

PASSIVE-AGGRESSIVE EXECUTIVE POWER

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My contribution to the 2013 Schmooze poses a question about the downside of executive power, at least in the enforcement context. If executive power to enforce the law presupposes the duty to use it,¹ what happens when the executive branch doesn't want to?

Perhaps reframing the question will help. What do the death penalty, driving violations, drugs, and DOMA have in common? (Besides the letter “d.”) The answer is passive-aggressive executive power, and in the brief discussion that follows, I use these four factual contexts to illustrate four variations of what I mean.

When those charged with enforcing the law don't want to, what they do is not so different from what the rest of us do when pressed. At least four responses easily come to mind—and at the outset, I set aside the “Just say no” response, which we've certainly seen as an exercise of executive power,² but is out of the passive-aggressive category (because it's just plain aggressive). Here are the four responses (surely there are others, feel to add to my list):

(1) do nothing, and hope nobody notices.

(2) do something silly, and make a mockery of the whole enterprise.

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¹ See U.S. CONST. ART II, § 3 (“[The President] shall take care that the laws be faithfully executed...”).

² See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 54 (1971) (“Eisenhower’s position was: ‘Thurgood Marshall got his decision, now let him enforce it.’”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 131 (1994) (“Moreover, in 1956 Eisenhower on more than one occasion refused to involve the federal government when mob protests and state obstructionism blocked the implementation of school desegregation orders.”); see also ROBERT V. REMINI, THE LIFE OF ANDREW JACKSON 216 (1988) (discussing President Jackson’s famous, but perhaps historically inaccurate, quote in the wake of the Supreme Court’s ruling in *Worcester v. Georgia*, 31 U.S. 515 (1832), “John Marshall has made his decision; now let him enforce it!”).

(3) say that you *would* do something, but you're too busy.

(4) say, in a moment of rare clarity and self-awareness, “*Fine, I’ll do it, but let’s just be clear—I don’t want to.*”³

First I flush out these variations with my four examples (the death penalty, driving violations, drugs, and DOMA). Then I turn to a normative assessment and comparison based on the standard of a reasonably prudent thirteen-year-old⁴ (and some parallel institutional considerations).

First, the death penalty. At the state level, the governor typically stands as the last stop between a condemned inmate and his or her death.⁵ In most states with the death penalty, this last stop takes the form of a clemency petition from the condemned inmate, but in some, it takes the form of an application by the state for a death warrant instead.⁶ In any event, the point is this: state governors have executive power to prevent executions (by commuting them to life sentences, granting pardons, and the like) or to order that executions be carried out (by issuing death warrants, denying clemency petitions, and the like). But when petitions are on their desk, state governors have to go one way or the other, they have to decide.

Or do they?

Consider Florida’s death penalty in 2011—a pristine example of the “do nothing, and hope nobody notices” strand of passive-aggressive executive power. Florida has the second largest death row in the nation, with over 400 condemned inmates awaiting execution.⁷ In April 2011, 47 of those—slightly over ten percent—had exhausted all appeals and were waiting for

³ This response is sometimes followed by the add-on, “*and I think it’s unfair.*”

⁴ I credit Julia Rose Lain for her unwitting contributions to my comparison.

⁵ This assumes that all judicial remedies have been exhausted. By governor, I mean governor or clemency board, also a part of the state executive branch.

⁶ In Florida, New Hampshire, and Pennsylvania, the governor must sign a death warrant to commence an execution.

⁷ See DPIC, DEATH ROW INMATES BY STATE, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Feb. 10, 2013) (showing 411 death row inmates in Florida as of October 2012, compared to California’s 724).

just one thing: the governor's signature on their death warrant.⁸ Nearly twenty of Florida's death row inmates have been awaiting execution for at least thirty years.⁹

What's the hitch? Florida Governor Rick Scott had just started his term in January 2011, so although the press faulted him for the backlog, he had little to do with it (as he has subsequently made clear by signing at least six death warrants since then).¹⁰ But Governor Charlie Crist, who preceded him, had signed just six death warrants during his entire four-year term—a marked difference from the 24 death warrants that Governor Jeb Bush signed during his tenure as governor.¹¹ Indeed, under Governor Crist, more people on Florida's death row died of natural causes than died from executions—around three times as many.¹²

Why didn't Crist sign more warrants? The short answer (and key point, for the purposes of this discussion) is that he didn't *want* to, but for those who are curious, a number of explanations come to mind. One blogger writing about Florida's lag time on death row opined:

The Executive Branch starting with Crist just didn't want to sign the warrants. Crist was running for US Senate and didn't want bad publicity in the press like Texas Governor Perry receives.¹³

⁸ See *Some 40 death row inmates awaiting death warrant from governor, Democrat claims*, POLITIFACT FLORIDA TAMPA BAY TIMES, MIAMI HERALD, (Apr. 20, 2011),

<http://www.politifact.com/florida/statements/2011/apr/20/geraldine-thompson/some-40-death-row-inmates-awaiting-death-warrant-g/>.

