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The Limits of Pledging Prosecutorial Discretion: The Ogden Memorandum's Failure to Create an Entrapment by Estoppel Defense

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Introduction

On October 19, 2009, Deputy Attorney General David Ogden issued a memorandum (the "Ogden Memorandum"), that gave U.S. Attorneys "guidance and clarification" on how to enforce the Controlled Substances Act in states where medical marijuana had been legalized."[1] The path-breaking memorandum said that with the Department of Justice's desire to "mak[e] efficient and rational use of its limited investigative and prosecutorial resources," prosecutors were to "not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[2] The memorandum directed prosecutors to shift resources towards other, higher-priority prosecutions.[3] While the memorandum did not make medical marijuana legal under federal law, it

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1. Memorandum from David W. Ogden, Deputy Att'y Gen., to U.S. Attorneys 1 (Oct. 19, 2009), http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

2. *Id.* at 2.

3. *Id.* (The memorandum asked prosecutors to target possession of marijuana when tied to "unlawful possession or unlawful use of firearms; violence; sales to minor; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; amounts of marijuana inconsistent with purported compliance with state or local law; illegal possession or sale of other controlled substances; or ties to other criminal enterprises.").

opened up a conversation about the degree to which the Obama administration would refrain from prosecuting cases involving medical marijuana.[4]

Concerned that some might seek to use the memorandum as the basis for a legal defense, the memorandum included a strong disclaimer stating that it was not intended to create any legal rights. The Ogden Memorandum stated explicitly that the Department of Justice's decision to prioritize the prosecution of some crimes over others could not be invoked as a legal defense in any particular case. The memorandum made clear that it did not "provide a legal defense to a violation of federal law" and was "intended solely as a guide to the exercise of investigative and prosecutorial discretion."[5] If an individual believes that the Ogden Memorandum protects her from prosecution, this belief would be a "mistake of law" and is not a legal defense.[6]

While the memorandum was not intended to impact the behavior of states, cities or individuals, there was huge growth in the medical marijuana industry after it was issued. Following the memorandum's release, "the number of medical marijuana patients and dispensaries in the states that have enacted legislation legalizing the possession, cultivation, and use of marijuana for the treatment of certain illnesses" increased dramatically.[7] This growth was "directly attributable to the imprimatur of the Executive Branch with respect to medical marijuana."[8] The medical marijuana industry believed that the government would not prosecute users and distributors in states where it was legal.[9] Some

4. This Comment refers to the Ogden Memorandum as the title of the policy established by the Obama administration's Department of Justice to encourage selective utilization of prosecutorial resources to prosecute marijuana offenses. That policy originally established in 2009 has been reinforced in later memoranda, most recently in a memorandum sent to the U.S. Attorneys in August 2013 by David Ogden's successor, James Cole (the "Cole Memorandum"). *See* Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys 1 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf. For definitional consistency, this Comment refers to the "Ogden Memorandum" or "Ogden policy" though the position is continued in further memoranda.

5. Ogden Memorandum, *supra* note 1, at 2.

6. Cheek v. United States, 498 U.S. 192, 199 (1991) (explaining that "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system").

7. 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, 559-560 (2010).

8. *Id.* at 560.

9. Ryan Grim & Ryan J. Reilly, *Obama's Drug War: After Medical Marijuana Mess, Feds Face Big Decision on Pot*, THE HUFFINGTON POST (Jan. 26, 2013), http://www.huffingtonpost.com/2013/01/26/obamas-drug-war-medical-marijuana_n_2546178.html (quoting Steph Sherer, the head of Americans for Safe Access, who noted that the medical marijuana industry interpreted the Ogden Memorandum

states, including Washington and Montana, began to legalize medical marijuana in the belief that the Ogden Memorandum would protect medical marijuana users in their states from federal prosecution.[10]

