

Marijuana Legalization: Does Congress Need to Act?

By Graham Boyd, Sarah Trumble, and Lanae Erickson Hatalsky | Published: 06/10/14

Despite a federal prohibition on marijuana possession, sale, and use, Colorado and Washington recently became the first states to enact laws legalizing the recreational use of this drug.¹ Although the Obama Administration has taken steps to attempt to deal with this evolving situation, we believe the status quo is untenable and Congress must act to provide certainty and a framework for these states moving forward. This report explains the problem and offers a solution:

- Enacting a waiver system at the federal level;
- Allowing states with sufficiently strict regulatory regimes and safeguards to act outside of federal law without fear of prosecution; and,
- Crafting these waivers with a sunset to allow policymakers to reassess these experiments after a set period of time.

This “waive but restrict” framework would provide consistency and protect public safety more effectively than either current law or the other policy proposals on the table.

The Problem

A Changing Landscape

The landscape on marijuana policy is quickly changing—“just say no” has been replaced by patients using medical marijuana in nearly half the country, decriminalization measures passing coast to coast, and a handful of states flat out legalizing the drug under state law, with more in the works. Public opinion is shifting in favor of marijuana legalization at a startling pace, as voters become increasingly open to the possibility that a regulated and taxed marijuana market could provide better outcomes and more effectively protect public safety than the traditional approach of criminalization. Legal medical marijuana use has eased pain and suffering in 22 states, 17 states have decriminalized possession of a small amount for personal use, and already two states have legalized recreational use in popular votes. Voters in Alaska and Oregon are likely to follow suit in 2014, and another half dozen states could join the legalization trend by 2016.² The days of Nancy Reagan’s drug policy are over—and the federal government cannot simply stick its head in the sand

and hope this emerging trend works itself out. The conflict between federal prohibitions on marijuana and state legalization is coming to a head, and it is doing so faster than many DC policymakers may realize.

Public support for marijuana legalization has been increasing at an astronomical rate in recent years—faster than almost any issue in American politics today, rivaled only by the landslide of support for allowing gay and lesbian couples to marry. In 1990, support for marijuana legalization stood at only 16%, but that number has more than tripled in the years since, reaching 52% in 2013.³ In Third Way's most recent national poll, 54% of voters favored putting more trust in individuals when it comes to recreational marijuana use, compared to only 40% who said we need more government ground rules.⁴ And with nearly two-thirds of Millennials favoring legalization and voters poised to directly take up the issue around the country in the coming years, the spread of legal recreational marijuana seems practically inevitable in a handful of states in the next few years.⁵

Federal Inaction Isn't Tenable

Drug law enforcement in the United States has long followed a path of “cooperative federalism,” where states and the federal government share a common goal of controlling drug use through criminalization. Federal law enforcement agents, led by the Drug Enforcement Administration (DEA), target high-level drug producers and sellers, while the far more numerous state and local police and prosecutors handle the vast majority of cases involving low-level consumers, producers, and sellers. This division of labor arises in part from the Constitution, which establishes the federalist structure, in part from the *Controlled Substances Act*, which dictates the specific elements of federal policy, and in part from Congressional funding decisions which limit the number of federal drug agents and prosecutors. But as states begin to legalize marijuana use within their borders for purposes of state law, this enforcement model has become impractical. The federal government must update its marijuana enforcement policy to ensure that states can effectively regulate marijuana use, that dispensaries will be managed by law-abiding citizens, and that these markets will not be targets for criminal activity.

If legalizing states are going to regulate effectively, they need federal consistency.

Colorado and Washington State have both set up strict state regulatory regimes for the recreational use of marijuana, but without federal cooperation—or at the very least, consistency—participants in those regimes are subject to the whims of changing administrations and unpredictably fluctuating guidance. Under federal law, all use, cultivation, and sale of marijuana are illegal and prosecutable—even if someone is adhering to state law.⁶ Current federal guidance has suggested that these state markets will not be targeted for enforcement efforts so long as certain

standards are being met, but this guidance is worth little more than a pinky promise—it provides no legal cover and could be easily changed unilaterally or even ignored by prosecutors in the current Administration or any others in the future.⁷ States need federal consistency and cooperation in order to establish strong and reliable licensing and regulatory regimes that will keep drugs out of the hands of children and criminals. The federal government’s outdated policy remains a formidable obstacle to achieving this goal and a potential barrier to state experimentation that could identify a path for new and more effective approaches to marijuana policy.

