was embraced by the media,<sup>76</sup> as well as a significant number of states and many of their residents.<sup>77</sup> Shortly before the Ogden Memo was released, as of early October 2009, 12 states allowed for some form of legalized medical marijuana.<sup>78</sup>

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<sup>71</sup> See *id.* at 1078.

<sup>72</sup> See Ogden Memo, *supra* note 1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Mikos, *supra* note 28, at 639.

<sup>76</sup> See *id.* at 639 n.34 (citing Editorial, *Medical Marijuana's Merit: Obama Administration's Policy Change Is Right Call*, DALLAS MORNING NEWS, Oct. 26, 2009, at A12 ("[The NEP memorandum] reverses longstanding federal policy and marks a step toward separating those who could be helped by marijuana's therapeutic properties from those who criminally distribute or use it."); Editorial, *Good Sense on Medical Marijuana*, N.Y. TIMES, Oct. 21, 2009, at A30 ("Attorney General Eric Holder Jr. has made the right decision, calling off prosecutions of patients who use marijuana for medical purposes or those who distribute it to them - provided they comply with state law. It is a welcome reversal of the Bush administration's ideologically driven campaign to prosecute dispensaries.")).

<sup>77</sup> See discussion of state legalization and growth of industry *infra* Part II(D).

<sup>78</sup> See PROCON.ORG, *Historical Timeline: History of Marijuana as Medicine - 2900 BC to Present*,

Following the release of the Ogden Memo, Maine immediately legalized medical marijuana within a matter of weeks, and then seven more states followed with legalizations by March of 2014.<sup>79</sup> Additionally, and perhaps more indicative of a trend, today, less than five years after the Ogden Memo was released, several other states, not including the aforementioned 20, currently<sup>80</sup> have pending legislation which will allow for the legalization of medical marijuana.<sup>81</sup>

The impact of the Ogden Memo also can be measured by the significant economic growth of the industry during this period and to date. According to IBISWorld, an industry reporting company, the federal government's "signal [of] its tacit acceptance" of state action to legalize marijuana for medical use has caused the nationwide medical marijuana industry to grow at a rate of 13.8 percent since 2009.<sup>82</sup> IBISWorld projects the industry's annual revenue to be \$2 billion and estimates that over 1.3 million people across the country are employed in the industry.<sup>83</sup> Of course, with the pending legalization legislation in several additional states, one can certainly expect those industry numbers to continue to grow.<sup>84</sup> Indeed, a recent Huffington Post article cited a projected annual growth of the "legal" marijuana market, the vast majority of which is medical, to eclipse that of even the smartphone—formerly the fastest growing market, based on a recent report about the growth of the marijuana industry.<sup>85</sup>

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<http://medicalmarijuana.procon.org/view.timeline.php?timelineID=000026#2005-2009> (last visited Aug. 29, 2014) [hereinafter PROCON.ORG].

<sup>79</sup> See *id.* These states include: New Jersey, Arizona, Delaware, Connecticut, Massachusetts, New Hampshire, and Illinois.

<sup>80</sup> As of September, 2014.

<sup>81</sup> See PROCON.ORG, *supra* note 78.

<sup>82</sup> See Brian Alexander, *Medical Marijuana Requests Climb Sky High*, Apr. 15, 2009, <http://rss.msnbc.msn.com/id/30217044> [hereinafter Alexander]; see also IBISWORLD.COM, *Medical Marijuana Growing in the US: Market Research Report*, <http://www.ibisworld.com/industry/medical-marijuana-growing.html> (last visited August 29, 2014) (medical marijuana industry currently growing at a rate of 16.2%) [hereinafter IBISWORLD.COM].

<sup>83</sup> IBISWORLD.COM, *supra* note 82.

<sup>84</sup> See generally Alexander, *supra* note 82.

<sup>85</sup> Carly Schwartz, *Marijuana Market Poised To Grow Faster Than Smartphones*, HUFFINGTON POST, Nov. 1, 2013, [http://www.huffingtonpost.com/2013/11/04/marijuana-market\\_n\\_4209874.html](http://www.huffingtonpost.com/2013/11/04/marijuana-market_n_4209874.html)

Steve Berg, managing director of Wells Fargo Bank and editor of this report, the second edition of the *State of Legal Marijuana Markets*, stated that cannabis is the fastest-growing domestic industry in the nation.<sup>86</sup> Berg's report credits a "seismic shift in the public attitudes towards marijuana" for its rapid growth in a large group of select states.<sup>87</sup> The report predicts that, in the next five years, fourteen more states will legalize marijuana in some form, and that the market will grow to \$10.2 billion annually by 2018.<sup>88</sup>

#### E. Resistance to the Nationwide Trend of Medical Marijuana Legalization within the Executive Branch's Own Department of Justice

Unfortunately for some, a "shift" in "public attitudes towards [medical] marijuana"<sup>89</sup> does not necessarily equate to federal acceptance of this state-catalyzed trend across the three branches. In fact, there is evidence of some form of resistance to this trend from every branch of government: the Legislative Branch has consistently rejected attempts at CSA reform;<sup>90</sup> the Supreme Court has analogized the *legal* wheat market with the *illegal* marijuana market to support its holding that marijuana regulation is within the federal domain;<sup>91</sup> and, perhaps most surprisingly, even the Executive

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(stating the smartphone market is growing at an annual rate of 7.3%) [hereinafter Schwartz] (citing Arcview Market Research, *LEGAL MARIJUANA MARKETS 2D* (2013), available at <http://www.arcviewmarketresearch.com>) [hereinafter Arcview Market Research].

<sup>86</sup> See Arcview Market Research, *supra* note 85.

<sup>87</sup> Schwartz, *supra* note 85.

<sup>88</sup> *Id.* (citing Arcview Market Research, *supra* note 85).

<sup>89</sup> See Schwartz, *supra* note 85.

<sup>90</sup> 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); see also H. Amdt. 674, 110th Cong. (2007); H. Amdt. 1144, 109th Cong. (2006); H. Amdt. 272, 109th Cong. (2005); H. Amdt. 646, 109th Cong. (2004); H. Amdt. 297, 108th Cong. (2003).

<sup>91</sup> See *Raich*, 545 U.S. at 19, 22. This analogy has become a subject of much debate. See generally Steven K. Balman, *Supreme Court Review: Constitutional Irony: Gonzales V. Raich, Federalism And Congressional Regulation Of Intrastate Activities Under The Commerce Clause*, 41 TULSA L. REV. 125 (2005).



Branch's own Drug Enforcement Agency continues to battle medical marijuana legalization, in violation of its own department's, *i.e.*, the DOJ's, internal policy pursuant to the Ogden Memo.<sup>92</sup>

As publicized evidence of its open resistance to the legalization of medical marijuana and non-enforcement of medical-marijuana crimes, four years after the release of the Ogden Memo, the DEA released a 68-page report (hereinafter DEA Position Report), detailing its stance against the legalization of medical marijuana and the reasons for this position.<sup>93</sup> In summary, the report states that “[t]he campaign to legitimize what is called ‘medical’ marijuana is based on two propositions: first, that science views marijuana as medicine; and second, that the DEA targets sick and dying people using the drug. *Neither proposition is true.*”<sup>94</sup> Early in this report, the DEA reiterates what David Ogden had stated in his 2009 memorandum, but offers a far more conservative interpretation: “While some people have interpreted [the Ogden Memo’s dissemination of Executive Branch marijuana enforcement policy] to mean that the federal government has relaxed its policy on “medical” marijuana,” the DEA Position Report explains that “this in fact is not the case. Investigations and prosecutions of violations of state and federal law will continue. These are the guidelines DEA has and will continue to follow.”<sup>95</sup>

The report then cites a far less-well-publicized letter to former administrators of the DEA,<sup>96</sup> written by Attorney General Eric Holder on October 13, 2010 in response to the administrators’ earlier letter outlining their concerns about California’s Proposition 19,<sup>97</sup> a ballot initiative for the legalization of marijuana.<sup>98</sup> The DEA

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<sup>92</sup> See Ogden Memo, *supra* note 1.

<sup>93</sup> U.S. DEPARTMENT OF JUSTICE, THE DEA POSITION ON MARIJUANA, Apr. 2013, available at [http://www.justice.gov/dea/docs/marijuana\\_position\\_2011.pdf](http://www.justice.gov/dea/docs/marijuana_position_2011.pdf) [hereinafter DEA POSITION REPORT].

<sup>94</sup> *Id.* at 1 (emphasis added).

<sup>95</sup> *Id.*

<sup>96</sup> In fact, as evidence of its lack of publicity, I was unable to locate Attorney General Holder’s letter in its entirety.

<sup>97</sup> See Brian Montopoli, *Marijuana Legalization Could Be Put to California Voters*, CBS NEWS, Dec. 15, 2009, available at <http://www.cbsnews.com/news/marijuana-legalization-could-be-put-to-california-voters>.

Position Report informs readers that, in *this* letter, the Attorney General stated:

[R]egardless of the passage of [Proposition 19] or similar legislation, the Department of Justice will remain firmly committed to enforcing the CSA in all states. Prosecution of those who manufacture, distribute, or possess any illegal drugs, including marijuana, and the disruption of drug trafficking organizations is a core priority of the Department. Accordingly, we will vigorously enforce the CSA against those individuals and organizations that possess, manufacture, or distribute marijuana for recreational use, *even if such activities are permitted under state law.*<sup>99</sup>

In support of its position on medical marijuana, the DEA Report cites over 100 sources, many of which are purported medical

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<sup>98</sup> See DEA POSITION REPORT, *supra* note 93, at 1 (citing a letter to the former Administrators of the Drug Enforcement Administration, in response to their concerns about Proposition 13 and the legalization of marijuana) (stating that the DEA maintains that, in this letter, Holder was merely “reiterate[ing]” the DOJ’s position on the legalization of medical marijuana); see also John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES, Oct. 16, 2010, available at <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>. In the original letter sent by “Former Administrators of the DEA” to Eric Holder, the Former Administrators expressed their “shock[] and dismay[]” caused by Holder’s “decision to allow the states of Colorado and Washington to legalize the production and sale of marijuana for recreational use.” See Letter from the Former Administrators of the Drug Enforcement Administration to the Attorney General Holder (Sept. 9, 2013), available at <http://webcache.googleusercontent.com/search?q=cache:QEPTGLwKpdcJ:www.drugwatch.org/component/phocadownload/category/8-current-legislation.html%3Fdownload%3D45:holder-letter+%&cd=2&hl=en&ct=clnk&gl=us>.

