

Appendix 1: The Obama Administration's Approach to Medical Marijuana: A Study in Chaos

President Obama sounded a conciliatory note when asked in December of 2012 by Barbara Walters about the Colorado and Washington votes to legalize recreational marijuana: “[I]t would not make sense for us to see a top priority as going after recreational users in states that have determined that it’s legal,” he said, because “we’ve got bigger fish to fry.”

But unless and until the Obama Administration makes very, very clear commitments not to go after marijuana suppliers who comply with the new state laws, anyone tempted to rely on the President’s public posture might want to consider how the Obama Justice Department cracked down on medical marijuana suppliers who had naively relied on similarly soothing assurances from Obama during the 2008 campaign, and from Attorney General Eric Holder thereafter.

Ask Chris Williams of Montana (now serving five years without parole), or Aaron Sandusky of Rancho Cucamonga, California (now serving ten years without parole, after his judge refused to let him show his jury videos of friendly statements about medical marijuana by Obama and Holder), or Matthew Davies of Stockton (under indictment on charges that carry a sentence of ten years without parole), or Matthew Cohen of Mendocino (raided and handcuffed with his wife by federal agents who came at night with machine guns and chainsaws to destroy his crop).⁵⁰

A. Medical Marijuana Laws at Present

Eighteen states (including Colorado and Washington) and the District of Columbia—twelve of them by popular votes—have removed state law penalties for possessing, using, cultivating, and in some cases distributing limited quantities of marijuana for medical purposes, starting with California’s “Compassionate Use Act” (Proposition 215) in 1996. At least another twenty state legislatures have considered proposals to legalize medical marijuana since 2011.⁵¹

While medical marijuana laws vary considerably, all provide that, to be exempt from arrest, prosecution, and civil forfeiture of their marijuana, medical users must show that they have a debilitating medical condition (except in California, where any illness

50. See, e.g., Gwen Florio, “Medical Marijuana Grower Gets Five Years in Federal Prison,” *Independent Record*, Feb. 1, 2013; KABC, “IE Man Gets 10 Years for Running Marijuana Clinics,” Jan. 7, 2013; Adam Nagourney, “In California, It’s U.S. vs. State on Marijuana,” *New York Times*, Jan. 13, 2013; Michael Montgomery, “Prosecutors Move to Shut Down Mendocino Pot Permit Program,” *Newsfix*, Jan. 11, 2012; Montgomery, “Mendocino County Pot Program at Risk after Raids,” *California Watch*, April 6, 2012.

51. See Robert A. Mikos, “A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana,” Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 11-07 (2011) (hereinafter *Mikos 2011*) at 633.

will do if a physician says that marijuana might provide relief), diagnosed by a physician (or, in some states, other medical practitioner); they must also have the physician's recommendation, which must be in writing (again except in California, where an oral recommendation will do), that marijuana might provide relief. Most laws list eligible diagnoses, typically including cancer, AIDS, glaucoma, and other chronic diseases with symptoms such as severe pain, seizures, and nausea. California's list includes a broad catch-all: any condition for which marijuana may, in the treating physician's opinion, benefit the patient.⁵²

Most but not all medical marijuana states require qualifying patients to register with the state beforehand and provide a signed form from the physician. The state then issues a registry identification card that looks like a driver's license for the patient and the caregiver to show to authorized providers of marijuana. State laws generally ban use while driving or on public property; they also prohibit driving under the influence, and limit (yet again excepting California) how much marijuana a patient may have.

Physicians who recommend medical marijuana are protected by all of these state laws from being prosecuted under state law or sanctioned at the hands of state licensing boards and hospitals. They are also protected by the First Amendment from federal as well as state sanctions. Designated personal caregivers are protected from state sanctions for possessing, handling, and in some states cultivating marijuana for their patients. Some states also seek to shield patients, physicians, and dispensaries from adverse actions by private actors including landlord, schools, and employers.

Several of the medical marijuana states relegate qualified patients to growing their own, getting it from friends, or buying illegally from the black market.⁵³ California law allows very vaguely defined nonprofit so-called cannabis cooperatives, with minimal state regulation; while many localities have regulations, many of those are not tightly enforced. In Colorado, Arizona, and New Mexico, among others, the state or local governments license limited numbers of medical marijuana growers and dispensaries, with tight restrictions.⁵⁴ Local regulations include zoning as well as licensing, and some localities have banned marijuana dispensaries.

