



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy.

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Pot Puts States, Feds at Odds | OAS Episode 28

Welcome to “Our American States,” a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host, Gene Rose.

U.S. Attorney General Jeff Sessions has made it known that he believes federal laws regarding marijuana should be enforced. This puts the federal government at direct odds with nine states and the District of Columbia, which allow for the sale of recreational marijuana. Susan Frederick, senior federal affairs counsel at the National Conference of State Legislatures, will help us explain what’s at stake for states. Susan, thank you for being on the program today.

Susan: Oh, you’re welcome, Gene. Great to be here.

Gene: So first, Susan, let’s talk about this from the federal perspective. What is the motivation for the attorney general to reverse previous guidance by the Justice Department that essentially allowed states to approve these measures?

Susan: Well, Attorney General Sessions has a long history of opposing the legalization of marijuana for any reason, for medicinal or for recreational. He’s been very open about that position through his confirmation hearing and afterwards, and it’s really that simple. He believes that marijuana has no medical benefit and that it has a high potential for addiction, and it should remain a Schedule 1 illegal substance under federal law.

Gene: So what’s at stake here for states if the attorney general aggressively seeks to close down the sale of marijuana in states that have already approved it?

Susan: It’s multidimensional. I think on the policy side, federal enforcement actions against state growers and sellers preempt laws in 29 states and the District of Columbia, Puerto Rico and Guam. And then there’s the economic side where we can look at states like Colorado,

Washington and Oregon, which have regulatory schemes and taxation structures in place for marijuana sales which, if they're not allowed to continue that, would put a significant dent I think in those states' economies.

On the criminal justice side, there are about 20 states and the District of Columbia which have decriminalized the possession of small amounts of marijuana. That has actually provided somewhat of a cost savings or cost benefit to states because simple possession no longer means jail time, but rather a fine or a fee as more of a civil violation than a criminal one.

Gene: Are there penalties that he is seeking? What's the process there?

Susan: No, he hasn't gone that far. What he's done in his most recent memorandum on this topic, which is I think what is causing all of the uncertainty in the states and the furor over what's going to happen to states that have legalized marijuana in any context, is that he's going to allow U.S. attorneys to conduct enforcement measures on a case-by-case basis, and that the Department of Justice has told us that there's no "blanket category" that could be exempted from prosecution. And their goal is to establish this maximum amount of flexibility to local prosecutors.

So there's no real guidance coming from the Department of Justice as to what sorts of marijuana cases will be prosecuted, which ones will not be. Will they go after medicinal? Will they only go after recreational? It is completely uncharted territory at this point.

Gene: Let's dive into the medicinal aspect of this. You mentioned that he is seeking to close that down as well. I would think that that would cause huge alarms across the country.

Susan: Given the lack of certainty in the department's guidance and the amount of flexibility that they're giving the U.S. attorneys across the country, whether or not those states and actors in those states who are in medicinal only states or some level of medicinal marijuana regulation, will have a real difficulty I think in ascertaining whether or not they will be prosecuted or not because of the U.S. attorney in that state or in that region feels about the issue.

Gene: And how are states reacting to this? What are you hearing from the leaders across the country, Susan?

Susan: It depends on the state quite frankly. Some U.S. attorneys like Robert Troyer in Colorado have already spoken to the issue and have already said that he will not make marijuana prosecutions a priority issue because he's got bigger fish to fry so to speak.

But other states, depending on the viewpoint or philosophy of the attorney general there, may take a different approach. And I say that because what we have started to see, and I don't know if this will catch on nationwide in those 29 states but, for instance, in Massachusetts state legislators have filed a bill that would prohibit state and local police from participating in federal cases against people or licensed operators who follow state cannabis laws. So they're basically throwing down the gauntlet saying: We passed a law in Massachusetts and we think that people who are in our state that are complying with that law should not be subject to federal prosecution.

Gene: I understand that the National Conference of State Legislatures has written a letter to leaders of the U.S. Senate. Tell us about what NCSL's position is on this and what kind of reaction you're getting from Congress.

Susan: Our letter has asked that Congress respect state marijuana laws based on federalism principles, and we also have policy that asks that Congress de-schedule marijuana as a controlled substance under the Controlled Substance Act. Our letter also asks that Congress vote in favor of an appropriations rider that would have protected states that have medical marijuana laws on the books to prohibit the use of Department of Justice funds to prosecute in those states.

That rider did not succeed in this last go-round of the appropriations cycle. However, it has been on the books since 2014. So there's been a policy shift in Congress and it is uncertain as to how that will play out in the long term.

