POLITICS & SOCIETY DISPATCHES

Five things you should know about federal and state marijuana laws

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Attorney General Jeff Sessions announced on Jan. 4 that U.S. prosecutors will enforce a federal prohibition on marijuana even in states that have legitimated the substance. The suggestion by the attorney general that the Justice Department may crack down on the drug alarmed both civil liberties groups and some local law enforcement agencies, since the Obama administration had made a practice of not enforcing federal marijuana laws against users in states where it was legalized.

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In the wake of these developments, here is a review of five major factors in the enforcement of marijuana laws in the United States.

The federal Controlled Substances Act. The Controlled Substances Act, enacted in 1970, classifies regulated substances into five categories and permits federally registered physicians to prescribe drugs listed in all but Schedule I. The law lists "marihuana" as a Schedule I substance because Congress determined it had "a high potential for abuse," had "no currently accepted medical use" and lacked "accepted safety." It is illegal to prescribe, use, distribute, possess or cultivate any Schedule I substance except as part of an approved research study.

As a point of reference, tobacco, which is at least as addictive and harmful as marijuana and has no recognized medicinal use, is exempt from the Controlled Substances Act, as is alcohol.

Congress can deschedule or reschedule marijuana whenever it chooses. Every year since 1981 bills have been introduced to reclassify marijuana as a Schedule II drug, which would permit it to be prescribed for medical use and more easily researched, or to completely eliminate it from the list of controlled substances; none have ever made it out of committee. The Drug Enforcement Agency, in consultation with other administrative agencies such as the Food and Drug Administration, also has authority to deschedule or reschedule substances, but the D.E.A. has rejected every petition to change marijuana's classification.

State marijuana laws. State marijuana laws are commonly divided into three groups: medical use, (de)criminalization and legalization. State medical marijuana laws vary greatly, but all recognize the therapeutic effect of cannabis and cannabinoids. The first such law, the Compassionate Use Act, went into effect in California in 1996 and was meant to

benefit "seriously ill" patients. But the broad language of the law, which permitted physicians to "recommend" marijuana whenever it was determined a "patient's health would benefit," led to considerable abuse. In contrast, Ohio's medical marijuana law, enacted in 2016 and scheduled to be operational by September 2018, limits the number of licensed growers and dispensaries, narrowly defines the illnesses for which marijuana may be recommended, and requires physician recommenders to take a certifying class.

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Only four states—Idaho, Kansas, Nebraska and South Dakota—have no medical marijuana law. Most have passed comprehensive medical marijuana legislation, and more than a dozen other states permit the use of "low THC, high cannabidiol (CBD)" products for limited medical reasons or as a defense to criminal charges.

Decriminalization is a change in the law that minimizes or eliminates penalties for marijuana use. Twenty states have decriminalized the possession of small amounts of marijuana, which means that rather than arresting marijuana users, police issue citations, similar to parking or traffic tickets, that carry minimal fines and usually do not result in a criminal record. In addition, many cities and police departments throughout the nation have adopted non-enforcement policies that have the same effect as legislative decriminalization.

Legalization of marijuana is a state's acceptance of adult recreational use and, in some states, the production and sale of marijuana. In 2012 Washington and Colorado were the first states to legalize non-medical marijuana production and tax its sale. In 2016, marijuana sales in Colorado exceeded $1 billion and generated $200 million in state tax revenue. As of this writing, the District of Columbia and eight states, including California, which continues to run its medical marijuana program, have legalized marijuana. (In addition to Colorado and Washington, the others are Alaska, Maine, Massachusetts, Nevada and Oregon.) The governor of Vermont is expected to sign legislation adding that state to the list.

Federal enforcement history. The Clinton administration's initial response to California's medical marijuana law was to threaten doctors who recommended marijuana use with loss of their prescription-writing privileges. Federal courts enjoined these threats as a violation of First Amendment free speech rights but did not otherwise prohibit the federal government from enforcing the Controlled Substances Act. In 2002, President George W. Bush's attorney general, Alberto Gonzales, defended enforcement of the Controlled Substances Act against medical marijuana users who challenged the constitutionality of the law. Despite acknowledging that enforcement would cause the marijuana users, who were in total compliance with state law, considerable pain and "irreparable harm," the U.S. Supreme Court upheld the law's application to them as a proper exercise of Congress's authority to regulate interstate commerce.

Under President Barack Obama, the Justice Department issued several guidance memoranda regarding the enforcement of federal drug laws in states that had legalized medical and recreational marijuana. The memos, dating from 2009 to 2014, illustrate the difficulties of enforcing a stagnant federal law within a nation of increasingly tolerant states.

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The earliest memo indicates that federal efforts should focus on stopping dangerous drug traffickers rather than prosecuting "individuals whose actions are in clear and unambiguous compliance with existing state laws." In 2011, however, perhaps in response to California's lax medical marijuana regulations, the Justice Department indicated that "[p]ersons 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." By 2013, eight enforcement priorities were identified and have been used, until recently, to instruct federal prosecutors regarding where they should focus their efforts. The eight priorities are: preventing distribution to minors, preventing revenue from benefiting criminal enterprises, preventing the diversion of marijuana from states where it is legal to states where it is not, preventing the trafficking of other illegal drugs, preventing violence and the use of firearms, preventing drugged driving and the exacerbation of other adverse public health consequences, preventing the growth of marijuana on public lands and preventing marijuana possession or use on federal property.