52. For an overview of state medical marijuana laws, see *Mikos 2012* at 4-6; <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

53. See William Yardley, "New Federal Crackdown Confounds States that Allow Medical Marijuana," *New York Times*, May 7, 2011; see generally *Mikos 2012* at 5-6.

54. *Mikos 2012* at 5; See Fernanda Santos, "Arizona Tries to Keep Reins Tight as It Starts Regulating Medical Marijuana," *New York Times*, June 8, 2012. Oregon allows growers to supply at most four qualified patients and accept reimbursement only for costs of materials and utility bills, and not for their labor. OR. REV. STAT. § 475.304, 475.320(2)(C) (2010). New Mexico requires that licensed growers be nonprofit and prohibits volume discounts. N.M. STAT. ANN. § 26-2B-4(F) (West 2010) ("A licensed producer shall not be subject to arrest, prosecution or penalty, in any manner, for the production, possession, distribution or dispensing of cannabis pursuant to the . . . Compassionate Use Act").

B. The Obama Administration's Initial Policies

During his 2008 campaign, Barack Obama voiced unqualified approval of these complex, variegated medical marijuana laws: "I think the basic concept of using medical marijuana for the same purposes and with the same controls as other drugs prescribed by doctors is entirely appropriate. I'm not going to be using Justice Department resources to try to circumvent state laws on this issue."

Attorney General Holder was similarly reassuring and much more specific in a March 18, 2009, press conference. He said the Administration would end the Bush Administration's raids on medical marijuana suppliers and that "[t]he policy is to go after those people who violate both federal and state law," meaning "traffickers who falsely masqueraded as medical dispensaries and 'use medical marijuana laws as a shield'" (emphasis added).⁵⁵

Holder's assurance was formalized in an October 2009 memo from Deputy Attorney General David Ogden to United States Attorneys stating that while "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, . . . continues to be a core priority . . . , pursuit of these priorities should not focus federal resources in your states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁵⁶ Some states took this as encouragement to adopt medical marijuana laws and regulations. But as to growers and distributors of marijuana for medical use, including those who complied with state laws, this "Ogden memo" was pocked with ambiguities that turned out to be traps for the unwary.⁵⁷

The Justice Department has continued under Obama to give a free pass to medical marijuana users—as it did by and large under Presidents Clinton and George W. Bush. Simple possession for recreational (as well as for medical) use is only a misdemeanor under federal law, and for many years federal prosecutions for mere possession have

55. Associated Press, "Attorney General Signals Marijuana Policy Shift," NBC News, March 18, 2009; David Johnston and Neil A. Lewis, "Obama Administration to Stop Raids on Medical Marijuana Dispensaries," *New York Times*, March 18, 2009; see also *id.*: "In the Bush administration, federal agents raided medical marijuana distributors that violated federal statutes even if the dispensaries appeared to be complying with state laws. . . . Mr. Holder's comments appeared to be an effort to clarify the policy after some news reports last month interpreted his answer to a reporter's question to be a flat assertion that all raids on marijuana growers would cease. Department officials said Mr. Holder had not intended to assert any policy change last month but was decidedly doing so on Wednesday."

56. Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," October 19, 2009 (hereinafter Ogden memo), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

57. It also said, for example, that "even when there is clear and unambiguous compliance with existing state law," federal investigation or prosecution should go forward whenever it "serves important federal interests."

been rare even in most states where all marijuana use is illegal. Marijuana possession charges by local police are more common, but often grow out of searches in traffic stops and stop-and-frisks and seldom lead to prison or even jail time.⁵⁸

For recreational as well as medical users, “Marijuana is, as a practical matter, already legal in much of California,” despite the federal ban and the defeat of a recreational-marijuana ballot initiative in California in 2010, the *New York Times* reported in December 2012. “Marijuana has, in many parts of this state, become the equivalent of a beer in a paper bag on the streets of Greenwich Village. It is losing whatever stigma it ever had and still has in many parts of the country. . . . Marijuana can be smelled in suburban backyards in neighborhoods from Hollywood to Topanga Canyon as dusk falls – what in other places is known as the cocktail hour – often wafting in from three sides. In some homes in Beverly Hills and San Francisco, it is offered at the start of a dinner party with the customary ease of a host offering a chilled Bombay Sapphire martini.”⁵⁹