Gene: What should legislators and those interested in this issue be on the watch for?

Susan: I think that they should be on the watch for anything coming out of their U.S. Attorney's offices, and of course anything coming out of the Justice Department here in D.C.'s criminal division that clarifies or speaks to the issue of how or when or if any of these cases would be prosecuted.

I think it's important for legislators to understand that there has been a policy shift at the federal level and that they should be vigilant as to how that plays out going forward.

I will say there have been a few bills introduced in Congress seeking to de-schedule marijuana as a Schedule 1 drug. They're currently not moving. So I think if you are in a state that has marijuana laws on the books, whether they're medicinal, recreational or both, that you should actively work to support that federal legislation going forward, and I would even say continue to be on the lookout for further federal decrees on the topic.

Gene: And in the meantime, I suspect this issue is going to keep you busy.

Susan: Yes. (chuckles) I suspect that it will. It's been a hot topic in our membership for a couple of years now. We've programmed on it. We've most recently programmed on it last summer at our Boston Summit meeting and we had some experts on our panel that spoke to how states can deal with what was then an anticipated decision by the Attorney General to deal with the marijuana issue. And it was very well received and very highly attended.

So we will be programming on it again with new information and hopefully updates on what states are doing and how they are dealing with this turn of events.

Gene: We've been talking with Susan Frederick, Senior Federal Affairs Counsel at the National Conference of State Legislatures. Susan, thank you for your time today.

Susan: Oh, you're very welcome, Gene. Thank you.

Music

Gene: We welcome to the program Karmen Hansen, program director in the Health Program at the National Conference of State Legislatures. Karmen, you were one of our first guests on “Our American States” and we’re glad to have you back.

Karm: Thank you, Gene. It’s a pleasure to be back.

Gene: So I’d like to find out what has happened in the 12 months since we last talked. At that time the public was responsible for all state laws that allowed for the sale of recreational marijuana. I understand that has now changed.

Karm: Yes it has. 2018 is off to a roaring start on this issue. Already this year legislators in Vermont passed a bill to legalize adult possession of up to one ounce of cannabis and home grows, two plants at home. It also created new penalties for people who provide cannabis to anyone under 21, and that is the first state to do this through the legislative process.

And the Vermont law is different in that it can be compared most to the current District of Columbia law in that it didn’t create a commercial marketplace for cannabis product dispensaries or adult-use product sales; they do have a market for their existing medical program and a study commission is looking into specific areas that may lead to creating an adult-use retail, commercial structure by legislation later this year or maybe next year. We’ll just have to see how that goes.

Gene: So what else has changed in that time? Have there been other developments in recreational marijuana sales or medicinal marijuana in the last 12 months?

Karm: Yes there have been. Cannabis policy covers a lot of policy areas, so there have been a lot of changes. States with both medical and adult-use programs have looked at what they would describe as improvements to their programs in the areas of licensing and processing changes, packaging and marketing improvements, safety and testing requirements, and changes to industry participation by nonresidents. And that’s just kind of a quick snapshot of the wide variety of changes.

Gene: So what’s the national picture right now, Karmen? Give us the number of states that allow for the use of marijuana on the recreational and medicinal sides.

Karm: On the medical side there are 29 states and three territories that have comprehensive programs, and those are all generally operational. And by comprehensive we mean that they allow for use of cannabis products for a wide range of medical diagnoses or symptoms and that they allow access to a few different types of cannabis-based products, be they edible products, flower, or concentrate products.

There are also 17 states that have low THC, which is the psychoactive compound within cannabis, or high CBD, which is cannabidiol, and that is more known to be a therapeutic compound in cannabis. Those states only allow access to a limited scope of patients with specific symptoms or conditions and most of those programs are not fully implemented due to the lack of in-state production of the CBD products, which is a hurdle to access for patients in those states. So sometimes they’re harder to get off the ground because there aren’t producers within the states.

And on the adult-use retail side, the total is nine states and the District of Columbia that have passed adult-use cannabis laws at the ballot box or through the legislature, but only six of them are currently operational: Colorado, Washington, Alaska, Oregon, California, and Nevada. Vermont's new possession and home grow law will take effect on July 1st of this year, and Massachusetts and Maine are still in the process of implementation and rulemaking for their programs.

Maine's implementation program hit a snag this last winter when Governor LePage vetoed the legislature's approved regulation measure late in November. And Massachusetts is starting their sales for adult use this summer.

