

ENABLING STATE DEREGULATION OF MARIJUANA THROUGH EXECUTIVE BRANCH NONENFORCEMENT

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In an apparent victory for federalism, the Obama Administration has set out a policy of deference to state marijuana regulations, even when state laws conflict with federal prohibition. Critics of this policy have alleged that the executive is unconstitutionally leaving portions of federal law unenforced, effectively legalizing a drug that is still classified as a Schedule 1 narcotic. But in reality, current executive branch guidelines for the exercise of prosecutorial discretion are limited, vague, and largely unenforceable. Instead, the real risk is not that current federal nonenforcement policy will effectively legalize marijuana, but that the policy will fail to induce the reliance necessary for states to serve as effective laboratories of experimentation. This concern can be addressed, to an extent, by requiring that U.S. Attorneys use their enforcement authority in a more formal, transparent, and reliable fashion. However, constitutional limits on executive power mean that deregulation is likely to remain imperfect until a legislative solution is enacted.

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INTRODUCTION

The federal Controlled Substances Act (CSA),¹ passed in 1970, categorically and unambiguously bans the possession, cultivation, and distribution of certain “Schedule I” narcotics, including marijuana, subject to criminal penalties.² However, the legal status of marijuana in any jurisdiction is actually determined by a confluence of local, state, and federal laws, many of which conflict with one another.³ In defiance of federal prohibition, many state governments allow marijuana use for medicinal and sometimes recreational purposes.⁴ Furthermore, an increasing number of states have gone beyond decriminalizing marijuana and have sought to actively supervise and tax distribution centers, facilitating (and profiting from) the growth of a booming marijuana industry.⁵ But because federal law is supreme, the ability of states to enable marijuana use and distribution of *any* kind remains contingent upon the forbearance of federal law enforcement officials within the executive branch.

State expectations of federal nonenforcement have often proven to be well founded. In California, for instance, distribution centers have proliferated to the point that marijuana dispensaries outnumber Starbucks coffee shops in some areas.⁶ Determining whether to prosecute any given crime includes an often-complex evaluation of the crime’s severity and the prosecutorial resources available, and so out of necessity many ostensibly “criminal” activities escape the attention of prosecutors.⁷ These enforcement decisions are made by prosecutors on a case-by-case basis, with little to no direct input from the Attorney General or “Main Justice”—the governing authority of the Department of Justice (DOJ) in Washington.⁸

¹ Controlled Substances Act, 21 U.S.C. §§ 801–70 (2012).

² Controlled Substances Act, 21 U.S.C. §§ 812, 841–65.

³ See Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 820–39 (2004) (detailing the complex federal-state relationships that have evolved in drug control policy).

⁴ See Marijuana Policy Project, *The Twenty-Three States and One Federal District with Effective Medical Marijuana Laws*, <http://www.mpp.org/assets/pdfs/library/MMJLawsSummary.pdf> (Feb. 1, 2014) (detailing current marijuana laws in the fifty states).

⁵ These states are Arizona, Delaware, Colorado, Connecticut, Illinois, Nevada, New Hampshire, New Mexico, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont. *Id.* Washington state does not allow dispensaries, but does permit “marijuana stores for adults.” *Id.*

⁶ See *In California, Marijuana Dispensaries Outnumber Starbucks*, (NPR broadcast Oct. 15, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=113822156> (reporting “estimates of 800 or 900 storefront shops” in Los Angeles alone).

⁷ See *infra* notes 78–89 and accompanying text (describing DOJ enforcement practices).

⁸ See *id.* (describing prosecutors’ independence from internal review).

However, decisions not to enforce marijuana law also increasingly represent a broader policy choice by the President to deprioritize and even ignore large swathes of marijuana activity in states that have rejected the federal regime. This policy has been elaborated through a series of official memoranda and public statements by the President and executive branch officials.⁹ In one of the latest such statements, issued in August 2013, Deputy Attorney General James S. Cole advised federal prosecutors (and state regulators) that so long as states have “strong and effective regulatory and enforcement systems. . . . Enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”¹⁰ In short, to all appearances, the executive branch has simply decided not to enforce the CSA in many cases when doing so would inconvenience the states—including when those states permit or even abet activities that are clearly illegal under federal law. And although the Cole Memo presents this policy as a principled reallocation of limited enforcement resources, some have taken a less charitable view, arguing that the Obama Administration’s approach to the CSA “exemplifies what we all do when we do not want to do something, but feel pushed to do it anyway—we say we *would* do it, but we are too busy with other more important things to do.”¹¹

This Note addresses the constitutional and practical limits to the President’s ability to effect real marijuana policy change without the help of the legislature. Executive policymaking may have the potential to bring about rapid and significant change to the drug enforcement status quo, without the inefficiencies and compromises that accompany the legislative process.¹² But although the executive branch has extensive discretion in determining enforcement priorities, the law of

⁹ *E.g.*, sources cited *infra* notes 21–29.

¹⁰ Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’y’s, at 3 (Aug. 29, 2013) [hereinafter Cole Memo], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹¹ Corinna Barrett Lain, *Passive-Aggressive Executive Power*, 73 MD. L. REV. 227, 239 (2013).

¹² Indeed, the perception of ongoing legislative paralysis is likely one motivation for the President’s unilateral approach to drug policy. In his 2014 State of the Union address, the President announced his intention to enact his policy goals without the assistance of the legislature wherever possible, rather than wait for a gridlocked Congress to resolve society’s ills. Without mentioning drug policy specifically, President Obama stated: “America does not stand still—and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do.” President Barack Obama, Address on the State of the Union (Jan. 28, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

the land is written in statute, which can only be modified by Congress (unless declared unconstitutional by the courts). Therefore, so long as the CSA remains in effect, any executive effort to enable state-level legalization of marijuana will require officials to turn a blind eye to overt and even egregious forms of state-sanctioned lawbreaking. However, even if selective disregard for the law does not violate constitutional principles of separation of powers and equal protection, it is far from clear that the informal “guidelines” issued by the Attorney General thus far can provide the stability or clarity needed to encourage state reliance in deregulatory experiments. Without more direct executive action, attempts at marijuana legalization are likely to remain incomplete.

Part I of this Note reviews the current administration’s policy of nonenforcement of federal marijuana law in states that have enacted their own conflicting laws, and presents one complaint that this policy raises: that delegating enforcement authority to the states violates the President’s constitutional duty to enforce the law as it is written. Then, Part II responds to this complaint by showing that the articulated non-enforcement policy neatly avoids any risk of constitutional sanction by granting all real authority to federal prosecutors, who are not easily subjected to constitutional review. I argue that this defense is inherently problematic from a normative standpoint, because the independent policymaking authority of local prosecutors diminishes the transparency and consistency of executive enforcement, foreclosing the possibility of state-level reliance. Finally, Part III considers a few limited and politically practicable measures that might improve policy efficacy within the current structure of the executive branch without falling on the wrong side of the Constitution, including especially increasing the transparency and self-regulation of U.S. Attorneys.

I

THE POLICY OF NONENFORCEMENT

A. *The Administration’s Response to State Deregulation*

Since California voters passed the Compassionate Use Act in 1996,¹³ permitting “seriously ill” residents to possess and cultivate marijuana for personal medical use, states have become ever bolder in their resistance to federal prohibition. As of July 2014, marijuana use

¹³ Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007). The conflict between state and federal spheres was not inadvertent: The Compassionate Use Act’s stated goals include “[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.” *Id.*

had been decriminalized for medical purposes in twenty-three states and the District of Columbia,¹⁴ and more had deregulation measures pending.¹⁵ Seventeen of these states and the District of Columbia had implemented policies calling for some form of state-regulated dispensaries.¹⁶ State deregulation took its logical next step in November 2012, when Colorado and Washington became the first states to legalize marijuana for recreational use.¹⁷ Both states now treat marijuana similarly to alcohol—subject to taxes and heavy regulation, but nonetheless legal for adult use—and other states are beginning to follow their example.¹⁸ Meanwhile, the federal government has struggled to adapt the half-century-old CSA to constantly shifting state and local marijuana laws, resulting in what has aptly been termed a “federalism crisis.”¹⁹

In contrast to his predecessor’s aggressive antimarijuana stance,²⁰ President Obama’s response to this crisis has been to retreat. In his first presidential campaign, Obama repeatedly promised not to use “Justice Department resources to try to circumvent state laws on this issue.”²¹ This position has been repeated and emphasized in public statements by executive branch authorities throughout his time in

¹⁴ See Marijuana Policy Project, *supra* note 4 (“Twenty-three U.S. states and the District of Columbia have enacted laws that remove criminal sanctions for the medical use of marijuana, define eligibility for such use, and allow some means of access—either through home cultivation, dispensaries, or both.”).

¹⁵ *3 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481> (noting states with marijuana decriminalization measures pending).

¹⁶ Marijuana Policy Project, *supra* note 4.

¹⁷ COLO. CONST. amend. XVIII, § 16, available at <http://www.fcgov.com/mmj/pdf/amendment64.pdf>; Washington Marijuana Legalization and Regulation, Initiative 502, ch. 3, 2013 Wash. Legis. Serv. 28 (West) (Initiative Measure-Marijuana-Legalization and Regulation); see also Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legalization Questions Remain*, N.Y. TIMES, Nov. 7, 2012, available at <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html> (describing the state voter initiatives).

¹⁸ COLO. CONST. amend. XVIII, § 16, available at <http://www.fcgov.com/mmj/pdf/amendment64.pdf>; Washington Marijuana Legalization and Regulation, Initiative 502, ch. 3. In 2014, voters approved similar initiatives to legalize marijuana in Washington D.C., Oregon, and Alaska. Josh Barro, *D.C., Oregon, and Alaska Vote to Legalize Marijuana*, N.Y. TIMES, Nov. 3, 2014, available at <http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html>.

¹⁹ David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 575 (2013).

²⁰ See Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997) (setting forth George W. Bush’s stance of strong federal opposition to all marijuana use, including uses permitted under state law).

