

The Past—and Future—of Federal Marijuana Enforcement



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In the last two decades, state laws and public opinion on marijuana have undergone a startling transformation. When President George W. Bush was sworn into office in 2000, only eight states in the nation had legalized marijuana for medical use and not a single one had legalized its recreational use. Today there are 29 states where medical marijuana is legal, eight of which also allow adults to use it recreationally, and another 17 who allow limited use of marijuana extracts to treat certain medical conditions. All in all, 46 states and the District of Columbia have legalized the use of some form of marijuana. And public opinion has shifted at least as quickly, becoming significantly more supportive of legalization across regions, political parties, and demographic groups. Currently 88% of Americans support legalizing the use of marijuana for medical purposes and 61% support legalizing adult recreational use.¹ But despite this rapid evolution, federal law has not changed one bit. Marijuana remains a prohibited Schedule I drug under the 1970 federal *Controlled Substances Act*, and anyone who sells, uses, or possesses it anywhere in the country is subject to prosecution by federal law enforcement agents.

While federal raids on marijuana growers and dispensaries may seem like distant memories, under both of the last Presidential Administrations, the federal government regularly prosecuted those in the marijuana industry—even in states where it was legal and where businesses were in full compliance with state laws. It would be a mistake to believe that it couldn't happen again under the current President, given the histories of the two before him—and the personnel he has chosen to head up his law enforcement arm.

Under the George W. Bush Administration, A Culture of Fear

President George W. Bush used every lever at his disposal to enforce the federal ban on marijuana. In fact, during his time in office, his Justice Department argued and won two Supreme Court cases strengthening federal authority to prohibit marijuana use. In 2001, the Supreme Court upheld the broad application of the *Controlled Substances Act* in *U.S. v. Oakland Cannabis Buyers' Coop*, ruling that medical need does not create an exception to federal marijuana prohibition.² And in 2005's *Gonzalez v. Raich* a few years later, the Court affirmed the federal government's power to enforce that prohibition, even in states that had legalized medical marijuana.³ Together, these cases mean that in the eyes of federal law, medical marijuana is no different—nor less illegal—than marijuana used for any other purpose, and there is nothing that states can do to protect their patients if federal agents come knocking. While the states that have legalized medical marijuana can bar state and local officials from arresting or charging a person with a marijuana-related offense, the federal government still has free reign to crack down on those violating the federal ban on marijuana use at any time. And during the Bush Administration, they regularly did.

Through the Department of Justice, the Drug Enforcement Administration (DEA), and the vehemently anti-marijuana Drug Czar John Walters, the Bush Administration aggressively enforced the federal prohibition on marijuana—and created a

culture of fear in the states and on the ground. Despite 13 states legalizing medical marijuana by the time Bush left office, their laws could not provide a safe harbor from federal raids or prosecution. No one was safe, and everyone knew it. From 2001–2003, the federal government raided over 100 state-legal medical marijuana growers and dispensaries.⁴ In 2006 alone, DEA agents arrested 594 people on marijuana charges in California, which had voted to legalize medical marijuana a decade earlier.⁵ Business owners in full compliance with state laws saw their assets seized, and even if they were acquitted of all charges, any marijuana-related property confiscated by law enforcement was not returned.

During this time period, medical marijuana businesses were often subject to heavily-armed raids and their proprietors charged with serious federal crimes ranging from distribution and cultivation to money laundering. With federal mandatory minimum sentences for distribution or cultivation ranging from five to 10 years, there were serious risks associated with operating a state-legal medical marijuana business during the Bush Administration.⁶ One estimate indicates that throughout the Bush era, 163 federal criminal cases were brought against individuals either using medical marijuana or involved in medical marijuana businesses in states where doing so was legal.⁷

