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MEDICAL MARIJUANA POST-*MCINTOSH*

*Robert L. Greenberg*¹

INTRODUCTION

On August 16, 2016, the United States Court of Appeals for the Ninth Circuit issued a landmark decision on a series of cases relating to businesses and individuals in the state-legal cannabis business. In *United States v. McIntosh*,² the Court heard ten cases challenging the United States Department of Justice (DOJ) prosecution of medical marijuana patients. These cases involved criminal defendants who were charged with violations of federal narcotics laws while ostensibly in compliance with the laws of their respective states.³ The court determined that federal law prohibits the prosecution of these cases when the defendants are otherwise in compliance with state law. The impact of this decision is discussed *infra*.

I. THE UNDERLYING LAW

McIntosh deals with a unique interplay of conflicting statutes: the Controlled Substances Act and the Continuing Appropriations Acts of 2015 and 2016. The former proscribes the possession, sale, and use of marijuana in any form, and the latter prohibit the DOJ from interfering with state medical marijuana laws.

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² *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

³ The matter was “remand[ed] with instructions to conduct an evidentiary hearing to determine whether Appellants have complied with state law.” *Id.* at 1179. No legal determination was made regarding whether the defendants were in compliance with state law. *See generally id.*

A. The Controlled Substances Act

Marijuana—medical or otherwise—remains a Schedule 1 drug under the Controlled Substances Act.⁴ Being listed as a Schedule 1 drug means that there is no legitimate medical usage for marijuana.⁵ The decision in *McIntosh* does not affect the Controlled Substances Act. Further discussion of this decision’s impact is found *infra*. However, several states have enacted medical marijuana laws that license organizations to grow and distribute cannabis products for limited medical purposes and license patients to purchase and consume them. The state and federal laws come into conflict in these states.

Previously, in *Gonzales v. Raich*, the United States Supreme Court found that the states may not permit what federal law prohibits.⁶ What is left is a statutory and regulatory scheme in which individuals and organizations are in compliance with state law, but in violation of federal law.

B. The Continuing Appropriations Acts

In 2014 and again in 2015, Congress passed Continuing Appropriations Acts that contained a clause withholding funds from the DOJ in order to prevent the DOJ from interfering with state medical marijuana laws. The Court’s decision points to these Continuing Appropriations Acts of 2015 and 2016.⁷ The latter of these acts states:

None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.⁸

⁴ 21 U.S.C. § 812(c)(10) (2012).

⁵ *Id.* § 812(b)(1) (explaining that Schedule 1 drugs must have a “high potential for abuse” and “a lack of accepted safety for use of the drug or other substance under medical supervision”).

⁶ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”).

⁷ *McIntosh*, 833 F.3d at 1169-70.

⁸ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

These states and territories (together the “Medical Marijuana States”)⁹ have already passed laws that authorize patients to receive medical marijuana as a treatment for various ailments. In its operation, the Department of Justice may not use the funds allocated to it to enforce the general prohibitions on marijuana as a Schedule I Narcotic against those individuals in compliance with state law.¹⁰

II. CONGRESS’S “POWER OF THE PURSE” IN THE CONSTITUTION

A. *Defining Congress’s Check on the Executive Branch*

Article I of the United States Constitution grants Congress the “power of the purse.”¹¹ The Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]”¹² This power means that no actions may be taken by the Executive without the explicit approval of Congress. This clause is a basic example of checks-and-balances: without Congress approving the funds, the Executive Branch cannot do anything.¹³

B. *Applying This Principle to the Department of Justice*

The question before the Court was whether the Department of Justice was drawing funds in violation of the Continuing Appropriations Acts.¹⁴ The language of the Acts was written only to prohibit the DOJ from preventing “any of [the Medical Marijuana States] . . . from implementing

⁹ *McIntosh*, 833 F.3d at 1175, 1175 n.3. Since the elections on November 8, 2016, an additional two states – Arkansas and North Dakota – will allow medical marijuana usage, while three new states voted to legalize recreational marijuana use as well. See Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida> [<https://perma.cc/49F6-4M6H>].

¹⁰ David Stout & Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), <http://www.nytimes.com/2009/10/20/us/20cannabis.html> [<https://perma.cc/EK77-A8KN>].

¹¹ See, e.g., *Power of the Purse*, U.S. HOUSE OF REPRESENTATIVES HISTORY, ART & ARCHIVES, <http://history.house.gov/institution/origins-development/power-of-the-purse> [<https://perma.cc/N2X3-EUPG>] (last visited Aug. 30, 2016).

¹² U.S. CONST. art. I, § 9, cl. 7.

¹³ See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990).

¹⁴ *McIntosh*, 833 F.3d at 1168 (“We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states’ implementation of their own medical marijuana laws.”).

their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”¹⁵ The question then became: Does this prohibit the DOJ from prosecuting individuals in these states who are in compliance with their state laws?

The Court summarized the federal government’s arguments and responded as follows:

DOJ argues that it does not prevent the Medical Marijuana States from giving practical effect to their medical marijuana laws by prosecuting private individuals, rather than taking legal action against the state. *We are not persuaded.*

...

DOJ, without taking any legal action against the Medical Marijuana States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. *By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct.* If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.

We therefore conclude that, at a minimum, [the Continuing Appropriation Act] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.¹⁶

The Court concluded that Congress forbade the DOJ from enforcing the laws against individuals who are in compliance with state law. The DOJ may not go after individuals who are in compliance.