If the threat of federal prosecution exists, most legitimate business owners won’t run dispensaries—only those comfortable operating at the edge of the law will.

Anyone running a marijuana-related business operating under a state license understands that even if his or her actions may not be a target for federal action today, a future prosecutor may look back and punish the conduct—and the current guidance would be no defense. The usual Constitutional protection against *ex post facto* criminal punishment (prosecution for actions that were not illegal when they were taken) does not apply to marijuana businesses or consumers here, since the federal guidance explicitly warns that all such conduct remains illegal. So long as anyone can be prosecuted for violating federal law despite state legalization, only those who are willing to risk imprisonment will run marijuana dispensaries—and that could attract exactly the types of businesspeople we don’t want at the helm of the legal marijuana market. In order to create an orderly, safe marijuana industry—one that serves the public safety goals of protecting children and dismantling organized crime—the threat of federal law enforcement must be removed or at least suspended for a definite period of time. And since the Administration lacks the power to unilaterally provide a truly safe harbor against federal enforcement, the only solution is for Congress to act—amending the *Controlled Substances Act* to establish waivers for or otherwise exempt those who act in compliance with state-level marijuana laws in certain states from federal laws outlawing marijuana use, possession, and sale.

Forcing dispensaries to run all-cash businesses is dangerous and illogical.

Not only are sellers and consumers of legal marijuana violating federal law under the status quo—so too is any bank that accepts deposits or holds accounts from any marijuana-related business, regardless of whether it is legal in the state.⁸ This means (despite efforts described below by the Obama Administration to ameliorate the problem) that dispensaries are prohibited from holding bank accounts, using debit cards, writing checks to pay their taxes, or any another banking-related activity. As a result, dispensaries must currently operate as all-cash businesses—and criminals know it.⁹ Every inventory purchase, rent payment, employee salary, and customer transaction must be done in cash. Dispensaries in Colorado are paying taxes with shopping bags full of cash, making

them a magnet for thieves and other criminals and putting dispensaries, their employees, their customers, and their neighbors in danger.¹⁰ Regardless of how well-regulated or strictly enforced the legal marijuana market may be, unless and until it has access to banking services, it is at risk of falling victim to crime and will be forced to operate on the fringes.

Actions by the Obama Administration

Policy Prior to 2013

In the past, federal officials have focused their limited enforcement resources on growers and sellers of significant quantities of marijuana, leaving minor possession and use charges to state law enforcement. During the Bush Administration, no states had yet legalized recreational use of marijuana, but the federal government moved aggressively against medical marijuana dispensaries, regardless of state laws authorizing their existence.¹¹ Two Supreme Court cases upheld federal authority in this area.¹² Supplying marijuana to patients became a risky venture, leading to forfeited property and even prison for some medical marijuana dispensary operators and growers during the Bush Administration.¹³

As a candidate campaigning for the presidency, Barack Obama pledged to reverse the Bush Administration's aggressive policies on this front.¹⁴ Shortly after his election, the new President made good on his promise with a policy of greater federal tolerance for medical marijuana dispensaries in states where they were permitted. In 2009, Deputy Attorney General David Ogden announced a new federal policy deprioritizing enforcement against people using medical marijuana in compliance with state law.¹⁵ This announcement was widely interpreted to signal federal tolerance of producers and distributors of medical marijuana, so long as state law permitted such activities. As a result, medical marijuana dispensaries expanded rapidly in several western states.¹⁶

But that announcement was followed by a partial retrenchment and a new round of medical marijuana enforcement actions. In June 2011, Deputy Attorney General James Cole released what would become known as the First Cole Memorandum. This memo announced that the federal government was revising its enforcement policy on medical marijuana and would indeed take action against "large-scale, privately-owned industrial marijuana cultivation centers" and other similar operations, "even where those activities purport to comply with state law."¹⁷ After this policy change went into effect, federal officials took enforcement actions against medical marijuana dispensaries in states with relatively lax regulatory systems (e.g. Montana and California), while largely tolerating dispensaries operating under tight state regulations (e.g. Colorado and New Mexico).¹⁸

