Marijuana Series Part 1: Creating a Legal Framework in New Jersey for a Drug That is Illegal Under Federal Law

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This is the first installment in Porzio's series, *Marijuana: Creating a Legal Framework in New Jersey a Drug Illegal Under Federal Law.*

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Over the past several years, States have begun to legalize recreational marijuana. The first States to do so were Colorado and Washington in 2012, with Alaska, California, the District of Columbia, Maine, Massachusetts, Nevada, and Oregon doing so in the ensuing years. Most recently, on January 22, 2018, the governor of Vermont signed a bill that legalizes marijuana for recreational use, and many other States are moving to legalization. Moreover, a majority of States throughout the country have enacted laws permitting medical marijuana. While both medical marijuana programs and the movement to legalize recreational marijuana are spreading to more and more States, they do so in the face of a seemingly sizeable legal obstacle: under federal law, marijuana is illegal.

In New Jersey, the Compassionate Use Medical Marijuana Act was signed into law in January 2010, and has been implemented by the New Jersey Department of Health via its Medicinal Marijuana Program, but recreational marijuana use remains illegal in New Jersey. Legislation to legalize marijuana was first introduced in 2014, but, until now, it has never progressed very far in the legislative process. However, the legalization movement in New Jersey has picked up significant momentum recently from a number of factors, including support from key legislators and Governor Phil Murphy, who took office on January 16, 2018. Throughout his gubernatorial campaign, Governor Murphy advocated for the legalizing of marijuana for recreational use. His position did not change upon his election, as he even mentioned the issue during his Inaugural address, in which he declared that "[a] stronger and fairer New Jersey embraces comprehensive criminal justice reform -- including a process to legalize marijuana[.]"

In this four-part initial series, we will focus on a number of issues concerning the status of marijuana in New Jersey. In the first two parts, we will outline the federal government's position on marijuana enforcement, including recent changes, and how it could impact New Jersey. In the third part of our series, we will provide an overview of New Jersey's Medical Marijuana Program, including Governor Murphy's January 23, 2018, Executive Order that directed the Department of Health and Board of Medical Examiners to review all aspects of the current program. In the fourth part of our series, we will examine the current status of the legalization movement in the Legislature and offer insight into how it may proceed in

Trenton.

Part 1: The Cole Memo and the Decision to Rescind It

During the Obama administration, the Department of Justice ("DOJ") issued guidance to federal prosecutors regarding marijuana enforcement in both 2009 and 2011. Then, in August 2013, the DOJ updated its guidance with its issuance of the "Cole Memo," which was authored by James M. Cole, Deputy Attorney General, and addressed to all United States Attorneys. The Cole Memo was issued to address the fact that States had begun to legalize possession of marijuana and regulate its production, processing, and sale. The Cole Memo reiterated the DOJ's commitment to the enforcement of the Controlled Substances Act and recognized the fact that Congress had determined that marijuana was a dangerous drug. Moreover, the Cole Memo acknowledged that the illegal distribution and sale of marijuana was a serious criminal offense that provided significant revenue to gangs, cartels, and other criminal enterprises.

However, the Cole Memo outlined that the DOJ was "also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way." Accordingly, the Cole Memo outlined eight enforcement priorities that were especially relevant and important to the federal government. Those priorities included, among other things, preventing the distribution of marijuana to minors, preventing the revenue of marijuana sales from going to gangs, cartels, and criminal enterprises, preventing the diversion of marijuana from States where it was legal under State law to other States where it was not, and preventing violence and the use of firearms with respect to marijuana's cultivation and distribution. The priorities enumerated in the Cole Memo were intended to guide the DOJ's enforcement of federal laws and was intended to "serve as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state laws."

On February 24, 2014, Mr. Cole authored another memorandum for all United States Attorneys that provided guidance regarding marijuana related financial crimes. Specifically, this memo offered guidance to US Attorneys as to how they could exercise their prosecutorial discretion with respect to financial crimes involving marijuana, recommending that they focus on the eight enforcement priorities that were included in the 2013 Cole Memo and whether the particular activity at issue implicated those priorities. The memo described scenarios and activities that would be more prone to prosecution, as it noted that "financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with … state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal law enforcement priorities."

The Cole Memo remained in place until January 4, 2018. On that date, the DOJ announced that Attorney General Jeff Sessions had issued a memo that rescinded prior guidance, like the Cole Memo, concerning federal marijuana enforcement. In his memo, Attorney General Sessions explained: "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. … These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community." In view of the DOJ's well-established general principles, Attorney General Sessions concluded that the prior guidance specific to marijuana enforcement was "unnecessary" and, therefore, he rescinded it, effective immediately.