<sup>99</sup> See DEA POSITION REPORT, *supra* note 93, at 1 (citing a letter to the former Administrators of the Drug Enforcement Administration, in response to their concerns about Proposition 13 and the legalization of marijuana) (stating the DEA maintains that, in this letter, Holder was merely “reiterate[ing]” the DOJ’s position on the legalization of medical marijuana) (emphasis added).

and scientific experts.<sup>100</sup> For example, the American Medical Association has rejected proponents' attempts to convince them to endorse marijuana as medicine, and instead has urged that marijuana remain as a prohibited, controlled substance; the American Cancer Society does not advocate inhaling smoke, nor the legalization of marijuana; the American Academy of Pediatrics believes that "[a]ny change in the legal status of marijuana, even if limited to adults, could affect the prevalence of use among adolescents"; the National Multiple Sclerosis Society states that studies done to date have not provided convincing evidence that marijuana benefits people with MS, and thus maintains that marijuana is not a recommended treatment; and the British Medical Association voiced extreme concern that downgrading the criminal status of marijuana would "mislead" the public into believing that the drug is safe, maintaining that marijuana "has been linked to greater risk of heart disease, lung cancer, bronchitis and emphysema," to name a few.<sup>101</sup> Additionally, the DEA report cites a wide array of evidence to support its position on marijuana use in general, including contentions that: marijuana use is a gateway to harder drug use;<sup>102</sup> marijuana growers have a negative impact on the environment;<sup>103</sup> today's marijuana is far more "potent" than that of previous decades;<sup>104</sup> its use among teens is disproportionately associated with high school dropouts;<sup>105</sup> marijuana is detrimental to mental health;<sup>106</sup> it is detrimental to physical health;<sup>107</sup> and its use is also dangerous to non-users because

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<sup>100</sup> See generally *id.* at 1–2.

<sup>101</sup> See DEA POSITION REPORT, *supra* note 94, at 2–6; DEA, *Speaking Out Against Drug Legalization* 38 (2010).

<sup>102</sup> *Id.* at 37.

<sup>103</sup> *Id.* at 24 (citing evidence that chemicals used by marijuana growers end up in freshwater creeks).

<sup>104</sup> *Id.* at 25–26 (citing analysis from the National Institute on Drug Abuse).

<sup>105</sup> *Id.* at 28.

<sup>106</sup> *Id.* at 27–29 (stating marijuana can worsen depression, and that "teens who smoke marijuana at least once a month are three times more likely to have suicidal thoughts than non-users").

<sup>107</sup> DEA POSITION REPORT, *supra* note 94, at 32 ("In 2011, . . . there were 1,252,000 emergency department (ED) visits involving an illicit drug. Marijuana was involved in 455,668 of these visits, second only to cocaine."). Marijuana also worsens breathing problems due to its high levels of toxic compounds. *Id.* at 33.

of its proclivity for causing “delinquent behaviors” and “drugged drivers.”<sup>108</sup>

Additionally, all evidence of the DEA enforcement action pertaining to marijuana possessors, cultivators, and users, is consistent with its official stance proclaimed in the DEA Position Report, with no evidence of curtailment following the release of the Ogden Memo. After California voters approved of the Compassionate Use Act, Proposition 215, which removed state-level criminal penalties for possession and use of marijuana by patients with a doctor’s recommendation,<sup>109</sup> the DEA immediately followed with tempestuous raids of grow houses (properties, usually located in suburban neighborhoods, where marijuana is produced) and dispensaries.<sup>110</sup> These frequent raids have continued through the 1990s and 2000s,<sup>111</sup> and did not show any signs of slowing down after Obama became President.

For example, a mere week after the Ogden Memo release, DEA agents raided a medical marijuana dispensary in San Francisco, claiming that the establishment was in violation of state and federal law.<sup>112</sup> Today, newspaper and online periodicals regularly report on the numerous DEA raids conducted on medical marijuana

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<sup>108</sup> *Id.* at 39–41.

<sup>109</sup> See CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 1998) (“Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.”).

<sup>110</sup> See Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 674–75 (2009) [hereinafter Stern & Difonzo].

<sup>111</sup> See, e.g., Scott Glover, *Morro Bay Pot Dispensary Owner Found Guilty of Federal Charges*, L.A. TIMES, Aug. 6, 2008, available at <http://www.latimes.com/news/local/la-me-pot6-2008aug06,0,516054.story>; Steve Hymon, *DEA Raids 10 Pot Shops*, L.A. TIMES, July 26, 2007, at B4.; Eugene W. Fields, *Rifle-toting DEA Agents Raid Marijuana Store*, ORANGE CNTY. REG., Jul. 30, 2008, available at <http://www.ocregister.com/articles/adams-orange-agents-2109067-city-going>.

<sup>112</sup> Stern & DiFonzo, *supra* note 110, at 765 n.15 (citing Rachel Gordon, *DEA Raids Pot Dispensary in SF*, S.F. CHRON., Mar. 26, 2009, available at <http://http://www.sfgate.com/health/article/DEA-raids-pot-dispensary-in-SF-3167274.php>) [hereinafter Gordon].

businesses, even when those facilities are in compliance with state law.<sup>113</sup> Further, contrary to the Agency's assertion in its 2013 Position Report that it does not target "the sick and the dying,"<sup>114</sup> there is at least some evidence of DEA agents raiding farms that supplied marijuana to hospices.<sup>115</sup> For instance, in 2002, "between twenty and thirty armed agents led by officers of the federal Drug Enforcement Administration" raided a farm that supplied medical marijuana to a hospice in California.<sup>116</sup> The hospice had 250 patients, many of whom were terminally ill.<sup>117</sup> As the Federal Court for the Northern District of California described:

The DEA agents forcibly entered the premises, pointed loaded firearms at [Respondents], forced them to the ground, and handcuffed them . . . . [Respondents] were then...transported to the federal courthouse in San Jose, where they were released without being charged . . . . DEA agents remained on the premises for eight hours, seizing 167 marijuana plants, many of the [hospice] members' weekly allotments of medicinal marijuana, various documents and records, and other items.<sup>118</sup>

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<sup>113</sup> See, e.g., Gordon, *supra* note 112; Joseph Serna & Emily Alpert Reyes, *DEA, LAPD raid marijuana dispensaries, Beverly Hills homes*, L.A. TIMES, Mar. 11, 2014, available at <http://www.latimes.com/local/lanow/la-me-ln-marijuana-dispensaries-raid-20140311,0,7956322.story#axzz2xNqEghry>; Matthew Fleischer, *DEA Continues Crackdown on Medical Marijuana Dispensaries*, TAKEPART, Aug. 4, 2014, <http://www.takepart.com/article/2013/07/29/marijuana-legalization-dea-still-targeting-dispensaries>.

<sup>114</sup> See DEA Position Report, *supra* note 98, at 1 ("DEA targets criminals engaged in the cultivation and trafficking of marijuana, not the sick and dying.").

<sup>115</sup> See Stern & DiFonzo, *supra* note 110, at 725–26.

<sup>116</sup> See *Cnty. of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1197 (N.D. Cal. 2003).

<sup>117</sup> *Id.* at 1195.

<sup>118</sup> *Id.* at 1197.

## II. ARGUMENT

### A. The Problem

Twenty-one jurisdictions have passed, or are in the process of passing, laws legalizing medical marijuana since the release of the Ogden Memo in October 2009.<sup>119</sup> Moreover, the medical marijuana industry, as measured by dollars and people employed, has grown significantly since the release of the Memo, and it continues to grow [perhaps even increasingly] rapidly.<sup>120</sup> There is no escaping the obvious conclusion that this increase in medical-marijuana-related activity is directly attributable to the fact that the Executive Branch has promulgated a policy of non-prosecution of federal medical marijuana crimes, assuming compliance with state laws, so that medical marijuana patients and dispensaries are now comfortable with possessing, cultivating and using marijuana, without fear of federal criminal sanctions.<sup>121</sup>

Given this context, it would be reasonable to presume that much of the marijuana industry's recent growth can be attributed to state and individual *reliance* on the Ogden Memo,<sup>122</sup> in spite of numerous examples of federal government resistance to the Memo.<sup>123</sup> And given that an entire multi-billion dollar industry is being made possible by way of individual state legalizations of a federally illegal substance, pursuant primarily to one single policy memo,<sup>124</sup> the obvious and important question becomes whether this Ogden Memo carries any legal or authoritative weight. In this article, I will argue that the Ogden Memo utterly lacks the requisite authoritative force to merit an entire industry's reliance thereupon;<sup>125</sup>

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<sup>119</sup> See Jolie Lee, *Which States Have Legalized Marijuana?*, USA TODAY NETWORK, Jan. 6, 2014, <http://www.usatoday.com/story/news/nation-now/2014/01/06/marijuana-legal-states-medical-recreational/4343199>; PROCON.ORG, *supra* note 79 (last visited Mar. 14, 2014).

<sup>120</sup> See, e.g., Alexander, *supra* note 82.

<sup>121</sup> See Sekhon, *supra* note 29, at 560.

<sup>122</sup> See *id.* ("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.").

<sup>123</sup> See *supra* Part II.

<sup>124</sup> See generally Ogden Memo, *supra* note 1.