⁹ See *id.* (discussing case of 64-year-old death row inmate Gary Alvord, who had been awaiting execution for 37 years); *Just why are the "waits" on Florida's death row so long?*, SENTENCING LAW AND POLICY BLOG (Feb. 13, 2012), http://sentencing.typepad.com/sentencing_law_and_policy/2012/02/just-why-are-the-waits-on-floridas-death-row-so-long.html (noting that 19 people on Florida's death row had been waiting for execution longer than 31 years).

¹⁰ See *Some 40 death row inmates awaiting death warrant from governor, Democrat claims*, *supra* note 8. See also *Gov. Scott signs 5th death warrant, for Manuel Pardo, a cop turned executioner*, FLAGLERLIVE (Dec. 2, 2012), <http://flaglerlive.com/46202/manuel-pardo-execution/>; *Scott Signs Death Warrant in the Killing of a Florida State Trooper*, THE LEDGER.COM (Jan. 19, 2013), <http://www.theledger.com/article/20130119/NEWS/130119263>.

¹¹ See *Some 40 death row inmates awaiting death warrant from governor, Democrat claims*, *supra* note 8. In fairness, Jeb Bush served for two terms, so those 24 warrants were signed over eight years, not four. Still, Bush's rate was twice that of Crist (whether that is a good thing or bad is a different question).

¹² See *Just why are the "waits" on Florida's death row so long?*, *supra* note 9 (noting that only five people were actually executed under Governor Crist, while fifteen died of natural causes).

¹³ See *id.*

Other explanations might have been in play as well. The phenomenon of death row exonerations may have made Crist nervous (at 24, Florida has had more exonerations than any other state).¹⁴ The prospect of triggering another round of post-conviction challenges based on new law (or even new facts) might have curbed his enthusiasm too.¹⁵ It is also possible that the so-called “Marshall Hypothesis”¹⁶ was at work—as empirical evidence has shown, the more people know about the death penalty, the more disturbing it becomes.¹⁷

And who was pushing to move on those executions anyway? Certainly not the death row inmates who were the subject of the pending warrants, or the correctional officers responsible for carrying them out.¹⁸ Making the point, others have wondered “whether anyone really cares all that much about how slow this march has come to be.”¹⁹ I’m guessing victims care (at least some of them), perhaps state attorneys general too. But there’s no deadline on these sorts of petitions and the process is notoriously secretive, so there’s only so much anyone can do.²⁰ That’s why Florida’s death penalty under Governor Crist is a perfect example of the “do nothing and hope nobody notices” genre of passive-aggressive executive power.

Outside Florida, it’s hard to say how many state governors are taking a passive-aggressive approach to executions in their state. This isn’t Texas, where the governor has had no

¹⁴ See DPIC, INNOCENCE AND THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited Feb. 10, 2013) (listing Florida’s death row exonerations as of December 26, 2012).

¹⁵ See *Just why are the “waits” on Florida’s death row so long?*, *supra* note 9 (“New issues based on recent court rulings and changes in the law provide new fodder for appeals all the time.”).

¹⁶ See *Furman v. Georgia*, 408 U.S. 238, 370 (1972) (Marshall, J., concurring) (“Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”).

¹⁷ See, e.g., Austin Sarat and Neil Vidmar, *Public Opinion, the Death Penalty, and The Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L.R. 171 (empirically supporting Marshall Hypothesis).

¹⁸ See *Law Enforcement Endorsements*, SAFE CALIFORNIA, <http://www.safecalifornia.org/about/law-enforcement-endorsements> (last visited Feb. 10, 2013) (indicating over 150 law enforcement endorsements to abolish the death penalty in California, including 24 correctional, parole, and probation officers).

¹⁹ *Just why are the “waits” on Florida’s death row so long?*, *supra* note 9.

