RECENT DEVELOPMENT

UNITED STATES V. MCINTOSH: NINTH CIRCUIT LIMITS FEDERAL PROSECUTORS FROM SPENDING TO ENFORCE MARIJUANA LAWS IN MEDICINAL STATES

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I. INTRODUCTION

The United States has debated the use and criminalization of marijuana for decades.[1] Many states have now enacted a variety of laws relating to the use of cannabis for both medicinal and recreational purposes.[2] There has been little action on the part of the federal government, with states leading the way in terms of implementing more progressive policies towards cannabis.[3] In 2014, however, Congress passed its Consolidated Appropriations Act (CAA), which included a section prohibiting the Department of Justice (DOJ) from using federal dollars to prosecute marijuana offenses where the accused had strictly complied with relevant state laws.[4] Congress further updated this provision in 2015 with section 542 of the CAA.[5] The Ninth Circuit, in *United States v. McIntosh*,[6] issued its opinion regarding the application of section 542. This decision held the DOJ may not spend federal money to prosecute persons in violation of federal marijuana laws but who are in "strict" compliance with their state's medical marijuana statutes.[7]

This Recent Development analyzes the implications of the Ninth Circuit's decision in the national context of the rapidly-developing marijuana law backdrop. Part II provides more background on *United States v. McIntosh*.

1. *See* The Editorial Board, *Repeal Prohibition, Again*, N.Y. TIMES (July 27, 2014), http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html?op-nav (arguing for a repeal of anti-marijuana laws in the United States after decades of outright prohibition).

2. *See* United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016) ("Not only are such laws varied in composition but they also are changing as new statutes are enacted, new regulations are promulgated, and new administrative and judicial decisions interpret such statutes and regulations."); *see also* The Editorial Board, *State Voters with Minds of Their Own*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/opinion/state-voters-with-minds-of-their-own.html?rref=collection%2Ftimestopic%2FMarijuana%20and%20Medical%20Marijuana&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=4&pgtype=collection (nothing that more than 20% of the country now lives in a state that legalized recreational marijuana).

3. *See DEA Announces Actions Related to Marijuana and Industrial Hemp*, DRUG ENF'T ADMIN. (Aug. 11, 2016), https://www.dea.gov/divisions/hq/2016/hq081116.shtml (announcing, in a press release, that the Drug Enforcement Administration would not be rescheduling marijuana from a schedule I drug in response to two petitions).

4. Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

5. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015) (updating the previous appropriations prohibition to include both Guam and Puerto Rico as well as slightly amending the language of the provision).

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

7. *See Id.* at 1178 (determining strict compliance with local marijuana statutes is how Congress intended to craft section 542).

Part III offers an analysis of what this decision means, both for states within the Ninth Circuit as well as the application of section 542. Part IV examines the role of the Appropriations Clause in this decision as well as the statute's provision of giving practical effect to states' medical marijuana laws, followed by a look at what this means across the country and what to expect in the future.

II. BACKGROUND: THE DEFENDANTS AND THE APPROPRIATIONS RIDER

McIntosh is a consolidated case consisting of ten different cases where the defendants, who were indicted under the Controlled Substances Act (CSA), disputed the ability of prosecutors to carry out a marijuana prosecution because of the restriction of spending on such actions from Congress.[8] For example, the Defendant McIntosh was part of a group that ran "Hollywood Compassionate Care . . . and Happy Days, and nine indoor marijuana grow sites in the San Francisco and Los Angeles areas."[9]

Following the indictments of the defendants in the series of cases at issue in *McIntosh*, Congress passed an appropriations bill in 2014 which stated, "[n]one of the funds made available in this Act to the DOJ may be used . . . to prevent such [s]tates from implementing their own [s]tate laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[10] The trial courts in the respective cases denied motions to dismiss or enjoin the prosecution because of the appropriations language.[11] Appellants filed interlocutory appeals citing the appropriations rider as the basis of the appeal.[12]

In general, it is rare for courts to attempt to prohibit a prosecution, but in the circumstances of a direction by Congress, it is reasonable.[13] It is not

8. *Id.* at 1168–69.

9. *Id.* at 1169. It is important to note that these are marijuana dispensaries which are not for small or individual consumers of marijuana. More specifically, the "codefendants were indicted for conspiracy to manufacture, to possess with intent to distribute, and to distribute more than one thousand marijuana plants in violation of [federal laws]." *Id.*

10. *Id.* (quoting Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)).