<sup>125</sup> See discussion *infra* Part III.B–C.

and furthermore that, even if the memo did have dominion right *now*, it is still risky, and perhaps even dangerous, for state legislators and individuals to rely upon it due to uncertainty regarding future administrations' medical marijuana policies.<sup>126</sup> It follows, therefore, that states and individuals should be very apprehensive about embracing this new "trend" as one that is here to stay.<sup>127</sup> Lastly, I will argue that this unprecedented policy of non-enforcement upon an entire category of crime is inherently unconstitutional because it constitutes an abuse of prosecutorial discretion by way of usurping the authority of Congress to make effective laws.<sup>128</sup>

#### B. The Ogden Memo's Promulgated Policy has no Real Authority Over the Prosecutorial Discretion of Individual Assistant United States Attorneys

While it is certainly possible that the Ogden Memo's promulgated policy regarding non-enforcement of marijuana possessors, cultivators, and users who are in compliance with state law has influenced some AUSAs in their prosecutorial decisions, it certainly does not technically constrain the activities of Department of Justice personnel. As stated earlier, there remains considerable reason to believe that the DEA has not curtailed its vigorous enforcement of federal marijuana law following the release of the Ogden Memo, based on its intermittent raiding of grow houses and dispensaries in compliance with state law, as well as the publicly-released DEA Position Report.<sup>129</sup> In light of the Ogden Memo, one might conclude that the lack of consistency within the Department of Justice resulting from the seemingly contradictory policies between the DEA and the U.S. Attorney's Office would ultimately produce a relatively positive result for those arrested by DEA agents for

<sup>126</sup> See discussion *infra* Part III.D.

<sup>127</sup> See generally *supra* discussion Part III.A. and sources cited *supra* note 82.

<sup>128</sup> See *infra* discussion Part III.E.; see also U.S. Const. art. II, § 3 ("[The Executive Branch] shall take care that the laws [are] faithfully executed."); U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.").

<sup>129</sup> See discussion *supra* Part II.E.

violating the federal Controlled Substances Act,<sup>130</sup> assuming that the defendants were acting in compliance with state medical marijuana law. After all, even if one is arrested, how can one be convicted of a crime under a statute that prosecutors universally refuse to enforce?<sup>131</sup>

Unfortunately for this class of defendants, however, there is ample reason to believe that the Ogden Memo imposes very little actual restraint on individual AUSAs, who are the individuals with the ultimate authority to decide what charges (if any) to bring in criminal cases of federal jurisdiction.<sup>132</sup> In general, each AUSA is afforded an incredible amount of discretion in every charging decision.<sup>133</sup> Theoretically, there is probably a strong argument that publicized DOJ policy *should* constrain the prosecutorial discretion of AUSAs, at least to some degree. However, defendants are typically unable to be granted relief when federal prosecutors fail to adhere to DOJ guidelines, thereby rendering general DOJ guidelines as de facto without legal authority.<sup>134</sup>

For instance, the “Petite Policy” of the DOJ,<sup>135</sup> which “precludes the initiation or continuation of a federal prosecution,

<sup>130</sup> See 21 U.S.C. §§ 801–971 (2006).

<sup>131</sup> See Ogden Memo, *supra* note 1.

<sup>132</sup> See Mikos, *supra* note 28, at 643; see also discussion *infra* Part III.E. (discussing of limits of prosecutorial discretion).

<sup>133</sup> See Ellen S. Podgor, *Department Of Justice Guidelines: Balancing “Discretionary Justice”*, 13 CORNELL J. L. & PUB. POL’Y 167, 168 (2004) (“Prosecutors are afforded enormous discretion in a multitude of decisions.”) [hereinafter Podger].

<sup>134</sup> See *id.* at 177–86 (noting that the charging decision may be limited when an individual’s constitutional rights are in question in the context of “vindictive” and “selective” prosecutions); *Wayte v. U.S.*, 470 U.S. 598, 608 (1985) (stating that selective prosecution claims are judged according to ordinary equal protection standards); *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (finding due process was violated when the prosecution brought a claim in retaliation for the defendant’s exercise of her legal rights); *U.S. v. Brown*, 862 F. Supp. 2d 1276, 1286 (N.D. Ala. 2012). Vindictive prosecution differs from selective prosecution in that the former arises out of the severity of the charges against a defendant and is raised after the defendant exercises a constitutional right, while selective prosecution occurs when a person is prosecuted based on an immutable personal characteristic—such as race or religion—or in response to some constitutionally-protected act that a person has done prior to the criminal charge being brought against him. *Brown*, 862 F. Supp. at 1285.

<sup>135</sup> Deriving its name from *Petite v. United States*, 361 U.S. 529 (1960).



following a prior state or federal prosecution based on substantially the same act(s) or transgression(s),”<sup>136</sup> is sometimes violated by individual AUSAs in certain cases.<sup>137</sup> In her article, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* Georgia State University College of Law professor Ellen Podgor explains that, “Although the government has discretion to dismiss cases when its ‘Petite Policy’ is violated, defendants are not afforded this same opportunity.”<sup>138</sup> As additional material illustrative of the notion that defendants lack recourse when AUSAs do not adhere to internal policy, Ms. Podgor also cites examples of prosecutors’ occasional failure to adhere to the requirement that they must advise grand jury witnesses that they are “targets” or “subjects” of an investigation pursuant to DOJ guidelines. Moreover, she explains that, even in these situations, defendants utterly lack recourse.<sup>139</sup>

On the other hand, there are certainly alternative methods of enforcement of, along with several mechanisms that are designed to encourage AUSAs to follow, the promulgated DOJ policy, thereby supporting an argument that there are perhaps some internal checks on the prosecutorial discretion of individual AUSAs.<sup>140</sup> For example, the President nominates U.S. Attorneys, who are the

<sup>136</sup> U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-2.031 (2003), available at

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/2mcrm.htm#9-2.031](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031) [hereinafter U.S. ATTORNEYS’ MANUAL].

<sup>137</sup> See, e.g., *U.S. v. Rodriguez*, 948 F.2d 914, 915 (5th Cir. 1991); *U.S. v. Robinson*, 774 F.2d 261, 275 (8th Cir. 1985); *U.S. v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983).

<sup>138</sup> See Podgor, *supra* note 133, at 179 (citing *Rodriguez*, 948 F.2d at 915 (finding “[n]o error in denial of the motion, because the Petite policy is merely an internal rule of the Justice Department”); *Robinson*, 774 F.2d at 275 (stating that “[e]ven a genuine failure by the Government to follow the Petite policy does not create a right that a defendant can invoke to bar federal prosecution”); *U.S. v. Ng*, 699 F.2d at 71 (finding that the Petite policy “[i]s not a statute or regulation; nor is it constitutionally mandated”); *U.S. v. Byars*, 762 F. Supp. 1235, 1240 n.6 (E.D. Va. 1991) (finding that the Petite policy is a DOJ internal policy); *U.S. v. Bouthot*, 685 F. Supp. 286 (D. Mass. 1988) (“The Petite policy does not create any substantive or due process rights which a criminal defendant may invoke against the government.”)).

<sup>139</sup> Podgor, *supra* note 133, at 181–84.

<sup>140</sup> I refer to these as internal checks because they come from within the Executive Branch. By contrast, External Checks would come from the Legislative or Judicial Branches. See discussion *infra* Part III.E.

overseers of AUSAs,<sup>141</sup> and the President has the power to remove any U.S. Attorney for any reason, including disregarding DOJ policy.<sup>142</sup> The U.S. Attorney General can also remove, reprimand, or suspend AUSAs;<sup>143</sup> “slash the budget of nonconforming districts”;<sup>144</sup> and even, in some circumstances, “move to vacate convictions that [he or] she believes to have been obtained in violation of DOJ policy.”<sup>145</sup>

Despite these purported internal checks on the prosecutorial discretion of individual non-conforming AUSAs—or on non-conforming federal districts in which the AUSAs practice—they are likely fairly ineffectual in the context of ensuring conformity with the policy put forth in the Ogden Memo, given the inherent difficulty of monitoring AUSA compliance therewith.<sup>146</sup> Because AUSAs only technically violate the Ogden Memo’s policy when they prosecute defendants who have complied with the medical marijuana laws of their own state, a determination of whether an AUSA has violated the memo’s policy requires a determination of whether a given defendant’s marijuana-related activity was in compliance with his or her state’s law.<sup>147</sup> And, as Professor Mikos explains, this determination “proves remarkably difficult for several reasons.”<sup>148</sup>

First, although state legislatures that have legalized marijuana, for medical purposes or otherwise, have generally adopted regulations detailing who may possess and use marijuana, these legislatures have not adequately addressed how the patients are

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<sup>141</sup> 28 U.S.C. § 541(c) (2006); U.S. ATTORNEY’S MANUAL, *supra* note 136, at § 3-4.752.

<sup>142</sup> See 28 U.S.C. § 541(c) (2014) (“Each United States attorney is subject to removal by the President.”); *Parson v. U.S.*, 167 U.S. 324, 335 (1897); OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008) *available at* <http://www.justice.gov/oig/special/s0809a/chapter13.htm#200> (“It is the President’s and the Department [of justice]’s prerogative to remove a U.S. Attorney who they believe is not adhering to their priorities or not adequately pursuing the types of prosecutions that the Department chooses to emphasize.”).

<sup>143</sup> U.S. ATTORNEY’S MANUAL, *supra* note 136, at § 3-4.752.

<sup>144</sup> Mikos, *supra* note 28, at 644.

<sup>145</sup> *Id.*

<sup>146</sup> See *e.g.*, Podgor, *supra* note 133, at 180.

<sup>147</sup> See Ogden Memo, *supra* note 1, at 1–2.

<sup>148</sup> See Mikos, *supra* note 28, at 644.

supposed to *acquire* that marijuana.<sup>149</sup> Alaska, for example, has expressly banned the sale of marijuana, even to qualified patients,<sup>150</sup> despite the fact that its laws also explicitly allow these patients to possess, and even grow, the drug, themselves.<sup>151</sup> And while Alaska clearly forbids its sale, most states permitting the possession of marijuana have not addressed the issue of how legal marijuana possessors are supposed to acquire the marijuana in the first place.<sup>152</sup> Therefore, as it may be an open question whether a given defendant is operating under compliance with state law,<sup>153</sup> it follows that it is also an open question whether a prosecution of that defendant violates the policy put forth by the Ogden Memo.<sup>154</sup>

Furthermore, even when states have laws on this topic, there are two reasons why these laws might be extremely difficult to locate for either an AUSA himself or herself and/or a DOJ supervisor seeking to determine whether a given AUSA has complied with the Ogden Memo.<sup>155</sup> First, given the changing status of marijuana laws over the last two decades, even in individual states, the “black letter” state law might be somewhat elusive and/or

<sup>149</sup> See Mikos, *supra* note 29, at 1431–32.