²⁰ See Sarah Lundy, *Only Florida’s governors can say how they pick execution order*, ORLANDO SENTINEL (May 19, 2009), available at <http://www.fadp.org/news/2009052003/> (discussing secrecy and lack of accountability in death warrant process).

problem executing the law (or people).²¹ And it isn't Oregon, where the governor has had no problem publicly denouncing the administration of capital punishment in his state and issuing reprieves.²² (Indeed, the latest from Oregon is a lawsuit over whether death row inmates can refuse to accept them).²³ But this may be California (and other non-executing states with people lingering on death row).²⁴ California has the largest death row in the country, with over 700 death row inmates awaiting execution.²⁵ Here again, non-execution deaths vastly outnumber the state's executions. Of the 98 people who have died on California's death row, 13 died by execution, 57 by natural causes, 21 by suicide, and 6 by "other."²⁶ Although California's lethal injection problems might explain its lack of executions over the last several years,²⁷ it does not explain the lack of executions over the previous twenty.

What we are seeing is the same basic phenomenon that Mark Graber (fittingly enough) wrote about in his path-breaking work on legislative deferrals.²⁸ When legislators find it too

²¹ With 491 executions since 1976, Texas is the clear leader among the states; Virginia is second highest with 110 executions. See *Number of Executions by State and Region Since 1976*, DPIC, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Feb. 10, 2013).

²² Oregon's governor is an example of the Marshall Hypothesis in action. See *supra* notes 16-17 and accompanying text (explaining Marshall Hypothesis). Apparently, Governor Kitzhaber was "haunted" by two executions during his first term of office, leading him to believe that Oregon's death penalty is "compromised and inequitable." See *Oregon death row inmate fighting reprieve from governor*, FOXNEWS.COM (July 24, 2012), <http://www.foxnews.com/us/2012/07/24/oregon-death-row-inmate-fighting-reprieve-from-governor/print>.

²³ See *id.* The death row inmate claimed that "A reprieve is not effective until accepted by the recipient" and that he wanted "to speed his punishment in protest of a criminal justice system that he says is broken." *Id.* In the end, the judge ruled that the inmate had a right to reject the reprieve, while noting "I agree with many of the concerns expressed by the governor." Lynne Terry, *Gary Haugen can reject Gov. Kitzhaber's reprieve, judge rules*, THE OREGONIAN (Aug. 3, 2012), available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/08/gary_haugen_can_reject_gov_kit.html.

²⁴ See *Jurisdictions with no recent executions*, DPIC, <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last visited Feb. 10, 2013) (showing 25 jurisdictions with no executions in the last 10 years and 33 jurisdictions with no executions in the last 5 years). In fairness, death row inmates may not be executed for a number of reasons, including mental health issues and new legal challenges based on changes in the law.

²⁵ See *supra* note 7 (noting California's 724 inmates on death row).

²⁶ I presume that "other" means killed by another, as it is hard to imagine what's left. See California Dept. of Corrections and Rehabilitation, *Condemned Inmates Who Have died Since 1978* (Aug. 27, 2012), available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

²⁷ For a discussion of California's problems with lethal injection over the last several years, see Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 MIAAMI L.R. 397 (2013).

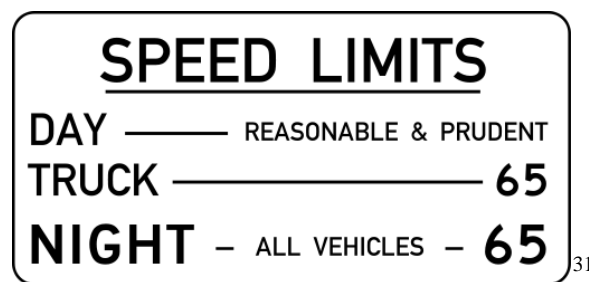
²⁸ See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

costly to take a stand one way or the other, the stand they most prefer to take is no stand at all.²⁹ When chief executives do not want to say ‘yes’ to executions, but cannot afford to say ‘no,’ they do nothing and hope nobody notices. Same basic response, but it’s not legislative deferral—it’s passive-aggressive executive power.

Second, driving infractions. This one is a tad off-point because it concerns a state’s passive-aggressive enforcement of a federal mandate, so it’s not purely an exercise of executive power (although executive power was a necessary part of it). But it’s a beautiful example of a passive-aggressive response to enforcement obligations, and this is one that comes from personal experience so I had to use it. Besides, it’s just quirky enough to be a good fit for the Schmooze.

