

Essays

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Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization

Abstract: Passage of marijuana-legalization initiatives in Colorado and Washington poses a problem for the federal government: marijuana remains illegal under federal law, but the federal government lacks the capacity to fully enforce that law without state and local cooperation. Complete deference to state legalization would put each state's cannabis policy at the mercy of its neighbors'. A system of legislatively-authorized policy waivers would allow controlled exploration of alternative systems of control. In the absence of such authorization, the executive branch could use existing authority to craft cooperative agreements with the states intended to confine the effects of each state's new policies within its own borders.

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Background

Passage of marijuana-legalization initiatives in Colorado and Washington (Healy 2012) poses a policy problem for the federal government, since marijuana remains illegal under federal law.¹ (Medical-marijuana laws pose a similar challenge.)

The constitutional validity of the federal law is not in doubt; the Supreme Court ruling in *Gonzalez v. Raich* (545 U.S. 1, 2005) reaffirmed the supremacy of federal law even for purely intra-state activity for medical purposes. A variety of federal laws criminalize actions that state laws do not touch (e.g. bribery of a foreign official) and that situation is not regarded as problematic.

¹ Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

What distinguishes the marijuana issue from foreign bribery is the active engagement of state officials in taxing and regulating actions that violate federal law. When a state-chartered corporation bribes a foreign official, it does not get a state license to do so. Like the current medical-marijuana laws, state-level cannabis legalization puts the states in the anomalous position of trying to tax and regulate actions that are federal felonies. How that comports with the combination of the Supremacy Clause and the constitutional provision requiring state officials to take an oath to uphold the Constitution remains to be determined. Fairly clearly, states could not choose to enter into the cannabis trade themselves, since this would involve their officials in “direct conflict” with the Controlled Substances Act (CSA) (Mikos 2012).

The initial federal approach to the new situation has been hesitant; requests from state officials for clarification have gone unanswered, except for the statement that the CSA remains in force (Durkan 2012). President Obama, in a televised interview, posed the problem as how to reconcile the ban on marijuana embodied in the CSA with the new state laws (ABC News 2012).

In legalizing cannabis at the state level, the voters in Colorado and Washington have acted on a policy preference that has substantial, though not overwhelming, support nation-wide (Frank Newport 2012; Galston and Dionne 2013). They have also offered the rest of the country the chance to gain vicarious evidence about the actual consequences of marijuana legalization: consequences about which advocates and opponents have firm and opposite convictions – largely unsupported by evidence – while the scholarly community remains in doubt. If it were possible, as the President suggested, to reconcile federal and state laws in this regard, that would both preserve comity and allow the “laboratories of the states” to create new knowledge about the actual consequences of alternative choices. What is the relationship between marijuana price under legalization and the level of problem use, or the initiation rate among juveniles? What would be the impact on traffic safety? On alcohol abuse? None of those questions currently has a convincing answer – in part for the simple reason that no modern industrial society has ever tried true legalization. (The Dutch “coffeeshop” system and California “medical dispensary” system come closest, but growers in the Netherlands, and both growers and retailers in California, face legal risks, keeping prices high.)

Options for accommodation

Federal accommodation to state-level experiments with cannabis legalization could take the form of administrative action or of legislation. Discussion to date

has focused on the informal or semi-formal use of administrative discretion or on legislative action commanding the Executive to defer to state actions with respect to cannabis. Two additional options have received less attention: formalizing the exercise of administrative discretion through binding agreements with the states, as permitted by the CSA, and legislation to permit, but not command, the Executive to permit cannabis-legalization experiments under agreed conditions: what will be called here “cannabis policy waivers.”

Informal administrative discretion

One approach to reconciling federal actions with state-level cannabis legalization would be the stance initially taken by the Administration with respect to the “medical” marijuana systems in many states: the exercise of prosecutorial discretion to de-emphasize cases against small-scale activity in compliance with state law (though still formally banned by federal law) (Barrett 2009). This approach was embodied in what has come to be known as the “Ogden Memo” (Ogden 2009). But, as that experience has shown (Hoeffel 2011), such an approach can create great ambiguity about who is, and who is not, in the sights of federal prosecutors, and can lead to boundary-pushing by the industry, with a relatively few participants finding themselves unexpectedly facing long federal prison terms for actions in accord with state law. Even if the prosecutorial guidance were explicit and clear, it could not be made binding on a future administration; every participant in the industry would face the risk of federal prosecution should the political winds shift. Such policy ambiguity also complicates the work of state-level lawmakers and regulators.

The Congress could endorse such discretion through a “sense-of-the-Congress” resolution, or even command its exercise (in the short term) with a “no-funds” rider forbidding the use of appropriated monies to prosecute marijuana cases where the underlying activity is consistent with state law, would leave industry participants legally vulnerable for currently protected actions should the rider not be extended in some future year (Eddy 2010).