Gene: In our interview with Susan Frederick, she said there's a possibility that the federal government is looking to enforce laws to prevent the use of medicinal marijuana. Do you have a number of people across the country that take advantage of medicinal marijuana?

Karm: Sure. The last known number that was actually produced by the Marijuana Policy Project, which tracks the number of licensures and physicians and has a lot of details on each of these programs, they report roughly 2.5 million people across the United States that are registered users in medical cannabis programs.

Gene: And so let's get back to the recreational marijuana use. Are states that have approved the sale of recreational marijuana seeing a financial benefit?

Karm: States with adult-use sales have been collecting a variety of taxes on each sale, as well as fees for licensing and permits. For example, Colorado recently released its 2017 revenue report which includes things like taxes, licenses and fees, and it showed over 247 million dollars for 2017. And Colorado has collected a total of nearly 639 million dollars since adult-use sales started in 2014.

Now most of that money has gone to program oversight and enforcement, local community enforcement assistance, some school construction grants, substance use disorder and prevention, treatment efforts and public health surveillance, and other public safety and education efforts, which are things spread around the state quite widely.

According to Washington's most recent reports, they collected a total of 319 million dollars in taxes and licensing fees for their fiscal year 2017, which was July 1st of 2016 through June 30th of 2017. Their marijuana tax revenue generated over 113 million more than their liquor tax revenue, which grew by 30% from the previous year.

And revenues are allocated in roughly the same way in Colorado as they are in Washington with approximately 30% of that 319 million going to their general fund, and about 35% going to healthcare services, 10% to education and prevention, and the rest goes to things like research, local governments and other efforts.

And just a reminder for people that think that this is somehow a cash cow for states. In Colorado specifically, it's only 2.5% of Colorado's total state budget is generated from marijuana tax revenues. So this is not considered a sure-fire way to shore up or save state budget shortfalls.

Some of the early reports from Nevada show a strong adult-use market, which started on July 1st of last year. Their first few months seemed to be outpacing much larger states like Colorado and Washington, and that would be of course due to the large amount of tourism that go to, let's say, Las Vegas or the Reno area.

California is also slow to roll out their adult-use market statewide, but we'll be sure to track their sales and revenue reports when they come out.

Gene: And what's on your radar for 2018? Are more states seriously looking at this issue, or are the statements by the U.S. Attorney General kind of putting states on the sidelines?

Karm: That's a great question. We've been tracking legislation and ballot initiatives for 2018 and legislators are still showing interest in this issue. About a dozen states have introduced legislation to legalize adult use and production of cannabis, and some of those measures would send it to a vote of the people, so it wouldn't be just a done deal at the legislative level. There are a few potential ballot initiatives that are percolating, but nothing has qualified for the ballot so far to our knowledge.

Another dozen states have bills for comprehensive medical cannabis programs, and these are generally the states that currently have no access to medical cannabis, or they have one of those low THC programs. Some of these bills would also send it to a vote of the people for final approval.

As far as the statement by Attorney General Sessions, it hasn't seemed to change much on the enforcement side by state U.S. attorneys so far, but some U.S. attorneys have made public statements which generally say that they will continue to prosecute major crime concerns in their jurisdictions, and those are based on current resources and priorities. So some of them feel that the legal markets that are happening within their states, either for retail or medical use, aren't that much of a concern because of all the oversight involved with them.

There has also been pushback by members of Congress on cannabis-legal states to encourage federal agencies to remain hands-off on this issue as they believe this administration would do based on their previous statements during the presidential campaign. And many legal marijuana state attorney generals, including Colorado's Attorney General Coffman, have sent letters to Congress in support of changes to federal laws to allow for the cannabis industry to have more access to banking services, and letters to the Attorney General Sessions state that they will continue to defend legitimate marijuana legal activities within their states.

And governors are taking action as well. They are citing their strict regulatory and enforcement systems and members of Congress from marijuana-legal states are also sticking up for their states' rights and the will of their own voters who have passed these in eight of the nine states. So they're also pushing back against changes in federal law enforcement actions.

So, as you can see, it's been really busy and whatever happens federally or within the states, we're looking at another year of activities to track. So it's definitely not a dull moment for us policy wonks in this area.

Gene: That seems to be an understatement. We've been talking with Karmen Hansen, a Program Director in the Health Program at the National Conference of State Legislatures. Karmen, I'm sure we'll be talking with you again soon.

Karm: I look forward to it, Gene. Thank you.

Music and Gene VO:

And that concludes this edition of "Our American States." We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.