

Challenges and Opportunities to Renew Effective Federalism in the West on Marijuana Legalization and Regulatory Reform

By Edgar Ruiz

The start of a new presidency offers state and local government officials an opportunity to connect with representatives of the new administration, share their priorities and concerns, and calibrate their intergovernmental affairs strategies. For state and local governments in the Western United States, establishing effective partnerships with key federal agencies is crucial due to the federal government's regulatory footprint on a number of regionally-important policy areas such as energy and water resources management, public land ownership, and national defense installations

Upon the election of Donald Trump as president of the United States, a coalition of regional, multi-branch and bipartisan associations representing western governors, attorneys general, legislators and county officials quickly mobilized and collaborated to promote a vision of a stronger state-federal relationship. This coalition, comprised of the Western Governors' Association, Conference of Western Attorneys General, The Council of State Governments West, or CSG West, Pacific NorthWest Economic Region, and the Western Interstate Region of the National Association of Counties, jointly adopted federalism principles, the first time such a joint effort has occurred in recent history.

The federalism principles adopted by the western coalition, which were presented to President Trump's transition team and congressional leaders in December 2016, call for greater and meaningful state consultation of proposed federal regulations, rules, directives, and budget proposals that have "substantial direct effects on the states and/or local governments or on their relationship with the federal government."¹ Moreover, the principles solicit "increased flexibility for state and local waivers of statutory or regulatory requirements" so that state and local governments can utilize and develop flexible and innovative policy approaches.²

The western coalition's interests to further state-federal relations are being put to the test as the new administration moves forward to pursue its objectives which have caused uncertainty and legal challenges in a number of policy areas. These include the legalization of marijuana and regulatory reform. The administration's approach to these issues have major implications for many Western states and local gov-

ernments. The following provides a brief overview of the state-federal overlays in these areas.

Recreational Marijuana

In November 2016, voters in California and Nevada passed initiatives legalizing the adult-use of recreational marijuana, thus becoming the 5th and 6th Western states to legalize marijuana. Voters passed legalization initiatives in Colorado and Washington in 2012 and Oregon and Alaska in 2014. While the legalization of recreational marijuana is no longer limited to Western states, this policy issue has gained greater traction in the Western region than in any other part of the country. States such as Colorado and Washington were pioneers in the establishment of regulatory mechanisms to regulate this industry, literally establishing such regulatory structures overnight and without any guidance from other jurisdictions.

The legalization of recreational marijuana in several states has occurred amidst the conundrum that marijuana remains illegal under the federal Controlled Substance Act, or CSA. In 2013, under former President Obama's administration, the U.S. Department of Justice issued guidance to federal prosecutors concerning marijuana enforcement under the CSA. The memorandum identified eight enforcement priorities as a guide to the exercise of federal investigative and prosecutorial discretion. These included preventing the distribution of marijuana to minors, preventing the diversion of marijuana from states where it is legal under state law in some form to other states, and preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.

STATE-FEDERAL RELATIONS

The U.S. Department of Justice's 2013 guidance rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.³ However, this guidance, which called for selective enforcement and discretionary prosecution under the CSA, "did not alter the Department's authority to enforce federal law regardless of state law."

Under the leadership of newly appointed Attorney General Jeff Sessions, who has long opposed legalization of marijuana, it is unclear whether stricter enforcement of federal marijuana laws will be pursued. Speaking at a National Association of Attorneys General in February 2017, Attorney General Sessions stated that "states, they can pass the laws they choose...I would just say that it remains a violation of federal law to distribute marijuana throughout any place in the United States, whether a state legalizes it or not."⁴ These remarks have created angst among state officials in states that have legalized recreational marijuana, as well as proponents of legalized marijuana, who believe that with a stroke of a pen Attorney General Sessions can "cause chaos in a \$6.7 billion industry that is already attracting major investments from Wall Street hedge funds and expected to hit \$21.8 billion by 2020."⁵

In response to a potential federal crackdown on legalized marijuana, some western jurisdictions are pursuing legislation to protect cannabis consumers and businesses. This includes legislation signed into law by Oregon Gov. Kate Brown which prohibits a marijuana retailer from recording or retaining any information that may be used to identify a consumer.⁶ Other jurisdictions are pressuring the president to fulfill his campaign promise to adhere to a "states rights" policy.