<sup>150</sup> See ALASKA STAT. § 17.37.040(a)(3) (2012).

<sup>151</sup> ALASKA STAT. ANN. §§ 11.71.090, 17.37.040(a)(3), 17.37.070 (2012).; *see also* Ravin v. State, 537 P.2d 494, 511 (Alaska 1975) (holding that “possession of marijuana by adults at home for personal use is constitutionally protected”). Note, however, that current Alaska criminal code prohibits possession of any amount of non-medical marijuana. ALASKA STAT. §§11.71.040-11.71.060 (2012); *see*

Jason Brandeis, *The Continuing Vitality of Ravin v. State: Alaskans Still Have A Constitutional Right To Possess Marijuana in the Privacy of Their Homes* 176 n.5 (2012) (“Alaska law provides an affirmative defense for medical marijuana use that complies with the requirements of the state medical marijuana act.”) ALASKA STAT. § 17.37.030 states, “A patient, primary caregiver, or alternate caregiver registered with the department under this chapter has an affirmative defense to a criminal prosecution related to marijuana to the extent provided in AS 11.71.090.”

<sup>152</sup> See Mikos, *supra* note 29, at 1431–32 (“This means that qualified patients must often resort to the black market to obtain the marijuana they are legally entitled to possess, cultivate, and use.”). Note that Oregon, New Mexico, and California constitute exceptions to this proposition. *See id.* (citing N.M. STAT. ANN. § 26-2B-4(F) (2007); Or. REV. STAT. § 475.304 (2013); CAL. HEALTH & SAFETY CODE § 11362.765 (Deering 2014).

<sup>153</sup> See Mikos, *supra* note 28, at 644.

<sup>154</sup> See Ogden Memo, *supra* note 1, at 1–2.

<sup>155</sup> See Mikos, *supra* note 28, at 644.

very complicated.<sup>156</sup> Specifically, state medical marijuana laws might consist of voter-approved referenda, state statutes, state agency regulations, city or town local ordinances, and judicial opinions of courts of varying authority attempting to interpret the above.<sup>157</sup> Moreover, even when the laws are clear, determining whether a given defendant has complied with a particular state law, a necessary determination for ascertaining whether an AUSA's prosecution is in violation of the Ogden Memo, might be very difficult.<sup>158</sup> For example, if a state law criminalizes the sale of marijuana to anyone other than a qualified patient, and if an AUSA is considering prosecuting the dispensary for a violation of that law, it might be next to impossible to determine whether a given purchaser constituted a qualified patient because states often do not require patients to register, nor do they require patients to even obtain a written physician's recommendation.<sup>159</sup>

If the DOJ is not able to adequately and accurately gauge compliance with the Ogden Memo, it follows that the DOJ also "cannot credibly pressure [AUSAs] to adhere to the policy."<sup>160</sup> Matters are further complicated by the contrasting policies on the subject of medical marijuana within the DOJ, specifically those which have been put forth by the DEA.<sup>161</sup> Further, as a practical matter, for the reasons stated above, ascertaining compliance on the part of individual AUSAs might very well require significant resources from the DOJ. Ironically, therefore, an attempt to discipline a particular AUSA for a lack of compliance with this policy might also arguably counteract the plain language of the Ogden Memo, if read broadly, which states: "[t]he Department is . . . committed to making efficient . . . use of its limited investigative and

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<sup>156</sup> *See id.*

<sup>157</sup> *See id.* Examples include the California Supreme Court's invalidation of portions of a state statute limiting the quantity of medical marijuana that patients could possess, and lower California courts' enjoinders of local ordinances restricting the number and location of medical marijuana dispensaries. *See id.* (citing *People v. Kelly*, 222 P.3d 186, 196 (Cal. 2010); *Ams. for Safe Access v. City of Los Angeles*, No. BC433942 (Cal. Super. Ct. Dec.10, 2010)).

<sup>158</sup> *See Mikos, supra* note 28, at 645.

<sup>159</sup> *See id.* (citing California as an example of one of these states); *see generally Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (assessing California law).

<sup>160</sup> Mikos, *supra* note 28, at 645.

<sup>161</sup> *See discussion supra* Part II.E.

prosecutorial resources.”<sup>162</sup> A supervising AUSA’s expenditure of time and effort trying to ascertain the actual status of a given state’s complex medical marijuana law is not an efficient use of that professional’s time, nor is it an efficient use of tax-payer-funded resources.

Because the DOJ rarely disciplines individual AUSAs for violating internal regulations,<sup>163</sup> and because determining whether an AUSA actually complied with the Ogden Memo is especially difficult in any event,<sup>164</sup> it follows that the Ogden Memo utterly lacks weight with respect to curtailing federal prosecutions of medical marijuana facilities. A rule that utterly lacks any enforcement mechanism, and that entirely lacks a record of enforcement, is hardly a rule at all.<sup>165</sup>

### C. The Ogden Memo Does Not Protect Individuals in the Criminal Adjudicatory Context, nor Does It Protect Individuals from Civil Sanctions

As discussed in previous sections of this article, there exists ample reason to believe that the Ogden Memo is utterly lacking in authoritative weight with respect to its ability to constrain prosecutorial discretion,<sup>166</sup> as well as its ability to constrain the activities of the DEA.<sup>167</sup> Additionally, a significant amount of evidence indicates that the Ogden Memo is also unable to serve as a defense to criminal and civil sanctions. As Professor Mikos

<sup>162</sup> Ogden Memo, *supra* note 1.

<sup>163</sup> Note that the Ogden Memo probably only qualifies as an internal regulation in the broadest definition of the phrase because general references to DOJ internal regulations typically refer to the U.S. Attorney Guidelines found in the U.S. Attorneys Manual. *See generally* U.S. ATTORNEYS’ MANUAL, *supra* note 136.

<sup>164</sup> *See* Mikos, *supra* note 28, at 645.

<sup>165</sup> *See generally* AUSTIN, *supra* note 6 (stating, to be legitimate, laws must be backed by sanctions); LON L. FULLER, THE MORALITY OF LAW 38–39 (Yale Univ. Press rev. ed. 1969) (discussing eight rules for making rules, including requirements that laws must not ask the impossible, laws must be congruent between announcement and enforcement, and laws must be clear and understandable); discussion *supra* Part III.B. (stating the Ogden Memo’s policy, insofar as it is impliedly binding on AUSA’s prosecutorial behavior, does not adhere to these important requirements).

<sup>166</sup> *See* discussion *supra* Part III.B.

<sup>167</sup> *See* discussion *supra* Part II.E.

explains, the memo is merely providing “guidance regarding how the DOJ will enforce the law, not a declaration of what the law means.”<sup>168</sup> While the latter, by its nature, holds the sort of binding legal weight that can reasonably be relied upon, the former does not.<sup>169</sup> Accordingly, the Federal Court for the Southern District of California has held that “[a] reasonable belief that one will not be *prosecuted* is not the same thing as a reasonable belief that one’s actions *do not violate federal law*.”<sup>170</sup> For these reasons, in this section of my article, I argue that the Ogden Memo will not provide a defense for people charged with violations of the Controlled Substances Act (CSA), even if those people are in compliance with their state’s medical marijuana laws. I also explain that, with the exception of one federal agency,<sup>171</sup> the policy of non-prosecution in this arena is not respected as a defense to non-criminal sanctions for violations of federal marijuana laws either.<sup>172</sup>

While the doctrine of entrapment by estoppel is generally considered to be a “narrow exception to the general principle that ignorance of the law” is no excuse for a violation thereof,<sup>173</sup> the defense is probably unavailing in the context of medical marijuana prosecutions.<sup>174</sup> To assert the entrapment by estoppel defense, the defendant typically must prove the following: (1) a government official (2) made an affirmative representation that the conduct was legal, and (3) the defendant reasonably relied on this

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<sup>168</sup> See Mikos, *supra* note 28, at 642.

<sup>169</sup> See *United States v. Stacy*, 734 F. Supp. 2d 1074, 1080 (S.D. Cal. 2010).

<sup>170</sup> *Id.*

<sup>171</sup> The US Department of Veterans Affairs released a Veterans Health Administration directive on July 22, 2010, stating that veterans who participate in legal state medical marijuana programs will no longer be disqualified from “substance abuse programs, pain control programs, or other clinical programs.” VHA Directive 2010-035, Medical Marijuana (U.S.D.V.A. 2010), *available at* <http://medicalmarijuana.procon.org/sourcefiles/VHADirectiveJuly22.pdf>.

<sup>172</sup> See Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997) (covering the Internal Revenue Service, the Postal Service, the Department of Transportation, the Department of Defense, the Department of Housing and Urban Development, and the Department of Labor).

<sup>173</sup> *United States v. Bruscantini*, 761 F.2d 640, 642 (11th Cir. 1985).