Holder did draw a firm line against *recreational* marijuana in late 2010, prompted by a ballot initiative (Proposition 19) which would have made California the first jurisdiction anywhere in modern times to legalize recreational use. Amid political pressure to speak out from nine former DEA heads and Mexico’s President Felipe Calderon, Holder vowed that the Justice Department would “vigorously enforce the CSA against those . . . that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law.”⁶⁰

The California initiative was narrowly defeated, perhaps in part because of Holder’s threat, perhaps in part because then-Gov. Arnold Schwarzenegger abolished criminal penalties for possession of up to an ounce.

All the while, medical marijuana farms and dispensaries were multiplying, in reliance on the Obama-Holder assurances and in many cases with the approval of state and local governments. And more states were moving toward licensing such suppliers. Through most of 2010, the Obama Administration “seemed to make a point of paying little attention” to this.⁶¹

C. The Administration’s Subsequent Crackdowns

But then, in 2011, with no warning from the White House or Attorney General Holder, something changed. Justice Department crackdowns on medical marijuana

58. See *What Everyone Needs to Know* at 42-47, 190.

59. Adam Nagourney, “Marijuana, Not Yet Legal for Californians, Might as Well Be,” *New York Times*, Dec. 20, 2012.

60. E.g., John Hoeffel, “Holder Vows Fight over Prop. 19,” *Los Angeles Times*, Oct. 16, 2010.

61. William Yardley, “New Federal Crackdown Confounds States that Allow Medical Marijuana,” *New York Times*, May 7, 2011.

suppliers in states including California, Washington, and Montana began to proliferate, and Holder's March 2009 assurance that those who complied with state law would be safe from federal enforcement of the CSA seemed to become inoperative, at least in parts of the country. The crackdowns were apparently spurred in part by a sense that the medical marijuana industry was spinning out of control in states including California, where the pretense of many of the state's hundreds of largely unregulated pot shops to be for bona fide medical users was widely seen as a joke. On the boardwalk in California's Venice Beach, "pitchmen dressed all in marijuana green approach passers-by with offers of a \$35, ten-minute evaluation for a medical marijuana recommendation for everything from cancer to appetite loss."⁶²

"Some federal prosecutors say states have simply let medical marijuana get out of hand," the *New York Times* reported in May 2011. "Many supporters of medical marijuana agree. 'Seeing storefront dispensaries advertise with neon pot leaves is inconsistent with the idea most people have of medical marijuana,' said [Alison] Holcomb, [director of drug policy for the ACLU of Washington]. 'But until you let states regulate these dispensaries, you have no way to control that.'"⁶³

Deputy Attorney General James Cole, Ogden's successor as Holder's number two, also expressed alarm about state and local moves toward licensing "multiple large-scale, privately-operated industrial marijuana cultivation centers," with "revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants."⁶⁴ Some U.S. Attorneys essentially declared war on such large operations, even when licensed by local governments, and even when they appeared to have complied with state law.

U.S. Attorneys including Jenny Durkan and Michael Ormsby, of the Western and Eastern Districts of Washington, respectively, also went so far as to imply in a letter to Washington Gov. Christine Gregoire that if she signed a pending bill to license and regulate medical marijuana suppliers, the state regulators would be violating the CSA (and might be prosecuted). This implication was probably wrong as a matter of law. But the implied threat scared Gregoire into vetoing most provisions of the proposed legislation.⁶⁵ This did little to uproot Washington's large marijuana industry; it just

62. Norimitsu Onishi, "Medical Marijuana Only for the Sick? A Farce, Some Angelenos Say," *New York Times*, Oct. 7, 2012 (hereinafter *Only for the Sick*).

63. Norimitsu Onishi, "Cities Balk as Federal Law on Marijuana Is Enforced," *New York Times*, June 30, 2012 (hereinafter *Cities Balk*).

64. Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," October 19, 2009 (hereinafter Cole memo), available at http://www.drugpolicy.org/sites/default/files/DOJ_Guidance_on_Medicinal_Marijuana_1.pdf

65. Letter from Jenny A. Durkan and Michael C. Ormsby to Hon. Christine Gregoire, April 14, 2011, available at http://www.thestranger.com/images/blogimages/2011/04/14/1302831694-usa_letter_4-14-

prevented the state from regulating it.

Cole formalized the new hard line in a June 29, 2011, memorandum to U.S. Attorneys. Not only did Cole sharply qualify the more ambiguous October 2009 Ogden memo. He also, like the Durkan-Ormsby letter, flatly contradicted Holder's March 2009 assurance that the Administration would go after only "those people who violate both federal and state law." To the contrary, Cole stressed that the feds could go after "[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities. . . *regardless of state law*" (emphasis added). He added—in what could be seen as a reference to state and local taxation of medical marijuana proceeds—that "[t]hose who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."

Then, on October 7, 2011, California's four U.S. Attorneys, the DEA, and the IRS, came together to claim at a press conference that the medical marijuana movement had been "hijacked by profiteers" in violation of California as well as federal law. They announced criminal charges against growers and dispensaries—including one charged with sending hundreds of pounds of supposedly medical marijuana to New York and Pennsylvania—and sent out dozens of letters warning suppliers and their landlords to stop growing and selling marijuana or face confiscations and prosecution.⁶⁶ U.S. Attorney Melinda Haag, of the Northern District of California, said at the press conference that cities and counties which were "licensing and ostensibly authorizing the commercial and very profitable distribution of marijuana" were being "inconsistent with federal law."⁶⁷ To the extent that Haag implied that such cities and counties were *violating* the CSA, her assertion, like the Durkan-Ormsby letter, was probably wrong as a matter of law.

The four U.S. Attorneys in California proceeded over the ensuing months to shut down hundreds of dispensaries statewide, although hundreds also remained open. Their actions, plus further implied threats to go after local officials involved in regulating medical marijuana, prompted the vast majority of the 50 California municipalities with medical marijuana ordinances to suspend their regulation of dispensaries. Another 180 localities in California have banned dispensaries.⁶⁸

2011.pdf/. See Olivia Katrandjian, "Under Federal Threat, Wash. State Gov. Vetoes Medical Marijuana Dispensary Bill," *ABC News*, April 30, 2011.

66. Peter Hecht, "Feds Unveil Charges Against Some Medical Marijuana Operators in California," *Sacramento Bee*, Oct. 8, 2011; John Hoeffel, "Federal Crackdown on Medical Pot Sales Reflects a Shift in Policy," *Los Angeles Times*, Oct. 7, 2011.

67. Michael Montgomery, "Prosecutors Move to Shut Down Mendocino Pot Permit Program," *news fix, KQED's Bay Area news blog*, Jan. 11, 2012.

68. *Only for the Sick*.

D. Where Things Stand: Criticism and Confusion

Critics of the crackdown have accused the feds of causing chaos by indiscriminately trashing good as well as bad operators and pushing seriously ill patients into the black market. Among those that closed down were Humboldt Medical Supply, a dispensary in Humboldt County that had obtained a permit in 2010, gave free marijuana to elderly patients, and was seen as a model of compliance with local regulations; Divinity Tree, a San Francisco cooperative run by a quadriplegic medical marijuana patient; and “Oaksterdam University,” an Oakland-based marijuana trade school run by Richard Lee, who started using medical marijuana for pain control after a work accident left him paralyzed from the waist down. He said he had trouble paying the big federal taxes for which Oaksterdam was liable due to federal law’s disallowance of ordinary business expense deductions for marijuana businesses.⁶⁹ Then there are the federal prosecutions like the ones that have brought long prison terms for would-be medical marijuana entrepreneurs Chris Williams and Aaron Sandusky, and the one that threatens Matthew Davies with a ten-year, no-parole sentence.