The federal government's approach to dealing with states that have legalized recreational marijuana will have major repercussions across the country. It will also alter the way in which states view their ability to pursue innovative initiatives to tackle complex policy issues.

Regulatory Reform

The federal government has a large footprint in the Western United States, with significant military installations; public lands in the form of national parks, forests and monuments; and management of critical infrastructure such as dams, highways and airports. This presence is coupled with landmark

federal laws, such as the Clean Air Act, the Clean Water Act, and the Endangered Species Act, along with key court rulings that have expanded the authority of the federal government into many areas of governance in the West. This has resulted in a web of regulatory overlay among local, state and federal governments who, in many instances, share jurisdiction in certain policy areas while exercising sole, or primary, jurisdiction in others. During the first days of his administration President Trump called for regulatory reform. This included Executive Order 13771 that, among other things, requires federal agencies to repeal at least two existing regulations when proposing a new regulation. A follow-up executive order requires the head of each agency to designate officials who shall carry out regulatory reforms.

Several Western state leaders have reacted positively to President Trump's regulatory reform agenda, especially federal rules that they consider an overreach of federal authority, encroaching on state policy and stifling economic growth. This has been particularly true in several states in response to revamping the Waters of the United States rule which gave the federal government authority over not only major water bodies but also the wetlands, rivers and streams that feed into them within state jurisdiction.⁷ Another has been President Trump's directive instructing the U.S. Environmental Protection Agency to rewrite 2015 regulations that limit greenhouse gas emissions from existing electric utilities.

On the other hand, leaders in other Western states have reacted with concern and opposition to the president's regulatory reform agenda who consider these efforts as rolling back sensible policies designed to protect the environment. Several states have pursued legal actions to challenge the current administration's efforts to repeal regulations adopted during former President Obama's tenure. This includes the intervention of attorneys general from several states in an existing federal suit brought by the Alliance of Automobile Manufacturers where they are defending regulations aimed at enhancing vehicle emission standards, or standing up for the right of their states to adopt stricter pollution standards.⁸

While the tensions about the proper role of the federal government's authority in a variety of policy areas dates back to the adoption of the U.S. Constitution, the recent schisms among state and federal governments, especially in the West with regard to the management of public lands and resources development and protection, to name a few, have increased

the need for greater dialogue and understanding of the proper balance and coordination among state and federal entities with jurisdiction in the West.

Conclusion

The current state of state-federal relations is at an important crossroads. The new administration of President Trump provides a potential opportunity to realign and redefine the state-federal relationship in a manner that achieves enhanced cooperative federalism. However, this opportunity is challenged by heightened political tensions and opposition to the policy objectives by the Trump administration. The ramifications of the actions pursued in this environment will likely have long-term impacts on future state-federal relations. As such, organizations such as CSG West will need to step up their efforts to serve as neutral conveners to foster greater state-federal cooperation and engagement.

Notes

¹ WGA, CWAG, CSG West, WIR and PNWER, *Principles to Clarify and Strengthen the State—Federal Relationship*, December 2016

² *Ibid*,

³ James M. Cole, Deputy Attorney General, U.S. Department of Justice, “Guidance Regarding Marijuana Enforcement,” August 29, 2013

⁴ Tessa Berenson, “Attorney General Jeff Sessions Just Hinted at Crackdown on Legal Marijuana,” Time Magazine Article, February 28, 2017; <http://time.com/4685414/jeff-sessions-recreational-marijuana-legal-crackdown/>

⁵ James Higdon, “Jeff Sessions’ coming war on Legal Marijuana,” Politico, December 5, 2016 <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501>

⁶ Oregon Senate Bill 863, Section 2(3).

⁷ Juliet Eilperin and Steven Mufson, “Trump to roll back Obama’s climate, water rules through executive action,” Washington Post Article, February 20, 2017; https://www.washingtonpost.com/news/energy-environment/wp/2017/02/20/trump-to-roll-back-obamas-climate-water-rules-through-executive-action/?utm_term=.9f632d912461

⁸ Reid Wilson, “Blue states rush to block Trump emissions rollback,” The Hill Article, March 15, 2017, <http://thehill.com/homenews/state-watch/324179-blue-states-rush-to-block-trumps-emissions-rollback>

About the Author

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