Some local governments explicitly relied on the Ogden Memorandum in constructing their policies. For example, the State of Delaware and the City of Oakland both relied on the Ogden Memorandum when deciding to grant permits to marijuana dispensaries within their jurisdictions. The Solicitor General of Delaware stated that Delaware licensed medical marijuana dispensaries because of "guidance from the U.S. Department of Justice that federal prosecution resources" would not be steered towards prosecuting the medical marijuana industry.[11] Similarly, the City of Oakland claimed in litigation that, "[i]n reliance on the government's statements and conduct [in the Ogden Memorandum], Oakland permitted and regulated the growth of the medical cannabis industry within Oakland."[12] Oakland claimed that it had invested "substantial resources to administering the medical cannabis dispensary permit program" because of the Ogden Memorandum.[13]

While disavowing that the memorandum had any legal significance, the White House was aware that broad swaths of the public were relying on the memorandum to consume and sell medical marijuana. A former White House official who worked on drug policy conceded, "Nobody can argue that the number of medical marijuana shops in California and Colorado didn't grow at an exponential rate directly because of [the Ogden Memorandum]."[14] The Ogden Memorandum, even if it was not intended to, created a widespread perception that the federal government would no longer prosecute individuals for possession or distribution of marijuana in a state where medical marijuana had been legalized.

This raises an important question: in the event that DOJ chooses to prosecute an individual for utilizing or distributing medical marijuana, should the defendant be able to invoke the Ogden Memorandum as a defense? Under the entrapment by estoppel defense, a defendant can argue that the government's assurance of the legality of an otherwise unlawful activity provides a total defense. Would such a defense be valid if an individual relied on the Ogden Memorandum in their decision to consume or distribute medical marijuana? While

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to mean that "we're all in the clear; it's time to expand our businesses and bring in outside investors").

10. *See id.*

11. Letter from Michael A. Barlow, Del. Solicitor Gen., to Charles M. Oberly III, U.S. Attorney for the Dist. of Del. (Dec. 7, 2011), http://medicalmarijuana.procon.org/sourcefiles/charles-oberly-delaware-medical-marijuana.pdf.

12. City of Oakland's Response to Defendants' Motion to Dismiss at 6-7, City of Oakland v. Holder, 901 F. Supp. 2d 1188 (N.D. Cal. 2013) (No. V 12-5245 EJ).

13. *Id.* at 7.

14. Grim & Reilly, *supra* note 9.

this question has received glib treatment in the literature, there is a need for a stronger treatment of the question of whether this memorandum can generate an entrapment by estoppel defense.[15]

This Comment argues that while the Ogden Memorandum did have a significant impact on public perception of the legality of medical marijuana, it does not create a viable entrapment by estoppel defense. In Part I, the Comment provides an overview on the creation of the entrapment by estoppel defense doctrine dating back to the Supreme Court's decision in *Raley v. Ohio*. In Part II, the Comment argues that an entrapment by estoppel defense requires a specific assurance from a government agent to an individual that action is legal and is not triggered by an individual's interpretation of a general government statement. In Part III, the Comment argues that the Ogden Memorandum did not create an entrapment by estoppel defense and that granting such a defense would limit the ability of DOJ to offer guidance on how federal prosecutors ought to invoke their discretion.

I. Entrapment by Estoppel Doctrine

A defendant who argues entrapment by estoppel seeks to demonstrate that the government assured him of the legality of his conduct. In *United States v. Batterjee*, for example, the Ninth Circuit concluded that a defense of entrapment by estoppel requires the defendant to prove that "(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable."[16]

The Supreme Court has allowed a defense of entrapment by estoppel in cases where a defendant was given direct government assurance that his conduct was legal, that the defendant relied on that advice and the reliance was reasonable. The Supreme Court first recognized the doctrine of entrapment by estoppel in *Raley v. Ohio*.[17] There, the defendants had been questioned by Ohio's Un-American Activities Commission and had received guidance from its Chairman that they could refuse to answer potentially self-incriminating ques-

15. *See, e.g.*, Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 Stan. L. & Pol'y Rev. 633, 640 (2011) ("The NEP does not create a legal defense to a CSA violation. No defendant could cite the policy as the basis for dismissing a criminal prosecution brought by the United States."). There is a need for a more in-depth consideration of this question in the literature when faced with a memorandum that was ambiguous and which was widely interpreted by the public as a form of legalization of medical marijuana in accordance with the law of the state in which the marijuana was grown, sold, and consumed.

