



Department of Justice

Acting United States Attorney Michael K. Loucks
District of Massachusetts

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CONTACT: CHRISTINA DiIORIO-STERLING
PHONE: (617)748-3356
E-MAIL: USAMA.MEDIA@USDOJ.GOV

More than 20 years ago Justice Powell, writing for the Supreme Court, stated, "In our criminal justice system, the Government retains broad discretion as to whom to prosecute. . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Justice Powell's words are particularly apt in the case of Andrew Sullivan.

In an decision notable for its hostile tenor in a matter involving a petty offense, a U.S. Magistrate Judge criticized the United States Attorney's decision to dismiss a violation notice charging an infraction occurring on federal property: possession of two "joints" of marijuana. That Judge asserted we had not adhered to a "bedrock" principle that all people be treated equally once charged. The Globe recently raised similar questions.

Our Constitution requires the fair and even-handed administration of justice, but does not require that every defendant who has violated the same law be treated exactly alike. Individuals charged with the same crime are routinely treated differently by prosecutors making charging decisions and by judges imposing sentences. Indeed, it would be unjust in making prosecutorial decisions to turn a blind eye to defendants' differing circumstances. The Justice Department's Principles of Federal Prosecution require federal prosecutors to balance, in making charging decisions "[t]he nature and seriousness of the offense" and "[t]he probable sentence or other consequences if the person is convicted", among other things. This balancing routinely *and justly* results in reaching different charging decisions for individuals who may have committed the same crime. The Constitution entrusts this decision-making to the executive, not the judiciary.

In the case of Andrew Sullivan, continuing his petty offense prosecution may have resulted in the denial of his renewable visa or his pending application to become a permanent legal resident. Few defendants appearing in federal court on a similar infraction face similar consequences. It was a fair and just exercise of discretion, in balancing the probable outcome -- Mr. Sullivan's forfeiture of \$125 dollars as a non-criminal adjudication -- against the probable immigration consequence, to decide, given the *petty* nature of Mr. Sullivan's conduct, to dismiss the violation notice issued by the National Park Service. (The Globe statement that three others were charged in the same incident with Sullivan and did not have their violations notices dismissed is incorrect; Mr. Sullivan was alone.)

The court's opinion (and the Globe's editorial) implies we treated Sullivan differently because of who he is. That is not true. Had the judge inquired, he would have learned that neither I nor the Assistant U.S. Attorney handling the matter had ever heard of Sullivan before and knew nothing of his notoriety, other than that the AUSA had been told he was a well known

blogger. His *blogging* views played no role in our decision.

The Globe's coverage has been especially disappointing. The reporting and editorializing has unjustifiably promoted further public cynicism about the fairness of the criminal justice system. Moreover, the Globe saw fit to carry this *petty offense* story on the front page, followed by the editorial. The Globe never balanced the opinion's assertion we had violated a "bedrock" principle with a discussion of the constitutional principles of separation of powers, and the limits placed on judicial involvement in prosecutorial discretion.

On the day of the petty offense hearing, I was in Washington participating in the announcement of this office's prosecution of Pfizer Inc. We had secured the largest criminal fine ever in a health care prosecution: Pfizer agreed to plead guilty and pay \$2.3 billion. That was a page B-6 story. Last Friday, our office secured the conviction of the largest Internet fraud ever prosecuted in the United States; that defendant, Albert Gonzales, faces up to 25 years in prison. The Globe relegated that to page B-5, the very day the Globe posted the *petty offense* article on page one.

While the Globe, like any citizen, has the right to criticize our discretionary decision not to pursue forfeiture of \$125, I do think the Globe should evaluate its own discretionary decision that the appropriate dismissal of the petty offense was more important to the public than the discretion we exercised in pursuing the prosecutions of Gonzales and Pfizer, Inc.

MICHAEL K. LOUCKS
Acting United States Attorney
District of Massachusetts