What the Feds Can Do About Prop 19

The attorney general will have a tough decision to make if California legalizes marijuana.

by Ryan Tracy October 25, 2010

Photos: The Most Marijuana-Friendly Nations

Globe Toking: A Look at the World's Most Marijuana-Friendly Nations

Assume for a moment that California voters approve Proposition 19 on Nov. 2. The state will have just enacted a process for legalizing, regulating, and taxing marijuana use that no one else in the world has ever attempted. But Attorney General Eric Holder, President Obama’s top law-enforcement officer, has said the administration will “vigorously enforce” federal drug laws in the country’s most populous state regardless of the vote. For all the trails that approving Prop 19 would blaze, much of its impact would depend on the extent to which Holder follows through on that threat.

The attorney general has shown some willingness to scale back on marijuana enforcement; his Justice Department ended Bush-era crackdowns on medical pot dispensaries in California. Of course, the post–Prop 19 world would be different. California cities could license businesses that grow and sell marijuana on a large scale. Drug dealers in other states would surely head to California’s “coffee shops” (as weed retailers are called in Amsterdam), buy some California-grown product, and illegally transport it back home. It’s arguable that pot smokers and presumably some dealers can do that today, but they at least need a doctor’s permission and a state-issued ID card, which provides cover for authorities, however easily those cards may be obtainable. With that cover removed, Holder, whose department includes the Drug Enforcement Administration, could hardly ignore such a blatant violation of federal drug law.

Or could he? If one takes Holder at his word, the administration plans to do battle with marijuana retailers in California. That would not surprise advocates of decriminalized
marijuana—this and other administrations have always opposed their cause. But if, after
election night, Holder and Obama still believe in that course of action, they will have
reasons to reconsider. For one, the administration’s cheapest course of action, a
challenge to Prop 19 in the courts, looks doomed. Constitutional-law experts say
California has no obligation to have the same criminal laws as the federal government,
so Holder’s Justice Department can forget any lawsuit compelling the state to make
marijuana use a crime. “Arguably a state could decriminalize murder” and the federal
government could not force it to do otherwise, says Ruthann Robinson, a constitutional-
law professor at the City University of New York. On the legalization question, then,
Holder’s hands are tied.

But there may be other options in the courts. UCLA’s Mark Kleiman, a drug-policy
expert, suggests Justice could try to preempt cities from passing laws that license
marijuana sales by arguing that those licenses would help marijuana dealers commit a
federal crime. That strategy, if successful, would torpedo the entire tax-and-regulation
structure of Prop 19. But some legal experts are skeptical of that approach.

Pot: The Perfect Republican Issue? John Dennis, who is running for Nancy Pelosi’s
House seat, is one of few Republicans who support the future legalization of marijuana,
and potentially harder drugs. Dennis says it’s “high time” for the GOP to embrace a pro-
pot platform.

The Justice Department is currently arguing that federal regulations trump state law in
trying to block Arizona’s immigration law. But federal drug policy differs from immigration
policy in that the latter is an attempt to comprehensively regulate an issue without the
help of the states, says Alex Kreit, a professor at the Thomas Jefferson School of Law.
By contrast, when Congress outlawed marijuana under the Controlled Substances Act, it
said the act did not preclude state laws regulating marijuana unless “the two [laws]
cannot consistently stand together.” Since it would be possible for a Californian to follow
both federal law and the laws Prop 19 would allow (easy: just don’t buy, sell, or consume
pot), the courts could not prevent, say, Oakland from licensing marijuana, Kreit says.

However, Erwin Chemerinsky, dean of the law school at the University of California,
Irvine, thinks Justice may have a case if it can argue that a local law that licenses
marijuana “impedes the achievement of the federal objective,” namely preventing the
sale of illegal drugs. But if Justice were going to sue the state or local municipalities,
wouldn’t Holder have said so? In a recent letter to former DEA agents regarding Prop
19, Holder made his promise to “vigorously enforce” federal drug laws, but he did not
threaten a lawsuit, even though many of those agents favor one and a suit would require
far fewer resources than raiding marijuana retailers and making arrests.

