Marijuana Series Part 2: Reaction of US Attorneys to Rescission of Cole Memo

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

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In the first part of our series, we outlined how the Department of Justice ("DOJ") during the Obama administration had provided specific guidance to United States Attorneys about marijuana-related prosecutions, guidance that Attorney General Sessions rescinded on January 4, 2018. That decision was largely greeted with outrage by advocates of marijuana legalization and concerns that there would be an increase in marijuana-related prosecutions. However, as we observed in our last update, it is far too soon to accurately ascertain the impact that Attorney General Sessions' decision will have. It may be that prosecutions increase, but it is also possible that there is no discernible effect on prosecutions. Ultimately, the true impact of Attorney General Sessions' decision will be shaped by the decisions of the United States Attorneys across the country; specifically, on whether to prosecute marijuana-related offenses, which offenses they focus on, who they target in such prosecutions, and how their offices prosecute such offenses.

Because the Attorney General's decision places even greater discretion in the United States Attorneys in the 93 districts across the country, we thought it would be helpful to evaluate how some of those United States Attorneys reacted to the rescission of the Cole Memo. Specifically, in the rest of this article we will recount the public statements of United States Attorneys in States that have legalized marijuana, as well as the response from the current United States Attorney for the District of New Jersey, where there is a push for legalization in the New Jersey Legislature.

Because of the importance of this issue, and because we feel it is imperative to place the statements from the United States Attorneys in the proper context, we have reproduced their statements in full from the official press releases they issued, except for the United States Attorney for the District of New Jersey, as explained below. While the statements are all unique, some common themes that emerge, including:

- Because marijuana remains prohibited by federal laws, the United States Attorneys will be guided by the same well-established principles that govern all prosecutorial decisions;
- The United States Attorneys will be exercising their discretion on a case-by-case basis and will not be offering specific guidance or assurances about the types of cases that they may prosecute;
- The United States Attorneys intend to focus on offenses that cause the greatest safety threats to the public; and
- The United States Attorneys will be working with their federal, State, and local law enforcement partners to address the greatest risks to the public in this area.

As to the statements offered by the United States Attorneys in States where recreational marijuana use has been legalized, the US Attorney for Oregon, Billy J. Williams, issued a statement on January 4 that provided: "As noted by Attorney General Sessions, today's memo on marijuana enforcement directs all U.S. Attorneys to use the reasoned exercise of discretion when pursuing prosecutions related to marijuana crimes. We will continue working with our federal, state, local and tribal law enforcement partners to pursue shared public safety objectives, with an emphasis on stemming the overproduction of marijuana and the diversion of marijuana out of state, dismantling criminal organizations and thwarting violent crime in our communities."

Bob Troyer, the US Attorney for the District of Colorado, on January 4 issued the following statement: "Today the Attorney General rescinded the Cole Memo on marijuana prosecutions, and directed that federal marijuana prosecution decisions be governed by the same principles that have long governed all of our prosecution decisions. The United States Attorney's Office in Colorado has already been guided by these principles in marijuana prosecutions -- focusing in particular on identifying and prosecuting those who create the greatest safety threats to our communities around the state. We will, consistent with the Attorney General's latest guidance, continue to take this approach in all of our work with our law enforcement partners throughout Colorado."

That same day, Annette L. Hayes, the US Attorney for the Western District of Washington, issued the following statement: "Today the Attorney General reiterated his confidence in the basic principles that guide the discretion of all U.S. Attorneys around the country, and directed that those principles shepherd enforcement of federal law regarding marijuana. He also emphasized his belief that U.S. Attorneys are in the best position to address public safety in their districts, and address the crime control problems that are pressing in their communities. Those principles have always been at the core of what the United States Attorney's Office for Western Washington has done – across all threats to public safety, including those relating to marijuana. As a result, we have investigated and prosecuted over many years cases involving organized crime, violent and gun threats, and financial crimes related to marijuana. We will continue to do so to ensure – consistent with the most recent guidance from the Department – that our enforcement efforts with our federal, state, local and tribal partners focus on those who pose the greatest safety risk to the people and communities we serve."

The next day, the US Attorney for the Eastern District of Washington, Joseph H. Harrington, issued a statement on the Attorney General's decision that provided: "The Attorney General reiterated his confidence in the long-established principles of federal prosecution that guide the discretion of each United States Attorney around the country (U.S.