When I was a kid growing up in Montana, my dad used to put five-dollar bills in the glove compartment box of our car. I didn’t think about what that was for, but when I became a teenager and got my license, I figured it out pretty quickly. It was to pay speeding tickets, which in the daytime amounted to an on-the-spot \$5 fine. Crazy, right? Here’s the backstory.

Before 1974, and then again for a brief period of time after 1995,³⁰ Montana’s highway posting of speed limits looked like this:



²⁹ See *id.* at 53-61.

³⁰ In 1998, the Montana Supreme Court struck down the state’s “reasonable and prudent” speed limit as too vague to give drivers notice as to what was prohibited, violating the state’s due process clause. See *Montana v. Stanko*, 974 P.2d 1132 (Mont. 1998). As one Montanan tells it, “The case was brought by a plaintiff named Rudy Stanko, who was a well-known ‘Freeman’ white-supremacist nut-job who was a perennial recreational litigant who finally hit a winner challenging the speed law.” <http://boards.straightdope.com/sdmb/archive/index.php/t-464693.html> In 1999, the legislature set the speed limit at 65 m.p.h. It was later bumped to the current 75 m.p.h on interstates, 65 m.p.h on secondary roads.

Outsiders called our roads the “Montanabaun,”³² but those of us who lived there knew it was mostly a matter of necessity—there were so many miles to cover, and so few cars, that most of the time, it just didn’t make sense to drive slower than 80-90 m.p.h. on the highway.³³

Then the energy crisis hit, and Congress passed the National Maximum Speed Law in 1974, imposing a limit of 55 m.p.h. across the country as a fuel conservation measure.³⁴ (The national speed limit was later raised to 65 m.p.h., and then repealed entirely in 1995).³⁵ To coerce compliance, the act threatened to withhold federal transportation dollars from states that did not play along.³⁶ Montana played, but like other states, wasn’t happy about it. (Remember that Sammy Hagar song, “I can’t drive 55”?)³⁷ “The only reason we’ve got any speed limit at all is Federal blackmail, pure and simple,” one Montana official maintained.³⁸ Few federal mandates have inspired more hate.³⁹

³¹ Available at <http://en.wikipedia.org/wiki/File:MONTANA-PR.svg>. I add the picture because my colleagues say that my Montana stories are at times too crazy to be true.

³² *Montana Speeding Tickets: Did they used to have a flat \$5 rate and when did it change?*, THE STRAIGHT DOPE (Apr. 20, 2008, 5:00 PM), <http://boards.straightdope.com/sdmb/archive/index.php/t-464693.html> (discussing Montana’s reputation as the “Montanabahn”).

³³ See Timothy Egan, *Speeding is Easy (and Almost Free) in Montana*, N.Y. TIMES (July 10, 1989), available at <http://www.nytimes.com/1989/07/10/us/speeding-is-easy-and-almost-free-in-montana.html> (“Trying to drive the speed limit here in the Big Sky State is like trying to eat nothing but bread crusts at a banquet. There is just so much road and so few cars, that the temptation to put the pedal to the metal is overwhelming.”). See also *infra* note 39 (making similar point). For those curious, I claim the Fifth as to the fastest I’ve ever driven on Montana’s roads.

³⁴ See 1974 Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, 87 Stat. 1046 (codified in part as 23 U.S.C. § 658).

³⁵ See Surface Transportation and Uniform Relocation Assistance Act, Pub. L. 100-17, 101 Stat. 132 (1987) (raising speed limit on rural interstate highways to 65 m.p.h.); National Highway Designation Act of 1995, Pub. L. 104-59, 109 Stat. 568 (granting all speed limit control to the states).

³⁶ See *A Chronology of Dates Significant in the Background, History and Development of the Department of Transportation*, U.S. DEPT. OF TRANSPORTATION, <http://ntl.bts.gov/historian/chronology.htm> (last visited Feb. 10, 2013) (“The act required that the Department approve no highway projects for states having a maximum speed limit greater than 55 mph.”); see also Egan, *supra* note 33 (“Only after Federal officials threatened to withhold highway funds did the state enact the \$5 speeding ticket.”).

³⁷ For those who, sadly, have no idea what I’m talking about, see http://www.youtube.com/watch?v=RvV3nn_de2k.

³⁸ Egan, *supra* note 33.