In 2014, Congress passed the Rohrabacher-Farr amendment to an appropriations bill, which prohibits the Justice Department from funding enforcement efforts against the implementation of state marijuana laws. Now known as Rohrabacher-Blumenauer, the amendment is in effect through Jan. 19, when the latest short-term extension of funding for the federal government runs out. Lower courts have upheld this appropriation limitation and dismissed cases brought against state-authorized medical marijuana providers and individual marijuana users who strictly comply with state law, but those interpretations could be overturned.

As noted above, on Jan. 4 Attorney General Sessions rescinded the Obama administration's eight priorities memos as unnecessary and informed federal prosecutors that they should make marijuana prosecution decisions using general law enforcement principles, which include "priorities set by the Attorney General." It is unlikely this change will inaugurate wide-scale arrests of individual marijuana users, but it puts everyone involved in marijuana use, including state medical marijuana employees, on notice that they could be subject to federal prosecution if Congress fails to reauthorize the Rohrabacher-Blumenauer amendment.

Federalism and pre-emption. Federal authority to regulate marijuana is based on the Commerce Clause. But state authority to regulate marijuana is based on traditional police and public health powers and the Tenth Amendment. Overlaps between federal and state powers that result in legislative conflicts are resolved by applying the constitutional principles of federalism and pre-emption. That is, state governments have sovereign powers, but they are not equals of the federal government, and the Supremacy Clause gives the federal government primacy over the states. Deference is given to states when they act pursuant to their historic police powers, but state laws that prevent the enforcement of constitutionally authorized federal laws are routinely struck down by the courts as pre-empted by federal law.

Thus, state decriminalization of marijuana does not conflict with federal law, as states are free to write their own criminal statutes. But medical marijuana and legalization laws differ in that they provide state approval, rather than mere disinterest, to federally prohibited activities.

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The U.S. Supreme Court has ruled that compliance with a state's marijuana law is not a shield from federal prosecution under the Controlled Substances Act. Nevertheless, state marijuana laws are not in and of themselves unconstitutional. They may be implemented by the states as long as they do not interfere with federal law enforcement efforts. It is unclear whether the federal government can take action against state officials, and possibly

the states themselves, for aiding marijuana use, production and distribution. Attorney General Sessions has not yet threatened to withhold federal funds from states that have legalized marijuana—as he has against "sanctuary cities" that oppose federal immigration policy—but the inconsistencies between federal and state law make life uncomfortable for many, including local law enforcement officials. Some states, for example, require authorities to return marijuana that was wrongfully (under state law) seized from state-authorized medical marijuana users during traffic stops. Lower courts are split on whether the return of that marijuana violates federal law.

Complications from antidiscrimination and other laws. Criminal prosecution is not the only problem facing private individuals, government officials and businesses involved in marijuana activities. Federal law dictates that marijuana users may be prohibited from owning guns or living in public housing, yet state disability laws prohibit discrimination against medical marijuana users. Employers and employees are uncertain how state-authorized marijuana use can impact hiring and firing decisions. Insurance companies do not know whether they violate federal law if they provide state-required medical marijuana coverage or pay claims for damaged or stolen marijuana. Military veterans, despite a recent directive authorizing Veterans Affairs doctors to discuss (but not facilitate) medical marijuana use with their patients, are concerned their participation in medical marijuana programs will impact their benefits. Business owners risk civil forfeiture of their profits and assets, and they may lose banking services that had been opened to them by the Obama administration.

There are numerous arguments for and against marijuana legalization, but the current situation is untenable. As Justice Louis D. Brandeis noted, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Today, however, the entire citizenry is at risk. Patients risk a cut-off of their supply of medicine; tenants risk eviction; employees risk job loss; police departments, landlords, insurance companies and employers risk lawsuits; banks and businesses risk assets; and everyone involved in marijuana production and distribution, from the truck driver who delivers office supplies to the lawyer who drafts a lease, risks running afoul of a federal prosecutor. These risks only can be reduced by changing state or federal law.

Changing state law, willingly at least, is unlikely, as momentum and public opinion are with marijuana legalization. The most recent state marijuana law was enacted this week, and a 2017 poll indicates that 94 percent of U.S. voters favor medical marijuana and 60 percent favor the general legalization of the drug. Meanwhile, the Controlled Substances Act is 48 years old, and it is unclear whether any member of Congress supports it as currently written. Congress could deschedule marijuana and remove it from the controlled substances list, which would eliminate conflicts even in states that have legalized marijuana for recreational use. Alternatively, Congress could reschedule marijuana from a Schedule I substance to a Schedule II or III substance and alleviate conflicts with state medical marijuana laws. But if Congress does not act, Attorney General Sessions could effectively nullify state marijuana laws through rigorous federal enforcement.

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