Attorney's Manual, chapter 9-27.000), and directed that those principles shepherd enforcement of federal law regarding marijuana. With those principles in mind, the Attorney General emphasized his belief that United States Attorneys are in the best position to weigh all relevant considerations – to include the nature and seriousness of an offense, the potential deterrence effect of prosecution, a putative defendant's culpability in connection with an offense, a putative defendant's criminal history and other circumstances, and the limited federal resources -- when deciding which cases to prosecute in their respective communities. When weighing those considerations public safety is always at the fore.

Those principles have always been at the core of what the United States Attorney's Office for the Eastern District of Washington does – across all threats to public safety, including those that may relate to marijuana. This United States Attorney's Office will continue to ensure, consistent with the most recent guidance from the Department of Justice, that its enforcement efforts with our federal, state, local, and tribal law enforcement partners focus on those who pose the greatest safety risk to the communities in Eastern Washington, by disrupting criminal organizations, tackling the growing drug crisis, thwarting violent crime, and corralling white-collar fraudsters in this District."

A few days later, on January 8, Andrew E. Lelling, the US Attorney for the District of Massachusetts, issued the following statement: "I understand that there are people and groups looking for additional guidance from this office about its approach to enforcing federal laws criminalizing marijuana cultivation and trafficking. I cannot, however, provide assurances that certain categories of participants in the state-level marijuana trade will be immune from federal prosecution. This is a straightforward rule of law issue. Congress has unambiguously made it a federal crime to cultivate, distribute and/or possess marijuana. As a law enforcement officer in the Executive Branch, it is my sworn responsibility to enforce that law, guided by the Principles of Federal Prosecution. To do that, however, I must proceed on a case-by-case basis, assessing each matter according to those principles and deciding whether to use limited federal resources to pursue it. Deciding, in advance, to immunize a certain category of actors from federal prosecution would be to effectively amend the laws Congress has already passed, and that I will not do. The kind of categorical relief sought by those engaged in state-level marijuana legalization efforts can only come from the legislative process."

On January 9, 2018, the US Attorney for the District of Maine, Halsey B. Frank, issued the following statement on the issue of marijuana enforcement: "I have received numerous inquiries from members of the media, government officials, and others seeking guidance from this office about its approach to enforcing the federal marijuana laws. Those laws make the production, distribution and possession of marijuana illegal based on its classification by Congress as a Schedule I Controlled Substance because Congress determined that it has a high potential for abuse and dependence and has no acceptable medical use.

As the chief federal law enforcement officer in this district, my job is to enforce federal law, not countermand it. While I have some discretion in how my office does so in any particular case, that discretion is guided by the Principles of Federal Prosecution of the Department of Justice (DOJ). Those principles include the interests of society, the public's confidence in the criminal justice system, federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the person's culpability in connection with the offense, their criminal history and willingness to cooperate in the investigation or prosecution of others, the interests of any victims, and the probable sentence or other consequences if the person is convicted, all in light of the DOJ's and my office's limited resources. I do not have the authority to categorically declare that my office will not prosecute a class of crime or persons. Rather, we must proceed on a case-by-case basis, individually assessing each matter according to DOJ's Principles and deciding whether to use our

resources to pursue it. DOJ's national priorities include the rule of law, national security and terrorism, immigration, violent crime and international gangs such as MS-13, the opiate crisis, supporting law enforcement, and promoting public confidence. In addition, our local priorities include domestic violence and guns, human trafficking, and elder fraud. We will work with our federal, state, local and tribal partners to focus on those who pose the greatest threat to the people and communities that we serve.

With respect to the prosecution of drug offenses, this office has prioritized the prosecution of cases involving the trafficking of opiates, cocaine, crack and similar hard drugs. We have also prosecuted large-scale marijuana distribution organizations and did so even while operating under the recently rescinded DOJ guidance. Prosecution of drug possession cases has not been a priority."

Most importantly for the legalization movement in New Jersey, on January 3, 2018 – one day before he rescinded the Cole Memo – Attorney General Sessions appointed Craig Carpentito as Interim United States Attorney for the District of New Jersey. Mr. Carpenito's appointment took effect on January 5, 2018. In a statement to NJ Advance Media, Mr. Carpenito's office addressed the issue of marijuana enforcement in the following way: "As was the case before and after the Cole Memo, the cultivation, distribution, and possession of marijuana continues to be generally prohibited by the Controlled Substances Act. We will use our prosecutorial discretion in evaluating all cases and making determinations as we do with all controlled substance cases." Whether that statement provides comfort to supporters of marijuana legislation in New Jersey, or causes them concern, will be determined in the coming months, as will any marijuana-related prosecutions that are initiated in New Jersey or any of the other districts across the country.