



MARIJUANA

Issue Brief

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“It 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.” – Justice Louis Brandeis (1932)¹

New Federal Paradigm In Marijuana Legalization

Introduction

Conflicting activities related to marijuana at state and federal levels raise questions as to whether a new federal/state legal relationship concerning marijuana legalization is forthcoming.

The Network for Public Health Law has been tracking state laws concerning marijuana since its inception.² In 2017, West Virginia joined twenty-eight other states and D.C. in allowing residents to use marijuana for medicinal purposes. Eight states legally authorize and regulate recreational marijuana programs subject to state taxation for various public purposes.³ In January 2018, Vermont lawmakers approved legislation to legalize recreational marijuana, which the state’s Governor Phil Scott has promised to sign.⁴

Despite drastic expansion of marijuana legalization throughout U.S. states in recent years, federal guidance issued in January 2018 is at odds with this movement, imparting legal uncertainty on the future of the marijuana industry. This Issue Brief reviews the current federal legal framework regarding marijuana control and explores possible options for federal, state, and local governments in the near future. As the concepts of federalism in public health law and criminal law continue to evolve, activity at the state level will play a large role in the formulation of marijuana laws and public policy. In tandem with marijuana legalization in states, social and public health impacts of these policies should be considered, especially regarding potential social determinants of health and health inequalities.

Federal Legal Framework Regarding Marijuana Control

Marijuana is listed as a Schedule 1 drug via the federal Controlled Substances Act (CSA)⁵ of 1970. This means marijuana has a “high potential for abuse,” has “no currently accepted medical use in treatment in the United States,” and lacks “accepted safety for use of the drug under medical supervision.”⁶

Correspondingly, under federal law, the production, possession, and distribution of marijuana is clearly unlawful and subject to criminal prosecution under CSA. A narrow exception exists for marijuana use during participation in FDA approved studies



or other federally approved Compassionate Use Investigational New Drug Programs.⁷ Setting this limited exception aside, there is little doubt that federal agents are fully authorized to enforce CSA prohibitions as written.

Despite the federal policy choices embodied in the CSA, many states have moved in a different direction. In 1996 California enacted its Compassionate Use Act allowing for the possession and use of marijuana by patients who receive a doctor's recommendation. Multiple states have since followed California's lead.

Whether state-level enactments allowing medical marijuana use are preempted by federal law remains questionable. In *Gonzales v. Raich*, the U.S. Supreme Court ruled that the CSA can regulate the purely intrastate manufacture and possession of marijuana for medicinal purposes under the Commerce Clause.⁸

The CSA could preempt other state-level activities, but this is not an "all or nothing" proposition. By including a "preemption disclaimer" in CSA, Congress affords states some room to legislate on drug control issues. CSA preemption only applies when there is a "positive conflict" between federal and state laws which "cannot consistently stand together."⁹ State attorneys general and courts have interpreted the term "positive conflict" broadly. Subsequent findings suggest that returning wrongfully seized marijuana¹⁰ and shielding users from employment discrimination are preempted by CSA.¹¹

However, there is at least a theoretical argument that state law should only be preempted when a state directly *promotes* marijuana activities or *forces* individuals to violate federal law. This view holds that licensing marijuana distributors is not in direct conflict with CSA, since it is only a declination of enforcement and does not convert the distributor into a state actor.¹² State legalization of marijuana provides individuals a choice, not a mandate, in the use of marijuana for medicinal or recreational purposes.

Other constitutional questions relating to the permissible scope of state-level marijuana regulation and enforcement remain. Under the Tenth Amendment and the Supremacy Clause, can the federal government require a state to enforce the CSA?

The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." Congress' ability to compel the States to enact CSA prohibitions or to enforce federal law is potentially limited by 2 recent U.S. Supreme Court decisions. In *New York v. United States*,¹³ the Court held that Congress could not require a state to enforce a federal law requiring disposal of low-level radioactive waste generated within its border. In *Printz v. United States*, the Court clarified that Congress could not "commandeer" state employees to carry out enforcement of a federal law.¹⁴

Resolving uncertainty on the permissible scope of state-level marijuana laws and policies depends partly on how aggressively the federal government chooses to exercise its CSA authority.