²¹ The Editorial Board, *American Mayors: Let Them Smoke Pot*, N.Y. TIMES, June 29, 2013, available at http://www.nytimes.com/2013/06/29/opinion/american-mayors-let-them-smoke-pot.html?_r=0.

office.²² But in spite of these statements, the Obama Administration has not proposed or publicly supported any legislative measure to legalize marijuana, or to alter marijuana's status as a forbidden Schedule I narcotic.²³ At least officially, marijuana's legal status at the federal level remains the same as it has been since 1970: Possession, cultivation, and distribution are categorically forbidden and subject to criminal penalties.²⁴

Instead of seeking to change the substantive law in cooperation with the legislature, the administration has pursued its marijuana policy goals unilaterally. The administration has adopted a public position of tacit encouragement for state legalization, premised on a baseline of federal nonenforcement. This policy was formalized on October 19, 2009, in a memo from Deputy Attorney General David W. Ogden (the Ogden Memo).²⁵ Taking the approach that has largely come to define the administration's position, Ogden called for a change in "enforcement priorities," but did not make any kind of legally binding promise or categorically rule out federal enforcement in states with permissive marijuana laws.²⁶ Importantly, the memo did not purport to reinterpret the CSA, or claim that the President's constitutional authority allows a more general right to ignore inequitable or impractical laws. On the contrary, it made quite clear that mari-

²² See, e.g., Stephen Dinan & Ben Conery, *Bush Holdovers at DEA Continue Pot Raids – Obama Vowed to End Policy*, WASH. TIMES (Feb. 5, 2009) (quoting White House spokesman Nick Shapiro: "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"); Rachel Weiner, *Obama: I've Got 'Bigger Fish to Fry' Than Pot Smokers*, WASH. POST (Dec. 14, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/14/obama-ive-got-bigger-fish-to-fry-than-pot-smokers/> (quoting the President: "It 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").

²³ See Press Briefing by Principal Deputy Press Secretary Josh Earnest (Aug. 21, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/21/press-briefing-principal-deputy-press-secretary-josh-earnest-8212013> ("[T]he priority here . . . should be targeted toward drug kingpins, drug traffickers and others who perpetrate violence in the conduct of the drug trade But at the same time, the President does not at this point advocate a change in the law."); Response to the New York Times' Editorial Board's Call for Federal Marijuana Legalization (July 28, 2014, 6:40 PM), <http://www.whitehouse.gov/blog/2014/07/28/response-new-york-times-editorial-marijuana-legalization> ("[T]he Obama Administration and the Office of National Drug Control Policy remain committed to drug use prevention, treatment, support for recovery, and innovative criminal justice strategies to break the cycle of drug use and associated crime.").

²⁴ Controlled Substances Act, 21 U.S.C. § 812 (2012); *id.* § 801; *id.* §§ 841–65.

²⁵ Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys (Oct. 19, 2009) [hereinafter Ogden Memo], <http://www.justice.gov/usao/az/reports/medical-marijuana.pdf>.

²⁶ *Id.* at 1.

juana remains illegal under federal law.²⁷ Nonetheless, the obvious intent was to give qualified reassurance to states considering deregulation, and to signal a general shift in drug enforcement tactics. The memo directed that DOJ attorneys “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 marijuana.”²⁸ Attorney General Eric Holder publicly explained that this policy was designed to prioritize prosecution of “serious drug traffickers” rather than the sick, and promised to focus efforts on those who violate both “state and federal laws.”²⁹

In response to increasing state-level legalization efforts, including those which succeeded in Colorado and Washington, the administration clarified and enlarged its enforcement priorities in another memorandum, issued in August of 2013 by Deputy Attorney General James M. Cole (the Cole Memo).³⁰ While previous policy statements, including the Ogden Memo, adopted a general stance favoring deregulation but were ambiguous or hostile toward large-scale producers and distributors in regulated states,³¹ the Cole Memo emphasizes eight broadly stated priorities to be enforced “regardless of state law.”³² But outside these priorities, the Cole Memo expresses strong deference to state law, noting that the federal government has tradi-

²⁷ See *id.* at 1 (“Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime.”). This strategy contrasts with other instances of nonenforcement by the Obama Administration, where the President has denied the legitimacy of certain federal laws. For instance, the administration refused to defend the Defense of Marriage Act (DOMA) in court, on the basis of its interpretation that the law itself was unconstitutional. Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

²⁸ Ogden Memo, *supra* note 25, at 2.

²⁹ Press Release, U.S. Dep’t. of Justice, Office of Public Affairs, *Attorney General Announces Formal Medical Marijuana Guidelines* (Oct. 19, 2009), <http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html>.

³⁰ Cole Memo, *supra* note 10.

³¹ See Ogden Memo, *supra* note 25 (“[P]rosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.”).

³² *Id.* at 2. These are:

Preventing the distribution of marijuana to minors; Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; Preventing violence and the use of firearms in the cultivation and distribution of marijuana; Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana

tionally relied on states to police most forms of marijuana activity.³³ Furthermore, the memo even suggests that states with far-reaching regulatory measures, like Colorado or Washington, should be subjected to *less* federal intervention than those with more limited programs, on the grounds that “a robust system” of state regulation is more competent to independently address federal priorities than mere legalization or deregulation.³⁴

B. *Nonenforcement and Separation of Powers*

While other administrations, including that of George W. Bush, have pursued political goals through nonenforcement, the Obama Administration has been unique in its use of the technique.³⁵ The administration has received particularly strong criticism for unilaterally deprioritizing enforcement of certain immigration laws and deferring prosecution of young immigrants who have been in the United States since birth—effectively enacting substantial portions of the DREAM Act, which has repeatedly been rejected by Congress.³⁶ In response to that action, Justice Scalia accused the administration of using the “husbanding of scarce enforcement resources” as a pretextual justification for immigration measures taken in pursuit of political policy goals.³⁷ And Republicans in Congress have also objected to selective and delayed implementation of the Affordable Care Act, including by voting to sue the President for violating his constitutional duty to enforce the law.³⁸

production on public lands; and Preventing marijuana possession or use on federal property.

Id. at 1–2.

³³ *Id.* at 2.

³⁴ *Id.* at 3.

³⁵ See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1066 (2013) (observing that Obama, like Bush, has “us[ed] nonenforcement to achieve substantive policy goals. However, he has done so somewhat more transparently”); Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013) (describing novel and extensive uses of nonenforcement under the Obama Administration).

³⁶ See Delahunty & Yoo, *supra* note 35, at 783–84 (observing that by deciding “not to enforce the removal provisions of the Immigration and Nationality Act (INA)[,] . . . the Obama Administration effectively wrote into law ‘the DREAM Act,’ whose passage had failed numerous times” (footnote omitted)).

³⁷ *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).

³⁸ See Jeremy W. Peters, *House Votes to Sue Obama for Overstepping Powers*, N.Y. TIMES, July 31, 2014, available at <http://www.nytimes.com/2014/07/31/us/politics/house-votes-along-party-lines-to-sue-obama.html> (describing this vote, and the accompanying political debate). Republican representative John Boehner, the Speaker of the House, justified this lawsuit by arguing that “the President has circumvented the American people

To a suspicious eye, the DOJ's instruction for prosecutors to "focus their enforcement resources and efforts . . . on persons or organizations whose conduct interferes with"³⁹ certain enforcement priorities looks like a policy not to enforce the law at all.⁴⁰ By promoting deregulation of marijuana, the President has chosen to back a policy that the legislature has repeatedly and publicly voted against: On numerous occasions, Congress has considered and declined to pass legislation that would end enforcement of the federal marijuana prohibition in deregulated states.⁴¹ Furthermore, Congress has refused to pass amendments to appropriations bills that would prohibit the use of appropriated funds to obstruct state legalization of medical marijuana on several occasions.⁴² At the least, the conflict between law and policy can be striking: The Cole Memo reaffirms that "the illegal distribution and sale of marijuana is a serious crime,"⁴³ but how serious can it really be if the executive chooses to leave distributors and sellers unmolested?

The President must be careful to ensure that his attempts to achieve marijuana reform through the constitutional principle of fed-

and their elected representatives through executive action, changing and creating his own laws, and excusing himself from enforcing statutes he is sworn to uphold." John Boehner, *Why We Must Now Sue the President*, CNN, July 7, 2014, <http://www.cnn.com/2014/07/06/opinion/boehner-obama-lawsuit/index.html?c=&page=1>.

³⁹ Cole Memo, *supra* note 10, at 2.

⁴⁰ See, e.g., Letter from National Police Organizations to Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice (Aug. 30, 2013), http://o.b5z.net/i/u/10030424/f/Law_Enforcement_Group_Letter_on_DOJ_Marijuana_Policy.pdf (arguing that "the failure of the Department of Justice to challenge state policies that clearly contradict Federal law is both unacceptable and unprecedented" and constitutes an "open invitation to other states to legalize marijuana in defiance of federal law"); see also Vijay Sekhon, *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, 558 (2010) ("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 . . . use of prosecutorial discretion."); Matt Wilstein, *Ted Cruz Makes Pot Brownie Joke Before Hitting Obama's Drug Policy*, MEDIAITE.COM (Jan. 11, 2014, 12:35 PM), <http://www.mediaite.com/tv/ted-cruz-makes-pot-brownie-joke-before-hitting-obamas-drug-policy/> (quoting Texas Senator Ted Cruz: "You could go to Congress . . . and you could have a real conversation This president didn't do that. He just said, 'The laws say one thing' . . . these are laws that say if you do 'X, Y, and Z' you will go to prison. The president announced, 'No, you won't.'").

⁴¹ E.g., 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).

⁴² E.g., H. Amend. 674 (amending H.R. 3093), 110th Cong. (2007); H. Amend. 1144 (amending H.R. 5672), 109th Cong. (2006); H. Amend. 272 (amending H.R. 2862), 109th Cong. (2005); H. Amend. 646 (amending H.R. 4754), 109th Cong. (2004); H. Amend. 297 (amending H.R. 2799), 108th Cong. (2003).

⁴³ Cole Memo, *supra* note 10, at 1.

eralism—by deferring to state deregulation—are not accomplished at the expense of the equally fundamental constitutional principle of separation of powers.⁴⁴ While the President’s veto power authorizes him to intervene in the legislative process in certain defined situations, common sense dictates (and the Supreme Court has held) that there can be no commensurate power to unilaterally nullify laws that have already passed through the requisite legislative channels.⁴⁵ In the case of marijuana deregulation, the tension between law and policy has led some commentators to conclude that “[t]he federal government violates the rule of law when it chooses to apply federal laws without impartiality by prosecuting federal marijuana cases in states that have not legalized marijuana and turning a blind eye in states that have legalized marijuana.”⁴⁶

As a constitutional matter, the duty to enforce the law is most clearly expressed in Article II, Section 3 of the Constitution, the “Take Care” clause, which states simply that the President “shall take Care that the Laws be faithfully executed.”⁴⁷ The clause is hardly specific, but has been interpreted to provide a grant of power unique from the powers of the legislature or judiciary, and—most relevant here—to impose a baseline of good-faith enforcement.⁴⁸ And

⁴⁴ The fundamental test of separation of powers is that the task of lawmaking properly belongs to the democratically elected legislature, whereas the executive is limited to enforcing the laws as written. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions . . . to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”). The principle of separation of powers is central to the idea that in a free and democratic society no one branch of government should hold authority to both make and execute the law. *See* THE FEDERALIST NO. 47, at 266 (James Madison) (E.H. Scott ed., 1898) (“The accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

⁴⁵ *See* *Kendall v. United States*, 37 U.S. 524, 613 (1838) (“To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”); *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 705 (2014) (“Prospective nonenforcement—that is, an announced promise of declining enforcement of a law in the future—is a particular offense to legislative supremacy because it undermines the deterrent effect of the law. Similarly, categorical nonenforcement for policy reasons usurps Congress’s function of embodying national policy in law.”).