But after the 2012 election, when voters in both Colorado and Washington passed initiatives legalizing marijuana for recreational use, President Obama declared "we've got bigger fish to fry"

when asked to describe the federal response, and 2013 brought another set of new guidelines.¹⁹

2013 Guidelines and Current Policy

In August 2013, Deputy Attorney General Cole released what has become known as the Second Cole Memorandum, offering new guidelines for marijuana enforcement which represented a significant break from past policy. It declared that federal officials would utilize prosecutorial discretion, and that conduct falling within the regulatory framework of Colorado and Washington State would not be a priority for federal arrest, forfeiture, or criminal prosecution. At the same time, the Memorandum reiterated that possession, cultivation, and distribution of marijuana remain federal crimes, and that this new policy in no way provides affirmative protection against prosecution to those who undertake such activities. If federal officials determine that it serves their interests, they can still initiate criminal cases against any marijuana possession, production, or sale.²⁰

The Administration won't preempt state legalization laws—for now.

Attorney General Eric Holder has described the new policy as taking a “trust but verify approach” to state legalization laws.²¹ The Department of Justice has said that it will not attempt to stop the laws in Colorado and Washington from going into effect by filing preemption suits alleging they conflict with federal law at this time, but it has explicitly reserved the right to do so at any point in the future.

Federal officials won't prosecute actions legal under state law for now, unless they violate specific federal interests.

As the critical underpinning of this new policy, the Department of Justice recognized for the first time that state efforts to regulate, rather than criminalize, marijuana may actually complement federal policy goals. In delineating the bounds of its tolerance for state marijuana legalization, the Second Cole Memorandum identified a series of goals, all of which have long been embodied in the federal *Controlled Substances Act*, which are now recognized as the same potential goals and outcomes of the regulatory regimes in Colorado and Washington State:

- Preventing distribution of marijuana to minors;
- Preventing revenue from going to organized crime;
- Preventing diversion to states that have not legalized marijuana;
- Preventing commerce in other drugs;

- Preventing violence and illegal use of firearms;
- Preventing impaired driving;
- Preventing unauthorized cultivation on public lands; and,
- Preventing marijuana on federal property.

Additionally, reinforcing and arguably expanding upon the Memorandum, federal officials have issued guidance that takes an important step toward allowing financial institutions to provide some services to licensed marijuana businesses.²² The issue first arose when Deputy Attorney General Cole testified before the Senate Judiciary Committee and faced questions about the potential dangers of forcing marijuana businesses to operate as cash-only enterprises. As several Senators pointed out, federal rules currently prevent marijuana businesses from holding bank accounts, forcing them to keep large amounts of cash on hand, and thereby creating a high risk of robbery and violence. Cole declared that he would take responsibility for clearing away obstacles to marijuana businesses having access to financial services.²³ The Second Cole Memorandum and the engagement in the banking issue suggest a shift in federal policy towards a more nuanced and pragmatic policy stance on state-regulated marijuana. But without Congressional action, it is merely a band-aid solution, since it could be changed at a moment's notice and gives no guarantee of protection against prosecution, still explicitly stating that banks and marijuana businesses would be contravening federal law even by following the guidance.

The Solution: Waive but Restrict

The current federal policy is a good first step toward giving state officials room to construct a regulatory system and begin issuing licenses. But without legislation at the federal level, the participants in these newly-regulated markets will continue to face significant hurdles and uncertainty, and states will continue to be hampered in their ability to protect the public safety interests of their citizens. The next President or Attorney General could put a quick end to existing marijuana businesses and could even undertake prosecutions for past actions. In short, an exercise of prosecutorial discretion today can become a policy of prosecutorial vigor tomorrow. The federal government could also decide to change course and sue the legalizing states directly—a risk that increases each time a state gets more involved in directly regulating certain aspects of the marijuana market. This atmosphere of uncertainty and peril dissuades law-abiding businesspeople from becoming operators, discourages transparent business practices, and impedes state lawmakers who wish to crack down on mislabeled marijuana products which could threaten public safety and health. To solve these problems and create space for the states that have legalized recreational marijuana use to do it right, Congress needs to amend the *Controlled Substances Act* to establish a policy of federal non-intervention based in state waivers that carry the force of law.*

* The idea of federal waivers for states that legalize marijuana was initially suggested by Mark A.R. Kleiman, see “Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization” in the *Journal of Drug Policy Analysis*, 2013.