<sup>174</sup> See Mikos, *supra* note 28, at 641–42.

representation.<sup>175</sup> In theory, “because the government misled the defendant, the defense estops the government from asserting that the advice provided was incorrect.”<sup>176</sup> One of the goals behind the policy that ignorance of the law is no excuse is to encourage potential defendants to ascertain exactly what the law is.<sup>177</sup> However, in light of modern criminal statutory complexity, the Supreme Court has recognized the need for the entrapment by estoppel defense because the rationale of disincentivizing intentional ignorance is not furthered where a defendant has sought out and acted upon a seemingly legitimate, but actually *incorrect*, government interpretation of the law.<sup>178</sup>

Typically, courts have held that to succeed under an entrapment by estoppel defense, the defendant must do more than show that the government made vague or even contradictory statements.<sup>179</sup> Rather, a defendant must demonstrate that the government affirmatively informed him that the proscribed conduct was permissible, and that he reasonably relied on this information.<sup>180</sup> “A defendant's reliance is reasonable if ‘a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.’”<sup>181</sup> In *Cox v. Louisiana*, the Supreme Court reversed the convictions of picketers who were arrested for picketing in a given location, after they proved that they had previously been given permission to picket in that location.<sup>182</sup> Similarly, in *United States v. Pennsylvania Industrial Chemical Corporation*, the Supreme Court held that it was error to deny a corporate defendant the right to present evidence that

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<sup>175</sup> Madeline Stavis, *Deactivating the Mousetrap: Entrapment by Estoppel as a Defense to Federal Felon-In-Possession Charges*, 32 CARDOZO L. REV. 655, 659–60 (2010); see also *United States v. W. Indies Transp., Inc.*, 127 F.3d 299, 312–13 (3d Cir. 1997) (describing the various circuit tests).

<sup>176</sup> See Stavis, *supra* note 7, at 660.

<sup>177</sup> See *id.* at 659 n.20; see also *Clark v. State*, 739 P.2d 777, 779 (Alaska Ct. App. 1987) (discussing rationales behind the rule).

<sup>178</sup> See Stavis, *supra* note 175, at 659 n.20; *Cheek v. United States*, 498 U.S. 192, 199–200 (1991).

<sup>179</sup> See *Raley v. Ohio*, 360 U.S. 423, 438 (1959); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).

<sup>180</sup> See *Ramirez-Valencia*, 202 F.3d at 1109.

<sup>181</sup> *Id.* (quoting *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970)).

<sup>182</sup> See generally 379 U.S. 559 (1965).

it had been affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation.<sup>183</sup>

There have not, however, been any decisions in which the entrapment by estoppel defense has been successfully applied where a defendant relied on a disseminated prosecutorial policy of non-enforcement, as opposed to an affirmative representation of the legality of the conduct in question.<sup>184</sup> Accordingly, the Federal Court for the Southern District of California has expressly disallowed this defense for medical marijuana prosecutions within its jurisdiction, when, in the 2010 case *United States v. Stacy*, the defendant relied upon the Obama Administration's public announcements regarding its policy of non-enforcement for violations of the CSA in a situation where his actions complied with state law.<sup>185</sup> In *Stacy*, the defendant operated a medical marijuana collective under compliance with state law for three months before the DEA raided his dispensary and seized a significant amount of marijuana, pursuant to federal law.<sup>186</sup> The DOJ brought charges under the CSA.<sup>187</sup>

At his trial, the defendant first pointed to statements made by President Obama when he was a presidential candidate.<sup>188</sup> On national television, candidate Obama had expressed his openness to the notion of prescribing medical marijuana as palliative medicine, and he indicated that he would not use Justice Department resources to try to prosecute medical marijuana users or to circumvent state laws regarding doctors prescribing medical marijuana.<sup>189</sup> The defendant also presented evidence that a spokesman for the candidate had stated that Obama would end the DEA raids on medical marijuana suppliers in states with their own laws permitting medical marijuana use.<sup>190</sup> In response, the Court explained that it is not reasonable to believe that a presidential candidate is empowered to speak for the federal government regarding the application of

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<sup>183</sup> See generally 411 U.S. 655 (1973).

<sup>184</sup> See *United States v. Stacy*, 734 F. Supp. 2d 1074, 1080 (S.D. Cal. 2010).

<sup>185</sup> *Id.* at 1083.

<sup>186</sup> *Id.* at 1076.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1077.

<sup>189</sup> *Id.* at 1078.

<sup>190</sup> *Stacy*, 734 F. Supp. 2d at 1078.



federal drug laws.<sup>191</sup> The Court further noted that the candidate's statements lacked specificity and did not make representations regarding changing federal law to make the use, cultivation, and distribution of medical marijuana legal.<sup>192</sup>

Also put forth by the defendant were statements by Eric Holder, speaking as Attorney General after Obama's election, maintaining that he would not be authorizing DEA raids of medical marijuana dispensaries during the Obama administration; statements by Holder that the DOJ has no plans to prosecute dispensaries that are legal under state law; and the Ogden Memo,<sup>193</sup> as well as other, somewhat more ambiguous, official statements.<sup>194</sup> The Court responded by holding that:

[N]one of these statements constitute affirmative representations that Defendant's operation of a medical marijuana dispensary is lawful under federal law. At best, these statements show that in early 2009, when former President Bush personnel still held key positions in the federal government, the Obama administration did not *anticipate* that it would continue DEA raids of medical marijuana dispensaries complying with state law . . . . No promise was made that the DEA would never raid medical marijuana dispensaries claiming to operate in compliance with state law or that individuals operating such dispensaries would not be prosecuted.<sup>195</sup>

The Court further held that, "even assuming the statements at issue could reasonably be interpreted as establishing a policy that operators of medical marijuana dispensaries in compliance with state law will not be prosecuted, there is still no affirmative statement that

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Note, however, the Court stated that "Defendant could not have relied on this specific memorandum because it was issued after the acts alleged in the Indictment." *Id.* at 1079.

<sup>194</sup> *Id.* at 1078–79.

<sup>195</sup> *Id.* at 1080.

Defendant's conduct is *lawful* under federal law.”<sup>196</sup> The Court emphasized the importance of broad prosecutorial discretion, explaining that a holding that the Government is estopped from bringing a case if the prosecution, itself, contradicts prosecutorial policy “would constitute improper judicial interference with prosecutorial decision-making.”<sup>197</sup> The Court also reiterated that the fact that an individual may not be prosecuted under a given state law does not provide him or her with immunity under federal law.<sup>198</sup>

Moreover, while its authority within the DOJ is questionable at best, the Ogden Memo certainly does not bind Executive Branch officials operating outside the purview of the DOJ.<sup>199</sup> In 1997—a time when the state medical marijuana movement was still in its early stages—the federal government reacted to state legalization of medical marijuana by calling upon various agencies<sup>200</sup> to “respond” to Arizona’s and California’s legalization of this substance for medical usage.<sup>201</sup> An Example of these agency responses is the Department of Housing and Urban Development’s requirement that public housing be denied to those who violate federal drug policy,<sup>202</sup> regardless of compliance with state law.<sup>203</sup> Similarly, the Department of Transportation (DOT) has since made clear that the Ogden Memo “will have no bearing on the . . . [DOT’s] regulated drug testing program,”<sup>204</sup> and the Bureau of Alcohol, Tobacco, Firearms, and Explosives prohibits individuals who use federally “controlled substances” from possessing firearms.<sup>205</sup> In his article,

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<sup>196</sup> *Stacy*, 734 F. Supp. 2d at 1080.

<sup>197</sup> *Id.* at 1081.

<sup>198</sup> *Id.* at 1079 n.1.

<sup>199</sup> See Mikos, *supra* note 28, at 646.

<sup>200</sup> See Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

<sup>201</sup> See *id.*

<sup>202</sup> See 24 C.F.R. § 5.854 (2010).

<sup>203</sup> See Mikos, *supra* note 28, at 647 (citing Letter from Gail Laster, Gen. Counsel, U.S. Dep’t of Hous. & Urban Dev., to William C. Apgar, Assistant Sec’y, Office of Hous./Fed. Hous. Comm’r (Sept. 24, 1999)).

<sup>204</sup> See Notice from Jim Swart, Dir., Office of Drug & Alcohol Policy & Compliance, to Emp’s of U.S. Dep’t of Transp. (Oct. 22, 2009), *available* at <http://www.dot.gov/sites/dot.gov/files/docs/odapc-notice-recreational-mj.pdf>.

<sup>205</sup> See Mikos, *supra* note 28, at 647 (citing 18 U.S.C. § 922(g)(3) (2006)). Mikos notes that the Department of Veterans Affairs, however, announced that it would

Professor Mikos observes, additionally, that marijuana dispensaries also can be held liable under the Racketeer Influenced and Corrupt Organization statute, creating a civil cause of action against racketeers and authorizing enforcement by private persons injured by the racketeering activity.<sup>206</sup>

Even moving beyond the realm of strict sanctions, a lack of federal banking services available to medical marijuana dispensaries due their federal prohibition, even in states in which their operation is legal, serves to disadvantage both medical and non-medical marijuana businesses.<sup>207</sup> In February, 2014, the federal government issued “guidance” on this issue, which was perceived by many banking institutions to be a “red light.”<sup>208</sup> For example, the Colorado Bankers Association’s senior vice president, Jenifer Waller, acknowledged that the federal government outlined “all the risks involved of banking the marijuana industry,” and that, through this so-called “guidance,” the federal government has “made it very clear that financial institutions can still face criminal liability” for becoming involved with marijuana-related businesses, even if they are legal under state law.<sup>209</sup>

### C. What Happens to Medical Marijuana in 2017?

Notwithstanding the, at best, questionable authoritative weight of the Ogden Memo,<sup>210</sup> the Obama administration is still the most medical-marijuana-friendly administration since the beginning of the “Drug War.”<sup>211</sup> Specifically, no other president has ever

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no longer bar patients who use marijuana legally under state law from receiving pain medications. *Id.* at 648.

<sup>206</sup> *Id.* at 649–56.

<sup>207</sup> See, e.g., Matt Ferner, *Marijuana Businesses Should Have Access to Federal Banking System: Denver City Council*, HUFFINGTON POST (Jan. 7, 2014, 12:54 PM), [http://www.huffingtonpost.com/2014/01/07/marijuana-banking\\_n\\_455586.html](http://www.huffingtonpost.com/2014/01/07/marijuana-banking_n_455586.html).

<sup>208</sup> Herb Weisbaum, *Banks Stuck in a Tough Spot between Marijuana Money & Federal Regulations*, THE BLAZE, (Feb. 21, 2014, 11:00 AM), <http://www.theblaze.com/stories/2014/02/21/banks-stuck-in-a-tough-spot-between-marijuana-money-federal-regulations>.

<sup>209</sup> *Id.*

<sup>210</sup> See discussion *supra* Part III.B–C.