16. United States v. Batterjee, 361 F.3d 1210, 1216-17 (9th Cir. 2004) (internal quotation marks and citations omitted).

17. Raley v. Ohio, 360 U.S. 423 (1959).

tions.[18] However, the Chairman's advice was incorrect and the defendants were prosecuted and convicted for their refusal to answer. The Supreme Court reversed the conviction as a violation of the Due Process Clause of the Fourteenth Amendment, concluding that affirming the convictions and endorsing the government's conduct "would be to sanction the most indefensible sort of entrapment."[19] In *Raley*, entrapment by estoppel was present because the government agent gave reasonable advice on which reliance could be placed, and that advice was given directly to the defendants to guide their behavior.

In *Cox v. Louisiana*, the Supreme Court affirmed an entrapment by estoppel defense, overturning the conviction of demonstrators convicted of protesting excessively close to a courthouse.[20] The demonstrators had consulted with "the highest police officials of the city" and complied with the police instructions on where they could protest.[21] They were then arrested for protesting too close to the courthouse.[22] The Supreme Court, citing *Raley*, held that individuals cannot be convicted for violating a law when a government official has given them a direct and reasonable assurance of the legality of their conduct.[23]

In *Pennsylvania Industrial Chemical Corporation v. United States*, the Pennsylvania Industrial Chemical Corporation (PICCO) had been dumping an allotted amount of chemicals into the Monongahela River based on estimates provided directly to PICCO by the Army Corps of Engineers.[24] Those estimates were incorrect and PICCO was fined for dumping more than their legally allotted amount of chemicals into the river.[25] The Supreme Court held that PICCO was not liable because the company had a right to rely upon the guidance from the Army Corps of Engineers and, therefore, "traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."[26] The Supreme Court focused on the fact that the Army Corps of Engineers directly assured the company that its actions were legal and that the company relied on that guidance.[27] *Raley*, *Cox*, and *Pennsylvania Industrial* all hold that entrapment by estoppel can apply where a government official has provided direct assurance to an individual or company that their actions are lawful and that assurance guides their subsequent behavior.

18. *Id.* at 424.
19. *Id.* at 438.
20. Cox v. Louisiana, 379 U.S. 559, 568-69, 571 (1965).
21. *Id.* at 568-71.
22. *Id.*
23. *Id.* at 571.
24. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 671-74 (1973).
25. *Id.* at 660.
26. *Id.* at 674.
27. *Id.* at 673-74.

Federal circuit courts, too, have only used entrapment by estoppel as a defense when a government official made a direct commitment to a defendant that their conduct was lawful. For example, in *United States v. Batterjee*[28] and *United States v. Talmadge*,[29] the Ninth Circuit upheld a defense of entrapment by estoppel where the government issued gun licenses to non-citizens who were later prosecuted for illegal possession of those weapons. Similarly, in *United States. v. Abcasis*, the Second Circuit overturned the conviction of an informant who dealt heroine based on the suggestion of a police officer.[30] Direct assurance from a police officer to an individual that his conduct was sanctioned by the law will give that individual the "mistaken but reasonable, good faith belief that he has in fact been authorized to do so as an aid to law enforcement" and, thus, provide the grounds for a defense of entrapment by estoppel.[31] In *United States v. Hedges*, the Eleventh Circuit utilized an entrapment by estoppel defense to overturn the conviction of an Air Force officer who had been advised by a government attorney that he was not in violation of a conflict of interest statute.[32] That legal advice was incorrect but the court held that because the officer "acted on advice that he was not violating the statute," he could not be held liable for his violation of the law.[33]

II. The Specific Assurance Requirement in Entrapment by Estoppel

Courts have not extended the entrapment by estoppel defense to defendants who never directly communicated with government officials but merely interpreted public statements. In *United States v. Carlson*, the District of Minnesota held that government statements "to the public" cannot "demonstrate an essential element of entrapment by estoppel: that statements were made to him rather than in a general sense to the public at large."[34] Similarly, in *United States v. Lichtenstein*[35] and *United States v. Clark*,[36] the Fifth Circuit interpreted *Raley*

28. United States v. Batterjee, 361 F.3d 1210, 1218 (9th Cir. 2004) ("In contrast, 'entrapment by estoppel rests on a due process theory which focuses on the conduct of the government officials rather than on a defendant's state of mind.' While one of the elements of an entrapment claim is 'the absence of predisposition on the part of the defendant,' a defendant's predisposition to commit an offense is not at issue in an entrapment by estoppel defense.") (citations omitted).