⁴⁶ Melanie Reid, *The Quagmire That Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 N.M. L. REV. 169, 204 (2014).

⁴⁷ U.S. CONST., art. II, §3.

⁴⁸ Taking an originalist position, Martin S. Flaherty argues that the clause “advances the Founding goal of balance in mandating that the executive remain faithful to something other than his whim—presumably federal laws and the Constitution.” *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1794 (1996); *accord* Steven G. Calabresi & Saikrishna B.

although much scholarly attention has been devoted to the constitutional hazards of executive overreach, executive *underreach* presents perhaps an even more intractable problem. Critics of nonenforcement have emphasized the threat that inaction poses to the authority of Congress to enact the law, and to the democratic accountability of the executive branch more generally.⁴⁹

Of course, enforcement of the law does not take place in a vacuum, and the executive is frequently called upon to make complex determinations—not only about the allocation of resources, but about the appropriate interpretation of the law itself. The tale of the U.S. government since the New Deal is largely the story of the rise of the executive branch and the increasing centralization of power therein.⁵⁰ In the modern context of expansive executive authority, in which agencies undertake quasi-legislative responsibilities on a regular basis, it is relatively uncontroversial that the President will exercise a great deal of discretion in the enforcement of the law.⁵¹ And because statutes are written broadly and the needs of the public are constantly changing, this discretion extends beyond the mere allocation of resources to include the appropriate interpretation of the law itself. Nonetheless, the fundamental constitutional distinction between the legislature and the executive is premised on the idea that the act of legislation is separate from and prior to the act of enforcement.⁵² The

Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 620 (1994) (arguing that the Take Care clause grants the executive special authority to operate outside of a direct congressional mandate, but nonetheless acknowledging that the clause arose from “a desire to prevent the President from declaring that his executive power granted him the ability not only to enforce federal law, but also to suspend federal law or suspend the execution of it”).

⁴⁹ See, e.g., Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 265 (2003) (arguing that “[p]olitically inspired inaction is of special concern because it presents a direct challenge to the principle of legislative supremacy”); Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 882 (1989) (“[J]udicial review is generally needed more when prosecutors decide not to prosecute because such a decision can seriously undermine Congress’ statutory mandate.”).

⁵⁰ See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (arguing that the post–New Deal validation of the administrative state by the courts constitutes a “bloodless constitutional revolution” in terms of government structure); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430–53 (1987) (chronicling the post–New Deal shift away from constitutional checks and balances to a modern unchecked regulatory state).

⁵¹ See, e.g., Flaherty, *supra* note 48, at 1727 (“The dominance of executive power ought by now, to lift a phrase from Charles Black, to be a matter of common notoriety not so much for judicial notice as for background knowledge of educated people who live in this republic.”).

⁵² Much has been said about the benefits of this structure. For instance, Jeremy Waldron notes that the legislature has two practical advantages for lawmaking. First, unlike

difficulty, then, is only to find the barrier between the two, and to determine whether a policy designed to facilitate illegal drug activity can ever be justified under the Constitution's demand for executive enforcement.

II

BARRIERS TO NONENFORCEMENT

This Part explores two interrelated legal challenges to the President's policy of nonenforcement of marijuana law. Subpart A addresses the critique that the policy violates the executive's duty to enforce the law as written, jeopardizing separation-of-powers principles and raising concerns that the democratic process has been subverted by an imperial presidency. The Attorney General has characterized this policy as an exercise of prosecutorial discretion—a reallocation of prosecutorial priorities based on the need to optimize the use of available resources.⁵³ As I will discuss, this latter characterization is accurate, and is more than sufficient to defend the policy from constitutional scrutiny under the Supreme Court's current test.

Then, Subpart B discusses the figures that *actually* control marijuana policy at the state and local level: federal prosecutors and the U.S. Attorneys who directly supervise them. These officials, unlike Washington authorities, are largely free to leave the law unenforced without fear of constitutional repercussions. However, freedom from constitutional review does not come without a price. For states to effectively regulate (or deregulate) marijuana in the shadow of federal prosecution, the executive must provide consistency and clarity. Delegating authority to unaccountable local enforcers puts both in jeopardy, hindering state reliance and subverting the executive's policy goals.

the judiciary, it has the benefit of transparency, which allows for electoral accountability and democratic legitimacy. Second, unlike the executive, the legislature has the advantage of numerosity, and so may benefit from the collective wisdom of the group. Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 354–55 (2009).

⁵³ See Cole Memo, *supra* note 10, at 1 (stating that the Department of Justice is “committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way”); see also Jann S. Wenner, *Ready for the Fight*, ROLLING STONE, May 10, 2012, at 46, available at <http://www.rollingstone.com/politics/news/ready-for-the-fight-rolling-stone-interview-with-barack-obama-20120425> (quoting President Obama: “I can’t ask the Justice Department to say, ‘Ignore completely a federal law that’s on the books.’ What I can say is, ‘Use your prosecutorial discretion and properly prioritize your resources to go after things that are really doing folks damage’”).

A. *Constitutional Restraints on Nonenforcement*

The choice to implement policy through prosecutorial discretion raises a fundamental question: How much can the executive ignore federal drug law without crossing the line into unconstitutional legislation by fiat? Fortunately for the President, the Supreme Court's standard of review for executive action allows him to go quite far. As this Section discusses, a reviewing court would not (and should not) find that current Attorney General guidelines violate the executive's constitutional duty to enforce. Although the Court has interpreted the Constitution to require the President to uphold the law, the necessary complexities of implementing legislation on the ground have led it to grant broad discretion to the executive branch in determining how and when the law is to be enforced. This discretion is at its apex in cases like the present, in which enforcement policy is propagated not through the formal rulemaking process, but through relatively informal public statements and DOJ memoranda.

1. *Judicial Deference to Executive Decisions*

The outer boundaries of prosecutorial discretion were established during the "impoundment controversies," when Republican President Richard Nixon refused to spend over 11.8 billion dollars that the Democratic legislature had allocated to various social welfare programs.⁵⁴ Nixon claimed a general right to deny enforcement on principles of equity: "The constitutional right for the President of the United States to impound funds and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people, that right is absolutely clear."⁵⁵ But courts uniformly rejected Nixon's claim of authority. The courts noted that if Nixon's sought after impoundment power was deemed constitutionally valid, "no barrier would remain to the executive ignoring any and all Congressional authorizations if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation. . . . The Constitution cannot support such a gloss and still remain a viable instrument."⁵⁶ Ultimately, Congress brought final resolution to the

⁵⁴ See generally Abner J. Mikva & Michael F. Hertz, *Impoundment of Funds—The Courts, the Congress and the President: A Constitutional Triangle*, 69 NW. U. L. REV. 335, 343, 345 (1974) (describing Nixon's impoundments and the ensuing political backlash).

⁵⁵ *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. TIMES, Feb. 1, 1973, at 20 (quoted in Mikva & Hertz, *supra* note 54).

⁵⁶ *Local 2677, Am. Fed'n of Gov't Emps. v. Phillips*, 358 F. Supp. 60, 77 (D.D.C. 1973); *accord State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973) ("It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed because of a system of priorities the Executive chooses to impose on all expenditures.").

impoundment controversies by enacting the Congressional Budget and Impoundment Control Act of 1974, which gives the President limited authority to sequester funds, subject to certain legislative controls.⁵⁷

Unfortunately, absent a sweeping Nixonian claim of executive authority, the constitutionally required minimum level of enforcement can be more difficult to discern. In theory, a shift in enforcement priorities is subject to the same constitutional standard as an outright refusal to enforce: If an executive policy invalidates or fatally undermines a duly-enacted statute, then courts may strike that policy down.⁵⁸ However, in practice, courts treat agency inaction with a strong presumption of validity.⁵⁹ This deference is in part a matter of necessity. In a world of constrained resources, enforcement officials are required to pick and choose which laws to enforce, and how vigorously to enforce them.⁶⁰ The executive's flexibility in establishing and pursuing enforcement priorities counterbalances the legislature's tendency toward inaction, and speaks to the fundamental difference between the two branches of government.⁶¹ And because circumstances are constantly shifting while the law as written remains static, even broad departures from the intent of the Congress that enacted the original statute may be necessary for the effective exercise of executive authority.⁶² A claim of limited resources also indirectly impli-

⁵⁷ Congressional Budget and Impoundment Control Act, 2 U.S.C. §§ 601–88 (2012) (providing that the President may formally request that Congress rescind appropriated funds, and may then withhold funds for a maximum of forty-five days unless both Senate and the House of Representatives approve the rescission proposal).

⁵⁸ See *Nader v. Saxbe*, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974) (applying scrutiny to a DOJ policy of refusing to bring prosecutions under the Federal Corrupt Practices Act, noting that “the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review”).

⁵⁹ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

⁶⁰ See generally Frank H. Easterbrook, *On Not Enforcing the Law*, 7 REGULATION 14, 16 (Jan./Feb. 1983) (“[S]ometimes the best, or even the only, way to achieve compliance with the central feature of a law is to deny some people an ‘entitlement’ . . . because enforcing the ‘entitlement’ of one will mean deferring, and thus denying for a time or forever, the claims of others.”).

⁶¹ See THE FEDERALIST NO. 70 (Alexander Hamilton) (E.H. Scott ed., 1898) (arguing that the executive’s characteristic feature is “energy,” in contrast to legislative deliberation).

