



Tolerating Pot With a Frown

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Last month, 296 days after voters in Colorado and Washington decided to legalize marijuana, the U.S. Justice Department responded with a memo that leans toward accommodation rather than confrontation. Last week, testifying before the Senate Judiciary Committee, the author of that memo, Deputy Attorney General James Cole, explained why the feds decided to live with legalization: They had no viable way to stop it.

Pot prohibitionists had urged the Justice Department to file a lawsuit aimed at pre-empting the new marijuana laws under the Controlled Substances Act (CSA). But even if we accept the excessively generous reading of the power to regulate interstate commerce that allows continued enforcement of the federal ban on marijuana in states that have legalized it, the CSA limits pre-emption to situations where there is "a positive conflict" between state and federal law "so that the two cannot consistently stand together."

As Cole explained, states do not create such a conflict merely by choosing not to punish marijuana cultivation, possession, and distribution, since that does not stop the federal government from enforcing its own ban. "It would be a very challenging lawsuit to bring to pre-empt the states' marijuana laws," he said.

Cole suggested the Justice Department would be on firmer ground if it sought to overturn the regulations that Colorado and Washington have written for marijuana growers and sellers, presumably because those rules suggest official approval. That's debatable.

As Vanderbilt University law professor Robert Mikos explains in a Cato Institute paper published last December, "a positive conflict would seem to arise anytime a state engages in, or requires others to engage in, conduct or inaction that violates the CSA." If state officials supplied medical marijuana to patients, for example, they would be violating the CSA, and the law establishing that program would be pre-empted.

But specifying the conditions for exemption from state penalties does not require anyone to violate the CSA. Mikos concludes that Congress "has left [states] free to regulate marijuana, so long as their regulations do not positively conflict with the CSA."

Even if the Justice Department could prevent Colorado and Washington from licensing and regulating marijuana businesses, Cole said, that outcome would not necessarily be desirable,

since it would leave the industry legal but unregulated. Still, he said, “we reserve that right to pre-empt” should state regulation prove to be insufficiently strict.

Since Cole concedes litigation would be iffy at best, that seems like an empty threat. More likely is a crackdown featuring threats of prosecution and forfeiture against cannabusinesses and their landlords.

It would not be hard for U.S. attorneys to justify targeting state-legal growers and sellers, given the vagueness of the criteria Cole outlined for judging the effectiveness of state regulation. He listed eight problems that states will be expected to help prevent: sales to minors, diversion to other states, distribution of other drugs, cultivation on public lands, possession on federal property, violence or "use of firearms," the flow of revenue to "criminal enterprises," and "adverse public health consequences" such as drugged driving.

Just in case those "enforcement priorities" do not leave enough leeway for prosecution, Cole's memo adds that "nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves [sic] an important federal interest." In short, the feds will prosecute state-approved growers and sellers whenever they think they have a good reason. No wonder several U.S. attorneys said the Cole memo would not affect their work.

But prosecution, like litigation, could make matters worse, even from a prohibitionist perspective. Should the Justice Department succeed in shutting down licensed and regulated suppliers, unlicensed and unregulated suppliers will be waiting in the wings: home growers in Colorado and medical marijuana collectives in Washington. Given the lack of appealing options, maybe it's not surprising that the federal response to marijuana legalization was in the oven so long yet still seems half-baked.