29. United States v. Tallmadge, 829 F.2d 767, 773 (9th Cir. 1987).

30. United States v. Abcasis, 45 F.3d 39 (2d Cir. 1995).

31. *Id.* at 43.

32. United States v. Hedges, 912 F.2d 1397 (11th Cir. 1990).

33. *Id.* at 1405.

34. United States v. Carlson, No. 12-305, 2013 WL 5125434, at *31 (D. Minn. Sept. 12, 2013).

35. United States v. Lichtenstein, 610 F.2d 1272, 1280 (5th Cir. 1980).

36. United States v. Clark, 546 F.2d 1130, 1135 (5th Cir. 1977).

to require specific assurance directly to a defendant that her conduct was legal. In *United States v. Eaton*, the Eleventh Circuit held that, "[f]or a statement to trigger an entrapment-by-estoppel defense, it must be made directly to the defendant, not to others."[37] In contrast to the direct and personal assurances in *Raley*, *Cox*, and *Pennsylvania Industrial*, public statements cannot protect an individual from prosecution for illegal conduct.

The courts refused to recognize the DOJ's Petite Memorandum as creating a legal defense of entrapment by estoppel. The Petite Memorandum offered guidelines limiting when the DOJ would prosecute crimes that had already been tried in state court.[38] In *United States v. McInnis*, the Fifth Circuit concluded: "We have repeatedly refused to enforce that policy by dismissing an indictment; the practice of avoiding dual prosecution sets only an internal guideline for the Justice Department."[39] Similarly, in *United States v. Mitchell*, the Seventh Circuit held that "since it is an internal guideline for the exercise of prosecutorial discretion, [the Petite Memorandum] does not create a substantive right for the defendant which he may enforce, and is not subject to judicial review."[40] The Second Circuit cautioned in *United States v. Ng*, that "[t]o hold the policy legally enforceable would be to invite the Attorney General to scrap it, which would hardly be in the public interest."[41]

In this line of cases, the requirement is that a governmental actor provide a direct assurance to an individual as to the legality of their action; a misinterpretation of governmental policy simply is not enough to generate a viable entrapment by estoppel defense.

III. The Limitations of the Ogden Memorandum

Despite representing Department of Justice policy, the Ogden Memorandum was not a direct assurance that medical marijuana was legal under federal law. The memorandum was widely interpreted by the public as an assurance that activities permitted under state law would not be prosecuted, but that did not provide for adequate grounds for an entrapment by estoppel defense.

Thus far, the federal courts have only begun to consider this question. In *United States v. Stacy*, the District Court of Southern California held that the

37. United States v. Eaton, 179 F.3d 1328, 1332 (11th Cir. 1999).

38. *See* U.S. Attorneys' Manual 9-2.031 (2013) (the policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless" there is a "federal interest" in bringing the case.).

39. United States v. McInnis, 601 F.2d 1319, 1323 (5th Cir. 1979). *See also* United States v. Michel, 588 F.2d 986, 1003, n.19 (5th Cir. 1979) (holding that the court "need say only that the Petite policy, an internal policy of the Justice Department, is not to be enforced against the government").