Federal Selective Enforcement of CSA Prohibition of Marijuana

During the Obama Administration (2009-2017), the federal Department of Justice (DOJ) largely refrained from lawfully prosecuting authorized users and licensed producers of state sanctioned marijuana under CSA's prohibitions. Rather, DOJ issued a series of Memoranda offering guidance to U.S. Attorneys in the exercise of their prosecutorial discretion. The first Memorandum, issued October 19, 2009, by Deputy Attorney General David W. Ogden, reiterated DOJ's commitment to enforce CSA, but noted that enforcement against individuals who are in compliance with state marijuana laws would be an inefficient and poor use of federal resources.¹⁵

Attempting to clarify the seeming conflict between allowing state marijuana programs to operate and the federal government's continued opposition to production and sale of marijuana, DOJ issued a second Memorandum by Deputy Attorney General James W. Cole ("Cole Memorandum I") on June 29, 2011. The Memorandum focused on federal concerns for large-scale, privately-owned commercial marijuana production facilities.¹⁶ In 2011, DOJ stepped up enforcement of CSA by investigating several state-sanctioned marijuana dispensaries. The apparent goal was to deter the growth of the marijuana industry, but not to completely close it down.



With multiple states legalizing medical and recreational marijuana following the issuance of Cole Memorandum I, Deputy Attorney General Cole issued a new Memorandum on August 29, 2013,¹⁷ specifying 8 federal enforcement priorities centered on preventing:

- distribution of marijuana to minors;
- marijuana sales revenue from going to criminal enterprises, gangs, and cartels;
- diversion of marijuana from legalizing states to states where it remains unlawful;
- state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- violence and the use of firearms in the cultivation and distribution of marijuana;
- drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- growing of marijuana on public lands and the attendant public safety and environmental dangers; and
- marijuana possession or use on federal property.

In 2016, Congress enacted a relatively new restriction on interference with states' implementation of their medical marijuana laws through its appropriations rider included in the Consolidated Appropriations Act.¹⁸ While in effect, the rider prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engage in conduct permitted by state medical (not recreational) marijuana laws. These individuals must be in full compliance with their respective states' laws to be protected from federal prosecution.

Criminal defendants promptly used this rider as a defense against federal indictments alleging CSA violations. In 10 consolidated appeals, the Ninth Circuit Court of Appeals held that the defendants were entitled to an evidentiary hearing to determine whether their conduct was actually authorized by state law.¹⁹ If so, the rider precludes their prosecution under CSA.

Versions of the rider, deemed the Rohrabacher-Blumenauer Amendment, have been included in subsequent appropriations bills to continue protections for medical marijuana in states where authorized. However, U.S. Attorney General Jeff Sessions has asked Congress to remove the rider from the 2018 spending bill.²⁰

Rescission of President Obama-Era Memoranda

During the 2016 Presidential campaign, then-Presidential candidate Donald J. Trump noted support for medical marijuana initiatives and a seeming preference for leaving many marijuana enforcement decisions to the states.²¹ However, on January 4, 2018, Attorney General Sessions issued a Memorandum announcing the immediate rescission of previous federal guidance specific to marijuana enforcement (i.e. the Odgen and Cole Memoranda).²²

Session's guidance provides federal prosecutors with more leeway to enforce the federal CSA against marijuana-related activities. It eliminates the federal law enforcement priorities previously set in 2013, thus broadening prosecutorial discretion to cases with state law compliance.

Numerous Congressional members have criticized DOJ's reversal of prior guidance. Some have threatened to block all DOJ nominees unless this new policy is reversed.²³ Its immediate impacts remain cloudy. Federal prosecutors are already overstretched and historically bring only a few marijuana-related claims each year. Still, legal uncertainty and heightened possibility of federal prosecution are likely to obstruct the activity of expanding marijuana industries in states that have legalized its medical or recreational use.