11. *Id.* at 1170.

12. *Id.*; *see also* Appellant's Joint Reply Brief and Reply to Response in Opposition to Petitions for Writ of Mandamus at 1, United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) (No. 15-10122) (challenging the ability of the DOJ to prosecute based on the 2015 appropriations rider); *Rider*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "rider" as an "attachment to some document, such as a legislative bill or an insurance policy, that amends or supplements the document," and explaining "[a] rider to a legislative bill often addresses subject matter unrelated to the main purpose of the bill").

13. *See McIntosh*, 833 F.3d at 1172 ("We note the unusual circumstances presented by these cases. In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate.").

within the courts' discretion to ignore the direction of Congress.[14] Therefore, the Ninth Circuit stated that "federal criminal defendants may seek to enjoin the expenditure of those funds, and [the appellate court] may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief."[15]

III. APPLYING A SPENDING LIMITATION TO THE CASES

A. *The Appropriations Clause and the Payment of Money as Authorized by Congress*

The Constitution states "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[16] The court recognized the importance of Congress's power over the country's purse strings.[17] The argument goes to the fundamental idea of a separation of powers. Congress has sole authority to appropriate money from the treasury.[18] Limiting the ability of the executive branch, Congress's role is to legislate and to be a check on the power of the other branches of government.[19] "In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government."[20] Congress must be able to limit the ability of the executive branch from spending the amounts it wants and on the priorities it wants to spend it on.[21] Therefore, exercising jurisdiction over the money spent by the DOJ

14. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001) ("A district court cannot, for example, override Congress's policy choice, articulated in a statute, as to what behavior should be prohibited. 'Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.'" (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978))).

15. *McIntosh*, 833 F.3d at 1173.

16. *Id.* at 1174 (quoting U.S. CONST. art. I, § 9).

17. *See Id.* at 1175 (reviewing the importance of Congress's role as a limiting power over the executive which would have unbounded power to do as it pleases without the approval of Congress (citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 427 (1990))).

18. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344 (1988) ("This empowerment of the legislature is at the foundation of our constitutional order.").

19. *See Id.* at 1347 ("The multiple constitutional prerequisites for government activity are checks upon the exercise of government power, reflecting the foundational decision that the exercise of such power should be deliberate and limited.").

20. *See id.* at 1345. Stith goes on to give the example of the legislature prohibiting the use of money for the purpose of spending in support of the Contras in the 1980s. *Id.* at 1360 n.81 (citing Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935).

21. *See id.* at 1349 (stating the ability of the legislature to limit the power of the executive from spending tax dollars on what the executive solely sees fit to spend it on prevents the executive from "compel[ling] such legislation by spending at will"); *see also McIntosh*, 833 F.3d at 1172 (specifying Congress may create its own legislative agenda as well as "establish their [agenda's] relative priority for

is appropriate so that an executive agency does not ignore the directives and priorities of Congress.[22]

B. *Interference with the CSA by Giving Practical Effect to States' Medical Marijuana Laws*

In *McIntosh*, the DOJ argued that the CSA still permitted the government to enforce marijuana laws despite the appropriations rider and the individual state's laws permitting medical marijuana.[23] The court stated that it would review section 542 in a context towards its overall place within the statutory scheme regarding the relationship between the CSA and states' medical marijuana laws.[24]

Congress explicitly prohibits the DOJ from spending any money that would stop a state from implementing and giving "practical effect" to their own medical marijuana laws.[25] The DOJ attempted to argue that by prosecuting individuals for marijuana crimes under federal law, even though they may have been in compliance with state laws and regulations, the federal government was not actually preventing states from implementing and giving practical effect to their marijuana laws.[26] The Ninth Circuit disagreed. "By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct."[27]

It is this very non-prosecution that is necessary for states to give any kind of practical effect to their own marijuana laws.[28] State medical marijuana laws are useless when the federal government may simply step in at its own volition to prosecute those persons in violation of the CSA.[29] If the federal government prosecutes those who are in compliance with state law, but in violation of the CSA, then the appropriations rider prevents the DOJ from prosecuting those individuals who are participating in authorized activity

the Nation") (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)).

22. *See McIntosh*, 833 F.3d at 1172–73 (explaining a court's authority to enjoin the DOJ spending that contradicts the will of Congress).

