Friday, March 6, 2020

On Feb. 10, 2020, as West Virginia companies were finalizing applications for medical marijuana permits, President Donald J. Trump made statements that caused several companies to reconsider filing. President Trump said he is “empowered to ignore the congressionally approved medical cannabis rider [to the Omnibus Spending Bill], stating that the administration ‘will treat this provision consistent with the president’s constitutional responsibility to faithfully execute the laws of the United States.’”[1]

Both existing medical marijuana companies and those interested in applying for permits want to know whether this assertion of power would be justified and if it would affect their ability to do business going forward. That is: Has the executive branch been empowered to ignore the congressional spending power given to Congress in the Constitution? If so, from where does that power derive? Further, when two Congressional Acts conflict, what is the executive “empowered” to do, if anything?

Under Article II, Section 3, of the Constitution, “The executive power shall be vested in a president . . . [who] shall take care that the laws be faithfully executed.”[2] By assigning the executive power to see that laws be “faithfully executed” and assigning Congress with “all legislative powers” granted by the Constitution, the founders limited the executive to only enforce the laws promulgated by...
Thus, the executive branch is given limited power, which “must stem either from an act of Congress or from the Constitution itself.” Under the Controlled Substances Act (CSA), Congress has given the executive expressed power to enforce the laws identified under the CSA. This power, however, is limited to Congressional authority. Thus, the power can be suppressed or eradicated by Congress at will. When this occurs, the executive has little to no ability to enforce the law.

In 1970, Congress enacted the CSA to regulate specific drugs deemed at risk of abuse and dependence. Since then, cannabis has been declared by Congress to be a Schedule I drug, meaning there is no acceptable medical use, establishing its outright ban. To support the banning of cannabis, Congress asserted, “Controlled substances [like cannabis] have a substantial and detrimental effect on the health and general welfare of the American people.” Until 2014, Congress supported the full enforcement of the CSA through Omnibus Spending Bills.

However, in 2014, in public law No. 113-235, Section 38, in the Rohrabacher-Farr Amendment, Congress expressed its will to limit the DOJ’s (executive’s) power to enforce the CSA by restricting the DOJ’s use of congressionally approved funds therein. Specifically, the amendment prevented funds made available under the spending bill “to be used to prevent [32 States and the District of Columbia] from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” In so doing, Congress effectively removed the DOJ’s power to enforce the CSA against state legal entities.

In addition to the question of enforcement authority by the executive, there are also questions regarding whether Congress was endowed with the power to regulate the cultivation, processing, or sale of drugs generally. In our limited federal government model, in order for Congress to create a law, it must have been given the power to act by the Constitution. There are two essential constitutional provisions typically relied upon to justify the vast majority of our laws, which are both found in Article I, Section 8 of the Constitution. The first is the power to tax and spend for the “general welfare” of the people. The other is the power to regulate interstate commerce. The founders feared the power to tax and spend for the general welfare had the potential to be broadly construed, and they discussed at length how the General Welfare Clause should be interpreted narrowly.

In other words, absent an enumerated power listed in Article I, Section 8 or an amendment to the Constitution, Congress has no constitutional power to act. Some contemporary examples highlight the means by which Congress has been able to regulate such vices when there is no enumerated constitutional power to do so. For example, when Congress outlawed the sale of alcohol during the prohibition era, it could not do so based on the language of the Constitution. Rather, Congress had to amend the Constitution with the ratification of the 18th Amendment in 1919. Congress had no such constitutional authority to ban alcohol; it had to create a new power to enact prohibition. Likewise, when the federal government wanted to enact a federal minimum drinking age of 21, it knew it could not create a law mandating the restriction, because no such constitutional power exists. Rather, Congress used the General Welfare Clause by conditioning receipt of federal highway funds on a
state’s adoption of the 21-year age limit.\footnote{10} Congress did not create a national drinking age; it just provided a carrot to trigger state compliance.\footnote{11}