Amid speculation⁷⁰ that the Justice Department crackdowns may have been motivated in part by desire to preempt Republican attacks on Holder as soft (or incompetent) on crime, including the uproar over the “Fast and Furious” gun scandal, the U.S. Attorneys running the crackdowns and a Holder spokesperson claimed (as noted above) that these were local operations, not orchestrated by Holder.

Be that as it may, the crackdowns have brought Holder and Obama some very bad reviews from liberal activists and journalists who almost certainly voted for Obama.

“[O]ver the past year,” Tim Dickinson of *Rolling Stone* magazine complained in February 2012, “the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush. The feds are busting growers who operate in full compliance with state laws, vowing to seize the property of anyone who dares to even rent to legal pot dispensaries, and threatening to imprison state employees responsible for regulating medical marijuana. With more than 100 raids on pot dispensaries during his first three years, Obama is now on pace to exceed Bush’s record for medical-marijuana busts. ‘There’s no question that Obama’s the worst president on medical marijuana,’ says Rob Kampia,

69. *Cities Balk*; Lucia Graves, “Obama Administration’s War on Pot,” *Huffington Post*, April 18, 2012 (hereinafter Graves); Matthew Artz, “Oaksterdam Founder to Leave Cannabis Business,” *Oakland Tribune*, April 6, 2012.

70. See, e.g., Matthew Boyle, “Book: Holder Went on Anti-Marijuana Campaign to Distract from Fast and Furious,” *foxnews.com*, Aug. 13, 2012; Kristen Gwynne, “Why Is the Government Cracking Down on California’s Pot Dispensaries?” *rollingstone.com*, August 22, 2012.

executive director of the Marijuana Policy Project. ‘He’s gone from first to worst.’”⁷¹

In fairness to the four U.S. Attorneys in California, that state’s law, which bans for-profit marijuana suppliers, is hopelessly vague and confusing on what dispensaries may and may not lawfully do to qualify as nonprofit cooperatives or collectives. A plausible case can be made that would-be-legal marijuana entrepreneurs including Sandusky, Davies, and Cohen have violated not only federal but also California law, thus meeting Holder’s on-again-off-again litmus test, simply by creating large collectives with many members. Even top state officials have—sometimes mistakenly, a California appeals court recently held—equated being large with being for-profit and thus illegal.⁷² “The catch-22,” explains William Portanova, a seasoned Sacramento criminal defense lawyer and former federal prosecutor familiar with marijuana cases, “is that there really is no way to comply with California law, because no one knows what it is; it is so unclear and underdeveloped and Balkanized that no one knows if or how it might be done legally. The California legislature has done very little to help, nor have the various [state] attorneys general.”⁷³

Portanova adds that—in the wake of the early, reassuring Obama-Holder talk, and on the expectation that California might soon legalize a multibillion-dollar recreational marijuana industry—“many bad California lawyers encourage wannabe marijuana entrepreneurs to get into the business early, and then drift away after their clients have been indicted. The feds are a separate but equally worthy target for harsh criticism for their miserable failures at crime-enforcement prioritization in an era of global terror and fiscal crisis. . . . Despite the mess that California marijuana law is, the feds make it worse. Charlatans hypnotize the weak, then the feds bust them.”

But confusion over California cannot explain how Eric Holder—just a few months after his own Deputy, James Cole, had formally encouraged U.S. Attorneys to prosecute medical marijuana businesses “regardless of state law”—could testify at a June 2012 congressional hearing that “we limit our enforcement efforts to those individuals, organizations that are acting out of conformity with state law.”⁷⁴

Whatever the explanation, now Holder and Obama have big decisions to make about how to respond to the Colorado and Washington votes partially legalizing recreational marijuana. It’s past time for them to get their act together.

71. Tim Dickenson, “Obama’s War on Pot,” *Rolling Stone*, Feb. 16, 2012; see Steph Sherer, “Did Eric Holder Lie to Congress?” *The Blog, Huffington Post*, June 8, 2012. See also Graves.

72. See *People v. Jackson*, 210 Cal. App. 4th 525 (2012), review and depublication denied, 2013 Cal. LEXIS 457 (Jan. 16, 2013).

73. Author’s interview, March 20, 2013.

74. Stephen Dinan, “Holder Says No Effort to Shut Down All Medical Marijuana,” *Washington Times*, June 7, 2012.