<sup>211</sup> See generally Ogden Memo, *supra* note 1.

publicly discussed relaxing the Executive Branch's policy toward medical marijuana during his campaign, and no other administration's justice department has ever released a policy memo discouraging its AUSAs from enforcing federal marijuana law.<sup>212</sup> Although reliance on the Ogden Memo cannot be a defense to criminal charges,<sup>213</sup> and the Memo does not really constrain the prosecutorial discretion of individual AUSAs,<sup>214</sup> the Memo probably has influenced at least *some* individual AUSAs to scale back their prosecutions in this category.<sup>215</sup> Moreover, as states such as Washington and Colorado have moved to legalize recreational marijuana, the DOJ has stated that it will be taking a "trust but verify" approach to these new state laws, purporting to require that the state regulatory systems in place must "not only contain robust controls and procedures on paper," but must also "be effective in practice."<sup>216</sup> Accordingly, the DOJ apparently reserves the right to file a preemption lawsuit at a later date.<sup>217</sup>

But even if, beginning tomorrow, every AUSA ceased to prosecute medical marijuana crimes and every DEA agent ceased to raid marijuana facilities in states in which it is legal, what would that mean for the future? One thing we can be certain of is that the Obama administration will not continue past year 2016. So what would happen if, rather than upcoming administrations continuing this more liberal trend towards medical marijuana policy, the Obama DOJ's policy in this area actually proves to be the most liberal of the 21st century?<sup>218</sup> Even Bill Clinton, in his recent democratic and relatively liberal administration, took a hard stance toward medical

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<sup>212</sup> *See id.*

<sup>213</sup> *See* discussion *supra* Part III.C.

<sup>214</sup> *See* discussion *supra* Part III.B.

<sup>215</sup> *See generally* Podgor, *supra* note 133, at 169 ("[I]nternal guidelines . . . provide government prosecutors with guidance in making decisions. . . . [T]hey offer an element of consistency to the decision-making process, provide education for newcomers to the department, and can serve as a restraint on prosecutorial discretion.").

<sup>216</sup> Ryan J Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go into Effect*, HUFFINGTON POST (Aug. 29, 2013, 1:30 PM), [http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj\\_n\\_3837034.html](http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html).

<sup>217</sup> *Id.*

<sup>218</sup> *See generally* Ogden Memo, *supra* note 1.

marijuana.<sup>219</sup> Similarly, every earlier administration since the start of the “War on Drugs” has adopted a relatively stern policy toward marijuana, both medical and recreational.<sup>220</sup>

Pursuant to federal law, subsequent U.S. administrations would be well within their constitutional rights to take an extremely aggressive stance toward medical marijuana, due to the fact that it is, technically, illegal,<sup>221</sup> and because the [federal] “Laws of the United States” are the “supreme law of the land.”<sup>222</sup> There is even a strong argument that, assuming this federal law is not changed,<sup>223</sup> subsequent administrations would be constitutionally *obligated* to enforce it.<sup>224</sup> As noted earlier in this article, the marijuana industry has been growing at a rate of 13.8 percent since 2009,<sup>225</sup> and, during the next five years, as Wells Fargo Managing Director Steve Berg predicts, it will likely grow to \$10.2 billion annually.<sup>226</sup> Currently, an estimated 1.3 million people are employed in the industry nationwide,<sup>227</sup> and that number, too, is likely to grow as 14 more states are expected to legalize some form of marijuana by 2018.<sup>228</sup>

Given these current realities, if future administrations’ medical marijuana policies diverge in a conservative direction from those of President Obama, the results could be catastrophic for the

<sup>219</sup> See discussion *supra* Part II.C. (discussing prior administrations’ drug policies).

<sup>220</sup> See discussion *supra* Part II.A–C.

<sup>221</sup> See U.S. CONST. art. II, § 3 (“[The Executive Branch] shall take Care that the Laws be faithfully executed”); 21 U.S.C. §§ 801–971.

<sup>222</sup> U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding”).

<sup>223</sup> There have been many recent examples of Congress’s indications of unwillingness to change these laws, and I have found nothing to indicate that its stance is likely to change in the near future. 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).

<sup>224</sup> In fact, this administration is also probably constitutionally obligated to enforce the law as well. See discussion *infra* Part III.E. (discussing Executive Branch’s obligation with respect to law enforcement).

<sup>225</sup> IBISWORLD.COM, *supra* note 82.

<sup>226</sup> Schwartz, *supra* note 85.

<sup>227</sup> IBISWORLD.COM, *supra* note 82.

<sup>228</sup> See Schwartz, *supra* note 85.

economies of states with booming medical marijuana industries, as well as for the individuals employed therein.<sup>229</sup> Since the formation of the DEA, there have been eight presidential administrations.<sup>230</sup> Seven of them have aggressively prosecuted marijuana-related crimes, both medical and otherwise.<sup>231</sup> Only one of them has released a memorandum discouraging one category of federal medical marijuana prosecutions,<sup>232</sup> and yet, as I have shown, this memorandum does not truly constrain prosecutorial discretion,<sup>233</sup> nor can its existence serve as a legal defense.<sup>234</sup> Meanwhile, even during the most liberal of the past eight administrations (that of President Obama), the DEA continues to raid medical marijuana dispensaries,<sup>235</sup> and there is at least some evidence of the DOJ continuing to prosecute them.<sup>236</sup>

For these reasons, and based on the evidence I have presented, I would advise state legislatures to be cautious when deciding whether to legalize medical marijuana, and I would advise individuals to be similarly cautious when relying on their home states' recently changed laws as a reason to get involved in the marijuana industry.<sup>237</sup> Despite predictions of large growth based on current trends under this administration, there truly is no knowing, or even projecting, at this point in time, how long these trends will last.

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<sup>229</sup> See Alexander, *supra* note 82 (stating a significant and continued growth in the legal marijuana industry).

<sup>230</sup> See PRESIDENTSUSA.NET, <http://www.presidentsusa.net> (last visited Sept. 29, 2014).

<sup>231</sup> See *Forgotten War*, *supra* note 15.

<sup>232</sup> See generally Ogden Memo, *supra* note 1.

<sup>233</sup> See discussion *supra* Part III.B.

<sup>234</sup> See discussion *supra* Part III.C.

<sup>235</sup> See discussion *supra* Part II.E.

<sup>236</sup> See Nicole Flatow, *Jailed for Medical Marijuana: Five Stories of Why DOJ's Pot Policy Matters*, THINKPROGRESS.ORG (Aug. 30, 2013, 2:42 PM), <http://thinkprogress.org/justice/2013/08/30/2557781/jailed-medical-marijuana-stories-doj-pot-policy-matters> [hereinafter Flatow].

<sup>237</sup> See Sekhon, *supra* note 29, at 555 (“[T]he 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.”); Flatow, *supra* note 236.

#### D. The Policy Disseminated in the Ogden Memo Constitutes, at Best, a Constitutionally Questionable Use of the Executive Branch's Broad Prosecutorial Discretion Power

The United States Constitution mandates that Congress has the power both to regulate interstate commerce as well as to make all laws that are necessary and proper for the execution of its own powers, and that these laws are the supreme laws of the land (as compared to the laws of the states).<sup>238</sup> In a very real sense, Congress relied on these powers when it enacted the CSA in 1970, which criminalized the possession, cultivation, and use of marijuana under federal law.<sup>239</sup> And, as previously discussed, the Supreme Court has affirmed that this criminalization of marijuana-related activities was within Congress's constitutional powers, thereby leaving no doubt that Congress had the ability to enact these laws, and that they had binding authority on the states.<sup>240</sup> Moreover, the Constitution also requires the Executive Branch to execute the laws of the United States.<sup>241</sup> Therefore, given the facts that (1) the Legislative Branch not only passed the CSA within its legitimate constitutional power, but has also consistently resisted efforts for marijuana-related reform;<sup>242</sup> (2) the Judicial Branch affirmed that criminalization of

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<sup>238</sup> See U.S. CONST. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ."); U.S. CONST. art. I, § 8, cl. 1, 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."); U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>239</sup> 21 U.S.C. §§ 801–971 (2012).

<sup>240</sup> See discussion *supra* Part II.B.

<sup>241</sup> See U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

<sup>242</sup> 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). Congress has also repeatedly rejected amendments to appropriations bills that would prohibit the use of appropriated funds by the DEA and the DOJ to prevent states from implementing laws that authorize the possession, cultivation, and use of marijuana for medical purposes. H. Amdt. 674, 110th Cong. (2007); H. Amdt.

marijuana was within Congress's power;<sup>243</sup> and (3) the Executive Branch is expressly required to execute Congress's laws,<sup>244</sup> it seems somewhat surprising that the Executive Branch's DOJ even has the power to release a memorandum—the Ogden Memo—announcing a policy non-enforcement of a certain crime upon a certain class of defendants who are found to be in violation federal law.

On the other hand, the Executive Branch does possess one power that remains relatively unchecked by Congress or by the Judiciary—the power of prosecutorial discretion. Under federal law, prosecutors have exclusive discretion over the decision to prosecute, assuming the crime in question is supported by probable cause.<sup>245</sup> Additionally, the prosecutor also has discretion in deciding *how* he will conduct that prosecution.<sup>246</sup> Specifically, the prosecutor may choose which crime, if any, to charge the defendant with;<sup>247</sup> when to grant immunity;<sup>248</sup> whether to accept a plea bargain;<sup>249</sup> and whether to dismiss charges.<sup>250</sup> Following these types of decisions, “no court has any jurisdiction to inquire into or review a prosecutor's decision to treat differently two persons who may have committed what is precisely the same legal offense.”<sup>251</sup>

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1144, 109th Cong. (2006); H. Amdt. 272, 109th Cong. (2005); H. Amdt. 646, 109th Cong. (2004); H. Amdt. 297, 108th Cong. (2003).

<sup>243</sup> See *Gonzalez v. Raich*, 545 U.S. 1, 9 (2005).

<sup>244</sup> See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed.”).

