

The Broader Implications Of Sessions' Marijuana Move

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There will be little debate that this has been a bad day for the state-sanctioned (and regulated) marijuana industry. Stated simply, the Obama-era directives that significantly fettered the discretion of the nation's 93 presidentially appointed U.S. attorneys to bring federal narcotics charges against marijuana growers, distributors and possessors in those states that "legalized" marijuana for medicinal or recreational purposes (there are some eight states falling into the latter category) are now a thing of the past. Considering the many banks, landlords, law firms and others that "service" the marijuana industry, and that more than half of the states have, in one form or another, legalized — at least on the state level — marijuana, this change in federal enforcement approach is significant. But the deeper question is whether this major — and, in some circles at least, anticipated — move by Attorney General Jeff Sessions signals a new era of increasingly decentralized federal law enforcement decision-making.



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The Evolution of State Legalization — From "Medicinal" to "Recreational"

Starting in 2009, the U.S. Department of Justice issued successive guidance memos to federal prosecutors concerning marijuana enforcement under the federal Controlled Substances Act, or CSA. Most recently, on Aug. 29, 2013, then-Deputy Attorney General James M. Cole in a four-page memo instructed federal prosecutors "in the field" (that is, outside of Main Justice) that earlier efforts to limit federal enforcement against medical marijuana growers, distributors and possessors/users in those states where medical marijuana was legalized were extended to the then-in-its-infancy "recreational" marijuana industry.



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Some hailed this abrupt change in course as a victory for state and individual rights. But Cole's memo argued that, in those states that had legalized marijuana growing, distribution and possession, reliance on "traditional joint federal-state approach[es] to narcotics enforcement" and the individual states' "regulatory systems" allayed federal enforcement interests. (And this was so even though in the same memo, which essentially sought to carve out the part of the federal criminal law that related to marijuana, Cole noted that "marijuana is a dangerous drug.")

Putting a (Heavy) Thumb on the Scales of the Principles of Federal Prosecution

The standard exercise of prosecutorial discretion since at least 1980 relied on individual U.S. attorneys, guided by the U.S. Attorney's Manual's Chapter 9-27.000 (the Principles of Federal Prosecution, intended to assist federal prosecutors in "structuring [their] decision-making process" when it comes to initiating or declining federal prosecutions), to determine whether a prosecution is appropriate in any context, including drug enforcement. The net effect of these Obama-era Main Justice directives, then, was to centralize control in D.C. by telling the 93 U.S. attorney's offices spread around the country that there was a de facto presumption against such federal prosecutions.

Sessions Makes the Marijuana Industry Fair Federal Game

There have been rumblings that this loose and somewhat confusing — but nevertheless significant — insulation of the marijuana industry mandated by Main Justice could soon be a thing of the past. By way of example, candidates for appointment in federal law enforcement positions were frequently questioned on how they might roll back state marijuana legalization (as well as how to address immigration issues related to "sanctuary cities"). And various presidentially appointed officials were not shy when it came to expressing their opposition against the rapidly growing marijuana industry. Moreover, on Nov. 17, 2017, Attorney General Jeff Sessions signaled his concern that some of the DOJ's past guidance had expanded beyond merely explaining the current status of the law to "regulation by guidance."

On Jan. 4, 2018, any lingering doubt about the administration's intentions was removed when Sessions issued his one-page memo on marijuana enforcement. The memo's very first paragraph notes Congress' "determination that marijuana is a dangerous drug and that marijuana activity is a serious crime." Sessions' memo goes on to state that, on the question of how to deploy the DOJ's "finite resources," federal prosecutors confronted with a case of, say, marijuana growing or trafficking in a state where this activity was legalized, should proceed as they normally would when making any other federal charging decisions: They should consult the U.S. Attorney's Manual and "weigh all relevant considerations." Cutting to the chase, Sessions informed all U.S. attorneys that, "[g]iven the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately."

The Broader Implication — Less Enforcement Power in D.C. and More in the U.S. Attorney's Offices?

Beyond what this heralds for the marijuana industry in those states where it has received state sanction (and has been subject to state regulation), the broader lesson to be learned may concern the distribution of federal prosecutorial power. To be sure, the administration will likely, as would be expected, still vet candidates for U.S. attorney positions as to their support for Main Justice and executive policies. But the Sessions memo definitely also signals increased autonomy on the part of U.S. attorneys, at least with respect to laws relating to marijuana. Put another way, by removing this Main Justice directive and putting the issue of prosecutorial discretion back in the hands of the individual federal prosecutors actually handling the cases in the various states, Sessions has decentralized federal law enforcement decision-making.

Whether this is a philosophical decentralization-of-federal-powers trend that heralds the future (a litmus test will be how the DOJ addresses enforcement of immigration laws), rather than a means to a very specific end (namely, putting the brakes on the burgeoning marijuana industry), and what this means for those favoring states' rights, remains to be seen. But, for now, those who oppose

enforcement carveouts and selective Main Justice limitations on the considerable powers wielded by the individual U.S. attorneys (and those assistant U.S. attorneys working in their offices) will consider this a major win. And the attention paid by legislators and members of the public alike to those nominated to be U.S. attorney in states like Colorado, Washington, Oregon and California when it comes to their views on this discrete political hot-button issue will no doubt reach an all-time high.

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