

DEMOCRACY

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The Sessions War on Marijuana

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Earlier this month, Attorney General Jeff Sessions rescinded Obama-era Department of Justice guidance regarding state-legal marijuana (or “cannabis”). The so-called Sessions Memo overruled five other memos, most notably the “Cole Memo” that de-prioritized enforcement of the federal prohibition against marijuana in states that have legalized cultivation and distribution recreationally. None of the memos have the force of law—that is, they neither prohibited prosecutions nor required U.S. Attorneys to change their decision-making in states that have legalized marijuana distribution or consumption. The Sessions Memo does, however, represent a change in priority and encourages the affected U.S. Attorneys to bring forward prosecutions that had been discouraged by the five memos that showed deference to state laws. So although the Sessions Memo did not actually alter any law, state-legal marijuana merchants and distributors face a greater chance of prosecution with the new federal position on legal weed.

The change in federal policy likely stems mostly from Sessions’s longstanding personal disdain for marijuana, rather than from either the White House or Congressional Republicans. On the campaign trail, candidate Trump voiced strong support for leaving cannabis policy liberalization to the states. And while Congress has been resistant to making bold moves in federal marijuana policy, the Republican-controlled House has defunded prosecutions of state-legal *medical* marijuana distribution, effectively prohibiting such prosecutions (without actually legalizing medical marijuana), since 2014.

This *de facto* ban on state-legal medical prosecutions was made possible by the Rohrabacher-Blumenauer Amendment, initially known as Rohrabacher-Farr when it was adopted in 2014, which is a rider to the yearly appropriations bill. Because it is not a stand-alone law, it has to be amended to every budget appropriation. The current appropriation expires February 8, and there is no guarantee that it will be attached to the final budget for this year. Given the clear position of the AG and the partisan wrangling over this year’s budget that has already led to a government shutdown, the future of the popular amendment is uncertain.

If the amendment is indeed not renewed in the forthcoming budget deal, the Sessions Memo could have a much broader effect. Only eight states have legalized and taxed cannabis for recreational purposes, while another 21 other states have medical marijuana regimes. While medical marijuana patients will not be targeted by the DOJ, they may put at risk of losing access to their medication.

Medical cannabis is used to treat a variety of ailments, including chronic pain, chemotherapy-induced appetite suppression, and **epileptic seizures**. There is statistical evidence, though not

conclusive, that access to marijuana may have an effect on opioid mortality as well. A study published in 2014 in the *Journal of American Medicine* noted that in states which gave residents legal access to cannabis had nearly 25 percent fewer opioid deaths than states retaining prohibition regimes. Whether marijuana explains none, some, or a great deal of that difference, increasing any likelihood of patients moving to opioids if their cannabis is taken away should be unthinkable during this opioid crisis. If the Trump Administration were sincere about their desire to end the crisis, they would take a closer look at cannabis policy.

Despite the many problems that may come from the Sessions Memo, the overall impact is not likely to be as widespread as some may fear. The federal government simply does not have the resources to stop the commerce of marijuana everywhere it is legal. U.S. Attorneys may, if they choose, disrupt legal cannabis markets by sending cease and desist letters to operators and their landlords in the relevant districts, threatening legal action, and sending a chilling effect to others. Raids on businesses are also possible and would likewise encourage other businesses to close-up shop. These consequences would be very serious for the proprietors and employees of these businesses.

However, legal consumers will not face significant legal threat from the DOJ, as the federal government has always left street-level enforcement to state and local officials. Moreover, it is unclear how many U.S. Attorneys are truly eager to divert resources to cannabis prosecutions rather than focusing on crimes such as fraud, interstate gang enforcement, domestic terrorism, and other urgent matters of federal interest.

Still, the risk is not zero. Federal forfeiture law may incentivize U.S. Attorneys to go after cannabis dispensaries because they are often cash-only businesses—as banks have been reluctant to do business with many of them, and will be even less inclined to do so after the Sessions Memo—making interdiction profitable for the government. State legality is not a defense in federal court, so a federal indictment is virtually a guarantee of a conviction and may lead to prison. It is a cruel irony, however, that demonstrating compliance with state cannabis laws may be used against business owners to convict them of federal crimes.

The incredibly wide prosecutorial discretion of U.S. Attorneys may be a saving grace for business owners in some federal districts, and may be a curse for others. If the ambitions of those attorneys include state-wide office, as former U.S. Attorneys have become senators and governors, they may look past this particular whim of General Sessions so as to not upset their future constituencies. The other side of that coin, of course, is showing deference to the politics and politicians of the moment. Thus, the nation's cannabis merchants and dispensaries must wait to see what happens next.

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