Formalizing administrative discretion: cooperative enforcement agreements

The vast bulk of drug law enforcement is carried out by state and local, rather than federal, authorities. That is especially true for cannabis, where the federal effort is concentrated on relatively high-level dealing and the federal

government makes fewer than 10% of the arrests for growing or selling and an even smaller fraction of arrests for mere possession.

Accordingly, the CSA² provides that:

The Attorney General ***shall cooperate*** with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is ***authorized*** to ...

notwithstanding any other provision of law, enter into ***contractual agreements*** with State and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this chapter. *[emphasis added]*

Note the mix of mandatory and permissive language. The Attorney General is commanded to cooperate and authorized to enter into contractual cooperation agreements “notwithstanding any other provision of law.” Whether this authority could extend to an agreement *not to* enforce the federal law under specified circumstances remains an open question. But there is a completely straightforward argument to be made that such agreements could advance the cause of “suppressing the abuse of controlled substances”; if Colorado or Washington were to cease the enforcement of the laws against unlicensed cannabis production and against sale for shipment out of state, the federal government would find it difficult – perhaps impossible – to close the resulting gap and prevent an explosion of exports, perhaps leading to a national collapse in cannabis prices.³ Thus, a cooperative agreement binding the state and its localities to vigorous enforcement against exports in return for federal acquiescence in intra-state sales regulated and taxed under state law would plausibly advance the purposes of the Act better than any alternative available to the Attorney General.

A less explicit form of such an agreement might list joint enforcement priorities in order, leaving state-legal activities off the list or placing them at its end.

Either version of the written-agreement approach would have substantial advantages, in terms of certainty for state officials and industry participants, over semi-formalized administrative discretion. It might also do more to encourage vigorous state efforts to suppress production and sale for sales out of state than could be accomplished with a nod and a wink.

To the immediate objection that the Executive Branch – charged by the Constitution with the “faithful execution” of the laws – has no authority to acquiesce in the violation of some of those laws, there is an equally immediate rejoinder; those laws are now being violated and will continue to be violated, in ways the Executive is

² 21 U.S.C. Sec. 873 (a); thanks to Eric Sterling of the Criminal Justice Policy Foundation for bringing the significance of this section to my attention.

³ See calculations in Caulkins and Bond (2012).

practically powerless to prevent in any case and still more powerless without the active engagement of state and local enforcement agencies. If “the abuse of controlled substances” can be more effectively suppressed with cooperative agreements than without them, then the mandate to cooperate for the purposes of the Act might be best carried out by explicitly agreeing not to do what the federal government cannot in fact do with or without such an agreement.

Legislating unconditional deference to states’ legalization measures

Congress could amend the CSA to make it defer to state laws as applied to marijuana: possession, production, and intra-state distribution would be federal offenses only if forbidden by state law (or, alternatively, *not* be federal offenses if explicitly permitted by state law: production and sale, for example, could be made legal federally only when carried on under state license or by a state agency). In addition to avoiding the creation of legal gray areas, that approach would have the big advantage of allowing state-monopoly distribution systems, which could have substantial advantages over regulated and taxed private business in putting limits on marketing and minimizing diversion and tax evasion, but which would be impracticable under a policy of prosecutorial discretion without statutory change.

However, full deference to state law would put the enforceability of federal law, and of the laws of other states, very much at the mercy of the legislators (or voters) of any one state that chose to end marijuana prohibition. Banning inter-state commerce in a popular commodity with a very high value-to-bulk ratio is easier said than done. Marijuana is so cheap to produce under conditions of legality that a single state that legalized with loose controls and low taxes could flood the country with marijuana at a small fraction of the current illicit price, despite any enforcement efforts the federal government or the non-legalizing states might be able to mount (Kilmer et al. 2010). And that activity could be a source of substantial income for the residents of the legalizing state and substantial revenue for the state government. (New Hampshire demonstrated this process with its state lottery.) The Commerce Clause is in the Constitution for a reason.

Conditional deference: cannabis policy waivers

Arguably, federal deference to state marijuana legalization should be conditional on the willingness and ability of the legalizing state to keep the product

within its borders. Dictating the detailed conditions in federal legislation would be clumsy and would impede the process of gaining knowledge from observing the consequences of alternative policies in different states. It might also give rise to disputes over whether a given state's law did or did not qualify under the terms of the Congressionally legislated exemption.

An alternative would amend the CSA to create administrative authority – vested, perhaps, in the Attorney General – to grant state-level exemptions based on specified criteria. Those exemptions would be granted initially based on proposed policies and asserted capacities, perhaps with agreed-on performance criteria, and could be revoked if the state failed to follow through on its proposal (e.g. by not devoting the promised enforcement resources to preventing interstate sale) or failed to meet the performance criteria (which might include a maximum volume of “exports” and perhaps intra-state goals with respect to, e.g. marijuana abuse by minors and intoxicated driving). Or the exemptions might be time-limited but renewable, shifting the “burden of going forward” from federal officials who might want to revoke an existing waiver to state officials wanting to have that waiver extended.