23. *See Id.* at 1176 (disagreeing with the DOJ's assertion that the agency honors state rights by only prosecuting individuals and not pursuing "legal action against the state").

24. *See id.* ("[T]he CSA prohibits what the State Medical Marijuana Laws permit").

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

26. *McIntosh*, 833 F.3d at 1176.

27. *Id.*

28. *See id.* at 1176–77 (9th Cir. 2016) ("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.").

29. *Id.*

under state medical marijuana laws.[30]

The *McIntosh* court went on to hold the federal government is forbidden to spend money from appropriations in states with medical marijuana laws but only if the persons involved fully complied with the state's laws and regulations regarding medical marijuana.[31] This is a strict compliance standard that the Ninth Circuit placed on the parties who are attempting to avoid prosecution under the CSA.[32]

According to section 542 of the appropriations bill, Congress does not want the DOJ to spend money on prosecutions to give practical effect to state's medical marijuana laws.[33] This does not prevent the DOJ from spending money on prosecuting individuals who are not in compliance with their state medical marijuana statutes. That is, the "DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws."[34]

"[Section] 542 applies to a wide variety of laws that are in flux."[35] Congress chose to include the states and territories that section 542 applies to as well as the activities it saw fit to authorize.[36] In this context, Congress sought to prevent spending on the prosecution of persons who were engaging in authorized conduct under their state's medical marijuana laws.[37] Thus, the appropriations rider in section 542 does not apply to activities that are not authorized under a state law.[38]

One of the appellants in this consolidated case sought to prevent the DOJ from enforcing the CSA even when the individuals being prosecuted were not in compliance with state law.[39] The appellant argued that section 542 prevented the DOJ from prosecuting individuals who are licensed under

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

31. *See McIntosh*, 833 F.3d at 1177 (immunizing individuals from federal prosecution "who fully compl[y] with [state] laws").

32. *See id.* at 1179 (remanding to afford the appellants the opportunity to demonstrate their compliance with California law).

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

34. *McIntosh*, 833 F.3d at 1178.

35. *Id.*

36. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015) (stopping the DOJ from spending funds on prosecutions which would thwart the practical effect of a state's *authorized* uses of medical marijuana).

37. *McIntosh*, 833 F.3d at 1177–78.

38. *See id.* at 1178 (noting section 542 does not limit the DOJ's ability to "prosecute[] individuals who engage in conduct unauthorized under state medical marijuana laws").

39. *Id.* at 1177.

state law but fail to "comply fully with state law."[40] It is not outside the scope of the appropriations bill and the CSA to prosecute those who do not fully comply with state authorized medical marijuana laws.[41] The prosecution of a person who was not in compliance with state medical marijuana laws does not prevent the states from giving practical effect to their medical marijuana statutes.[42] The DOJ may prosecute those who do not strictly comply with the CSA even though states have not worked out their own enforcement mechanisms and interpretations of the law.[43] The court stated that Congress could have worded the bill to say that the DOJ is prevented from giving practical effect to laws that address or regulate medical marijuana.[44] Instead, Congress stated that the DOJ should not prevent states from giving practical effect to the laws that authorize medical marijuana.[45]

C. *Going Forward*

The Ninth Circuit remanded these cases back to the district courts for evidentiary hearings to determine if the appellants had complied with state law.[46] The court did not give instructions as to what remedy to provide the defendants if the district court finds the defendant strictly complied with state law.[47] Ultimately, the court concluded that the federal government is prevented from spending taxpayer dollars on the prosecution of these individuals if there is a finding they complied with state medical marijuana laws.[48]

40. *Id.*

41. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015); *see also McIntosh*, 833 F.3d at 1178 ("Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542.").

42. *See McIntosh*, 833 F.3d at 1178 (determining there is no need to stop prosecutions of unauthorized conduct because unauthorized conduct will not interfere with states implementing medical marijuana laws).

43. *See id.* at 1179 ("If Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such intention, hopefully with greater clarity, in the text of any future rider.").

44. *Id.* at 1178.

45. *Id.* at 1176–77.

46. *Id.* at 1179.

47. *Id.* The court merely entitles the defendant to an evidentiary hearing. *Id.* The Ninth Circuit later states that the *McIntosh* opinion does not suspend the CSA. United States v. Nixon, 839 F.3d 885, 888 (9th Cir. 2016).