⁶² See Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 68–69 (1997) (describing how Congress has internal incentives to diminish agency resources over time without enacting a corresponding reduction in legislated responsibilities); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 114 (2000) (“The possibilities of divided government, as well as changes in public mood that occur over time, virtually

cates the current Congress: It may be difficult to tell when a nonenforcement decision is made by the executive for political reasons, and when it is made because Congress has simply chosen to deny adequate funding.⁶³ As Justice Brandeis stated, “[o]bviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so.”⁶⁴

There may be especially good reasons to defer to executive discretion in the area of criminal law. William J. Stuntz has pointed out that many criminal laws are enacted under internal pressure to overlegislate, on the understanding that the full force authorized by law will be only occasionally and judiciously applied.⁶⁵ In the face of such broad legislation, acts of executive discretion are not only expected, but required. This is certainly the case with drug law: The ninety-first Congress enacted the CSA, part of the Comprehensive Drug Abuse Prevention and Control Act with the intention of initiating a national “war on drugs,”⁶⁶ and the metaphor calls to mind the authority of the President in war itself, where executive authority is nonpareil.⁶⁷ Given the breadth of the statute, and the scope of power

ensure that the President’s exercise of his functions will be out of step with . . . what past Congresses may have wanted when enacting statutes that have not yet been repealed.”).

⁶³ The “power of the purse” has long been one of the legislature’s most potent tools for undermining the executive, including by preventing enforcement of acts directly mandated by statute. *See* U.S. CONST. art. I, § 9, cl. 7. (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”). For a discussion of the broad scope of congressional authority to control funding, see Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988) (explaining that congressional authority over funds “impose[s] powerful limitations on the executive branch”).

⁶⁴ *Myers v. United States*, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting). On the other hand, courts may not be so tolerant when the claim of inadequate resources seems factually inadequate, or when the deviation from the law is extreme. *See, e.g., Salameda v. I.N.S.*, 70 F.3d 447, 452 (7th Cir. 1995) (refusing to diminish the standard of judicial review of agency action in spite of the agency’s claim that it lacked resources to meet federal standards, and finding that “understaffing is not a defense to a violation of principles of administrative law”).

⁶⁵ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 (2001) (describing factors which militate in favor of extreme discretion in executive enforcement of criminal law by claiming “prosecutorial discretion makes the risks from crime definition one-sided, and thereby pushes legislators to err on the side of too much . . . [It] creates agency costs that legislators can reduce by adding crimes [and] tends to alter the interest-group forces at work in criminal lawmaking”).

⁶⁶ For a short history of the Controlled Substances Act, see *Gonzales v. Raich*, 545 U.S. 1, 9–11 (2005) (referring to the Act as a “comprehensive regime to combat the international and interstate traffic in illicit drugs”).

⁶⁷ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”).

it grants, difficult choices by the executive are both necessary and inevitable.⁶⁸

Therefore, rather than assess the plausibility of an alleged cost-benefit calculus, the Court applies a highly deferential standard of review that looks at the formality and magnitude of the executive policy itself. The critical case establishing this standard is *Heckler v. Chaney*, in which death-row inmates filed suit demanding that the Food and Drug Administration (FDA) take action to stop certain drugs from being used for lethal injection, a purpose for which those drugs had not been approved.⁶⁹ The FDA argued that it did not have jurisdiction over the use of drugs for human execution and, in the alternative, that it had the “inherent discretion” to choose not to act if there were not a “serious danger to the public health or a blatant scheme to defraud.”⁷⁰ Justice Rehnquist’s decision for the Court held that the FDA’s choice not to regulate was “committed to agency discretion by law,” and therefore not subject to the requirement of enforcement by the Administrative Procedures Act (APA).⁷¹

⁶⁸ At least as a facial matter, the cost-control justification is plausible in the context of marijuana. The war on drugs has been intense and unrelenting, and the costs of prosecuting even a single individual for marijuana possession can be tremendous. See Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 573 (2010) (“[I]n light of the fact that the federal government is unable to stop state medical marijuana laws, it is difficult to view its effort to do so as anything other than a waste of law enforcement resources.”). There is ample evidence to suggest that these individual prosecutions, which were more common during the Bush Administration, do little or nothing to reduce the overall supply of marijuana, and even successful convictions may breed disrespect for law enforcement authorities, and long-term career criminalism. See DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS* 70 (2006) (“[W]e cannot justify the punishment of drug users in order to prevent systemic, economic, or psychopharmacological crime. In fact, a growing number of scholars believe that punishing drug use actually causes more crime in lower-class neighborhoods than it prevents.”); Cynthia S. Duncan, Note, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1711–15 (2009) (describing the long-term costs of expansive drug enforcement policies). President Obama has also pointed out that partial enforcement of marijuana law might in fact be worse than complete nonenforcement, due to its potential to render arbitrary results and breed disrespect for the law. See David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER, Jan. 27, 2014, http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick?currentPage=all (quoting the President: “[I]t’s important for [state marijuana deregulation] to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished”).

⁶⁹ *Heckler v. Chaney*, 470 U.S. 821, 821 (1985).

⁷⁰ *Id.* at 841.

⁷¹ *Id.* at 835–39 (quoting 5 U.S.C. § 701(a)(2)). Both enforcement and nonenforcement by administrative agencies are generally governed by the APA. The APA’s definition of agency action includes “failure to act,” and requires that courts “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 701(a)(2) (2012). However, there

Rehnquist provided four justifications for his decision. First, the decision not to enforce involves “a complicated balancing of factors which are peculiarly within [the executive branch’s] expertise.”⁷² Second, the Court found that “when an agency refuses to act it generally does not exercise its coercive power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”⁷³ Third, the Court noted that action, unlike inaction, provides a “focus” for judicial review: An action “at least can be reviewed to determine whether the agency exceeded its statutory powers,”⁷⁴ but inaction can present a nebulous target. Fourth, executive nonenforcement “shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict”—that is, the discretion exercised by individual prosecutors in determining which cases shall be brought to trial.⁷⁵

However, the problem is that cost control can be used to justify virtually *any* refusal to enforce, and so absolute deference would permit the President to undermine the law at will. Therefore, the *Chaney* Court left room for judicial review in “a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”⁷⁶ When a policy ceases to apply on a case-by-case basis, and becomes a “pattern of nonenforcement,” courts may step in.⁷⁷ But as the next Section discusses, there is little to no chance that this standard will be met where the nonenforcement strategy is structured not as a claim of executive

are two exceptions to this general rule: (1) cases in which the statute itself precludes review and (2) cases in which agency action “is committed to agency discretion by law.” *Id.*

⁷² *Id.* at 831. Not all critics have shared Chief Justice Rehnquist’s concerns about judicial competence, however. For one counterargument, see Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 674 (1985) (“[T]he *Chaney* Court’s reasoning was unpersuasive insofar as it indicated a general rule that inaction ought to be treated differently from other agency decisions. The ‘take Care’ clause does not justify special judicial deference if the administrator’s failure to act is in violation of duly enacted laws.”).

⁷³ *Chaney*, 470 U.S. at 832.

⁷⁴ *Id.* at 832.

⁷⁵ *Id.* For a vigorous critique of these factors, see Sunstein, *supra* note 72, at 674. In part due to fear of this type of judicial abdication of responsibility, John Ferejohn argues that judges should look critically not only at executive decisions, but at the processes that underlie them—and should apply greater scrutiny to executive actions that are ineffective or nontransparent. John Ferejohn, *The Lure of Large Numbers*, 123 HARV. L. REV. 1969, 1996 (2010) (“Judges should willingly defer more to policy judgments arising from ‘good’ policymaking processes, where the test of goodness is adherence to norms of democracy and effectiveness.”).

⁷⁶ *Chaney*, 470 U.S. at 833 n.4.

⁷⁷ *Id.* at 839 (Brennan, J., concurring).

authority, but as simple and nonmandatory shift in the priorities of federal prosecutors.

2. *The Structure of DOJ Policymaking*

Because existing policy statements are phrased as guidelines for federal prosecutors, their efficacy will depend upon the President's ability to ensure that those guidelines are actually implemented as intended, rather than ignored, misinterpreted, or subverted by idiosyncratic enforcement measures. But although the President is ostensibly the head of the executive branch, with authority to direct the enforcement of federal law, almost all criminal investigations are undertaken by local U.S. Attorneys' offices without the involvement of Washington.⁷⁸ Meanwhile, as a practical matter, Main Justice exerts only limited and indirect control over the decision of whether to bring any individual case to trial.⁷⁹ While Main Justice also has administrative authority over certain actions, such as the decision to seek an appeal in criminal cases, or the choice to pursue the death penalty, the vast majority of prosecutorial decisions are not subject to internal review.⁸⁰ Even when they are, the Supreme Court has held that "so 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."⁸¹ The DOJ manual directs U.S. Attorneys to prosecute when they believe that "conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain. . . a conviction unless. . . (1) No substantial federal interest would be served by prosecution; (2) The person is subject to effective prosecution in another jurisdiction; or (3) There exists an adequate non-criminal alternative to prosecution."⁸² And the determination of whether there is a substantial federal interest is a

⁷⁸ See Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 227 (2003) (describing the generally limited role of Main Justice and the extensive discretionary authority of prosecutors).

⁷⁹ See Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2089–90 (2009) ("Enforcer discretion—exercised by prosecutors and investigative agents—has always lain at the heart of federal criminal law, which has long been characterized by extraordinarily broad substantive statutes enforced by a relatively small bureaucracy that can pick and choose among possible targets."). For a more thorough breakdown of these controls, see O'Neill, *supra* note 78, at 227–32.

⁸⁰ O'Neill, *supra* note 71, at 228.

⁸¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

⁸² U.S. Dep't of Justice, *Principles of Federal Prosecution* 9-27.220 (1997).

totality-of-the-circumstances test, in which “federal law enforcement priorities”⁸³ are only part of the calculus.

Existing DOJ memoranda encouraging nonenforcement are hardly binding constraints on this discretion. Unlike agency rules published in the Federal Register, the DOJ’s internal memoranda are more accurately described as policy guidelines for U.S. Attorneys and prosecutors, which may influence the decision of whether to prosecute a case, but need not be determinative.⁸⁴ Even if prosecutors disregard those guidelines entirely and prosecute crimes that are clearly of minimal importance to Main Justice, there may be few consequences from outside the executive branch; the general consensus has been that the DOJ’s internal guidelines are “strictly internal and unenforceable at law.”⁸⁵ The Attorney General’s memoranda buttress this general presumption of unenforceability with boilerplate disclaimers, declaring that they create no new rights and should induce no legal reliance.⁸⁶ Meanwhile, disciplinary mechanisms within the DOJ are opaque, and have been criticized as inadequate.⁸⁷ This criticism extends to the ultimate disciplinary mechanism, the President’s authority to remove U.S. Attorneys at will,⁸⁸ which is rarely used and can be politically costly to engage.⁸⁹

⁸³ *Id.* at 9-27.230.