Attorney General Sessions's decision to rescind the guidance contained in the Cole Memo was greeted with outrage by some, including most prominently elected officials in States where recreational marijuana had been legalized. With respect to New Jersey, Senator Cory Booker issued the following statement about the Attorney General's decision: "Jeff Sessions'

determination to revive the failed War on Drugs knows no bounds. History has shown that our deeply broken drug laws disproportionately harm low-income communities and communities of color and cost us billions annually in enforcement, incarceration, and wasted human potential, without making us any safer. This unjust, backwards decision is wrong for America, and will prove to be on the wrong side of history."

It should be noted that in August 2017, Senator Booker introduced the Marijuana Justice Act of 2017 in the Senate. This bill would end the federal prohibition on marijuana. A companion bill was introduced in the House of Representatives on January 17, 2018, less than two weeks after Attorney General Sessions's decision to rescind the Cole Memo. Congresswoman Barbara Lee of California, one of the sponsors of the House bill, issued the following statement about it: "In the wake of Attorney General Session's decision to rescind the Cole memo, it's clear that the Trump Administration is doubling down on unjust marijuana criminalization policies[.] Now, it's up to Congress to end federal marijuana prohibition and help the victims of the failed War on Drugs rebuild their lives. The Marijuana Justice Act is a bold proposal to reverse decades of discriminatory drug enforcement and to bring federal marijuana policy in line with the wishes of the American people."

Senator Booker and Congresswoman Lee were two of the fifty-four members of Congress who jointly wrote to President Trump on January 25, 2018, about Attorney General Sessions's decision to rescind the Cole Memo. (Of the 54 members, there were 10 Senators – all Democrats – and 44 House Members, including 4 Republicans.) In their letter, the Congressional members argued that the Attorney General's decision "puts jobs, small businesses, state infrastructure, consumers, minorities, and patients at risk. This action has the potential to unravel efforts to build sensible drug policies that encourage economic development as we are finally moving away from antiquated practices that have hurt disadvantaged communities." As to the new guidance that Attorney General Sessions offered in his decision, the members claimed that it will have a chilling effect across the country in states that have worked tirelessly to implement voter-approved laws, creating legal and economic uncertainty." After reminding President Trump of the view he articulated during his campaign that marijuana legalization was an issue that should be left to the States, the Congressional members requested that the President "urge the Attorney General to reinstate the Cole Memorandum. This step would create a pathway to a more comprehensive marijuana policy that respects state interests and prerogatives. On behalf of the communities we represent, we hope you appreciate the critical nature of this issue and take immediate action."

In addition to angry reactions from elected officials, there were some predictions that the decision by Attorney General to rescind the Cole Memo would lead to more prosecutions, as well as a reduction in enthusiasm and support for the legalization movement across the country. As to the latter, that has not seemed to come to fruition following Attorney General Sessions's decision. For example, Governor Murphy has reiterated his support for legislation to legalize recreational marijuana, Vermont enacted a legalization law, and the New Hampshire House of Representatives passed legislation that would legalize marijuana.

As to the notion that Attorney General's Sessions's decision would lead to more prosecutions, it is very premature to make such predictions, or to make a truly informed assessment of the effect that his decision will have. As a threshold matter, the Attorney General's memo did not instruct US Attorneys to prosecute marijuana offenses or specifically prioritize the prosecutions of such offenses. Perhaps the most significant consequence of the Attorney General's decision is that each United States Attorney in each district will have greater discretion to prosecute – or not prosecute – marijuana-related offenses in their district.

The exercise of such prosecutorial discretion takes on greater importance in the States where marijuana has been legalized, as well as those States, like New Jersey, where there is a current legalization movement. (It should also be noted that federal Rohrabacher-Farr (also known as the Rohrabacher-Blumenauer) Amendment prohibits the use of federal funds to prevent States from implementing their own medical marijuana programs. The Amendment has remained in all of the

funding extensions passed by Congress over the last several months.) Ultimately, only time will tell how federal prosecutors will choose to enforce marijuana laws in their districts, as well as if there is a consistent approach across the country or if US Attorneys make different determinations about whether, and what, offenses to prosecute.

In the next article in our series, we will focus on how US Attorneys reacted to the decision of Attorney General Sessions to rescind the Cole Memo.