A Short-Term Waiver System for States that Strictly Regulate

In order to deal with the changing landscape of state laws on recreational marijuana use, Congress should amend the *Controlled Substances Act* to allow states to apply for waivers from federal marijuana enforcement law. Under this framework, no state would have automatic permission to violate federal law, but the Attorney General would have the authority to grant waivers permitting states to act outside of federal law if the state’s regulatory scheme is sufficiently stringent to protect federal interests, such as keeping drugs out of the hands of children and gangs and ensuring roadway safety. This exemption would only last for a specified period of time—perhaps three to five years—but while in effect, it would have the force of law and offer protection from any future prosecution for actions taken during the time in which the waiver applied. This structure would give federal officials the ability to ensure protection of legitimate federal interests, while also creating certainty for state officials and businesses and allowing them to operate outside the shadows.

What Would Be Required to Qualify for a Waiver:

In order for a state that has legalized marijuana to qualify for a waiver from federal law, it would have to have established a strict regulatory system to ensure that its legal marijuana market will be well-run, transparent, and safe. Furthermore, to earn a waiver, each state would have to agree to study the outcomes of their marijuana laws on a series of important metrics like youth marijuana use, rates of driving while intoxicated, diversion to other states, and prevalence of drug-related organized crime activity and share that data with the federal government. Finally, a state would have to agree to reapply for a waiver (if they were still available) once the initial waiver expires. If one is not granted, the state would either need to shutter its legal recreational marijuana market or risk future enforcement action by the federal government.

What States Would Get in Exchange:

In exchange for setting up a strict regulatory regime and tracking and sharing data on federal goals, states would receive a waiver, good for three to five years, which makes it clear that those running or regulating a licensed marijuana business in compliance with state law will not be prosecuted in real time or in the future for actions which violate federal laws against marijuana use and sale

during the time that the waiver applies. In states with waivers, federal officials would defer to the state licensing regime unless or until a marijuana-related business does something that violates other federal laws. This provision could be crafted to allow federal prosecutors to go after straw purchasers—people buying or selling marijuana on behalf of others who are not legally able to do so under state law—such as criminal enterprises or minors. And it would mimic a similar model already being used effectively by federal officials to enforce other criminal laws, including those related to firearms, across the country today.

Why Waivers Would Create Better State Regulatory Systems:

Under current law, state lawmakers, state officials, and state employees must be extraordinarily careful not to act in any way that could trigger a federal preemption lawsuit. To avoid such suits, state policymakers must avoid putting into place regulations that require any state employee to directly interact with marijuana, as doing so would create a direct conflict between state and federal law. Instead, they must do a delicate dance, attempting to craft a strict regulatory system which protects public safety and health without involving state employees too directly in its administration. If these states had an explicit waiver from federal law, they could play a more active role in protecting their citizens—for example, testing the strength of certain marijuana products to ensure they are not deceptively labeled or likely to cause overdose or even creating a state-run monopoly for growing or selling marijuana. In a newly legalized market, these interventions could mean the difference between creating a safe and orderly regulatory scheme and a free-for-all that poses dangers to children, drivers, and marijuana users alike.

Why Waivers Would Solve the Banking Problem:

Granting states waivers to act outside of federal law for a certain period of time would address the banking issues as well and allow dispensaries to stop acting as all-cash businesses. Once the Attorney General has given explicit statutory permission for state marijuana markets to operate outside of the federal prohibition on marijuana, notoriously risk-averse banking institutions will finally have the peace of mind necessary to open accounts and accept deposits from state-licensed dispensaries. This will increase the safety and transparency of state marijuana markets and ensure they can be adequately regulated, tracked, and taxed.

Alternative Policy Options are Insufficient

While many other policy options have been discussed as solutions to the conflict between federal and state marijuana laws, none of them are as functional or as effective as a “waive but restrict” system would be.

Defining federal law simply by deferring to states would ignore important federal interests and create confusion.

One suggested legislative proposal is to pass federal legislation which defers completely to state marijuana laws. While the federal government can surely withdraw entirely from a field of regulation, it is unworkable and arguably unconstitutional for the federal law enforcement decisions to rest entirely on a judgment about compliance with state law. Given the interstate market for marijuana and the widely divergent approaches to marijuana among the states, ceding all control to state laws is not an effective long-term solution. First, important federal interests are at stake in marijuana enforcement—including the eight outlined in the Second Cole Memorandum—on which federal officials legitimately claim the need to retain the authority to act. And second, all state legalization schemes are not created equal. Automatically deferring to any state law, even if it is poorly crafted, could mean that if a state legalized recreational marijuana use without incorporating limits like those suggested by Cole, federal authorities would lack any authority to act to keep drugs away from children or to stop organized crime.

