



What Does Former Attorney General Sessions' Marijuana Enforcement Memo Mean in Practice?

Although most states have changed their laws to allow medical marijuana, and nine regulate marijuana for adults' use,[\[1\]](#) federal law continues to prohibit nearly all forms of marijuana-related activity. Yet in recent years, well-regulated, state-legal marijuana businesses have not been the subject of federal enforcement actions. A 2013 Justice Department memo — the Cole Memo — directed federal law enforcement away from targeting state-legal marijuana businesses and individuals, except when one of eight federal priorities was implicated.[\[2\]](#)

On January 4, 2018, then-U.S. Attorney General Jeff Sessions rescinded the Cole Memo. In a letter to federal prosecutors, he said, "In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions."[\[3\]](#)

This deeply unpopular decision sparked bipartisan outcry.[\[4\]](#) More than 70% of Americans[\[5\]](#) — including most Republicans — believe the federal government should not interfere in states where marijuana is legal for medicine and/or for adults.

Will state laws legalizing medical or adult-use marijuana be nullified?

No. The federal government cannot force a state to criminalize marijuana or anything else.[\[6\]](#) Under our federalist system of government, the federal government cannot commandeer a state's resources and require it to penalize conduct.[\[7\]](#) Congress can *incentivize* states to criminalize conduct by making federal funding contingent on states' actions,[\[8\]](#) but there has been no effort to do so regarding states' marijuana laws.

Will existing medical marijuana businesses be raided or shut down?

Probably not — at least as long as Congress continues to include the Rohrabacher-Farr Amendment in annual appropriations bills. Congress has included language in its criminal justice appropriations budgets since December 2014 that says, "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [medical marijuana states] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

The Justice Department continued pursuing some cases in California, where the medical marijuana system was under-regulated, arguing Congress had prevented actions against states — not individuals. In August 2016, a Ninth Circuit panel disagreed, ruling that the rider prevented appropriated funds from being used to target people who fully complied with state medical marijuana laws.[\[9\]](#)

The current appropriations rider expires January 19, 2018.[\[10\]](#) If Congress fails to include it, U.S. attorneys (federal prosecutors) would each decide whether to make the unpopular and counterproductive decision to target medical marijuana businesses.

Does this mean some existing adult-use businesses will be raided or shut down?

It is not clear. The decision to use limited federal law enforcement resources targeting adult-use marijuana businesses now lies with federal prosecutors and law enforcement. However, it has been many months since Sessions' took that action, and we are not aware of any raids, prosecutions, or injunctions against state-legal businesses. In addition, Sessions is no longer attorney general.

It is also possible that the Justice Department will reverse itself in the face of pressure and new leadership. States cannot be prevented from legalizing marijuana, and heavy-handed enforcement will simply make it harder to control marijuana. During the Obama administration, the Justice Department's 2009 Ogden Memo indicated a hands-off policy on medical marijuana. In 2011, a new memo indicated the federal government would crack down on medical marijuana businesses, but well-regulated, licensed businesses were not targeted. Then in 2013, the Cole Memo formalized a policy of non-intervention in both medical and adult-use marijuana in most cases.

What does this mean for states considering adult-use marijuana regulation laws?

States will continue to move forward, changing their laws to treat marijuana similarly to alcohol. As mentioned, the federal government cannot force a state to criminalize marijuana, and now the benefits of legalization are becoming clear. There has been strong bipartisan opposition to the rescission of the Cole Memo, and it is very possible that Congress takes action to protect state-legal cannabis businesses. Given the growing national public support for legalization, states should operate under the assumption that federal policy will not prevent the functioning of state-legal marijuana businesses. Therefore, they should continue to consider, craft, and enact laws that legalize, regulate, and tax cannabis at the state level.

What can be done to protect state-legal marijuana activities?

Congress should maintain the medical marijuana amendment in its spending bills, and it should also approve a similar adult-use (also known as "recreational") rider, which would extend the policy of non-interference to adult use. Congress should also change federal law and stop criminalizing state-legal marijuana activity by passing either H.R. 975, the Respect State Marijuana Laws Act, or S. 776, the Marijuana Revenue and Regulation Act.

[1] See <https://www.marijuanas.space/wp-content/uploads/2018/11/Marijuana-Map-November-2018.pdf> and www.mpp.org/issues/medical-marijuana/medical-marijuana-protections-50-states/.

[2] www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

[3] justice.gov/opa/press-release/file/1022196/download?utm_medium=email&utm_source=govdelivery

[4] Carl Husle, "Trump's New Policy on Marijuana Draws Bipartisan Fire," *New York Times*, January 5, 2018.

[5] "Marijuana legalization support at all-time high," *CBS News*, April 20, 2017.

[6] For more information, see MPP's "Interplay of Federal Laws and State Medical Marijuana Laws."

[7] See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992), *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("the structure and limitations of federalism ... allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.")

[8] In 1984, Congress passed the National Minimum Drinking Age Act, which made federal highway funds contingent on states prohibiting people under 21 from drinking alcohol.

[9] *United States v. McIntosh*, Case No. 15-71179 (9th Cir., 2016)

[10] Alex Pasquariello, "Trump signs stopgap spending bill extending federal medical marijuana protections a few more weeks," *The Cannabist*, December 22, 2017. <http://dpo.st/2Cwqj92>