⁸⁴ See *United States v. Thompson*, 589 F.2d 1184, 1189 (10th Cir. 1978) (finding that “a press release expressing a policy statement and not promulgated as a regulation of the Department of Justice and published in the Federal Register is simply a ‘housekeeping provision of the Department’” and confers no rights upon a defendant).

⁸⁵ Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 169 (2004). Looking outside the context of marijuana law, Podgor reports that “[t]here have been numerous DOJ guideline violations by federal prosecutors, including violations of media guidelines, subpoena guidelines, improper charging of cases under the Racketeer Influenced and Corrupt Organization Act, and failure to follow the death penalty protocol of the department.” *Id.* at 177. She finds that courts rarely, if ever, find such violations actionable in the absence of an independent constitutional basis. *Id.*

⁸⁶ See Cole Memo, *supra* note 10, at 4 (“This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”).

⁸⁷ See Podgor, *supra* note 85, at 185–88 (arguing that internal review of guideline violations has traditionally been minimal); see also Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 72 (1995) (“[T]he process for sanctioning wrongful conduct of federal prosecutors is structurally inadequate.”).

⁸⁸ 28 U.S.C. § 541 (2006).

⁸⁹ See generally JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 97–98 (1978) (discussing the political barriers to removal of U.S. Attorneys); James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice’s Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 260–61 (2008) (describing a historic tradition of “secure tenure” in which U.S. Attorneys “could be fired only for personal or professional misconduct or incompetence.

Furthermore, and more importantly, the DOJ's marijuana policy statements are vague, giving U.S. Attorneys plenty of space to decide which state regulations fail to pass muster as adequate alternatives to prohibition without falling into open defiance of the President's authority. For instance, the Cole Memo states that even "large-scale, for-profit commercial enterprises" should be free from executive interference if they operate within an effective state regulatory structure, but provides little guidance as to what actually constitute "strong and effective regulatory systems."⁹⁰ In the face of such broad rules, it is difficult to imagine how a court could effect a constitutional remedy; there is no "policy" to strike down.⁹¹ Therefore it is important to consider the President's stated policy goals in light of the means by which they have been implemented. Far from creating an enforceable rule, the DOJ is simply sending a signal to prosecutors that the federal interest in prosecuting marijuana users and distributors in contravention of an effective state regulatory scheme does not constitute a substantial federal interest.

There are several potential advantages to this kind of informal policymaking. If taken seriously by DOJ officials—many of whom are Obama appointees—these guidelines have the potential to quickly shift the course of marijuana enforcement nationwide.⁹² By issuing such guidelines publicly, the President may also increase the consistency and clarity of prosecutorial decisionmaking, normalizing enforcement and improving predictability.⁹³ And because enforcement guidelines are issued unilaterally, without the burdens of the legislative process or even notice and comment, they may be especially

They were not removed because they did not follow the DOJ's directives on what specific cases to bring or how to handle specific cases . . . [or] for being insufficiently responsive to Main Justice or loyal to the President").

⁹⁰ Cole Memo, *supra* note 10, at 4.

⁹¹ See Price, *supra* note 45, at 758–59 (applauding the constitutionality of the current policy, because "a more definite nonenforcement policy, such as state officials and marijuana advocates sought, would exceed the Executive's proper role by effectively suspending a federal statute and thus usurping Congress's constitutional responsibility to set national policy").

⁹² See Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 531 (1995) (arguing that Attorney General "guidelines, if they were to promote federal prosecution only in those matters deserving federal attention, might be effective in focusing federal attorneys on their proper mission"); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899 (2000) (arguing that prosecutorial guidelines are an optimal tool for combating overexpansive legislation and returning local concerns to the control of the states).

⁹³ See Mengler, *supra* note 92, at 899 (discussing the use of enforcement guidelines to bring regularity to potentially arbitrary or opaque prosecutorial action).

suites to respond quickly to events on the ground, a quality which is especially significant when dealing with as fast-changing and politically fraught an area as drug policy.

Further, without a more formal or centralized policy, it is highly unlikely that any court will find the nonenforcement policy unconstitutional under the *Chaney* standard. On the contrary, the policy has been brilliantly designed to avoid centralized accountability for a program which would risk running afoul of the Take Care clause if pursued by other means. By using the decentralized administrative processes of the DOJ to enact its policy goals, the executive has maintained an impressive level of opacity as to just how formal or effective its policy may be. At a superficial level, it appears to be a masterpiece of cynical policymaking: all the benefits of legalization, without the burden of centralized accountability or judicial review. Instead, any checks on nonenforcement—from outside the executive branch or from *within* it—will have to be targeted at prosecutors' individual enforcement decisions.

B. *The Autonomy of DOJ Officials*

The corollary of the extreme ambiguity in DOJ marijuana policy is that prosecutors are granted substantial independence in determining where, when, and how vigorously to crack down on illegal drug use and distribution.⁹⁴ Therefore, the executive's current policy is best seen as a wager on the compliance of prosecutors: If these executive officials effectively and uniformly apply DOJ guidelines in the field, the President's policy goals might be enacted without any of the constitutional obstructions that would confront a more formal policy. The impressive growth in marijuana possession, cultivation, and use over the course of the Obama presidency suggests that this has in fact been the result, at least to an extent.⁹⁵

Meanwhile, there are few effective checks on prosecutorial authority.⁹⁶ But as this Subpart discusses, prosecutors' independence from authority is a double-edged sword. Although it makes them well-suited to the task of undermining constitutional restrictions on nonen-

⁹⁴ *Supra* notes 78–90 and accompanying text.

⁹⁵ See Sekhon, *supra* note 40, at 559–60 (“[T]he number of medical marijuana patients and dispensaries in the states that have enacted legislation legalizing the possession, cultivation, and use of marijuana . . . dramatically increased following the change in the Executive Branch’s enforcement policy regarding medical marijuana. This increase is directly attributable to the imprimatur of the Executive Branch.”).

⁹⁶ See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) (“Few officials can so affect the lives of others as can prosecutors. Yet few operate in a vacuum so devoid of externally enforceable constraints.”).

forcement, independence also enables prosecutors to operate without check from central authority, undermining the President's ability to enact a uniform and reliable national enforcement policy.

1. *Constitutional Checks on Prosecutorial Authority*

At a superficial level, federal prosecutors are held to the same high standard of law enforcement that applies to the executive branch as a whole. Federal law demands that "except as otherwise provided. . . each United States Attorney, within his district, shall. . . prosecute for all offenses against the United States," seemingly establishing a duty to enforce federal drug law against even the most minor of offenders.⁹⁷ But of course, nobody expects them to prosecute *all* offenses. And because the decision of whether to bring any given case to trial is a complex fact-based inquiry, the Court has repeatedly asserted that prosecutors are to be granted substantial liberty to control which crimes are prosecuted and which are ignored.⁹⁸

The foundational case in the development of prosecutors' expansive authority is *United States v. Batchelder*, in which a defendant was convicted of felony firearm possession under the more rigorous of two overlapping statutes. The defendant claimed, and the Seventh Circuit agreed, that the existence of the two statutes gave an "impermissibl[e] delegat[ion] to the Executive Branch the Legislature's responsibility to fix criminal penalties."⁹⁹ However, the Court found that:

when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.¹⁰⁰

In this decision, and subsequently in *Wayte v. United States*,¹⁰¹ the Court firmly established that so long as individual prosecutors remain in compliance with the formal law, their decisions are to remain

⁹⁷ 28 U.S.C. § 547(1) (2012).

⁹⁸ See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining why prosecutorial discretion is unsuitable for judicial review); *United States v. Batchelder*, 442 U.S. 114, 125 (1979) (describing prosecutorial authority limited only by constitutional concerns).

⁹⁹ *Batchelder*, 442 U.S. at 125.

¹⁰⁰ *Id.* at 123–24.

¹⁰¹ 470 U.S. 598, 607 (finding that prosecutorial discretion is inappropriate for "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").

largely unchecked, outside of certain narrow “constitutional constraints.”¹⁰²

At least in theory, one of these constraints is the constitutional bar on selective prosecution under the Equal Protection Clause of the Fourteenth Amendment. As the Court has repeatedly stated, the Equal Protection Clause provides individuals subjected to selective prosecution with a right of action to foreclose arbitrary or discriminatory enforcement of the law.¹⁰³ If official behavior has a discriminatory purpose and a discriminatory effect, and is based on an unjustifiable purpose such as race, religion, or some other arbitrary classification, then constitutional remedies may apply.¹⁰⁴ On its face, this would appear to constrain prosecution of marijuana vendors and users in regulated states. If subjected to federal prosecution, these defendants might look at similarly-situated malefactors operating publicly in other states and justifiably ask: “Why me?”

But selective prosecution claims are notoriously difficult to make.¹⁰⁵ To prevail, “a criminal defendant must present ‘clear evidence’” that a violation has taken place.¹⁰⁶ This bar has rarely been met, even in the context of racial discrimination suits, which receive the heightened protection of strict scrutiny.¹⁰⁷ And in the case of marijuana violations, prosecutors will generally have a clear rational basis for the discrepancy in enforcement: Refusal to prosecute cases in deregulated states is justified both by respect for state autonomy and by increased costs of enforcement without the cooperation of state officials. Therefore, the Equal Protection Clause will almost certainly not be a substantial hindrance to selective enforcement of drug laws.

¹⁰² *Batchelder*, 442 U.S. at 115.

¹⁰³ *Wayte*, 470 U.S. at 608 (establishing the applicability of equal protection principles to selective prosecution); *Batchelder*, 442 U.S. at 115 (“A prosecutor’s discretion . . . is not ‘unfettered’; selectivity in the enforcement of criminal laws is subject to constitutional constraints.”); *see also* Eisenstein, *supra* note 89 at 222 (“If different U.S. Attorneys emphasized the prosecution of different crimes, it would compromise the principle of equal justice and produce a hodgepodge of enforcement patterns.”).

¹⁰⁴ *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

¹⁰⁵ *Id.* at 463–64 (“[C]ases delineating the necessary elements to prove a claim of selective prosecution . . . explain that the standard is a demanding one. These cases afford a ‘background presumption’ . . . that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.” (citations omitted)).

¹⁰⁶ *Id.* at 465.

