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Federal-State Marijuana Policy: An Uneasy Peace

Recreational cannabis use may be legal under state law, but it's still a federal crime. The issue is: what's the Trump Administration going to do about it?

Cannabis industry entrepreneurs are used to navigating the obvious tension between state and federal law regarding the legalization of marijuana, particularly now that states like Colorado, Washington and California, among many others, have legalized recreational marijuana. However, recent comments by Press Secretary Sean Spicer and Attorney General Jeff Sessions indicating intent to increase enforcement of federal prohibitions on marijuana have ratcheted up that tension.

A closer look at the current legal framework in light of the recent change in administrations illustrates just how uneasy the peace is between federal and state law on marijuana, both medical and recreational.

Marijuana remains illegal at the federal level under the Controlled Substances Act (CSA, 21 U.S.C. §§ 801, *et seq.*). However, 28 states have legalized medical marijuana, and eight additional states and the District of Columbia have legalized recreational marijuana to various extents. Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (Nov. 10, 2016, 1:59 PM), http://time.com/4559278/marijuana-election-results-2016/.

Obama Approach

The Obama administration navigated this tension by adopting a permissive policy of prosecutorial discretion. Per official guidance from the Department of Justice, federal prosecutors were encouraged not to use government resources to prosecute federal marijuana crimes in legal medical marijuana states. James M. Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf ("In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana . . . . enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.").

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Congress went one step further than the nonbinding guidance from the Department of Justice, and in 2014, successfully added a rider to the congressional appropriations bill, which affirmatively prohibited the use of government funds to prosecute federal marijuana crimes in states that had legalized medical marijuana. Consolidated and Further Continuing Appropriations Act, 2015, Pub L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) ("None of the funds made available in this Act to the Department of Justice may be used, with respect to [legal medical marijuana states] to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

In other words, Congress didn't federally legalize medical marijuana, but it effectively defanged federal authorities with regard to marijuana prosecutions in legal medical marijuana states.

Before the courts

The congressional appropriations rider came before the courts in 2016, when multiple federal medical marijuana criminal defendants from legal medical marijuana states appealed their cases to the Ninth Circuit. *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). The Ninth Circuit held that as long as the defendants complied with the applicable state medical marijuana law, the congressional rider prohibited federal prosecution. *Id.* at 1177 ("We therefore conclude that, at a minimum, [the Congressional rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.").The same rider language—known as the Rohrabacher-Farr amendment, named after two of the three United States representatives who introduced the language—has been extended via a continuing resolution to fund the federal government that expires on April 28, 2017. Steph Sherer, *Congress Votes to Extend Rohrabacher-Farr through April*, Americans for Safe Access (Dec. 12, 2016), http://www.safeaccessnow.org/congress_votes_to_extend_rohrabacher_farr_through_april.

Because the Rohrabacher-Farr amendment only prohibits prosecution for states with legal medical marijuana, it likely would not extend the same protections to federal defendants asserting legalized recreational marijuana as a defense. Moreover, the court itself in *McIntosh* recognized the precarious nature of using the Rohrabacher-Farr amendment to prohibit prosecution in medical marijuana states:

> "We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to continue them. DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills."
> *McIntosh*, 833 F.3d at 1179.

Sessions and Spicer

The words of the Ninth Circuit have a much more ominous ring for cannabis entrepreneurs in light of the comments made by Sessions and Spicer. Spicer recently commented that "greater enforcement" of federal marijuana laws could be in the offing, while also seeming to signal that the Trump administration was cognizant of the benefits of medical marijuana. Madeline Conway, *Spicer: Expect to See "Greater Enforcement" of Federal Marijuana Law*, Politico (Feb. 23, 2017, 3:58 PM), http://www.politico.com/story/2017/02/federal-marijuana-enforcement-sean-spicer-235318.

Conversely, Spicer also stated that recreational marijuana was a "very, very different subject." *Id.* Meanwhile, Sessions stated that he is "definitely not a fan of expanded use of marijuana" and that states "can pass the laws they choose... [I]t does remain a violation of federal law to distribute marijuana throughout any place in the United States, whether a state legalizes it or not." Sadie Gurman & Eric Tucker, *Sessions: More Violence Around Pot than "One Would Think"*, Washington Post (Feb. 28, 2017), https://www.washingtonpost.com/politics/federal_government/sessions-more-violence-around-pot-than-one-would-think/2017/02/28/979fcb74-fd8e-11e6-9b78-824ccab94435_story.html?utm_term=.c0dd5a4870d7.