³⁹ One blogger writes, “The speed limit was treated with complete derision for a couple of reasons. First, expecting people to drive 55 on most of the state highways and interstates in Montana is a joke. These are mostly wide open, light traffic roads, and distances between towns is relatively far as compared to smaller states. NOBODY drives 55. Second, and more to the point, Montana has a bit of the “Live Free Or Die” spirit (with apologies for stealing the motto of New Hampshire) and there was a lot of resentment that the Feds would strong-arm the state into passing a

So what did Montana do? It did something silly, making a mockery of the entire enterprise. The whole point of the federal speed limit was energy conservation, so Montana decided to enforce the law with a \$5 on-the-spot fine for ‘wasting a natural resource.’⁴⁰ Violations of the law did not go on a person’s driving record and could not be used to raise insurance rates.⁴¹ Because there was little point in issuing such tickets—it often took more gas to catch up with a speeding motorist than the ticket was worth—state troopers often didn’t write them (although I paid one, once).⁴²

What Montana effectively said to the federal government with its \$5 on-the-spot fines was, “*Fine, we’ll enforce your silly law because we have to, but we’re not going to act like we mean it because we don’t. Read between the lines, here’s what we think of your law.*” The feds gave Montana a silly law, and Montana gave the feds silly enforcement, making a mockery of the entire enterprise. That’s why Montana’s enforcement of the National Maximum Speed Law is a nice example of yet another genre of passive-aggressive executive power.

Third, Drugs (specifically marijuana). Under the federal Controlled Substances Act (CSA),⁴³ marijuana is categorized as a Schedule 1 drug (like heroine and LSD) having a high potential for abuse and “no currently accepted medical use in treatment in the United States.”⁴⁴

law that was (a) unnecessary and (b) unwanted.” *Montana Speeding Tickets: Did they used to have a flat \$5 rate and when did it change?*, *supra* note 32; *see also* Egan, *supra* note 33 (“Few laws have ever been so despised...”).

⁴⁰ *See* Egan, *supra* note 33 (“Officially, a \$5 speeding ticket for violating the speed limit on Montana highways is not a moving violation, but ‘an unnecessary waste of a natural resource,’ gasoline. Moreover, the ticket cannot be cited to increase insurance rates for motorists or become part of the permanent driving record.”).

⁴¹ *See id.*

⁴² *See id.* (“Under this system, the state of Montana loses \$22 in labor and processing costs for every ticket written by a state trooper, a recent study by a legislative committee found. . . . “See, I can sit here and write every car that goes by,” [one officer] said. “One day I wrote 63 tickets. But with the Tinkertoy engine I’ve got in this car, it takes me five minutes just to catch up with the guy, and then I write a five-buck ticket. Is that worth it?”).

⁴³ 21 U.S.C. §§ 801 et. seq.

⁴⁴ 21 U.S.C. § 812(b)(1).

As such, its cultivation, distribution, and possession are criminally punishable under federal law.⁴⁵

Enter the states. Nineteen of them, and the District of Columbia, have decriminalized medical marijuana—marijuana purchased pursuant to a valid prescription and used for medicinal purposes.⁴⁶ Another two states—Washington and Colorado—have now legalized the drug in small amounts for recreational use.⁴⁷

Set aside the instinct to say that preemption doctrine resolves the conflict. For complicated reasons that go beyond the scope of this paper, the courts aren't finding preemption.⁴⁸ In practice, that means there are licensed businesses that are perfectly legit (and paying taxes) in twenty or so states, but nevertheless violating federal law. What result?

The answer has changed some over time, so for the purposes of this discussion, I go back to 2008 and 2009. In 2008, Barak Obama was running for his first term as president, and when asked about his position on medical marijuana, replied, "I'm not going to be using Justice Department resources to try to circumvent state laws on this issue."⁴⁹ Drug czar Gil Kerlikowske followed with the sound bite, "We're not at war with people in this country"⁵⁰—and he was on to something. Over seventy percent of those asked in public opinion polls support the use of marijuana for medical purposes if prescribed by a doctor.⁵¹

⁴⁵ Mere possession is a misdemeanor punishable by up to a year in prison and a minimum fine of \$1000. *See* 21 U.S.C. § 844(a). Cultivation and distribution are felonies punishable by up to five years in prison and a maximum fine of \$250,000. *See* 21 U.S.C. § 841(b).

⁴⁶ *See* Todd Garvey, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, at 1 (Nov. 9, 2012), available at <http://www.fas.org/sgp/crs/misc/R42398.pdf>.

⁴⁷ Both states decriminalize the possession of marijuana that is less than an ounce. *See id.* at 4.