¹⁰⁷ *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (“Even in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive—its prosecutorial discretion—we have emphasized that the standard for proving them is particularly demanding.”). For a review of the difficulty of prevailing in a claim of selective prosecution, *see* Reiss, *supra* note 96, at 1368–74.

Instead, prosecutors and U.S. Attorneys retain a great deal of leeway to do what they have always done: determine which cases to prosecute based on the facts of the situation and the goals of the DOJ. Indeed, if anything, the DOJ's statements of policy may bring some regularity and transparency to the process of selecting cases, which is often shrouded in darkness.¹⁰⁸ But the situation is not entirely rosy for the executive, as the next section will discuss. The decentralized structure of executive enforcement will make it highly difficult to effect more widespread change in drug law without issuing more formal and centralized statements of policy than have thus far been made.

2. *Internal Checks on Prosecutorial Authority*

Unfortunately for the President, a constitutional challenge was never the greatest threat to the goal of marijuana nonenforcement. In one of the many ironies of federal drug policy, the institutional factors that shield the executive from accountability for leaving aspects of the CSA unenforced also grant prosecutors implicit license to liberally interpret and even undermine the President's policy, without violating the letter of the vague and nonbinding memoranda that have been issued thus far. In spite of the ideal that each prosecutor will enforce the law according to uniform standards, there is tremendous variation in enforcement policy from one U.S. Attorney's office to the next,¹⁰⁹ including in the context of drug enforcement.¹¹⁰ Without reliable assurance that prosecutions will cease, or even specific guidelines for prosecutorial action, states contemplating marijuana law reform will often find existing federal statements less than helpful.¹¹¹

¹⁰⁸ See Reiss, *supra* note 96, at 1373 ("Prosecutors do not have to explain their decision to bring or refrain from bringing charges and many prosecution offices lack even general guidelines governing charging decisions."). Therefore, public statement of agency goals and interstate clarification of policy may be helpful in alleviating greater inequities in drug enforcement, which take place routinely without the possibility of judicial remedy.

¹⁰⁹ See Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 137 (2005) ("On paper, a single set of federal criminal statutes and Federal Sentencing Guidelines applies uniformly throughout the United States. But in practice, federal criminal charges and sentences vary greatly from state to state and from district to district.").

¹¹⁰ See *id.* at 142 ("Different U.S. Attorney's Offices take different approaches to charging and declining cases. One district may charge defendants with possessing a few pounds of marijuana. In contrast, the Southern District of California routinely referred to state authorities or deferred federal prosecution of couriers caught with less than 125 pounds of marijuana.").

¹¹¹ Robert A. Mikos, a frequent voice in the discussion of contemporary marijuana policy, has argued that the lack of centralized control is a critical flaw in the DOJ's approach. Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 645-46 (2011) (arguing

The perverse effects of the current state of affairs are evident in the case of the Harborside Center in California, which has been referred to as “the largest medical marijuana dispensary in the world.”¹¹² The Harborside Center is far from a covert criminal operation. It has a public website, is reviewed on Yelp, and was the subject of a Discovery Channel TV series “Weed Wars.”¹¹³ By 2012, the Center claimed to serve over 100,000 medical marijuana users a year, generated over \$20 million in gross sales annually from its four facilities, and paid over \$3 million in state, federal, and local taxes.¹¹⁴ For most of its history, the Center operated openly, in full compliance with California law but in flagrant defiance of federal law.¹¹⁵ Nonetheless, the Center’s adherence to state law was apparently enough to secure the forbearance of the DOJ. In 2006, for example, DEA agents shut down two nearby marijuana dispensaries that had failed to obtain state-required permits from the City of Oakland, but did not undertake any enforcement against the Harborside Center.¹¹⁶

Then, in June of 2011, DOJ officials abruptly reversed course, cracking down on large distributors in California and elsewhere, including filing civil forfeiture actions against two properties run by the Harborside Center.¹¹⁷ In 2012, the City of Oakland sued to prevent the shutdown, alleging that the federal action was foreclosed by the doctrine of equitable estoppel because of the facility’s reasonable reliance on the DOJ’s publicly stated policy of federal nonenforcement.¹¹⁸ The case was dismissed in the district court for lack of standing, and is on appeal in the Ninth Circuit.¹¹⁹ However, the Harborside Center’s chances are not promising; in a similar case, a sister California district court has already held that “[e]ven if Obama’s and Holder’s statements can be viewed as establishing a general policy against prosecuting marijuana dispensaries operating legally under

that the nonenforcement policy “may not have much influence over criminal prosecutions brought by U.S. Attorneys. It is not a legally enforceable policy”).

¹¹² *Feds Target \$20 Million ‘Weed Wars’ Medical Marijuana Dispensary in Calif.*, NBC NEWS (Jul. 12, 2012, 1:16 AM), http://usnews.nbcnews.com/_news/2012/07/12/12695610-feds-target-20-million-weed-wars-medical-marijuana-dispensary-in-calif.

¹¹³ Harborside Health Center, <http://www.harborsidehealthcenter.com/> (last visited Oct. 12, 2014).

¹¹⁴ NBC NEWS, *supra* note 112.

¹¹⁵ Complaint at 24, *City of Oakland v. Holder*, 901 F. Supp. 2d 1188 (N.D. Cal. 2013) (No. C 12 5245), 2012 WL 4825003.

¹¹⁶ *Id.* at 8.

¹¹⁷ See Larry Smith, *The Medical Marijuana Fracas: The Toke of the Town*, 33 NO. 1 OF COUNS. 12, 12 (2014) (describing these events).

¹¹⁸ *City of Oakland v. Holder*, 901 F. Supp. 2d 1188, 1190 (N.D. Cal. 2013); see also Smith, *supra* note 117 (describing the Oakland lawsuit, its progress, and its history).

¹¹⁹ See *City of Oakland*, 901 F. Supp. 2d at 1196 (granting defendant’s motion to dismiss for lack of standing).

state law, a reasonable person would not rely on these statements as an assurance that he or she would not be prosecuted under federal law.”¹²⁰

As a matter of judicial interpretation, the refusal to convert executive policy statements into binding law is sound. First, it honors the text of the DOJ’s policy statements, which uniformly declare that marijuana remains illegal and that nonenforcement is merely a preference, not a mandate.¹²¹ Second, it respects the realities of executive policymaking: The President cannot legalize marijuana merely by saying that it is so—even if he says it repeatedly, and on television. Third, and most importantly, there is in fact no guarantee that California’s regulatory structures are sufficiently rigorous to meet the DOJ’s requirements. That is, it is not clear that the federal crackdown even constitutes a violation of executive policy, because that policy’s particular contours have never been clearly defined.¹²² Although the DOJ’s actions could be interpreted in accordance with its policy statements, the shutdown of the Harborside Center clearly foregrounds an essential weakness of nonenforcement of drug laws. If Main Justice cannot control local DOJ officials, or if it refuses to clarify its regulations, it will be impossible to induce state reliance on federal nonenforcement. And, equally unfortunate, what reliance it *does* inspire will be unjustified, and may subject marijuana users to prosecution who would otherwise never have committed a crime (or would have committed it behind closed doors).

If the Harborside shutdown were an isolated incident, there would be little reason for concern. The failure of one or two U.S. Attorneys to conform to Main Justice policies could be efficiently corrected by reprimands from Washington DOJ, and future incidents might be curtailed by passing internal memoranda which more clearly indicate that large-scale distributors are to occupy the same low-priority status as smaller users and distributors.¹²³ But there is reason to believe that such aberrations are likely to be the rule, rather than the exception. Independence of DOJ officials from Washington is a

¹²⁰ United States v. Stacy, 696 F. Supp. 2d 1141, 1148 (S.D. Cal. 2010).

¹²¹ This is not to deny that these policy statements are at best misleading to marijuana users who have the most to lose from federal reversals, and at worst actually deceptive. See Sekhon, *supra* note 40, at 555 (arguing that the policy “provides individuals with a false sense of security in relying upon compliance with state medical marijuana laws given the imprimatur of the Executive Branch, the possibility of a legal challenge . . . and the length of the statute of limitations”).

¹²² See *supra* note 90 and accompanying text (discussing the ambiguity of the Attorney General’s guidelines).

¹²³ The Cole Memo, issued after the Harborside proceedings, contains just such a stipulation. Cole Memo, *supra* note 10, at 3.

cherished attribute of DOJ enforcement,¹²⁴ and the executive's tools for controlling U.S. Attorneys are weak.¹²⁵ Meanwhile, the professional and political objectives of law enforcement officials can be different from those of the population at large and may be inclined toward overenforcement.¹²⁶ This is more than an incidental flaw in the program: If state and local governments are to effectively serve as laboratories of experimentation, they must be able to legislate and regulate without the fear of arbitrary federal interference.¹²⁷ And, without the possibility of justifiable reliance, it is no surprise that implementation of the nonenforcement policy has been marked by noncompliance, confusion, and local resistance.¹²⁸

¹²⁴ Attorney General Robert Jackson famously celebrated decentralization in a speech addressing the nation's U.S. Attorneys:

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3-4 (1940).

¹²⁵ See *supra* notes 78-90 and accompanying text (discussing the independent authority exercised by U.S. Attorneys).

¹²⁶ See Price, *supra* note 45, at 768 (“[I]ndependent prosecutors, unlike executive branch officials with other cases to pursue, may face overwhelming pressure to ‘bag[] their prey.’”). David W. Rasmussen and Bruce L. Benson argue that “[d]rug war, the excessive application of enforcement that aggravates rather than mitigates the social consequences of drug use, is waged because it is in the interests of particular politically influential groups, including law enforcement bureaucracies and public officials.” David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 711 (2003). While Rasmussen and Benson focus primarily on the legislative process, their arguments are also applicable to the forces at work within individual enforcement agencies. See *id.* at 713 (“[O]ne bureaucratic strategy to compete for resources is to ‘generate’ demand for a bureau’s own services through direct lobbying, policy manipulation, and the selective release of information and misinformation to other interest groups and the media.”). Indeed, law enforcement officials have been among the most outspoken critics of state legalization efforts, and of the administration’s nonenforcement scheme. For instance, immediately following the release of the Cole Memo, the International Association of Chiefs of Police (IACP) released a strongly-worded rebuke to the new policy of nonenforcement, signed by the leaders of assorted diverse law enforcement agencies. Letter from National Police Organizations, *supra* note 40.

