

# Feds may take legal action against states that legalize pot

By Charlie Savage, New York Times

WASHINGTON – Senior White House and Justice Department officials are considering plans for legal action against Colorado and Washington that could undermine voter-approved initiatives to legalize the recreational use of marijuana in those states, according to several people familiar with the deliberations.

Even as marijuana legalization supporters are celebrating their victories in the two states, the Obama administration has been holding high-level meetings since the election to debate the response of federal law enforcement agencies to the decriminalization efforts.

Marijuana use in both states continues to be illegal under the federal Controlled Substances Act. One option is to sue the states on the grounds that any effort to regulate marijuana is pre-empted by federal law. Should the Justice Department prevail, it would raise the possibility of striking down the entire initiatives on the theory that voters would not have approved legalizing the drug without tight regulations and licensing similar to controls on hard alcohol.

Some law enforcement officials, alarmed at the prospect that marijuana users in both states could get used to flouting federal law openly, are said to be pushing for a stern response. But such a response would raise political complications for President Obama because marijuana legalization is popular among liberal Democrats who just turned out to re-elect him.

“It’s a sticky wicket for Obama,” said Bruce Buchanan, a political science professor at the University of Texas at Austin, saying any aggressive move on such a high-profile question would be seen as “a slap in the face to his base right after they’ve just handed him a chance to realize his presidential dreams.”

Federal officials spoke on condition of anonymity because they were not authorized to discuss the matter. Several cautioned that the issue had raised complex legal and policy considerations – including enforcement priorities, litigation strategy and the impact of international antidrug treaties – that remain unresolved, and that no decision was imminent.

The Obama administration declined to comment on the deliberations, but pointed to a statement the Justice Department issued last week – the day before the initiative took effect in Washington – in the name of the United States attorney in Seattle, Jenny A. Durkan. She warned Washington residents that the drug remained illegal.

“In enacting the Controlled Substances Act, Congress determined that marijuana is a Schedule I controlled substance,” she said. “Regardless of any changes in state law, including the change that will go into effect on Dec. 6 in Washington State, growing, selling or possessing any amount of marijuana remains illegal under federal law.”

Durkan’s statement also hinted at the deliberations behind closed doors, saying: “The Department of Justice is reviewing the legalization initiatives recently passed in Colorado and Washington State. The department’s responsibility to enforce the Controlled Substances Act remains unchanged.”

Federal officials have relied on their more numerous state and local counterparts to handle smaller marijuana cases. In reviewing how to respond to the new gap, the interagency task force – which includes Justice Department headquarters, the

Drug Enforcement Administration, the State Department and the offices of the White House Counsel and the director of National Drug Control Policy – is considering several strategies, officials said.

One option is for federal prosecutors to bring some cases against low-level marijuana users of the sort they until now have rarely bothered with, waiting for a defendant to make a motion to dismiss the case because the drug is now legal in that state. The department could then obtain a court ruling that federal law trumps the state one.

A more aggressive option is for the Justice Department to file lawsuits against the states to prevent them from setting up systems to regulate and tax marijuana, as the initiatives contemplated. If a court agrees that such regulations are pre-empted by federal ones, it will open the door to a broader ruling about whether the regulatory provisions can be “severed” from those eliminating state prohibitions – or whether the entire initiatives must be struck down.

Another potential avenue would be to cut off federal grants to the states unless their legislatures restored antimarijuana laws, said Gregory Katsas, who led the civil division of the Justice Department during the George W. Bush administration.

Katsas said he was skeptical that a pre-emption lawsuit would succeed. He said he was also skeptical that it was necessary, since the federal government could prosecute marijuana cases in those states regardless of whether the states regulated the drug.

Still, federal resources are limited. Under the Obama administration, the Justice Department issued a policy for handling states that have legalized medical marijuana. It says federal officials should generally not use their limited resources to go after small-time users, but should for large-scale trafficking organizations. The result has been more

federal raids on dispensaries than many liberals had expected.