A revocable waiver or – especially – a time-limited, renewable waiver, would make the states, and the participants in the legal cannabis industries created by state laws, accountable for some of the outcomes of those laws. That would change the incentives shaping state-level regulatory processes, since advocates of liberalized laws would have to balance their distaste for regulation and taxation against the goal of acquiring a waiver and keeping it in force. The legal cannabis industries would have reason to try to exercise some self-regulation (and also, of course, to hire lobbyists).

Such an approach would carry over to the criminal law the idea of policy “waivers” that proved so effective in converting “welfare reform” from a set of think-tank proposals to a national policy (Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services 2001; Arsneault 2000). (Whether or not that is regarded as having been a desirable outcome, it is hard to deny that state-level experiments provided valuable information for national-level policymaking.)

Granting the Attorney General the authority to issue conditional and revocable (or renewable) waivers would constitute a far less drastic devolution of power to the states than amending the CSA to give unconditional deference to state marijuana-legalization legislation.

Even if the waiver idea were accepted in principle, substantial policy-design work would remain to be done. (This would be true for any policy between full prohibition and outright commercial legalization.) How to balance clear, objective rules with administrative discretion is always a problem; the political

salience of the cannabis issue would complicate that problem. A threshold question would be whether to allow waivers for commercial legalization schemes of the kind adopted by the voters in Colorado and Washington, or to restrict them to laws allowing sale only by not-for-profit enterprises such as consumer co-operatives, or alternatively to state-monopoly systems that might make taxes more collectible and marketing controls more enforceable than the taxation and regulation of private-enterprise growers and sellers.

(Whether a waiver approach would be a good way to handle the “medical marijuana” issue is a different question; waivers for medical marijuana alone would not address the situation of Colorado and Washington.)

The choice of outcome measures would be especially tricky, involving questions of principle as well as fact.

- To what extent should states be accountable for controlling intra-state as well as inter-state effects? For example: Should restraining the growth in self-reported cannabis use, or heavy cannabis use, by minors be among the requirements? Or restraining the growth in cannabis-associated auto accidents?
- How much illicit inter-state sales, either diverted from the licit process or illicitly grown, would count as enough to justify waiver revocation or non-renewal? After all, there is already non-zero illicit inter-state commerce in cannabis.
- Should the accountability process consider gains as well as losses from legalization, and, if so, which gains? What tolerances should be built into waiver decision-making? A process that demanded no movement in an undesirable direction on any outcome dimension would demand the impossible. How is information to be used in these decisions to be gathered and evaluated? (The Department of Justice does not have any equivalent of the office of the Assistant Secretary for Planning and Evaluation [ASPE] at the Department of Health and Human Services.)

Despite the administrative complexities – including the need to reconcile whatever action is taken with U.S. obligations under various international conventions (Jelsma 2011) – it remains possible that a waiver process could be designed that would outperform alternative approaches to what must in any case remain a complex problem. Compared to cooperative enforcement agreements – which would leave the activity in state-regulated markets illegal under federal laws, albeit with some assurance that those laws would not be enforced – cannabis policy waivers would be far cleaner conceptually, and would greatly simplify the problems otherwise faced by state-legal cannabis businesses in gaining access

to financial services (otherwise arguably constituting “money laundering”) and dealing with the Internal Revenue Code (which disallows business deductions for the expenses of dealing in unlawful goods, thus creating very high effective tax rates for cannabis retailers).

However, cooperative enforcement agreements, unlike policy waivers, require only administrative action. They could, therefore, certainly be implemented more quickly than any waiver scheme and possibly could be implemented when a waiver scheme could not.

Conclusions

The purpose of marijuana prohibition under the CSA, and under the international drug treaties, is to reduce the prevalence of cannabis abuse. But since prohibitions are not self-enforcing, the efficacy of the law as a means to that end is limited by the extent of the available enforcement resources compared to the extent of the illicit markets. The Federal government has sweeping laws with severe penalties, but only very limited enforcement capacity: most of the actual work of enforcing the drug laws is done by state and local governments. When states exercise their constitutional prerogative to replace their own prohibitions with systems of regulation and taxation (clearly preferable, in terms of the purposes of the CSA and the international treaties, to the outright repeal of all cannabis laws which is the states’ undoubted right), then the federal government would be well advised to cooperate with the inevitable and attempt to manage, rather than trying to squelch, the resulting somewhat paradoxical situation of state-licensed and state-taxed violations of federal law.

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