⁴⁸ *See id.* at 7-14 (discussing issue in depth). In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court upheld Congress' power to pass the CSA, but did not address the preemption question that obviously followed. *See id.*

⁴⁹ *See* Tim Dickinson, *Obama's War on Pot*, ROLLING STONE, Mar. 1, 2012, available at <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216>.

⁵⁰ *See id.*

⁵¹ *See* Michael Scherer, *What is President Obama's Problem with Medical Marijuana?* TIME (May 3, 2012), <http://swampland.time.com/2012/05/03/what-is-president-obamas-problem-with-medical-marijuana/>.

Once in office, Obama’s Department of Justice (DOJ) put its money where his mouth was. In 2009, then-Deputy Attorney General David Ogden sent a memo to U.S. attorneys in states that authorized medical marijuana.⁵² Focusing on the “efficient and rational use of [DOJ’s] limited investigative and prosecutorial resources,” the memo told prosecutors that they “should not focus federal resources in [their] states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁵³ In a statement attached to the memo, Attorney General Eric Holder reiterated the point, stating, “It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana.”⁵⁴ The point, he told reporters in a Q&A session that followed, was “to go after those people who violate both federal and state law.”⁵⁵

In short, federal law was what it was, but enforcing this particular federal law wasn’t a priority given DOJ’s limited resources and the myriad of other things on its plate. It wasn’t that DOJ was *refusing* to enforce the law because of countervailing state positions and public opinion (as if it could).⁵⁶ And it wasn’t that DOJ was telling its attorneys to simply “ignore federal drug laws” as some Republicans claimed.⁵⁷ It was that DOJ had limited resources and other, more important things to do.⁵⁸ It *would* do something, but it was too busy.

⁵² See Memorandum for Selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009), available at <http://blogs.justice.gov/main/archives/192>.

⁵³ *Id.*

⁵⁴ See David Stout and Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 20, 2009), available at <http://www.nytimes.com/2009/10/20/us/20cannabis.html>.

⁵⁵ *Id.*

⁵⁶ See 28 U.S.C. §547 (“each United States attorney, within his district, shall...prosecute for all offenses against the United States”); see also *supra* note 1 (noting executive branch’s constitutional duty to “take care that the laws be faithfully executed”).

⁵⁷ See Stout and Moore, *supra* note 54 (quoting Representative Lamar Smith, senior Republican on the House Judiciary Committee).

⁵⁸ See *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (recognizing prosecutorial discretion).

The story would not be complete without fast forwarding to 2011, when things *really* got interesting. Hardliner Michele Leonhart was confirmed as head of the DEA, and shortly thereafter, the agency issued a position paper entitled, “The DEA Position on Marijuana.”⁵⁹ (With section headings like “The Fallacy of Marijuana for Medicinal Use,” one need not read all 63 pages to get the gist).⁶⁰ Within months, DOJ wrote another memo to federal prosecutors in medical marijuana states, clarifying that “Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act regardless of state law....[S]uch persons are subject to federal enforcement action, including potential prosecution.”⁶¹ A series of federal drug raids on state-licensed medical marijuana dispensaries soon followed, along with threats to prosecute those who own, operate, or otherwise associate with them.⁶²

The state of affairs now is massive confusion. While the Obama Administration maintains that its stance has been “clear and consistent” all along,⁶³ legislators from both sides of the aisle have written an open letter calling on the federal government to provide “clarity rather than chaos.”⁶⁴ For his part, Attorney General Holder “clarified” DOJ’s position as follows:

⁵⁹ U.S. DEPT. OF JUSTICE, DEA POSITION ON MARIJUANA (Jan. 2011), *available at* http://www.justice.gov/dea/docs/marijuana_position_2011.pdf

⁶⁰ *Id.* at 2.

⁶¹ See Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011), *available at* <http://www.freedomisgreen.com/full-text-department-of-justice-memo-on-medical-marijuana/>

⁶² See Dickinson, *supra* note 49 (discussing federal crackdown and statements by DOJ attorneys that they would “vigorously” enforce the CSA “even if such activities are permitted under state law”); *see also* William Yardley, *New Federal Crackdown Confounds States That Allow Medical Marijuana*, N.Y. TIMES, at A13 (May 7, 2011), http://www.nytimes.com/2011/05/08/us/08marijuana.html?pagewanted=all&_r=0. Most disturbing are the threats to prosecute the hundreds of state and local employees associated with licensing and regulating state-approved medical marijuana producers. *See infra* note 64.

⁶³ Dickinson, *supra* note 49.