¹²⁷ In this vein, Simons argues that prosecutorial guidelines have the potential to promote the goals of federalism and enable state independence in the realm of criminal law, but stipulates that to be effective, these guidelines “should be detailed, statute-specific, widely disseminated, and centrally monitored.” Simons, *supra* note 92, at 899; accord Mengler, *supra* note 92, at 532 (“[P]olicy guidelines, if they are to be effective, require clarity.”).

¹²⁸ See Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 25 (2013) (explaining that “[t]he

This problem certainly can be ameliorated by the executive's authority to appoint and remove officials. But it is unrealistic to expect that the President will risk the political controversy and administrative costs that accompany removal and replacement of a U.S. Attorney or other high official merely because of noncompliance with a relatively ambiguous (and entirely nonbinding) statement of internal policy. Because U.S. Attorneys have strong internal incentives to maintain their own authority within their jurisdictions, and because Washington has few direct mechanisms to exert control over aggressive local enforcement, local resistance to political policy goals is unlikely to disappear in the near future.¹²⁹ Overzealous enforcement by even a few local U.S. Attorneys has the potential to reduce state confidence in federal policy, and reduce the effectiveness of state laws.¹³⁰ And given the current ambiguity as to the finer points of what federal policy requires, even good-faith efforts to carry out policy goals may be over- or under-inclusive relative to the President's intended enforcement scheme. Lest we should think the more recent Cole Memo has put a stop to dissent within the executive branch, in January of 2014 the Chief of Operations at the DEA publicly argued that *all* legalization of marijuana, including at the state level, was "reckless and irresponsible."¹³¹

This is not to say that an informal policy will be entirely ineffective. Recent history has shown that states can go far—quite far—toward legalization of marijuana, regardless of whether the federal government offers its cooperation.¹³² Even a vigorous federal enforcement effort, like that which took place during the Bush Administration, will not have the resources to shut down more than a fraction of

federal executive policy can be characterized as spottily inconsistent at best and whimsical at worst," and remains pervaded by "rampant uncertainty").

¹²⁹ See generally EISENSTEIN, *supra* note 89, at 76–100 (describing the relationship between the DOJ and local attorneys as having "an undercurrent of tension and hostility," and explaining factors which lead U.S. Attorneys to aggressively protect their own autonomy).

¹³⁰ For a more comprehensive study of this risk, see Richman, *supra* note 79, at 2118 (arguing that increased bureaucratic controls are necessary to rein in prosecutors, because "[t]he risk that a hard-charging prosecutor's righteous indignation will have serious collateral consequences in the marketplace is all too real").

¹³¹ Ernesto Londoño, *DEA Operations Chief Decries Legalization of Marijuana at State Level*, WASH. POST (Jan. 15, 2014), http://www.washingtonpost.com/national/dea-operations-chief-decries-legalization-of-marijuana-at-state-level/2014/01/15/17af548a-7e38-11e3-9556-4a4bf7cbcd84_story.html.

¹³² See, e.g., Lawrence Downes, *The Great Colorado Weed Experiment*, N.Y. TIMES, Aug. 3, 2014, at SR10 (recounting the successes of the first seven months of marijuana legalization in Colorado, and noting that "[t]he striking thing to a visitor is how quickly the marijuana industry has receded into normality").

state marijuana dispensaries.¹³³ However, when states seek to bring a black market into the sunlight, the very threat of federal sanctions may be sufficient to keep many vendors and users belowground.¹³⁴ And because the laws of the federal government are supreme, all state deregulation is at least to some extent bargaining in the shadow of the law.¹³⁵ The need for reliance will be still more important when states not only permit illegal activity to take place, but also seek to regulate and tax it, as in Colorado and Washington.¹³⁶ As cases like *Oakland v. Holder* demonstrate, there is a price to be paid for unpredictability in executive enforcement. This price not only will accrue to dispensaries shut down by federal authorities, but also will be borne by businesses, state regulators, law enforcement officials, and private citizens who are struggling to balance conflicting state and federal laws.

III

THE LIMITS OF LEGISLATING WITHOUT THE LEGISLATURE

In sum, for all their sound and fury, existing marijuana policy statements and DOJ memoranda have very little formal significance. It is of course possible that this “policy” is nothing more than an attempt to appease all constituencies at once—to give the appearance of action without compelling any substantive results. However, because the President is the centrally accountable figure in government, he and his party may be subjected to political backlash for any failure to live up to the nonenforcement expectations that these policy

¹³³ See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1482 (2009) (pointing out that during the Bush Administration, “medical marijuana use . . . survived and indeed thrived in the shadow of the federal ban”); cf. Kreit, *supra* note 68, at 573 (“Because medical marijuana collectives already operate openly and without fear of state prosecution in the states where they are legal, the remote possibility that they will face federal prosecution likely has at best an insignificant impact on the price of the marijuana that they dispense.”).

¹³⁴ Indeed, the mere existence of countervailing federal law may exert a stifling effect on state deregulation. See Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1564 (2002) (arguing that “when a state chooses to pursue an independent moral norm and makes that choice clear to its citizens . . . some citizens will engage in this behavior . . . [but if] this same behavior is criminalized federally . . . the behavior will be chilled”).

¹³⁵ See Kreit, *supra* note 68, at 574 (arguing that federal interference in state laws creates inherent uncertainty, and therefore “has only made the state laws harder to control and easier to abuse,” and providing as an example that states and municipal government agencies will likely “refrain from physically inspecting collectives to make sure they are run properly, or testing medical marijuana to guard against adulterants and provide dosage and potency information, out of concern that doing so would run afoul of federal law”).

¹³⁶ *Supra* note 17.

statements have engendered.¹³⁷ This position of public exposure gives the executive a clear incentive to establish an enforcement strategy that can reliably carry out its policy goals—at least to the extent that it is possible to do so without engendering political controversy or judicial censure. Therefore, taking the President’s stated goals at face value, this final Section briefly discusses what measures might be taken within the bounds of the Constitution to further devolve marijuana enforcement authority to the states, without the help of the legislature.

A. *Expanding Federal Action*

In plotting nonenforcement, the President has a strong constitutional incentive to maintain the current decentralized enforcement structure. Under *Chaney*, any move to formalize an executive policy of what remains essentially sanctioned law-breaking will risk being overturned in court. Therefore, measures to improve state reliance and increase the efficacy of executive policymaking most likely must occur within the DOJ’s existing structure of largely autonomous enforcers.¹³⁸ The challenge, then, is to create the transparency and accountability needed for state reliance without requiring an overhaul of the DOJ or—almost as implausible in the present Congress—legislative reform of the CSA.

In any such process, the key figures will be the ninety-three U.S. Attorneys spread across the nation.¹³⁹ These presidential appointees serve as intermediaries between Main Justice and federal prosecutors

¹³⁷ Executive accountability can be a powerful incentive to deliver on presidential promises. See generally Calabresi & Prakash, *supra* note 48, at 603 (“[T]he Constitution’s clauses relating to the President were drafted and ratified to energize the federal government’s administration and to establish one individual accountable for the administration of federal law.”).

¹³⁸ Indeed, the practical effects of any more dramatic reorganization of the law enforcement infrastructure are highly debatable, and the political costs likely make it impossible. See Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 332–74 (1978) (weighing the pros and cons of transitioning toward an administrative law model of rulemaking within federal criminal law). On the other hand, some have argued that lack of centralized control in the DOJ is a critical problem, necessitating more extensive structural change. See, e.g., Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 52 (1998) (“Fixing federal criminal law requires that federal criminal-lawmaking power be diverted away from individual U.S. Attorneys to some institution that will be more responsive to the interests that should inform the exercise of this power.”).

¹³⁹ See U.S. ATTORNEYS’ MANUAL § 3-2.100 (2009) (“One United States Attorney is assigned to each judicial district with the exception of Guam and the Northern Marianas, where a single United States Attorney, serves in both districts.”). Each U.S. Attorney is “the chief law enforcement officer” within their district. *Id.*

and exert substantial control over their own jurisdictions while remaining proudly free from direct review by Washington.¹⁴⁰ Like the Attorney General, U.S. Attorneys are public figures with the ability to direct enforcement strategy within their jurisdictions. However, U.S. Attorneys are also directly involved with the day-to-day enforcement realities that exist within their jurisdictions, and they exert substantial control over which local cases are brought to trial. As such, their capacity to abet state-sensitive policymaking in the realm of drug control is an underutilized resource.

Rather than precisely defining for itself what kinds of state and local regulations are adequate to avert federal attention under the CSA, one way to quickly and efficiently give existing guidelines real teeth on the ground is for the Attorney General to demand that U.S. Attorneys publicly issue their own detailed statements of policy within the relatively broad framework set out by the Cole Memo.¹⁴¹ In many cases, this demand would merely require U.S. Attorneys to formally publicize the policies of nonenforcement which they already maintain behind closed doors. These guidelines could be issued at the state level in the form of relatively informal public statements (not unlike the DOJ memoranda themselves) with minimal bureaucratic difficulty, and could clarify precisely what kind of regulations need to be passed or complied with in order for state citizens to evade federal interference within any given jurisdiction.¹⁴² And although any such guidelines would, like the current federal standards issued from Main Justice, be entirely discretionary, they would add valuable specificity

¹⁴⁰ See *supra* notes 78–90 and accompanying text (discussing the independent authority exercised by U.S. Attorneys).

¹⁴¹ Other commentators have similarly argued that increased transparency and formality in the exercise of discretion is an optimal way to render prosecution more predictable and fair. See Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012) (claiming that the opaque role of prosecutors in determining individual sentencing decisions leads to harmful and arbitrary results—and that this problem can be addressed by publicly-developed statements of policy formulated in an administrative law model); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801–06 (2012) (arguing for “overt prosecutorial decriminalization” to constrain overbroad criminal statutes).

¹⁴² One objection to this proposal, and to transparency in agency policymaking in general, is that revealing and clarifying enforcement policy will undermine the law: Even though the DOJ does not have the resources to prosecute every instance of law-breaking, a certain degree of opacity and unpredictability in enforcement policy prevents lawbreakers from confidently exploiting the necessary lacunae in DOJ enforcement. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“Examining the basis of a prosecution . . . may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”); O’Neill, *supra* note 78, at 236 (“Such pronouncements may foil deterrence efforts and undermine public confidence in the law.”). In this case, however, the immediate goal is to *enable* certain regulated violations of federal law. Therefore, the opposite strategy is required.

to an area of enforcement that is currently rife with uncertainty. Furthermore, if U.S. Attorneys are themselves involved in delineating the requirements of enforcement within the areas that they control, they may take a more active interest in policing prosecutors to ensure that enforcement guidelines are followed.

