

Sessions' reversal of marijuana policy brings fury from both parties

Kate Irby

January 4, 2018

In rescinding Thursday an Obama-era policy that paved the way for states to legalize marijuana, Attorney General Jeff Sessions triggered a hail of criticism from lawmakers on the left and right who took to the Senate floor, Twitter, Facebook and any other platform they could find to make their fury felt.

Sessions' new policy will allow federal prosecutors in states where pot is legal to decide how to enforce the federal ban on marijuana sale or possession. But he made the announcement just days after the recreational marijuana market opened in California, sending the state into turmoil. Many states have legalized some form of medical marijuana, and a handful have legalized recreational use of the drug.

Under former President Barack Obama, the Department of Justice indicated to states in 2013 that while marijuana remained illegal under U.S. law, federal law enforcement officials would not interfere in states that chose to legalize cannabis as long as they hewed to certain restrictions such as barring minors from being able to buy it and prohibiting transport of the drug into states where it wasn't legal. That memo is what Sessions rescinded Thursday.

“It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission,” Sessions said in a statement. “Therefore, today’s memo on federal marijuana enforcement simply directs all U.S. Attorneys to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country.”

It's still too early to predict the practical impact of the announcement on the industry, said Ames Grawert, an attorney in the Brennan Center's Justice Program, but “this is going to have a

significant chilling effect,” he ventured. “These businesses have always operated with uncertainty, rescinding this policy will make that worse. This could stop the California market from ever getting off the ground, and the referendum won’t have the effect that California voters indicated they wanted,” Grawert said.

Results from the 2016 election brought about new rules on the use of recreational and medicinal marijuana in several states, with more than half now allowing for the latter. Federal government leaders including president-elect Donald Trump have voiced their opinion on the changing state of mind around marijuana. Is this the beginning of the end of marijuana prohibition?

Cristina Rayas McClatchy

Some pot companies had already lost 30 percent or more of their stock value hours after the announcement was made, according to New Frontier Data. Overall, publicly traded cannabis companies were down about 15 percent since noon on Thursday.

The announcement likely will lead to a hodgepodge of enforcement procedures across the country and even within the same state; some U.S. attorneys could choose to devote significant resources to a crackdown, while others may focus on different priorities. But Sessions has a strong hand in deciding who is named to those jobs (subject to Senate confirmation), and he has likely assembled a team of federal prosecutors whose views align with his in states where marijuana has been legalized, according to former U.S. Attorney for the District of Utah Brett Tolman.

“It is a chain of command organization, and policy is set at the top and followed down below,” said Tolman, who was appointed in 2006 under former President George W. Bush. “As a U.S. attorney you can choose which cases to pursue, but this is also going to hit the (Drug Enforcement Administration) and the FBI too, and pressure will go up, and the more cases you have the better budget you’re going to get.”

Additionally, Tolman said it’s common as a U.S. attorney to receive private guidance from the Justice Department to be more lenient or aggressive on certain crimes.

“Do you think the guidance on this will be more lenient or tough?” Tolman said. “I think we already know the answer to that.”

Sarah Huckabee Sanders, White House spokeswoman, said Thursday that President Donald Trump supports enforcing federal law, despite comments he made on the campaign trail that he believed the issue should be left to the states.

Just Wednesday, Sessions announced the appointment of 17 interim U.S. attorneys, including in districts in Nevada, California and Washington – all states where pot is legal. Grawert expressed doubt that the timing of the two announcements and California’s recent market opening were coincidental – suggesting Sessions wanted to deal a blow to a potentially huge pot market before it could get up and running.

Arthur Rizer, a former trial attorney with the Justice Department, primarily serving as a federal prosecutor with the Narcotic and Dangerous Drug Section, and Jonathan Blanks, a research

associate in Cato's Project on Criminal Justice, agreed that dispensaries of recreational pot may be most threatened by DOJ's changed policy. U.S. attorneys are unlikely to target users simply for possession, they said, and medical marijuana dispensaries aren't at the top of the list.

