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A marijuana update: federal law vs. state power

By: Bruce Ramsey – April 24, 2013

Will U. S. Attorney General Eric Holder clamp down on Washington and Colorado for legalizing marijuana? On April 18, Holder made the news by saying he would consider “the impact on children.” That means he’ll listen to the prohibition side. He also said, “We are certainly going to enforce federal law.” Still, these are signals only, and there was one on the other side in December by President Obama. We really don’t know what our supposedly liberal administration in Washington, D.C., is going to do.

On the same day I put the question to Washington’s state attorney general, Bob Ferguson. He and Gov. Jay Inslee, both Democrats, won in the same election—Nov. 2012—as marijuana did, and they had been to Washington, D.C., to try to explain how reasonable the state intends to be in implementing that law.

Ferguson said he was not annoyed at the slow pace of the federal response. “The more time they take the better it is for us, on a lot of levels,” he said. But if the news does turn out bad for our state’s social experiment, Ferguson said, and the Justice Department sues to block Initiative 502, “My office would fight that. We are most assuredly not at the mercy of the federal government.”

Sometimes it seems as if the state is. In 2011, U.S. attorneys general in Seattle and Spokane wrote to Gov. Chris Gregoire, warning that if she signed Sen. Jeanne Kohl-Welles’ bill directing the state to license medical marijuana businesses, the officials doing the licensing would be liable for federal prosecution. Gregoire vetoed large parts of that bill because of those letters, and there was a crackdown on dispensaries in Spokane and other cities.

In November the voters went further, and passed Initiative 502. What legal argument would our attorney general, who did not support 502, offer in its defense? Ferguson would not say. He says he has a team working on the arguments, but would not say how big it is. He is holding his cards close to his chest, which is probably a good thing. Others can talk, if he won’t. There are several analyses out on the state-federal question. One by the Congressional Research Service was put out in November. Another by the pro-legalization Cato Institute came out in December. The gist of what they say is that the federal government has the legal authority to ban marijuana but not to “commandeer” the states into enforcing its ban.

Ilya Shapiro, a legal scholar at Cato, said at a meeting in Seattle of the Federalist Society April 23 that it is probably all right for states to license and regulate marijuana suppliers. “I don’t see the federal government trying to criminally prosecute state officials,” he said. “That would be a constitutional crisis.” But he said the state cannot own or operate a marijuana business, including a marijuana testing lab. He said the state can tax marijuana, but that a general sales or business tax is on safer ground. The proceeds of a marijuana-only tax might be vulnerable to federal seizure.

The bottom line is that the law is still contradictory, but the politics are favorable to what Washington and other states are doing. “The states—and not the federal government—have already won the war over medical marijuana,” says the Cato report. The states have not won the war over general adult use, but so far, no one is stopping Colorado and Washington. A final fact: 99 percent of all marijuana prosecutions nationwide are state or local. End them, and you have a regime in which the substance is officially banned, but that if you follow state law and are not big enough to be noticed, you will be left alone.