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“We change laws.”

## **Federal Enforcement Policy De-Prioritizing Medical Marijuana: Statements from Pres. Obama, his spokesman, and the Justice Department**

Although federal criminal law does not have an exception for the medical use of marijuana, several statements made by Barack Obama, Attorney General Eric Holder and their spokespeople in 2008, 2009, and 2010 reflected that the enforcement of federal criminal laws against those complying with state medical marijuana laws would not be an enforcement priority. In 2011, U.S. Attorneys and the office of the Attorney General backtracked on prior statements, indicating that larger-scale providers *could* be targeted, but that enforcement against patients and those caring for them would not be a priority. Here is a collection of statements from Barack Obama, his spokesperson, and the Department of Justice on federal law enforcement and medical marijuana.

During a March 22, 2008 interview with Gary Nelson, editorial page editor for the Oregon newspaper *Mail Tribune*, Barack Obama stated: “What I’m not going to be doing is using Justice Department resources to try to circumvent state laws on this issue simply because I want folks to be investigating violent crimes and potential terrorism. We’ve got a lot of things for our law enforcement officers to deal with.”<sup>1</sup>

In a February 5, 2009 article in *The Washington Times*, White House spokesman Nick Shapiro said, “The president believes that federal resources should not be used to circumvent state laws, and as he continues to appoint senior leadership to fill out the ranks of the federal government, he expects them to review their policies with that in mind.”<sup>2</sup>

When asked during a press conference on February 25, 2009 if recent raids on medical marijuana providers in California represented American policy going forward, U.S. Attorney General Eric Holder responded, “No. What the president said during the campaign, you’ll be surprised to know, will be consistent with what we’ll be doing in law enforcement. He was my boss during the campaign. He is formally and technically and by law my boss now. What he said during the campaign is now American policy.”<sup>3</sup>

On March 18, 2009, during a question-and-answer session with reporters at the Justice Department, Holder clarified his previous statement. He said, “The policy is to go after those people who violate both federal and state law . . . Given the limited resources that we have, our focus will be on people, organizations that are growing, cultivating substantial amounts of marijuana and doing so in a way that’s inconsistent with federal and state law.”<sup>4</sup>

In October 2009, Holder’s stated policy was memorialized in a memo written by then Deputy Attorney General David W. Ogden to United States Attorneys in states with medical marijuana programs. The memo said that law enforcement efforts targeting drug manufacturing and trafficking should not “focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of

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<sup>1</sup> Gary Nelson, “He favors long-term timber-payments solution,” *Mail Tribune*, March 23, 2008. Full comments from video of interview at [http://granitestaters.com/candidates/video\\_obama\\_02.html](http://granitestaters.com/candidates/video_obama_02.html)

<sup>2</sup> Stephen Dinan and Ben Conery, “DEA pot raids go on; Obama opposes,” *Washington Times*, February 5, 2009

<sup>3</sup> YouTube video: <http://www.youtube.com/watch?v=kjZeW2fcQHM>

<sup>4</sup> Devlin Barrett, “Attorney General Signals Shift in Marijuana Policy,” *Associated Press*, March 18, 2009

marijuana.”<sup>5</sup> The Ogden memo provided a list of characteristics of “illegal drug trafficking activity of potential federal interest,” which included sales to minors, violence, ties to other criminal organizations, and unlawful possession of firearms.

New Mexico’s first licensed producer was licensed 2009, and U.S. Attorney General Eric Holder was specifically asked about the federal government’s take. He said, “For those organizations that are doing so sanctioned by state law and do it in a way that is consistent with state law, and given the limited resources that we have, that will not be an emphasis for this administration.”<sup>6</sup>

During a May 10, 2010 hearing before the House Judiciary Committee, Congressman Jared Polis (D-CO) asked Attorney General Holder, “Do you believe -- do you agree that statements that could be reasonably taken as threatening to businesses that are legal in our state are, in fact, contrary to your stated policy?” Holder replied, “Well, again, if the entity is, in fact, operating consistent with state law, and is not -- does not have any of those factors involved that are contained in that Deputy Attorney General memo, and given, again, the limited resources that we have and our determination to focus on major traffickers, that would be inconsistent with what the policy as we have set it out.”<sup>7</sup>

In late June 2011, the DOJ seemingly backtracked on prior statements. Following a series of letters from United States Attorneys that seemed at odds with prior statements by the White House and the DOJ, Deputy United States Attorney General James Cole issued a memo stating that the DOJ’s “view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed.” It said “it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers.”<sup>8</sup> However, the Cole memo defined caregivers as those caring for seriously ill patients and “not commercial operations cultivating, selling or distributing marijuana.” It noted legislation to authorize large scale cultivation with “revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants” and claimed the “Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”

Federal enforcement policy is currently unclear. The Cole memo said that “consistent with resource constraints and the discretion” that prosecutors may exercise, people who “are in the business of cultivating, selling or distributing marijuana,” even in a manner consistent with state law could be targeted. When asked if the federal government would exempt large-scale, non-profit medical marijuana collectives under this policy, Justice Department spokesman Matthew Miller declined to comment.<sup>9</sup>

Following the letters issued by U.S. Attorneys, three governors placed a hold on implementing new or improved medical marijuana legislation citing concerns that state employees could be federally prosecuted for implementing state medical marijuana law. One such governor, Arizona Gov. Jan Brewer (R), filed a lawsuit asking whether Arizona’s law is preempted by federal laws. In response to the suit, the DOJ filed a motion to dismiss because

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<sup>5</sup> David Ogden, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, United States Department of Justice, Office of the Deputy Attorney General. October 19, 2009

<sup>6</sup> KOB-TV, “Feds: Medical marijuana producers not a target,” June 5, 2009.

<sup>7</sup> [http://blogs.westword.com/latestword/2010/05/jared\\_polis\\_questions\\_attorney.php](http://blogs.westword.com/latestword/2010/05/jared_polis_questions_attorney.php)

<sup>8</sup> James M. Cole, *Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*. United States Department of Justice, Office of the Deputy Attorney General. June 29, 2011

<sup>9</sup> John Hoeffel, “Justice Department shoots down commercial marijuana cultivation,” *Los Angeles Times*, July 2, 2011.

there is no case or controversy. The department stated that there is no “genuine threat that any state employee will face imminent prosecution under federal law” and noted that “plaintiffs can point to no threat of enforcement against the State’s employees.”<sup>10</sup>

The governor of one of the three states that had put a medical marijuana dispensing program on hold — New Jersey Gov. Chris Christie — has resumed the state’s medical marijuana program, and the implementation of new dispensary programs are proceeding in the District of Columbia, Delaware, and Vermont. Meanwhile, Colorado, Maine, and New Mexico’s laws all include state-regulated dispensing programs, and those laws have all been implemented.

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<sup>10</sup> Assistant Attorney General Tony West, DOJ Assistant Branch Manager Arthur R. Goldberg, Trial Attorney with the United States Department of Justice Scott Risner, *Federal Defendant’s Motion to Dismiss and Memorandum of Law in Support Thereof*, United States District Court, District of Arizona case No. 2:11-cv-01072-SRB. August 1, 2011