With this seeming willingness from the executive branch to step up enforcement of federal marijuana laws, it remains to be seen how Congress will react in its next appropriations bill.

As shown in *McIntosh*, the only real mechanism that Congress has developed to allow state-based legalization without touching federal prohibitions is through congressional appropriations bill riders. As such, the Trump administration would have to mobilize sympathetic members of Congress to leave out the Rohrabacher-Farr Amendment. However, even if the Rohrabacher-Farr Amendment remains in the forthcoming appropriations bill, it would do nothing to stop prosecutions of recreational marijuana users, cultivators or sellers. Legalization-minded appropriations committee members would have to push for additional language, which would likely be a hard sell given the recent comments coming from the executive branch.

Federal Authority over Intrastate Legal Marijuana

All this discussion begs the question: Where does Congress get the authority to regulate marijuana that is cultivated, sold and consumed entirely in a state where marijuana is legal under state law? Federal crimes often conjure images of "interstate" activity, but with regard to marijuana, the Supreme Court has clearly spoken that even purely intrastate marijuana is subject to federal criminal regulation. In *Gonzales*

v. Raich, the Supreme Court held that because of its "aggregate" effect on the interstate market, even purely intrastate activity is subject to regulation under the commerce clause of the Constitution. 545 U.S. 1 (2005).

Although that decision may not be disturbed in the near term, the long-term viability of the decision looks questionable in light of its articulated rationale:

> "Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere... and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."
> *Raich*, 545 U.S. at 22.

(Presumably the conservative leanings of the Court's newest member, Associate Justice Neil M. Gorsuch, would prevent an overturning of *Raich*, but Gorsuch's record on marijuana, legal in his native Colorado for medical and recreational use, is somewhat sparse. *See* Keegan Hamilton, *High Court: This is How Trump's Supreme Court Nominee Has Ruled on Legal Weed*, Vice News (Feb. 1, 2017), https://news.vice.com/story/this-is-how-trumps-supreme-court-nominee-has-ruled-on-legal-weed. Moreover, the Supreme Court did not split along liberal-conservative lines in the *Raich* decision—Justice Scalia joined Justices Kennedy, Stevens, Ginsburg, Souter and Breyer for the majority, Justice O'Connor dissented with Chief Justice Rehnquist joining, and Justice Thomas wrote his own dissent. *Raich*, 545 U.S. 1.

The two articulated reasons for the holding in *Raich* are (1) difficulty of distinction between legally and illegally grown and distributed marijuana and (2) risk of diversion into illicit markets. However, as the number of states that have legalized recreational marijuana grows, the concern over risk of diversion proportionally shrinks. As of now, eight states and the District of Columbia have legalized recreational marijuana, but it is not difficult to imagine a future where a majority of states have legalized recreational marijuana. If that were the case, the concern over "diversion" into the minority of states where it is illegal might be small enough to where the commerce clause no longer justifies federal regulation. The "difficulty of distinction" argument also might lose force the more marijuana is sold commercially. In states like Colorado, recreational marijuana is sold commercially, with the attendant labels and packaging. As more states legalize an open marketplace for marijuana, it would likely become easier to distinguish between commercially-sold, legal marijuana and illegally transported unlabeled marijuana.

Conclusion

The recent comments from the Trump administration might unsettle cannabis industry entrepreneurs, especially given the precariousness and seemingly contradictory nature of federal enforcement. However, medical cannabis entrepreneurs can take heart in the fact that the administration seems to have made a distinction between medical and recreational legal marijuana, increasing the likelihood that the Rohrabacher-Farr amendment may be renewed when the current extension expires on April 28, 2017, prohibiting federal prosecution of medical marijuana users and providers that comply with state law. Conversely, businesses in the recreational marijuana industry may be more at risk if the administration's conduct aligns with its rhetoric. However, because federal enforcement currently hinges on Congressional appropriations rider language, the future of the state-federal balance of power regarding marijuana, both medical and recreational, remains unclear.