48. *McIntosh*, 833 F.3d at 1177. Notably, a federal district court in Michigan faced the same argument and applied the *McIntosh* standard when denying injunctive relief because the defendant had not been in strict compliance with the state medical marijuana laws. United States v. Samp, No. 16-cr-20263, 2017 WL 1164453, at *8 (E.D. Mich. Mar. 29, 2017).

The court did note, perhaps with a sympathetic eye toward the government, that there is a temporal issue in this case.[49] These cases were initiated by the government before there was a prohibition on the spending of tax dollars for this kind of conduct; and then, following the initiation of the cases, Congress passed the appropriations bill with the spending restriction in it.[50] Moreover, "Congress could appropriate funds for such prosecutions tomorrow."[51]

IV. CONCLUSION

Current trends indicate more states will enact or broaden medical marijuana statutes.[52] Thus, more circuits will have to adjudicate the paradox of marijuana being legal for certain uses under state law[53] but still outright forbidden under federal law as a result of the CSA.[54] *McIntosh* will provide guidance to federal district courts and other circuits where this will be an issue of first impression.[55] The state of the law is still uncertain as Congress could come back at any time and decide to do away with the appropriations prohibition. This appropriations rider also does not cover recreational marijuana, which is being approved in more and more states every election cycle.[56] The Obama Administration made the decision to not prosecute

49. *McIntosh*, 833 F.3d at 1179.

50. *Id.*

51. *Id.* Appropriations can change through the will of Congress and a signature of the President; therefore, agencies' limitations from Congress can be upended because of the will of a different Congress. *See* Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1736 (2013) (giving the Consumer Financial Protections Bureau as an example in which its framers sought to protect the federal agency from future appropriations by making it a self-funding agency).

52. *See Legal Marijuana and a Higher Minimum Wage: States That Passed Key Ballot Measures in 2016*, FORBES (Nov. 11, 2016 10:04 AM), http://www.forbes.com/sites/datadesign/2016/11/11/legal-marijuana-and-a-higher-minimum-wage-states-that-passed-key-ballot-measures-in-2016/#1a966fc87cb9 (reporting the 2016 election results in which "Maine, Massachusetts, Nevada, and California passed" recreational marijuana laws while "Montana, North Dakota, Arkansas, and Florida" passed laws legalizing medical marijuana). States like Texas, which have traditionally been conservative when it comes to marijuana use, now have medical marijuana statutes in place—although such laws are very narrow and restrictive. *See* TEX. OCC. CODE ANN. § 169.003 (West 2015) (allowing a physician to prescribe a low-THC form of cannabis to patients for the purpose of "alleviat[ing] a patient's seizures" if certain requirements are satisfied).

53. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2016) (codifying the Compassionate Use Act of 1996 allowing medical marijuana to be obtained by patients).

54. 21 U.S.C. § 841(b)(1)(D) (2012) (criminalizing possession "of less than 50 kg of marihuana").

55. *See* United States v. Samp, No. 16-cr-20263, 2017 WL 1164453 at *8 (E.D. Mich. Mar. 29, 2017) (denying injunctive relief in a district court outside of the Ninth Circuit).

56. *See* Patrick McGreevy, *California Scrambles to Implement New Recreational Pot Law*, L.A. TIMES (Nov. 9, 2016, 3:35 PM), http://www.latimes.com/politics/la-pol-ca-marijuana-legalized-implementation-snap-20161109-story.html (describing California's passage of a ballot measure to legalize recreational marijuana along with the efforts the state will make to regulate the substance and

those who were in compliance with state recreational laws,[57] similar to the Congressional rider for medical laws; however, presidential administrations come and go. Only time will tell how a new administration will prioritize marijuana enforcement in states that permit it in one form or another.[58] For now, federal district courts—in the Ninth Circuit at least—must first determine through an evidentiary hearing if individuals being prosecuted fully complied with state laws and regulations before the DOJ can pursue a case against them.[59]

provide information about the new law).

57. *See* Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws If Distribution Is Regulated*, WASH. POST (Aug. 29, 2013), https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws—for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972_story.html (announcing in 2013 that the Obama Administration "would not challenge laws legalizing marijuana in Colorado and Washington state as long as those states maintain strict rules involving the sale and distribution of the drug").

58. *See* Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017) (reporting on the appointment of Steven H. Cook as a member of Attorney General Jeff Session's staff, sparking worry in a dramatic change in policy on criminal justice and the war on drugs).

59. United States v. McIntosh, 833 F.3d 1163, 1179 (9th Cir. 2016).