Moreover, crafting a broad federal exemption based on compliance with state law breeds confusion. Who will decide what constitutes compliance with state law? To enforce the exemption, federal law enforcement officials would have to determine and eventually prove violations of state laws—something that is beyond their expertise and their purview.

The House of Representatives recently passed an amendment as part of an appropriations bill which would, if enacted, bar the DEA from taking action against medical marijuana operations which are legal under the laws of their state. Although this policy would be a positive step toward consistency compared to current law, crafting a similar provision for all recreational marijuana use (no matter how well or poorly regulated) would go too far in the direction of ceding this issue to the states, for the reasons outlined above and below.

Creating a permanent exemption from federal law is neither politically realistic nor wise in a quickly evolving landscape.

While a growing number of American voters believe that marijuana should simply be legal, many other voters and most elected leaders believe that there are serious risks and potential harms to fully legalizing the production, sale, and use of this drug. For the latter group, any openness to removing criminal penalties is premised on the promise that a robust regulatory system may be able to more effectively combat the potential harms of marijuana than the current criminal justice approach. They see Washington State and Colorado as experiments that might demonstrate a better way of dealing with marijuana, but like any experiment, they might also show that a regulatory system is unworkable or unsatisfactory at achieving society's public safety goals. In the

present political moment, any sort of exemption from federal marijuana prohibition needs to be revocable after a specified time period, in case these experiments fail. Marijuana laws and public opinion are changing so rapidly that it is advisable to take federal policy a few years at a time, rather than attempting to lock in a permanent exemption of some kind over a quickly evolving landscape.

Removing marijuana from the list of Schedule I controlled substances won't solve the problem.

Currently, marijuana is regulated as a Schedule I drug under the *Controlled Substances Act*, meaning it “has no currently accepted medical use in treatment in the United States” and is considered less medically beneficial than Schedule II drugs such as cocaine and methamphetamine.²⁴ Many people have suggested removing marijuana from the list of Schedule I controlled substances, and Attorney General Holder has suggested that he would be open to discussing that issue with Congress.²⁵ However, while it is worth having a debate about whether marijuana belongs on a list with heroin and LSD, lowering its schedule would still require a prescription for legal use under federal law—even in states where broad recreational use has been legalized.²⁶ So while reclassifying marijuana as lower than Schedule 1 would fix some issues, including paving the way for needed research around its medical uses, a conflict would still exist between what is legal under federal law versus under state law in states that have legalized recreational use. Market participants would still be at risk of prosecution, and banks would still be unwilling to do business with recreational dispensaries.

Conclusion

The next few years will bring a diversity of state approaches to marijuana. In some states, any marijuana activity will remain a crime. In others, decriminalization measures will make personal use of the drug a civil offense like a speeding ticket, subject simply to a low-level punishment like a fine rather than jail time. In many others, a limited exception for those with a medical recommendation will allow some degree of legal regulated use, production, and sale of marijuana. And in a growing number of states, marijuana use will be legal for adults, and marijuana production and sale will be legal for licensed entities. If a state wants to treat marijuana use as a crime, the federal government will continue to cooperate with efforts to ensure their criminal framework is achieving federal public safety goals. If a state creates a sufficiently strict regulatory framework that protects those same federal interests, federal officials should provide assurance that those who play by the rules will not be punished, while partnering with state officials to hold accountable those who don't. That is exactly what a “waive but restrict” approach would do.

The time for Congress to act is now. In 2016, a new president, and potentially a new party, will be

elected to the White House. If Congress has done nothing by then, a new administration could reverse the Obama guidelines, file preemption lawsuits against Colorado, Washington, and any other state that has legalized marijuana by that point, and prosecute anyone who has participated in their markets. On the other hand, a new administration could potentially go even further in the direction of federal non-intervention. If Congress doesn't act, the next President could unilaterally make major shifts in the federal government's policy towards states that have legalized marijuana—and what the next policy might look like is anyone's guess.

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