Legal issues aside, the DEA can still enforce federal drug laws in California. And though
it would be more effort than a legal challenge, enforcement wouldn’t require much
investigation. Even a DEA rookie could walk into, say, Oakland City Hall and ask to see
records of the licensed businesses, then go arrest people at the addresses on the list.
On this point, Holder could learn from his predecessors: when voters in California and
Arizona approved medical marijuana in 1996, the Clinton administration argued that
doctors who recommended it could face criminal penalties. When that failed to pass
legal muster, the Justice Department changed tactics and brought criminal cases against
marijuana retailers, state licenses notwithstanding.

During the Bush years, the DEA boosted its enforcement of marijuana laws in California,
to little or no real effect—DEA agents made 594 marijuana arrests in 2006 in the state,
compared with 359 in 2001, the San Francisco Chronicle reported in 2007. The
*Chronicle* also noted that the number of marijuana plants seized annually during that period grew more than threefold, to about 3 million in 2006. In 2008 DEA agents seized a record 5.2 million plants. And the arrests continued until the Obama administration stopped cracking down on dispensaries in March 2009. Yet despite the crackdown, dispensaries grew in number: in 2007, the *Chronicle* estimated that doctor-approved marijuana buyers could find the product in 300 stores across the state, up from 100 in 2001. (Other publications have put the number of dispensaries lower: London’s *Guardian* reported that there were 150 in 2008, and *The Christian Science Monitor* found there were 183 in 2007.) Now that the Obama administration has stopped busting dispensaries, various estimates put the number at between 500 and 1,000. If Prop 19 decriminalizes recreational marijuana use for everyone over age 21, the number of retailers would almost certainly skyrocket, and it’s unlikely that the DEA would have the resources to arrest them all.

History suggests that enforcement likely would not stop Californians from selling and consuming legal marijuana. But it still would be difficult for the attorney general to stand by as the state legalizes pot. The reason: other states might not care about thousands of Californians consuming legal marijuana, but they would fume at a Justice Department that allows drug dealers to carry California-grown cannabis across state lines.

Precisely how much of this legally bought, illegally transported “gray market” marijuana would flood the market is unclear and would presumably depend on price. A recent study by the nonprofit RAND Corporation estimates that taxed, California-produced marijuana would cost $91 per ounce for the end consumer at retail shops. That’s far cheaper than black-market prices, which can be as much as $400 per ounce. But the researchers acknowledged considerable uncertainty about the headway that gray-market California marijuana might make across the country. Smuggling costs are difficult to estimate, for example (what’s the going rate for driving a truck full of California pot to Wisconsin? Or Texas?), and tax levels in California are hard to predict. And if cheaper California marijuana were to flood the market, how far would sources of black-market pot, such as Mexican cartels or traffickers based in Canada and rural America, lower their prices to maintain their share of the business?

In another study, the RAND researchers made their best guesses at these variables and tried to compare the price of legal marijuana from California with cannabis exported by Mexico’s murderous cartels. They found that California pot would be far cheaper even with estimated taxes included, likely taking over the entire California market unless the cartels drastically cut their prices. When it came to prices in other states, the researchers concluded that marijuana from California would “undercut” prices of illegal cannabis across the country only “if the federal government reacted to Prop 19 in a fairly passive way.” In a post–Prop 19 world, in other words, the more federal regulators crack down on the flow of California marijuana across the country, the more expensive that pot would become in other states, making it less of a threat to the cartels’ business.

Prop 19 is, by many accounts, a flawed initiative. “I would rather be talking about the merits of legalization than the demerits of this cockamamie kluge of a bill,” says Kleiman, the UCLA drug-policy expert, expressing his frustration with the slew of media calls he’s received on the subject. “If a law is properly drafted, you know when it’s valid and you know what will happen if it passes. It seems to me neither is the case.”

Indeed, no one knows for sure whether California weed would replace Mexican dope, or if the feds would sue California, or how often DEA agents would be busting down doors in Oakland pot shops. But if voters approve Prop 19, the attorney general will have to figure out the answers to those questions, and quickly.
Editor’s note: An early version of this story said that Californians needed state-issued ID cards to buy medical marijuana. The ID cards are county-issued, and are not mandatory.