The Obama Administration Brings Hope But Only A Little Change

President Barack Obama's election in 2008 brought with it an optimism that a new federal policy would drastically reduce marijuana enforcement. And when President Obama stated shortly after being elected that the federal government would not target actors in the marijuana industry who were abiding by state laws, the industry took it as a sign that they were free to expand. But as the industry grew rapidly, the Administration changed course and began to target large-scale growers and dispensaries in states with lax laws that they believed insufficiently regulated the legal market. Thus, at least in the early years of his presidency, enforcement

actually *increased* under Obama compared to his predecessor. During his first term, 153 federal criminal cases were brought against people involved with the medical marijuana industry — nearly as many as were brought during the entire Bush Presidency.⁸

But by 2012, the national context had shifted significantly. That year, Colorado and Washington became the very first states in the country to legalize the recreational use of marijuana by popular vote. And another seven states had legalized medical marijuana since President Obama's inauguration. Given this new landscape, the Obama Administration shifted priorities. Citing federal prosecutorial discretion, the Administration announced in 2013 that it would no longer enforce the federal prohibition on marijuana in states where it was legal—so long as market actors were in compliance with state laws and those laws took into account important federal interests, like keeping marijuana away from kids, preventing its diversion across state lines, and keeping the profits out of the hands of gangs and criminals. Under this policy, bad actors—those failing to adhere to their states' laws or abusing the system—rightly remain subject to federal (and joint federal-state) enforcement.

Shortly thereafter, Congress attached what's known as the "Rohrabacher-Farr Amendment" to a government spending bill, prohibiting the Department of Justice from spending money to enforce the federal marijuana ban in states where medical marijuana is legal. But this *détente*—based in both Administration policy and legislation—is not permanent.

With President Donald Trump, A New Sheriff Is In Town

Donald Trump and his Administration have now inherited the vast enforcement powers that allowed the federal government to prosecute, incarcerate, or leave with nothing hundreds of business owners complying with their state laws. The prosecutorial discretion that has protected state-legal actors for the last four years could be overturned overnight by

President Trump, and the clock is ticking down on the Rohrabacher-Farr limitation.

While President Trump expressed support on the campaign trail for allowing medical marijuana to remain a state issue, members of his Administration have already signaled intentions to flex their muscles and ramp up federal enforcement of the marijuana ban. In February, White House Press Secretary Sean Spicer said, “there is still a federal law that we need to abide by when it comes to recreational marijuana and drugs of that nature” and suggested “you will see greater enforcement of it.”⁹ Attorney General Jeff Sessions—one of the most hardline anti-marijuana members of Congress when he served in the Senate—has said that “good people don’t smoke marijuana” and that marijuana “is only slightly less awful than heroin.” He has created a task force that is reviewing current Department of Justice policies on marijuana, including the use of prosecutorial discretion that protects states where marijuana use is legal.¹⁰

While the Rohrabacher-Farr Amendment currently limits the federal government’s ability to crack down on medical marijuana, it only applies through September. And in a potentially ominous move never made by Obama, earlier this month President Trump added a signing statement to that amendment. In it, he reserves his right to “take care that the laws be faithfully executed,” indicating that the Administration may disagree with Congress on this issue and be willing to ignore attempts to tie its hands on enforcement.¹¹ Furthermore, nothing in current law holds the Trump Administration back from raiding recreational marijuana businesses right now in the eight states that have legalized recreational use.

Conclusion

Despite the fact that more than nine-tenths of the states have legalized marijuana in some form, it remains illegal under federal law for any purpose. Every state-legal marijuana business is at risk of being raided and every business owner, consumer, and patient is at risk of

prosecution. Widespread support for legalization in public opinion polls is not an admissible defense in federal court.

If the last 15-plus years are any indication, federal enforcement is no small threat to businesses fully complying with state laws. Those who have become complacent in recent years may be facing a rude awakening. A new Administration bent on “law and order” is in office now, and there is nothing the states can do to protect themselves or their marijuana markets. Only Congress can serve as an effective bulwark against federal enforcement, either by amending budget bills with stopgap amendments to rein in the Administration, or by passing legislation to address the conflicts between state and federal marijuana laws once and for all.

TOPICS

MARIJUANA 23

END NOTES

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