⁶⁴ *Lawmakers in 5 States Tell Feds to Back Off Medical Marijuana*, HUFFINGTON POST (Apr. 2, 2012), *available at* http://www.huffingtonpost.com/2012/04/02/lawmakers-in-5-states-tell-feds-medical-marijuana_n_1397811.html.

If in fact people are not using the policy decision that we have made to use marijuana in a way that's not consistent with the state statute, we will not use our limited resources in that way.⁶⁵

(Um, yeah, that clears up a lot.) Meanwhile, the City of Oakland has now sued the federal government for seizing an Oakland building occupied by a registered and permitted medical marijuana dispensary, claiming in part that DOJ's policy statements and prior pattern of non-enforcement against state-authorized dispensaries bars its action now under the doctrine of equitable estoppel.⁶⁶

Maybe what we are seeing is passive-aggressive enforcement of a passive-aggressive decision not to enforce. Regardless, DOJ's 2008-09 approach to enforcement of the CSA in the context of medical marijuana provides a nice example of what we all do when we don't want to do something, but feel pushed to do it anyway—we say we *would*, but we're too busy with other, more important priorities.

Fourth and finally, DOMA. The Obama Administration's stance on Section 3 of the Defense of Marriage Act (DOMA) is an easy example, so I'll get right to the point. Section 3 of DOMA codifies the definition of marriage for all federal purposes as “only a legal union between one man and one woman as husband and wife.”⁶⁷ Thus, same-sex couples are not eligible for a host of federal benefits, from filing joint tax returns, to collecting on Social Security survivors' benefits, to qualifying for insurance coverage as the spouse of a government employee.

⁶⁵ Scherer, *supra* note 51.

⁶⁶ See Office of the City Attorney, City of Oakland News Release: *Oakland City Attorney and Morrison & Foerster Sue Federal Government to Prevent Seizure of Building Used by Medical Cannabis Dispensary*, available at <http://www.oaklandcityattorney.org/News/Press%20releases/Fed%20complaint%20med%20cannabis%20Oct%2010%202012.html>; Nicole Flatow, *Oakland Sues Federal Prosecutors Over Medical Marijuana Crackdown*, THINK PROGRESS (Oct. 11, 2012), <http://thinkprogress.org/justice/2012/10/11/993261/oakland-sues-federal-prosecutors-over-medical-marijuana-crackdown/?mobile=nc>.

⁶⁷ 1 U.S.C. § 7.

President Obama has long opposed DOMA in principle, and in February 2011, Attorney General Eric Holder sent a letter to Congress stating that both he and the President had concluded that it violates the Equal Protection Clause of the Fifth Amendment.⁶⁸ As a result, the Attorney General explained, the executive branch would no longer defend DOMA in cases where its constitutionality was being decided against a blank slate—although it would continue to defend the statute in other cases and in any event, would continue to enforce its provisions until Congress repealed them or the judicial branch ruled them invalid.⁶⁹ Attorney General Holder also pledged to “notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases.”⁷⁰ (And indeed, House Republicans hired a lawyer to defend DOMA on their own).⁷¹

In a roundtable discussion with reporters, President Obama explained his rationale:

Administratively, we can't ignore the law. DOMA is still on the books. What we have said is even as we enforce it, we don't support it, we think it's unconstitutional. The position that my administration has taken I think will have a significant influence on the court as it examines the constitutionality of this law.⁷²

As the nation's chief executive, Obama felt that he had to enforce DOMA. But he certainly didn't want to, and he didn't see his obligation as defending the law too (at least when he thought it to be unconstitutional). Indeed, Obama saw his refusal to defend DOMA as a way to undermine it, to signal to courts in no uncertain terms just how indefensible the Administration

⁶⁸ See Daniel Foster, *Obama Administration Declares DOMA Unconstitutional, Won't Defend in Court* (Feb. 23, 2011), <http://www.nationalreview.com/corner/260494/breaking-obama-administration-declares-doma-unconstitutional-wont-defend-it-court-dani> (reproducing letter to Congress).

⁶⁹ See *id.* (noting that where courts apply rational basis review, “the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard.”).

