Federal Marijuana Enforcement Policy

U.S. Department of Justice Cole Memo

Possessing, growing, and distributing marijuana is federally illegal, apart from a narrow exception for research. Meanwhile, dozens of states have taken a different approach, allowing marijuana for medical or adults' use, and the federal government's enforcement of its marijuana laws has relaxed. In an August 2013 memorandum[1] issued to federal prosecutors, then-Deputy Attorney General James Cole outlined the Department of Justice's (DOJ) enforcement policy with respect to states' medical marijuana and adult use laws (and businesses and individuals complying with those laws).

Former Attorney General Jeff Sessions rescinded the Cole memo, but current Attorney General William Barr said during his Senate confirmation hearing that he would not "go after" cannabis businesses complying with state law and the Cole memo. In a follow-up written response, Barr said, "I do not intend to go after parties who have complied with state law in reliance on the Cole Memorandum."[2]

The cornerstone of Cole memo policy is its emphasis on state regulation. According to the memo, the federal government will focus its efforts on eight enforcement priorities and rely on state law enforcement authorities to manage areas that are not federal priorities. The Cole memo made clear that in order to ensure that the U.S. government's concerns are addressed, the department expects states to implement a strong regulatory framework. It states, "The Department's guidance in this memorandum rests on its expectation that state and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems ...."

The eight areas of particular concern to the department are:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form from going to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and use of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

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[1] James M. Cole, Guidance Regarding Marijuana Enforcement, United States Department of Justice, Office of the Deputy Attorney General, August 29, 2013.
http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

[2] www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#2caae1745435

8. Preventing marijuana possession or use on federal property.

Congressional Action Mandating Non-Interference in Medical Marijuana Programs
In the 2015 and 2016 criminal justice appropriations budgets, Congress weighed in against federal enforcement targeting state-legal medical marijuana programs. It included a rider providing, "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [medical marijuana states] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[3] Yet, the DOJ continued pursuing some cases in California, arguing Congress had prevented actions against states — not individuals. In August 2016, a Ninth Circuit panel disagreed, ruling that the rider prevented appropriated funds from being used to target people who fully complied with state medical marijuana laws.[4]

Marijuana Laws and Preemption
Under our federalist system of government, states have broad authority to adopt their own criminal laws. The Controlled Substances Act itself explicitly says state laws are not preempted unless there is a positive conflict between the two laws — such as if a state *required* someone to violate federal law. Unsurprisingly, the federal government has never argued state marijuana laws are preempted, and in some cases where third parties have made the case, they have typically lost.[5]

The Limitations of Riders and the Cole Memo
Although they have given states and individuals some breathing room, the DOJ memos and the rider did not change federal statutes that criminalize possession, cultivation, and sale of marijuana. Also, the rider applies only to a given year's appropriations, so it must be renewed annually to continue in force.

As long as federal law criminalizes marijuana, there will be complications for state-legal individuals and businesses. Despite a federal memo aimed at reassuring banks, many are unwilling to provide financial services to marijuana businesses due to concern about federal money laundering laws — and those that do typically charge excessive fees. Other areas of federal conflict include excessive taxes — marijuana businesses cannot deduct most of their business expenses — and an ATF policy that limits marijuana users' gun rights.

The federal practice of a relatively hands-off approach has created breathing room for states and individuals. But, to resolve the conflict and prevent the public safety issues and tensions caused by it, marijuana must be federally de-scheduled and state-legal marijuana activities must become legal under federal law.

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[3] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015).
[4] *United States v. McIntosh*, Case No. 15-71179 (9th Cir., 2016)
[5] See: *White Mountain Health Center Inc. v. County of Maricopa*, CV-2012-053585, (December 3, 2012) and *Arizona v. United States*, Case No. CV 11-1072-PHX-SRB (D.C. Ariz. January 4, 2012).