Marijuana Series: Attorney General Sessions and Senator Gardner Battle Over Marijuana

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In our previous articles, we explained that it would be important to not only monitor the response of U.S. Attorneys to the January 4, 2018, decision of Attorney General Sessions to rescind the Obama-era Cole Memo, which had provided guidance to federal prosecutors about marijuana enforcement priorities, but also to be aware of the response of elected officials. Today's update will focus on a developing disagreement between Attorney General Sessions and Senator Cory Gardner, a Republican from Colorado, over the Attorney General's rescission of the Cole Memo and the actions that the Senator has taken in response.

After Attorney General Sessions rescinded the Cole Memo, Senator Gardner, who represents a State where recreational marijuana has been legalized, tweeted the following: "This reported action directly contradicts what Attorney General Sessions told me prior to his confirmation. With no prior notice to Congress, the Justice Department has trampled on the will of the voters in CO and other states." Senator Gardner also issued a statement in which he declared: "Before I voted to confirm Attorney General Sessions, he assured me that marijuana would not be a priority for this Administration. Today's action directly contradicts what I was told, and I am prepared to take all steps necessary, including holding DOJ nominees, until the Attorney General lives up to the commitment he made to me prior to his confirmation. In 2016, President Trump said marijuana legalization should be left up to the states and I agree."

On February 6, 2018, Attorney General Sessions delivered remarks at the Reagan Alumni Association's Celebration of President Reagan's Birthday. During his speech, Attorney General Sessions stated that "[w]e are not going to pretend that there is not a law against marijuana, or that it's not bad for you. … We don't think illegal drug use is 'recreation.' Lax enforcement, permissive rhetoric, and the media have undermined the essential need to say no to drug use – don't start. And we are identifying pill mill doctors and sending large members to the slammer." In addition, during a question and answer session following the speech, Attorney General Sessions discussed the problem of opioid over-prescription and heroin addiction, as he explained that "we think a lot of this is starting with marijuana and other drugs."

A February 7, 2018, *Denver Post* article, titled, "Cory Gardner's siege of the Justice Department over marijuana entered second month," recounts the effects of Senator Gardner's effort to block Department of Justice ("DOJ") nominees. According to the article, Senator Gardner has thus far prevented eleven DOJ nominees from receiving a Senate floor vote, with more to follow as additional nominees proceed through the confirmation process. The article pointed out that Senator Gardner had met with Attorney General Sessions about the issue of marijuana in January and that the Senator hoped that further negotiations with the Attorney General would prove successful. On that point, a spokesman for Senator Gardner stated that "[o]ur staff and DOJ staff continue to talk and meet to discuss a path forward which recognizes Colorado's

state's rights and ensures law enforcement has the authority and tools needed to protect our communities[.] These discussions continue to be necessary and we appreciate their willingness to have them."

However, on February 12, 2018, Attorney General Sessions delivered remarks to the National Sheriffs' Association in which he again affirmed that he would not pretend that marijuana was legal and referenced Senator Gardner's hold on DOJ nominees, though he did not mention Senator Gardner by name. Specifically, as to Senator Gardner's hold on DOJ nominees, Attorney General Session stated that "[t]he most important thing that any government does is keep its citizens safe. The first civil right is the right to be safe. Too often, politics gets in the way of that mission. Right now, we're trying to confirm a number of important component heads at the Department of Justice. That includes a new head of our Criminal Division, our Civil Rights Division, and our National Security Division. These are critically important components – and outstanding nominees. Our nominee to lead the National Security Division was approved unanimously in committee. But because of one senator's concern over unrelated political issues – like legalizing marijuana – we can't even get a vote." (emphasis added).

As to his position on marijuana, Attorney General Sessions declared that "I'm Attorney General of the United States. I don't have the authority to say that something is legal when it is illegal – even if I wanted to. I cannot and will not pretend that a duly enacted law of this country – like the federal ban on marijuana – does not exist. Marijuana is illegal in the United States – even in Colorado, California, and everywhere else in America."
It will be important to monitor the continued back-and-forth between Attorney General Sessions and Senator Gardner over this issue and whether the Senator's hold on DOJ nominees will remain in place. Of course, to end the impasse, Attorney General Sessions or Senator Gardner would seemingly have to change their position, a step that seems unlikely based on the public statements they have made.