Despite this legislative history, the Supreme Court found Congress has the authority to enact the CSA pursuant to the Commerce Clause.\footnote{12} Specifically, in Raich, California’s Compassionate Use Act authorized limited marijuana use for medicinal purposes, and respondents Raich and Monson, who were California residents, both used doctor-recommended marijuana for serious medical conditions.\footnote{13} After federal Drug Enforcement Administration (DEA) agents seized and destroyed all six of Monson’s cannabis plants, respondents brought this action seeking injunctive and declaratory relief prohibiting the enforcement of the federal CSA to the extent it prevented them from possessing, obtaining, or manufacturing cannabis for their personal medical use.\footnote{14} Respondents argued enforcing the CSA against them would violate the Commerce Clause and other constitutional provisions.\footnote{15} The district court denied the respondents’ motion for a preliminary injunction, but the Ninth Circuit reversed, finding they had “demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress’ Commerce Clause authority” as applied to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes.\footnote{16} On review, the Supreme Court vacated the Ninth Circuit and reinstated the district court’s ruling.\footnote{17} It held Congress was acting within its Commerce Clause power in enacting the CSA.\footnote{18}

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[2] The Constitution enumerates few powers to the executive. These include: power to veto bills passed by Congress—art. I, § 7, cl. 2 & 3; power to write checks pursuant appropriations made by law—art. I, § 9; military power as commander in chief—art. II, § 2, cl. 1; pardon power—\textit{id.}; power to make treaties, with advice and consent of the Senate—art. II, §2, cl. 2; power to nominate ambassadors, federal judges, and other public officers, with advice and consent of the Senate—\textit{id.}; power to make recess appointments—art. II, § 2, cl. 3; and power to convene and adjourn both houses of Congress—art. II, § 3. The Constitution also imposes duties on the president, which the president has power to implement. These include: duty to preserve, protect and defend the Constitution—art. II, § 1; duty to advise Congress on the state of the union—art. II, § 3; duty to receive ambassadors and other public ministers—\textit{id.}; duty to faithfully execute the law passed by Congress—\textit{id.}; and duty to commission officers of the United States—\textit{id.}
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[5] See \textit{id.}, at 602 (Frankfurter, J. concurring) (stating that “[i]t cannot be contended that the president would have had power” when “Congress explicitly negated such authority in formal legislation.” Thus, “Congress
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has expressed its will to withhold power from the president").


[8] The specific provisions stated within U.S. Const. art. I. § 8 are: “The Congress shall have power To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;” and “to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes[.]”

[9] Prior to the ratification of the Constitution, Alexander Hamilton, largely known as the leading advocate for a strong federal government, provided that “[t]his specification of particulars [the 18 enumerated powers of Article I, Section 8] evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd as well as useless if a general authority was intended.”[9]The Federalist 83 (Alexander Hamilton) (emphasis added); later Hamilton would take a more expansive view on the clause. See Hamilton, Alexander, (5 December 1791) “Report on Manufactures” The Papers of Alexander Hamilton (ed. by H.C. Syrett et al.; New York and London: Columbia University Press, 1961-79).James Madison, another key Federalist, said if Congress could do anything it wanted to promote the general welfare, then it “would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators.”[9] Letter from James Madison to James Robertson, Jr., (20 April 1831), National Archives, Founders Online, https://founders.archives.gov/documents/Madison/99-02-02-2332 (last updated September 29, 2019).


[11] Something to consider today is Congress’ recent act to raise the federal age of tobacco use to 21. Rather than attempting to connect the minimum age to a constitutional authority like the prior examples, it appears Congress outright mandated it to the states. This demonstrates that, over time, Congress feels it has gotten stronger as constitutional protections have weakened.


[13] Id. at 6-7.

[14] Id. at 7.

[15] Id. at 8.

[16] Id.
[17] Id. at 9.

[18] Id. at 22.

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