"The problem with these recreational dispensaries is they've had to register and show compliance, so they've provided evidence that they have committed a federal crime," Blanks said.

Rizer, who worked at the Justice Department from 2005 to 2014, said even before states started legalizing marijuana federal prosecutors would only go after the "big dogs."

"Most of the guys on the ground, their hearts are not into pot," Rizer said. "I wouldn't even take those cases if it didn't involve 500 pounds of pot, at least."

But Tolman said it's not that simple – as an assistant U.S. attorney in Utah, he said one of his cases involved a defendant who had only a small amount of methamphetamine, but he was charged as a major dealer. Defining what is a low-level crime under the law isn't always clear, he said.

"It's incredibly easy to take someone who is not a high-risk dealer and charge them as though they are," Tolman said. "Then they're placed in a system with mandatory minimums, and end up serving long sentences for what you and I would probably consider a low-level crime."

House Democratic leader Nancy Pelosi of California quickly condemned the attorney general's action, saying in a statement that it "bulldozes over the will of the American people and insults the democratic process."

"Democrats urge Attorney General Sessions to begin the New Year with a commitment to prosecute the real crimes devastating our nation, not to waste precious time and resources waging a pointless, unjust war against innocent Americans," Pelosi said.

Indeed, public support for the legalization of marijuana is at record highs, with 64 percent saying they believe it should be legal in an October Gallup poll. As of January 2018, recreational marijuana is legal in Alaska, California, Colorado, the District of Columbia, Maine, Nevada, Oregon and Washington state. It will become legal in Massachusetts in July. Medical marijuana is legal in 29 states and D.C.

Burbank, California-area Rep. Adam Schiff, the ranking member on the House Intelligence Committee, tweeted, "I believe the hands-off policy should be reinstated, by Congressional action if necessary." California Lt. Governor Gavin Newsom said in a statement that California officials would "pursue all legal, legislative and political options to protect its reforms and its rights as a state."

Pelosi and Schiff were part of a loud chorus of congressional critics – Republican as well as Democrat – who bemoaned the move as wasteful and misguided. Sessions' decision infuriated a number of congressional Republicans, many from states that have legalized some use of marijuana, and none seemed as angry as Colorado Sen. Cory Gardner, the chairman of Senate

Republicans' campaign committee, who threatened to block DOJ nominees until Sessions reconsidered.

In fiery remarks on the Senate floor Thursday morning, Gardner accused Sessions of going back on promises he'd made during his confirmation hearings, as well as those of then-presidential candidate Donald Trump when he campaigned in Colorado.

Sen. Lisa Murkowski, R-AK, said she had "repeatedly discouraged" Sessions from taking the action and asked that he work with the states and Congress to address his concerns, and Rep. Carlos Curbelo, R-Fla., called for Congress to pass legislation to clarify states' rights.

"@jeffsessions confirms that he has no respect for the Tenth Amendment of the Constitution and no respect for over 70 percent of Floridians who voted to legalize #MedicalMarijuana," Curbelo said via Twitter. "It's time for Congress to pass meaningful legislation on this issue that honors states' rights."

Rep. Matt Gaetz, R-Fla., managed to work Hillary Clinton into his critique: "Dear @jeffsessions - Prosecute Hillary Clinton, not medical marijuana businesses and patients!"

Rizer said there is some good news for pot advocates. First, investigators will likely have to build cases from scratch, meaning it will be a while before any charges are filed against dispensaries operating legally under state law. Second, regardless of whether Sessions' eventual goal is to shut down the marijuana industry, "he just can't, they don't have the resources."

Federal penalties for simple possession of marijuana include jail time of not more than one year and up to \$1,000 in fines. Possession of 100 or more cannabis plants with intent to distribute brings a mandatory minimum sentence of five years in prison, while 1,000 or more plants or 1,000 kilograms of pot triggers a mandatory minimum of 10 years in prison.