III. WHAT THIS DECISION MEANS

This decision is far reaching in its holding that enforcement of the Controlled Substances Act is estopped in the Medical Marijuana States when those who would be prosecuted are in compliance with their state laws. Medical Marijuana businesses and individuals are safe from prosecution as long as they maintain compliance with state medical marijuana laws.

¹⁵ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

¹⁶ *McIntosh*, 833 F.3d at 1176-77 (emphasis added).

A. Legality of Cannabis in These States

Federal law, namely the Controlled Substances Act, remains the law of the land. As the *McIntosh* court explained, this decision does not change the underlying prohibition of marijuana under federal law:

To be clear, [the Consolidated Appropriations Act] does not provide immunity from prosecution for federal marijuana offenses. The [Controlled Substances Act] prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) *is committing a federal crime*. The federal government can prosecute such offenses for up to five years after they occur. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow[.] . . .

Nor does any state law ‘legalize’ possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. Thus, while the CSA remains in effect, *states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.*¹⁷

The current act only prohibits the DOJ from using federal funding to go after those in the Medical Marijuana States who are in compliance with their state law. It does not change the underlying fact that these individuals are not in compliance with federal law. Appropriation acts are temporary measures and—as the court notes—the law could change tomorrow. It does not discuss recreational marijuana, which is presumably still illegal after this decision; the court only addresses how medical marijuana will not be prosecuted. Medical Marijuana remains illegal under federal law, and will remain so. The DOJ is enjoined from enforcing the Controlled Substances Act with respect to marijuana, but this decision does not change the underlying law.

B. Federal Enforcement of the Law in Medical Marijuana States

This decision does not prohibit DOJ from enforcing federal law in these Medical Marijuana States, and this decision does not protect individuals who are not in compliance with state law. As the court explained, “[i]ndividuals who do not strictly comply with all state-law conditions . . . have engaged in conduct that is unauthorized, and prosecuting such individuals” is legal.¹⁸ It is also important to note that this decision is very

¹⁷ *Id.* at 1179 n.5 (emphasis added) (internal citations omitted).

¹⁸ *Id.* at 1178.

recent and the only one thus far that explicitly prohibits the federal government from prosecuting legal medical marijuana users and businesses.

This decision does not affect the DOJ's ability to prosecute *recreational* marijuana users and businesses, even if they are in compliance with state law. Even though the particular business may still be in compliance with state law, since it is recreational and not medical, it is still violating the federal Controlled Substances Act.¹⁹

C. *Impact of the Decision in Newer-Legalizing States*

This recent decision has a far-reaching impact throughout the country. The Ninth Circuit covers the western part of the United States,²⁰ which has largely lead the way in the legalization of medical marijuana (and also the legalization of recreational marijuana). Subject to further appellate review and a petition for *certiorari*, *McIntosh* is good law. This, in conjunction with the Cole memorandum,²¹ should provide some safe harbor to those individuals and businesses that are in the legal medical marijuana business in the rest of the United States.

Maintaining compliance with state law is not an easy task, however. For example, the New York Compassionate Care Act,²² which authorizes medical marijuana, is still relatively new, with only five approved providers in the state.²³ Its rules are strict—including the prohibition of any smokeable forms of marijuana.²⁴ Patients cannot grow their own plants and

¹⁹ *Id.* at 1179 n.5.

²⁰ U.S. COURTS, GEOGRAPHIC BOUNDARIES OF UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS (2016), <http://www.uscourts.gov/file/document/us-federal-courts-circuit-map> [<https://perma.cc/XG8X-M7X2>].

²¹ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/NEU4-5BRH>].

²² Assemb. 6357-E, 2013 Leg., 237th Sess. (N.Y. 2014), <http://assembly.state.ny.us/leg/?term=2013&bn=A06357>; see also *New York State Medical Marijuana Program*, N.Y. STATE DEP'T OF HEALTH, http://www.health.ny.gov/regulations/medical_marijuana [<https://perma.cc/ZY55-TELU>] (last visited Aug. 24, 2016).

²³ N.Y. STATE DEP'T OF HEALTH, MEDICAL USE OF MARIJUANA UNDER THE COMPASSIONATE CARE ACT: TWO-YEAR REPORT 2-3 (2016) [hereinafter TWO-YEAR REPORT], http://www.health.ny.gov/regulations/medical_marijuana/docs/two_year_report.pdf [<https://perma.cc/UNE6-ZU73>]; see also *New York State Medical Marijuana Program: Registered Organizations*, N.Y. STATE DEP'T OF HEALTH, http://www.health.ny.gov/regulations/medical_marijuana/application/selected_applicants.htm [<https://perma.cc/GVK8-EFDL>] (last visited Aug. 24, 2016).

²⁴ TWO-YEAR REPORT, *supra* note 22, at 4 (“Smoking and edible products are not

can only get their medical marijuana in limited doses and at registered facilities.²⁵ There have not been any determinations of compliance under New York's law yet.

Ultimately, this provides some comfort to those who are adhering to the law and regulations promulgated by the states. As the state regulatory schemes mature, it will become clear for those in the industry and their patients how to maintain compliance and avoid federal prosecution.

* * *

permitted.”).

²⁵ *New York State Marijuana Program: Frequently Asked Questions*, N.Y. STATE DEP'T OF HEALTH, http://www.health.ny.gov/regulations/medical_marijuana/faq.htm [<https://perma.cc/DPV9-T8H5>] (last visited Oct. 19, 2016).