⁷⁰ *Id.*

⁷¹ See Bill Mears, *Boehner Hires Top Lawyer to Fight Over Marriage Law, Sources Say*, CNN.COM (Apr. 19, 2011), <http://www.cnn.com/2011/POLITICS/04/18/house.defense.of.marriage/index.html?iref=allsearch>

⁷² *Remarks by the President in an “Open for Questions” Roundtable*, OFFICE OF THE PRESS SECRETARY: THE WHITE HOUSE (Sept. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/28/remarks-president-open-questions-roundtable>.

thought the law was. Critics called the move “an executive power grab.”⁷³ But another (and in my mind better) characterization of Obama’s response to DOMA is passive-aggressive executive power.

* * * * *

Executive power is complicated, but passive-aggressive behavior is ubiquitous and exists in some pretty simple forms. Kids are a perfect example. Parents are in charge (nominally) and tell their kids to do things that they sometimes don’t want to do. For the most part (and assuming away the terrible twos), our children won’t come right out and say “no” to those directives. But they do other things—passive-aggressive things—and they’ve got those things down pat by the time they are in their early teens. So I thought I’d close with the following thought experiment: how might we feel about my four variations of passive-aggressive executive power if instead of talking about executive power, we were talking about a reasonably prudent thirteen-year-old?

First consider the “*do nothing, and hope nobody notices*” response. What parent on this planet is okay with that? None that I know, and the reason is not that the response is passive-aggressive; it’s that there’s a good chance it would work—we parents wouldn’t notice until some crisis occurred, at which point we’d hit the roof but it would be too late. We’re all busy, we don’t have time to be monitoring every move our thirteen-year-olds make. So we have to be able to have some modicum of trust that when we’ve told them to do something, they’ll actually do it (or come back and start the conversation anew). It’s about accountability, about having confidence in the fact that they’re doing what they’re supposed to do, if only so that we can get on with the myriad of other things burdening our already overcrowded lives.

⁷³ Devin Dwyer, *Critics Call Obama DOMA Decision an Executive Power Grab*, ABC NEWS (Feb. 24, 2011), <http://abcnews.go.com/Politics/critics-slam-obama-doma-decision-newt-gingrich-calls/story?id=12992207>

What about the “*do something silly*” response, the one that makes a mockery of the entire enterprise? No better, and in many ways worse. This is the one that infuriates us as parents because it’s all about flouting our power. It *feels* disrespectful because it *is* disrespectful. The whole point is making a mockery of what we’ve told our thirteen-year-old to do, and nobody likes that (least of all, parents).

Next is the “*I would, but I’m too busy*” response—the blow-off. When it’s a legitimate response (our thirteen-year-old has a school project due), we understand, we bend. But when it shows up as a passive-aggressive response to one of our directives, our reaction tends to be, “Busy? I’ll show you busy. Do ‘x’ or I’ll *really* give you something to do.” Moreover, even when we bend at first, we know as parents that we can’t bend for long. Parenting is a lot about managing expectations, and our repeated failure to prioritize a task means that at some point our kids will rely on it being a low priority (and reasonably so). We can’t get mad at our hypothetical thirteen-year-old for not emptying the dishwasher when we’ve consistently done nothing in response to her repeated failure to do it in the past.

Finally, there’s the “*Fine I’ll do it, but let’s just be clear—I don’t want to*” response. Now we’re on to something. Within the spectrum of passive-aggressive responses, that’s the one we parents like. (How many times have we praised our kids for “using their words”?) I can’t make my thirteen-year-old want to do what I’ve told her to do. But if she says to me in a passive-aggressive moment, “Fine, I’ll do it, but for the record, I don’t want to,” that’s about as good as it gets. It respects my authority. It allows for self-expression. And it paves the way for dialogue rather than ignorance, confusion, or anger (consequences of the other three variations). For a thirteen-year-old, it’s an incredibly mature thing to do.

I submit that the institutional considerations one might use to assess the various types of passive-aggressive executive power are not so different from these. We don't want our executive branch to do nothing and hope nobody notices—people are busy living their lives, they need confidence that the executive branch is out there doing whatever it is that the executive branch has been charged to do. We also don't want executive power being used in ways that make a mockery of our laws; the thumb-your-nose response to enforcement obligations is not exactly a healthy way of managing inter-branch conflict or complex institutional dynamics. The blow-off isn't much better, and in some ways is worse—it not only shirks executive branch duties, but also creates false expectations that can undermine the rule of law. Only the last variation—enforce but do not defend—presents an arguably justifiable response to unwanted executive power. It does not shirk enforcement obligations, but lets other branches know exactly where the executive stands. It allows for inter-branch dialogue, which in turn can eliminate the necessity for passive-aggressive executive power. And for an executive branch, that's an incredibly mature thing to do.