<sup>245</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

<sup>246</sup> See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 8 (2009) [hereinafter Krauss].

<sup>247</sup> *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (“[W]hen an act violates more than one criminal statute, the Government may prosecute (sic) under either so long as it does not discriminate against any class of defendants.”).

<sup>248</sup> *United States v. Flemmi*, 225 F.3d 78, 87 (1st Cir. 2000) (“A United States Attorney's authority to grant use immunity is implied from her statutory authority to make decisions anent prosecution . . .”).

<sup>249</sup> *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967).

<sup>250</sup> FED. R. CRIM. P. r. 48(a) (“The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.”).

<sup>251</sup> See Krauss, *supra* note 246, at 7 (quotation omitted).



In the 1979 case *United States v. Batchelder*, the Supreme Court explained that, while the Executive Branch has broad prosecutorial discretion, “selectivity in the enforcement of criminal laws is [still] subject to *constitutional constraints*.”<sup>252</sup> However, despite these alleged constraints, this discretion is left largely unchecked by the Judicial Branch.<sup>253</sup> As the Supreme Court explained in *Wayte v. United States*,

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.<sup>254</sup>

Indeed, the Judicial Branch seems to be in agreement that “the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch,”<sup>255</sup> and therefore that limiting that discretion by imposing judicial review “would invade the traditional separation of powers doctrine.”<sup>256</sup> Logic dictates, however, that with unchecked power comes potential for abuse.<sup>257</sup> As Kenneth Culp Davis

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<sup>252</sup> 442 U.S. 114, 115 (1979) (emphasis added).

<sup>253</sup> Note, however, that the charging decision may be limited when an individual’s constitutional rights are in question, in the context of “vindictive” and “selective” prosecutions. *See* *Wayte v. United States*, 470 U.S. 598, 605, 608 (1985) (finding selective prosecution claims to be judged according to ordinary equal protection standards); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (finding a due process violation in “vindictive” prosecution that had been brought in retaliation for defendant’s exercise of her legal rights).

<sup>254</sup> 470 U.S. 598, 607 (1985).

<sup>255</sup> *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

<sup>256</sup> *See* Krauss, *supra* note 246, at 10 (citing *U. S. v. Greater Blouse, Skirt & Neckwear Contractors Ass’n*, 228 F. Supp. 483, 489 (S.D.N.Y. 1964)).

<sup>257</sup> Krauss, *supra* note 246, at 12.

observes in his book *Discretionary Justice: A Preliminary Inquiry*, “[i]n our entire system of law and government, the greatest concentrations of unnecessary discretionary power over individual parties are not in the regulatory agencies but are in police and prosecutors.”<sup>258</sup>

Ironically, the constitutional clause requiring the President to “take Care that the Laws be faithfully executed”<sup>259</sup> is the clause most-often cited to support the contention that federal prosecutors should possess virtually unchecked discretion, pursuant to the Constitution.<sup>260</sup> In recent decades, however, there has been considerable debate concerning whether the power to prosecute should be solely within the province of the Executive Branch; although almost all of the discussion has pertained to questions of whether a President should be able to control decisions to prosecute individuals within his own branch.<sup>261</sup> For example, following the Watergate scandal, one Senator “rejected the idea that the administration of justice is inherently executive, observing that there is *not* one syllable in the Constitution that says that Congress *cannot* make the DOJ independent of the President.”<sup>262</sup>

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<sup>258</sup> KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 222 (Greenwood Press ed. 1980).

<sup>259</sup> U.S. CONST. art. II, § 3.

<sup>260</sup> See Krauss, *supra* note 246, at 23 (citing William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484 (1989) [hereinafter Gwyn]).

<sup>261</sup> See, e.g., Gwyn, *supra* note 260, at 484–85.

<sup>262</sup> *Id.* (emphasis added) (quotation omitted) (“Senator Sam Ervin . . . propos[ed] to establish the Justice Department as an independent agency . . . . Lloyd N. Cutler agreed [with Senator Ervin] and noted that to interpret the faithful execution clause as requiring that all federal prosecutors serve at the President's pleasure would mean accepting as Constitutionally mandated institutional arrangements which force us to tolerate conflicts of interest on the part of the President, the Attorney General and their immediate assistants that we cannot and do not tolerate in ordinary judges and lawyers. In its written evidence for the Senate committee, a committee of the Association of the Bar of New York concluded that the Executive is not the sole repository of law enforcement power; rather such power resides both in the Executive and Judiciary. Similarly, Arthur Larsen, professor of law at Duke University, stated, there is nothing inherent in the prosecutorial function to require that it be an executive function.” (quotations omitted) (citing *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 3 (1974)).

There has been relatively little debate, however, that has focused on how the Executive Branch's power to prosecute might, or should, be checked in the context of a grand, policy-based decision not to prosecute a certain kind of crime or a certain class of criminal, especially when Congress has decisively indicated its legitimate desire to make the category of behavior in question illegal.<sup>263</sup> In *Ponzi v. Fessenden*, the Supreme Court described the Attorney General as "the hand of the President in taking care that the laws of the United States[,] in protection of the interests of the United States in legal proceedings and in the prosecution of offences [sic], be faithfully executed."<sup>264</sup> While the Court's language certainly indicates that the prosecutorial function lies inherently within the Executive Branch, both the *Ponzi* opinion, as well as the wording of [what is generally referred to as] the "Take Care" clause of the Constitution (the President "shall take care that the laws be faithfully executed"), seem to additionally suggest that the President is obligated to *faithfully execute all United States laws*.<sup>265</sup>

Given that Congress is tasked with law-making, and that the Executive Branch is tasked with enforcing the laws made by Congress, it is difficult to see from where the authority for the type of expansive prosecutorial discretion encouraged by the Ogden Memo is derived from.<sup>266</sup> A blanket Executive Branch policy, such as that described in the Ogden Memo, which has the intended purpose and/or effect of undermining the clout of one of these very laws of the United States, would certainly seem to fly in the face of

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<sup>263</sup> 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); see also H. Amdt. 674, 110th Cong. (2007); H. Amdt. 1144, 109th Cong. (2006); H. Amdt. 272, 109th Cong. (2005); H. Amdt. 646, 109th Cong. (2004); H. Amdt. 297, 108th Cong. (2003).

<sup>264</sup> 258 U.S. 254, 262 (1921).

<sup>265</sup> U.S. CONST. art. II, § 3; *Ponzi*, 258 U.S. at 262.

<sup>266</sup> See Krauss, *supra* note 246, at 2 (arguing that "[t]he constitutional separation of powers doctrine does not adequately account for expansive prosecutorial discretion"). Note, however, that Krauss is referring to prosecutorial discretion in a more narrow sense (non-impermissible differing prosecutorial decisions between seemingly similarly situated defendants, for example); whereas I am specifically arguing that policy-based prosecutorial discretion on the scale of the Ogden Memo is of questionable constitutional validity pursuant to the Constitutional obligations of the Executive Branch.

the plain-text meaning of the “Take Care” clause of the Constitution.<sup>267</sup>

In his comment, *Highly Uncertain Times: An Analysis of the Executive Branch’s Decision to not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, United States Securities and Exchange Commission staff attorney Vijay Sekhon argues that the Executive Branch’s obligation to faithfully prosecute Congress’s laws constitutes the very “constitutional constraints” on prosecutorial discretion that the Supreme Court referred to in *Batchelder*.<sup>268</sup> Sekhon also asserts that the Supreme Court’s rationale supporting its refusal to “check” the Executive Branch’s prosecutorial discretion, articulated in *Wayte*,<sup>269</sup> would not be frustrated by judicial review of the policy put forth by the Ogden Memo.<sup>270</sup> Specifically, Sekhon argues that such a judicial review of the decision not to prosecute individuals in compliance with state medical marijuana laws would not undermine prosecutorial effectiveness by revealing the Executive Branch’s enforcement policy, nor would it delay any enforcement proceeding or chill law enforcement efforts, because the Executive Branch has already publicly announced its enforcement policy in this area.<sup>271</sup> Furthermore, Mr. Sekhon maintains, the concerns of the Court

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<sup>267</sup> See U.S. CONST. art. II, § 3; see also Sekhon, *supra* note 30, at 558 (“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.”).

<sup>268</sup> Sekhon, *supra* note 29, at 558. In my view, however, it is equally likely that the Court was referring to the exceptions of selective and vindictive prosecutions. See also *Wayte v. United States*, 470 U.S. 598, 608 (1985) (stating selective prosecutions can violate the Equal Protection clause); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (stating vindictive prosecutions can violate the Due Process clause).

<sup>269</sup> See Sekhon, *supra* note 29, at 557 (citing *Wayte*, 470 U.S. at 607–08 (“Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking (sic) to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”)).

<sup>270</sup> Sekhon, *supra* note 29, at 559.

<sup>271</sup> *Id.*

regarding judicial review of the strengths of a particular case, as well as a particular case's relationship to the Executive Branch's enforcement plan and/or the general deterrence value of the prosecution of a particular case, would also not be applicable in this context.<sup>272</sup> Rather, the review would relate to the Executive Branch's general enforcement plan in this area, as opposed to the prosecution of a particular case.<sup>273</sup> Ultimately, I am in agreement with Mr. Sekhon that the policy put forth in the Ogden Memo constitutes "a questionable use of prosecutorial discretion."<sup>274</sup>

In addition to consistently holding that it lacks the ability to check the Executive Branch's prosecutorial discretion,<sup>275</sup> the Supreme Court also has repeatedly determined that victims and interested citizens lack the ability to check the Executive Branch's use of prosecutorial discretion when their personal constitutional rights have not been directly violated.<sup>276</sup> In *Linda R.S. v. Richard D.*, the Supreme Court held that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."<sup>277</sup> The Supreme Court has, similarly, established a doctrine of sovereign immunity, which prohibits lawsuits against the federal government in the vast majority of circumstances.<sup>278</sup> As a result of this immunity, private citizens

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *See id.*

<sup>275</sup> *See, e.g.,* *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979).

<sup>276</sup> *See Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (stating it is "settled doctrine" that "the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution").