Relying on U.S. Attorneys to set local priorities rather than Washington bureaucrats will also give credence to the President's claim that nonenforcement is a necessary reallocation of limited resources, rather than a policy change motivated solely by politics. Because they are more familiar with local conditions and local needs, U.S. Attorneys can be expected to make a more fact-sensitive and personalized determination of which state programs truly are "strong and effective," and which are inadequate.¹⁴³ Additionally, and equally important from the executive's perspective, placing accountability on U.S. Attorneys would mean that any one district's regulations might be struck down, amended, or (on occasion) ignored without substantially endangering the national goal of enabling state-level reform.

Use of detailed, formal, and transparent statements of policy at the district level will also facilitate review from the top down, including through monitoring resources spent in prosecuting various types of cases and, if necessary, permitting the open and effective use of the President's authority to remove U.S. Attorneys for noncompliance.¹⁴⁴ In the removal and appointment of U.S. Attorneys, this kind of central monitoring is especially important: Maintaining clear and objective criteria will prevent the type of political firestorm which

¹⁴³ This conception is in alignment with the central purpose of the U.S. Attorney: to "exercise[] wide discretion in the use of his/her resources to further the priorities of the local jurisdictions and needs of their communities." *United States Attorneys' Mission*, DEPARTMENT OF JUSTICE, <http://www.justice.gov/usao/about/mission.html> (last visited Oct. 13, 2014). One of the most common justifications for the current decentralized structure of the DOJ is that local prosecutors' smaller jurisdiction size and greater proximity to cases allow them to be more aware of local concerns, and therefore better able to respond to those concerns. See O'Neill, *supra* note 78, at 230 ("If a locality is suffering from a drug epidemic, then prosecutors may elect to target drug dealers. Similarly, if the community is plagued by gang violence, prosecutors may choose to disrupt organized criminal enterprises."); see also Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 715 (1997) ("Local prosecutive guidelines are preferable to nationwide legislative and administrative classification schemes because local guidelines would allow federal prosecutors to tailor standards to local crime problems.").

¹⁴⁴ There may be additional measures available for the executive to take within the current structure of the DOJ to increase internal accountability without a more disruptive agency overhaul. Ellen S. Podgor suggests the use of "'soft' remedies" (as opposed to legally binding and judicially enforceable hard remedies) to improve transparency and administrative hierarchies, including internal restructuring based on the structures for maintaining a compliance program in the Federal Sentencing Guidelines for Organizations. Podgor, *supra* note 85, at 195-202.

took place when President Bush unilaterally removed seven U.S. Attorneys without explanation in December of 2006.¹⁴⁵ If the President wishes to base his nonenforcement policy on respect for state autonomy and the need for efficient resource allocation rather than making a naked political grab for power, it is essential that U.S. Attorneys' offices be "bastions of professionalism."¹⁴⁶

B. Policy Goals and Policy Limits

For state deregulation to be truly effective, the executive branch will also need to coordinate DOJ enforcement with the civil and criminal enforcement and regulatory efforts of other executive agencies. The President can and should also work to ensure that DOJ guidelines are not only reliable, but that they avoid conflict with other areas of executive authority.¹⁴⁷ Measures to coordinate interagency action are tremendously important in the realm of marijuana policy because many of the sanctions that fall upon marijuana users and distributors are beyond the authority of the DOJ. These additional penalties include everything from federal employment restrictions to limits on subsidized housing to restrictions on gun ownership.¹⁴⁸ By coordinating agency action, the executive will not only clarify its own position; it will also incentivize states to adopt marijuana provisions that fit the executive's standards of clarity and comprehensiveness. Optimally, such "rules" should be detailed, clear, and consistent with existing policy under the Cole Memo.

Even if the executive branch issues clear, comprehensive, and detailed regulations for every aspect of marijuana regulation, full state-level deregulation will probably be impossible for as long as marijuana remains categorically forbidden under the CSA. Although the DOJ can make freedom from enforcement more likely, it cannot entirely foreclose the possibility of enforcement by U.S. Attorneys or prosecutors, or provide a judicial remedy for those who detrimentally

¹⁴⁵ See Sheryl Gay Stolberg, *With Shifting Explanations, White House Adds to Storm*, N.Y. TIMES, Mar. 17, 2007, at A12 (providing a contemporaneous account of the political firestorm); see also *supra* notes 129–30 (discussing barriers to politically motivated removal of U.S. Attorneys).

¹⁴⁶ Richman, *supra* note 79, at 2117.

¹⁴⁷ For a strong argument in favor of increased executive involvement in agency affairs, including by coordinating enforcement actions among different executive agencies, see Andrias, *supra* note 35 (discussing the President's enforcement powers and role in administrative enforcement).

¹⁴⁸ See Mikos, *supra* note 111, at 645–50 (“[M]arijuana users face a host of civil sanctions . . . that hinge on marijuana’s continued illegal status under federal law. These sanctions are enforced mostly by non-DOJ agencies, which are not obliged to follow the [Attorney General’s internal statements of policy].”).

rely on statements of executive policy, without completely overhauling the structure of the DOJ and risking serious constitutional violations. Furthermore, the “energy” that characterizes executive policymaking is also a weakness insofar as consistency is concerned. Even if one presidential administration is able to implement a coherent and effective policy, there is no guarantee that future administrations will maintain that regime, or that they will even share the same policy goals. Therefore, as regulated parties are well aware, any legitimate reliance on federal policy will be accompanied by a potential four- or eight-year time limit. And so long as the President relies on the highly informal tools of DOJ policymaking, rather than issuing more binding statements of policy, it will be quite possible for enforcement rules to shift as rapidly as the political winds.

One example that suggests both the problems of unclear enforcement and the limits of executive policymaking more generally is currently playing out between banks, marijuana-related businesses, and the federal government: Thus far, most banks have refused to do business with even state-licensed marijuana distributors for fear of legal repercussions.¹⁴⁹ As a result of this hesitation, multi-million dollar businesses that are legal at the state level have been conducted entirely on a cash basis, with a resulting increase in both risks and operating costs.¹⁵⁰ Not only does the lack of bank cooperation increase costs, but it also incentivizes the very unlawful behavior that the Cole Memo seems eager to foreclose, as businesses either misrepresent their activities to secure the cooperation of unwilling banks, or forego those banks entirely for less formal venues. The rule of law has suffered. Marijuana money has been driven back to underground economies that are not subject to federal *or* state regulation, and state schemes to tax the nascent but lucrative marijuana industry in Washington and Colorado have been subverted.¹⁵¹

The executive branch has responded by issuing new policy guidelines intended to reassure both banks and businesses. In February of 2014, Attorney General Eric Holder set forth guidelines through two separate notices, issued through the Treasury Department and the DOJ, instructing banks on measures to take when dealing with the

¹⁴⁹ Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 12, 2014, at A1. Banks refusing to accept funds from marijuana businesses cite the risk of punishment—including fines—for violating federal prohibitions on money laundering and other federal laws. *Id.*

¹⁵⁰ *Id.* at A4.

¹⁵¹ *Id.*

marijuana industry.¹⁵² As with previous statements on marijuana policy, these advisories were phrased as a reallocation of priorities, rather than an absolute promise of protection.¹⁵³ Furthermore, in a welcome move toward consistency, both reinforced the eight federal enforcement priorities of the Cole Memo.¹⁵⁴ These statements, although new and somewhat vague, suggest that the executive branch is serious about erecting a more solid foundation for future legalization efforts. Nonetheless, most prominent banks expressed an intention to hold out for a more comprehensive, and therefore more reliable, legislative solution.¹⁵⁵

However, the perfect should not be treated as the enemy of the good. If the executive is serious about giving states room to develop their own forms of marijuana regulation, or about returning law enforcement authority to the states more generally, then it should take steps to ensure that the values of federalism are clearly and consistently built into DOJ policy. The recent policy clarifications for banks suggest that the executive branch is aware of the problems with unclear executive policies. To effectively implement change in national drug enforcement, and to allow states to experiment with alternative (and potentially more effective) regulatory regimes, the DOJ must continue to clarify precisely when and how federal enforcers will intervene in marijuana activity, and what measures states and individuals can take—short of actually obeying the letter of federal law—to prevent them from doing so.

¹⁵² Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’y’s (Feb. 14, 2014) (on file with the Dep’t of Justice), *available at* [http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20\(2\).pdf](http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf); Guidance Notice from Dep’t of the Treasury Financial Crimes Enforcement Network (Feb. 14, 2014) (on file with the Dep’t of Treasury), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf; *see generally* Serge F. Kovalski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES, Feb. 14, 2013, at A10, *available at* <http://www.nytimes.com/2014/02/15/us/us-issues-marijuana-guidelines-for-banks.html> (reporting on industry reactions to the two guidelines).

¹⁵³ Kovalski, *supra* note 152, at A10.

¹⁵⁴ Cole Memo, *supra* note 10, at 1–2.

¹⁵⁵ Kovalski, *supra* note 149. For instance, Rob Rowe, Vice President and Senior Counsel of the American Banking Association, said, “Until congress changes federal law and acknowledges that marijuana is legal, banks can’t accept any funds As much as we welcome changes to the regulations it doesn’t change the fact that it is still illegal.” Jonathan Hall, *Until 100% Legal, Banks to Turn Away Marijuana Money*, FORBES, Jan. 25, 2014, <http://www.forbes.com/sites/jonathanhall/2014/01/25/until-100-legal-banks-to-turn-away-marijuana-money/> (describing the general hesitation on the part of bankers to deal with businesses that remain illegal under federal law). For one argument in favor of a legislative solution, see Grabarsky, *supra* note 128 (arguing that Congress should create an exemption from federal enforcement in states that legalize medical marijuana).

CONCLUSION

In its recent guidelines, the Obama Administration has outlined a program of selective marijuana enforcement that will promote the constitutional values of federalism while directing resources away from harmful and expensive prosecution of matters better handled by the states themselves. In the process, it has opened itself to accusations of executive overreach, and has given federal prosecutors license to undermine the law as written by Congress. Worse, its own agenda has been muddled by contradictory statements and internal opposition. The President can address both concerns, to an extent, by continuing what he has started: by requiring that U.S. Attorneys use their power in a formal, transparent, and reliable fashion. In doing so, the executive branch will enhance its own accountability to the public and to the other branches—ameliorating concerns that this policy is merely a run around Congress’s legislative power—while also allowing states to develop their own policies against a comparatively stable backdrop of federal support. Unless and until the legislature itself enacts more sweeping reforms, this may be the best we can hope for from federal marijuana law.