

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, August 29, 2016
Re: *United States v. McIntosh*, 2016 WL 4363168 (9th Cir. Aug. 16, 2016): **Marijuana**: Ninth allows injunction of feds' med marijuana prosecutions

Players: Decision by Judge O'Scannlain, joined by Judges Silverman and Bea. Big win argued by ND Cal CJA stalwart Marc. Zilversmit, Fed. Defenders of E. Wa & Id. AFPD Robert Fischer, and ED Cal AFPD Andras Farkas.

Facts: A slew of defendants in three districts were indicted for marijuana crimes under the Controlled Substance Act. *Id.* at *1. They (unsuccessfully) moved to dismiss their indictments, or enjoin their prosecutions on the grounds that a rider on an appropriations bill prohibited the use of federal funds by DOJ to prosecute offenses involving medical marijuana. *Id.* at *2. The defendants filed interlocutory appeals, and sought writs of mandamus. *Id.* at *3. (No defendant has yet been convicted or sentenced. *Id.* at *3).



"Your condition is serious, Mr. Reynolds, but fortunately I recently scored some excellent weed that should alleviate your symptoms."

© Conde Nast Publications/www.cartoonbank.com

Issue(s): "We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical marijuana laws." *Id.* at *1.

Held: "In sum, § 542 prohibits DOJ from spending money on actions that prevent the Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* at *8. "We . . . conclude that, at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." *Id.* at *9. "[W]e conclude that § 542 prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542." *Id.* at *10. "When Congress has enacted a legislative restriction like § 542 that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief." *Id.* at *5.

Of Note: With no convictions, what's the Ninth's jurisdictional hook for this big defense win? Judge O'Scannlain turns to 28 USC § 1292(a)(1), and concludes that the Ninth has jurisdiction to consider the interlocutory appeals from the direct denials *of the requests for injunctions*. *Id.* at *5. The take-away? The starting point for this litigation in the district courts is a motion for injunctive relief.

How to Use: "The Feds can't touch pot cases," our clients will earnestly insist. The reality is a bit more -- nuanced. Most importantly, the Court emphasizes that this funding bar only works *if the defendant was in compliance with state law*. *Id.* at *10. In *McIntosh*, that threshold question was bounced backed for evidentiary hearings. *Id.* at *11. While *McIntosh* doesn't mean 4/20 always beats § 841, it does make one wonder. With no federal funds appropriated for the work, who exactly is going to prosecute Form 12s for dirty pot tests, or Form 8s for marijuana pretrial violations, or a host of other interesting conundrums?

For Further Reading: For an interesting, albeit sobering, article about what *McIntosh* does and doesn't mean, see John Hudak, *McIntosh decision limits DOJ powers, but medical marijuana advocates should worry*, at <https://www.brookings.edu/blog/fixgov/2016/08/19/mcintosh-decision-limits-doj-powers-but-medical-marijuana-advocates-should-worry/>