<sup>277</sup> *Richard D.*, 410 U.S. at 619. Note that a criminal defendant, by contrast, is afforded some limited degree of recourse in the context of allegations that the government has made their decisions to prosecute on the basis of unconstitutional considerations. *See Bordenkircher*, 434 U.S. at 363 (stating vindictive prosecutions can violate of the Due Process Clause); *Wayte*, 470 U.S. at 605, 608 (stating selective prosecution can violate of the Equal Protection clause).

<sup>278</sup> *See Lee*, 106 U.S. at 206–07. Congress has, however, consented to lawsuits against the Federal Government in a limited category of circumstances. *See* 28 U.S.C. § 1346(b)(1) (2006). Specifically through the Federal Tort Claims Act of 1948, Congress has consented to lawsuits against the Government in "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

would not be able to attain the requisite standing to sue the Executive Branch for its failure to enforce a provision of the Controlled Substances Act.<sup>279</sup> It is worth noting, however, that when a defendant is able to demonstrate that a *Constitutionally impermissible criterion* played a significant role in the *decision* to prosecute,<sup>280</sup> defendants may have standing to “check” specific instances of prosecutorial discretion,<sup>281</sup> although they are rarely successful.<sup>282</sup>

On the other hand, the Supreme Court has indicated that members of Congress might have standing to sue the Executive Branch for failure to enforce state medical marijuana laws.<sup>283</sup> In its 1939 decision *Coleman v. Miller*, the Court held that state senators had standing to challenge the passage of an amendment, pursuant to Article V of the Constitution, because senators “have a plain, direct and adequate interest in maintaining the effectiveness of their votes”

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occurred.” *Id.* In his comment, Vijay Sekhon explains that, because a private person cannot be liable for failure to enforce law, this statute 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. *See* Sekhon, *supra* note 29, at 560. Note also, as discussed earlier, that at least one Federal Court has expressly disallowed any sort of defense on the basis of reliance on the publicized non-prosecution policy, at least in the criminal context. *See Stacy*, 734 F. Supp. 2d at 1080. Based on this decision, it is unlikely that any sort of reliance argument would be successful in the civil context, either. *See id.*

<sup>279</sup> *See Lee*, 106 U.S. at 206–07; Sekhon, *supra* note 29, at 559.

<sup>280</sup> Of course, prosecutions, more generally are subject to many constitutional constraints. *See, e.g.*, U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”). Here, however, I am discussing the charging decision, itself.

<sup>281</sup> *See, e.g., Bordenkircher*, 434 U.S. at 363; *Wayte* 470 U.S. at 605, 608.

<sup>282</sup> *See* Peter J. Henning, *Prosecutorial Misconduct And Constitutional Remedies*, 77 WASH. U. L.Q. 713, 753 (1999).

<sup>283</sup> *See* Sekhon, *supra* note 29, at 560.

with respect to amendments to the federal Constitution.<sup>284</sup> More recently, the Supreme Court has held that members of Congress did not have standing to challenge the Line Item Veto Act<sup>285</sup> (giving the President the power to cancel items in any bill) in *Raines v. Byrd* because the members did not allege that they had been individually or concretely harmed by the Act; they had not voted for a bill that was affected by the Act; Congress's power to enact or repeal bills was not affected; and because Congress approved the Act and was also able to repeal it if it desired to do so.<sup>286</sup>

Mr. Sekhon argues that, under this doctrine of legislative standing, any United States Senator or Representative who has voted for appropriations bills that appropriated funds to the DEA and the DOJ for enforcement of the Controlled Substances Act is likely to obtain standing if he or she were to challenge the Executive Branch's decision not to prosecute individuals in compliance with state medical marijuana laws.<sup>287</sup> To support his argument, Sekhon uses the *Coleman* rationale, specifically asserting that Congressional legislators would be able to demonstrate that the effectiveness of their votes on such appropriations bills has been nullified by the Executive Branch's decision to disseminate enforcement policy that is in direct contravention to such bills.<sup>288</sup> Further, Sekhon then distinguishes this hypothetical situation from the facts of *Raines* because, here, federal legislators could point directly to the specific appropriations bills that they voted for and that were passed, but were then nonetheless nullified by the change in the Executive Branch's enforcement policy regarding medical marijuana.<sup>289</sup>

While Mr. Sekhon may be correct with respect to the standing issue, I am not optimistic about a hypothetical Congress member's chances of success in effectively challenging the legitimacy of the Ogden Memo, in light of the ample jurisprudence indicating the Judiciary's strong reluctance to make any decisions

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<sup>284</sup> *Coleman v. Miller*, 307 U.S. 433, 438 (1939); See Sekhon, *supra* note 30, at 560.

<sup>285</sup> 2 U.S.C.S. § 691 (supp. 1997).

<sup>286</sup> *Raines v. Byrd*, 521 U.S. 811, 813–14, 820–30.

<sup>287</sup> Sekhon, *supra* note 29, at 561.

<sup>288</sup> *Id.* (citing *Coleman*, 307 U.S. at 438).

<sup>289</sup> Sekhon, *supra* note 29, at 561.

that might check the Executive Branch's prosecutorial discretion.<sup>290</sup> On the other hand, as noted earlier, the Court has certainly shown a willingness to impose restraints on the Executive Branch's prosecutorial discretion when it feels that certain constitutional provisions have been violated.<sup>291</sup> Therefore, the Court's decision in this matter would likely turn on whether the "Take Care" clause of the Constitution limits the Executive Branch's prosecutorial discretion in a way that would restrict the branch from declaring a blanket refusal to prosecute an entire class of violations under federal law.<sup>292</sup>

Regardless of its outcome, I do not think that anyone would disagree that such a proceeding would, if brought, cause harm to the perceived legitimacy of our federal government. Given the ample and decisive evidence of Congress's position that medical marijuana should remain illegal under federal law,<sup>293</sup> it is certainly not out of the realm of possibility to imagine a legislator bringing this type of suit. That being said, the current trend in state-by-state legalization of both medical and recreational purposes,<sup>294</sup> together with the increasing public support for legalization, might serve as an effective political deterrent to any legislator's potential action to bring this type of suit.

Moving further into the purely hypothetical, if the Legislative Branch, as well as United States Citizens, are unable to trust the Executive Branch to enforce United States laws, what does this mean for the future of our separation of powers and the resulting

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<sup>290</sup> See *e.g.*, *Batchelder*, 442 U.S. at 123–24.

<sup>291</sup> See, *e.g.*, *Bordenkircher*, 434 U.S. at 363; *Wayte*, 470 U.S. at 605, 608.

Outside of the prosecutorial charging decision, courts also frequently impose many other Constitutional restraints on law enforcement personnel. See, *e.g.*, U.S. CONST. amend. IV; U.S. CONST. amend. V.

<sup>292</sup> See U.S. CONST. art. II, § 3.

<sup>293</sup> 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); see also H. Amdt. 674, 110th Cong. (2007); H. Amdt. 1144, 109th Cong. (2006); H. Amdt. 272, 109th Cong. (2005); H. Amdt. 646, 109th Cong. (2004); H. Amdt. 297, 108th Cong. (2003).

<sup>294</sup> See, *e.g.*, Schwartz, *supra* note 85 (stating marijuana market poised to grow faster than smartphones).



obligations of the three branches?<sup>295</sup> Or even for the continuing vitality of our Constitution itself? Perhaps the Obama administration's policy of non-enforcement of medical marijuana law is not catastrophic for this nation, in a practical sense, due to the growing popularity of medical marijuana use and the consequent burgeoning of the industry as noted.<sup>296</sup>

Nevertheless, is there not a worry that the Ogden Memo, by its nature, will set a precedent demonstrating that the prosecutorial discretion of the Executive Branch can extend even to entire categories of federally illegal activity?<sup>297</sup> What happens the next time that a Presidential administration disapproves of a criminal law that requires enforcement to remain legitimate?<sup>298</sup> In this situation, without any enforcement, does the law cease to be a law at all?<sup>299</sup> Of course, the Executive Branch has veto power over bills before they can become law.<sup>300</sup> However, if this type of policy of non-enforcement were to continue to be even tacitly sanctioned and, indeed, become the norm, I believe that any incoming administration would have the ability to effectively nullify any standing criminal law, which had been previously passed by Congress and signed by a

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<sup>295</sup> See Sekhon, *supra* note 29, at 558 (“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, has a strong likelihood of being one of the additional ‘constitutional constraints’ on the prosecutorial discretion of the Executive Branch.”).

<sup>296</sup> See, e.g., Alexander, *supra* note 82.

<sup>297</sup> See generally Ogden Memo, *supra* note 1.

<sup>298</sup> See generally AUSTIN, *supra* note 5 (stating, to be legitimate, laws must be backed by sanctions). Furthermore, deterrence logically requires a threat of sanctions in order to be a legitimate rationale to support criminal laws. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 17–18 (2005) (noting that, in the rationales behind contemporary criminal law, deterrence is one of the two that dominate presently).

<sup>299</sup> See generally AUSTIN, *supra* note 5.

<sup>300</sup> See U.S. CONST. art. I, § 7, cl. 2 (“If he approve [such legislation] he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.”). Note however, that this power can be overridden by a two-thirds majority in the House. See *id.*

previous President, through just such a policy, and resulting practice, of non-enforcement.<sup>301</sup>

### III. CONCLUSION

Both as concept and as a reality, the Ogden Memo is bad policy. As I have demonstrated in this article, the memo has the potential to lull states and those in the medical marijuana industry into a false sense of security regarding their chances of being prosecuted, both because it is unable to truly constrain the activities of DOJ personnel, and because it is utterly unclear if subsequent administrations will discourage enforcement in a similar fashion. Further, the very notion of an administration promulgating a policy of non-enforcement over an entire class of criminal behavior is, at best, a questionable use of prosecutorial discretion. At worst, if this broad prosecutorial authority is left unchecked, it could set the precedent of providing future Presidential administrations with ultimate retrospective veto power over any or all federal criminal laws.

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<sup>301</sup> See generally Ogden Memo, *supra* note 1.