Future Options Regarding Federal and State Relationships

Given the recent history of the federal/state relationship involving regulation of state medical and recreational marijuana laws, what are foreseeable options for potential policy changes within President Trump's Administration? At least 3 options are possible.



Vigorous enforcement of CSA as written. To date, the federal government has not sued states or their public officials or employees for CSA violations even when states' laws are contrary to federal law. Vigorous enforcement of CSA is possible constitutionally. As per the Eleventh Amendment to the U.S. Constitution,²⁴ "suits by the United States against a State are not barred by the Constitution."²⁵ Practically though, the so-called decades-long "War on Drugs" has been fought more by state and local law enforcement agencies than by federal agencies. Limited federal law enforcement resources have resulted in selective federal enforcement of CSA to date.

Continued selective enforcement of CSA. Maintaining some semblance of the status quo through selective enforcement of CSA (in the absence of removing marijuana from Schedule I of the CSA) is also possible (and may be likely given limited federal law enforcement resources). Despite Attorney General Session's January 2018 Memorandum, federal prosecutors may use their discretion to preserve federal resources for more urgent criminal drug-related activities.

Cooperative Federalism. Some commentators have suggested a "cooperative federalism" approach. Under cooperative agreements, states could opt-out of CSA's marijuana provisions, leaving state law intact.²⁶ In states choosing not to "opt out," CSA will continue to apply. Additionally, the cooperative agreement could set minimal federal requirements for opt-out states without "commandeering" the state program (which may be unconstitutional under principles of federalism). Another option is for Congress to amend CSA to clarify the federal/state relationship, perhaps by clearly adopting some form of "cooperative federalism." This option would require Congressional action to amend CSA, which seems unlikely.

Implications for Social Determinants of Health and Health Inequality

Medical and recreational marijuana legalization have the potential to affect certain social determinants of health and health inequalities depending on jurisdiction-specific factors. For example, the availability of medical and recreational marijuana may help diminish existing disparities related to racial and ethnic incarceration rates resulting from biased enforcement.²⁷ Having a criminal record can lead to job discrimination,²⁸ increased poverty, and poor health for affected individuals and their families.²⁹ Medicinal and recreational legalization may reduce these disparate arrests and incarceration rates,³⁰ as well as corollary negative health outcomes.

State marijuana tax revenues may also be used to fund public health interventions to address state-specific social determinants of health, as well as persisting health inequalities. For example, in Arizona, 2015 excise taxes on cigarettes raised \$165 million that was disbursed to the state Medicaid agency Arizona Health Care Cost Containment System (AHCCCS) for use in specific programs, including funds for the medically needy and acute care services for childless adults.³¹ Funds from marijuana taxes could similarly fund state public health initiatives such as improvements to low income housing, mental health counseling for at risk youth populations, or drug education programs.

Conclusion

Medicinal and recreational marijuana laws and policies raise inherent federal-state conflicts. The CSA reflects strong views on the harmful effects of increased marijuana distribution and usage. Historically, marijuana was viewed as a "gateway" drug. Empirically, this assumption is perhaps open to question. Still, serious law enforcement concerns about a growing state-authorized marijuana industry remain. Some state and local public health officials have also expressed concerns that medical and recreational marijuana can lead to increased access, use, and initiation, especially among youth.³² (Current research on these effects is inconclusive³³ justifying the need for more empirical research on key substance abuse questions).

State legislators who have successfully sought to liberalize marijuana laws weigh the competing policy arguments differently. The clinical benefits of medicinal marijuana are gaining increased acceptance. Some states now prefer to address recreational use through regulation and licensing rather than through prosecution of individual users. As noted above, there are profound implications that arise when criminalization policies exacerbate existing health disparities.

Public health law practitioners should be cognizant of legal conflicts between federal and state provisions as well as potential social and health inequality implications of legalization. As per Justice Brandeis's famous quote above, the federal system

of government entails constant experimentation at each level of government. State and local innovations in legalizing medical and recreational marijuana must be supplemented by continued research on social and health impacts.

Supporters:



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