40. United States v. Mitchell, 778 F.2d 1271, 1276 (7th Cir. 1985).

41. United States v. Ng, 699 F.2d 63, 71 (2d Cir. 1983).

Ogden Memorandum "was a loose statement that left open the possibility the Justice Department could change its 'plans' or could choose to prosecute medical marijuana dispensaries on a case-by-case basis."[42] In *Stacy*, the court held that "[e]ven if Defendant's prosecution were contrary to the guidance set forth in the Memorandum" there are no grounds "for dismissing an indictment because it is contrary to internal Department of Justice guidelines."[43] Building on *Stacy*, the Eastern District of Michigan ruled in *United States v. Hicks* that the Ogden Memorandum could not support an entrapment by estoppel defense.[44]

In conclusion, the Ogden Memorandum did not legalize marijuana, nor did it provide any direct guarantee to any individual or company about the legality of their action. Though some members of the public interpreted the memorandum as legalizing the use and distribution of medical marijuana in states where this was legal, that was a misinterpretation of the law. The Supreme Court in *Raley*, *Cox*, and *Pennsylvania Industrial* required a direct assurance from the government for a defendant to be able to utilize an entrapment by estoppel defense. The lower courts overturned convictions based on an entrapment by estoppel defense in circumstances where the government directly assured an individual that their conduct was legal, but the courts have upheld convictions when an individual relied on a general government statement. The Ogden Memorandum was not a direct assurance to any individual that their conduct was legal and, as such, cannot serve as the basis for an entrapment by estoppel defense. Other district courts should follow the persuasive reasoning in *Stacy* and *Hicks* and reject an entrapment by estoppel defense relying on the Ogden Memorandum.

At a policy level, there is reason to be concerned that were courts to recognize an entrapment by estoppel defense based on the Ogden Memorandum, the Department of Justice would likely rescind the memorandum and refrain from issuing further statements of prosecutorial discretion. As the Second Circuit noted in *United States v. Ng* concerning an earlier statement of prosecutorial discretion, a decision to enforce the policy would be tantamount to "invit[ing] the Attorney General to scrap it, which would hardly be in the public interest."[45]

What is needed from the government, which has been insufficiently addressed, is a broader public campaign to clarify that such memoranda do not

42. United States v. Stacy, 696 F. Supp. 2d 1141, 1147 (S.D. Cal. 2010).

43. *Id.* at 1149.

44. United States v. Hicks, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) ("The Department of Justice's discretionary decision to direct its resources elsewhere does not mean that the federal government now lacks the power to prosecute those who possess marijuana. Furthermore, Attorney General Holder's and Deputy Attorney General Ogden's statements cannot be construed as affirmatively representing to Defendant that he is now authorized to possess or use marijuana under federal law.") (citations omitted).

45. *Ng*, 699 F.2d at 71.

constitute permission to engage in otherwise illegal activity. There was broad public acclaim for the Ogden Memorandum as some form of legalization of Marijuana based on the policies of the states. Part of the problem was with the text of the memorandum itself, which was "pocked with ambiguities that turned out to be traps for the unwary."[46] More broadly, the administration knew that there were political advantages in taking a position that would be seen as helping to usher along the process of medical marijuana legalization.[47] Conservatives generally favored the administration's policy and polls demonstrated that there was "widespread public support for making marijuana available to relieve the suffering of people who are very ill."[48] President Obama raised hopes that he would push forward medical marijuana legalization and the administration benefited politically from the Ogden Memorandum. In turn, the administration did little to quash the public recognition of the memorandum as a form of quasi-legalization. While not legally obligated to emphasize the underlying legal irrelevance of the memorandum, the Department of Justice could have helped the public have a more realistic understanding of the meaning of the new policy. In the future, when the Department of Justice establishes guidelines concerning prosecutorial discretion, a stronger communications strategy would help to establish that the policy does not confer any immunity or new legal rights for potential law-breakers.

Fundamentally, there is a strong public interest in the Department of Justice being able and willing to lay out memoranda that can help direct resources towards the prosecution of certain crimes and away from others. That ability rests on the assumption that such prosecutorial discretion frameworks offer guidance to prosecutors, but do not give rise to legally enforceable defenses. To ensure that the Department of Justice can continue to lay out important frameworks that steer prosecutors towards the most severe crimes, it is important that courts respect that these frameworks do not give rise to an entrapment by estoppel defense.

46. Stuart Taylor, Jr., *Marijuana Policy and Presidential Leadership: How To Avoid a Federal-State Train Wreck*, 19 BROOKINGS INSTITUTION GOVERNANCE STUDIES 1, 1 (Apr. 11, 2013).

47. David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), http://www.nytimes.com/2009/10/20/us/20cannabis.html.

48. *Id.*