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Something Eric Holder Should Read Before He Sues to Block Pot Legalization

Jacob Sullum | Dec. 12, 2012 3:06 pm

Yesterday Attorney General Eric Holder, in response to questions after a speech in Boston, said the Justice Department will settle on a response to marijuana legalization in Colorado and Washington "relatively soon":

There is a tension between federal law and these state laws. I would expect the policy pronouncement that we're going to make will be done relatively soon.

Before making that pronouncement, Holder (or one of his underlings) should read this new Cato Institute paper, in which Vanderbilt University law professor Robert Mikos explains the limits that the anti-commandeering doctrine imposes on federal pre-emption of state law under the Supremacy Clause. As Mikos puts it, this principle, derived from the constitutional division of powers between the states and the federal government reflected in the 10th Amendment, says "Congress may not command state legislatures to enact laws [or] order state officials to administer them." In the 1997 case *Printz v. United States*, for instance, the Supreme Court held that Congress violated the anti-commandeering rule by requiring local law enforcement officials to perform background checks on gun buyers. What this rule means in the context of drug policy is that Congress may not compel states to enforce the federal ban on marijuana or to emulate it, since "the anti-commandeering principle protects the states' prerogative to legalize activity that Congress bans."

To illuminate the interaction of federal pre-emption and the anti-commandeering doctrine, Mikos proposes a "state-of-nature benchmark": Congress has no power to override legislation that merely reverts to the natural state of things in the absence of government intervention. "State laws that exempt the possession, cultivation, and distribution of marijuana for medical purposes from state-imposed legal sanctions," for example, "merely restore the state of nature that existed until the early 1900s, when marijuana bans were first adopted." Mikos concludes that the essential provisions of the

19 medical marijuana laws that have been enacted since 1996 therefore "*cannot* be preempted," although the story would be different if states were actively involved in growing or distributing marijuana. "As long as states go no further" than lifting penalties for heretofore prohibited activities, Mikos says, "they may continue to look the other way when their citizens defy federal law." That point is unaffected by *Gonzales v. Raich*, the 2005 decision in which the Supreme Court upheld federal prosecution of medical marijuana patients on dubious Commerce Clause grounds, because that ruling dealt only with the federal government's authority to enforce its own ban.

Mikos also notes that the federal Controlled Substances Act (CSA) itself expressly limits pre-emption to situations where there is "a positive conflict" between state and federal law "so that the two cannot consistently stand together." He explains that "a positive conflict would seem to arise anytime a state engages in, or requires others to engage in, conduct or inaction that violates the CSA." If state officials grew medical marijuana or distributed it to patients, for example, they would be violating the CSA, and the law establishing that program would be pre-empted. But specifying the criteria for exemption from state penalties does not require anyone to violate the CSA. Mikos concludes that Congress "has left [states] free to regulate marijuana, so long as their regulations do not positively conflict with the CSA."

Since medical use of marijuana is just as illegal under the CSA as recreational use, the same analysis applies to the legalization initiatives that voters in Colorado and Washington approved last month. The "tension between federal law and these state laws" that Holder cites does not amount to a positive conflict. Hence neither the CSA nor the Constitution allows the Justice Department to block the implementation of state laws allowing cultivation and sale of marijuana. If the "policy pronouncement" that Holder promises involves litigation aimed at pre-empting those laws, the Obama administration will have a hard time winning its case.

What other options does it have? As Mikos notes, "the federal governmentlacks the resources needed to enforce its own ban vigorously." Congress could make banning marijuana a condition of receiving federal grants, provided the financial impact is not dramatic enough to be deemed coercive. Mikos thinks that's an unlikely response to medical marijuana laws, which have been around since 1996 and are supported by a large majority of Americans. Support for general legalization of marijuana is not nearly as strong, but there is an emerging majority (especially among Democrats) that could deter Congress from interfering with the experiments in Colorado and Washington.

Is that expectation unrealistic? A couple of weeks ago, I noted that the only Republican not named Ron Paul who was co-sponsoring the Respect States' and Citizens' Rights

Act of 2012, aimed at clarifying that Colorado and Washington are free to set their own marijuana policies, was Mike Coffman, who represents Colorado's 6th Congressional District. Coffman, a conservative first elected to Congress in 2008 (succeeding Tom Tancredo), has heretofore shown no inclination to favor drug policy reform. But Amendment 64, Colorado's legalization initiative, not only won by 10 points statewide; it won about 52 percent of the vote in Adams, Arapahoe, and Douglas counties, which make up Coffman's district. That's four percentage points more than Coffman, who was re-elected by a 48 percent plurality. Amendment 64 also received more votes in Colorado than Barack Obama did.