Five Decades Later: Time to End Marijuana Prohibition?

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When Congress passed the Controlled Substances Act (CSA) in 1970, it classified marijuana as a Schedule I drug, the designation for substances with high abuse potential, no currently accepted medical use in treatment and a lack of accepted safety for use under medical supervision. That classification was meant to be preliminary, not permanent, as the statute and legislative history make clear. Today, marijuana remains on Schedule I, 50 years after President Richard Nixon signed the CSA into law.

Few serious people maintain that cannabis has no medical utility or that marijuana use is life-threatening. In 1972, the CSA-funded National Commission on Marihuana and Drug Abuse (the Shafer Commission) concluded that marijuana's potential for harm was *de minimis* and recommended changes to federal policy. Those recommendations were rejected, as were a series of descheduling and rescheduling petitions brought before federal rulemaking authorities in the following decades.

The response to federal rebuffs was, and continues to be, marijuana legalization at the state level. On November 3, 2020, voters in all five states with marijuana-related proposals on the ballot approved those measures, bringing the number of jurisdictions with medical and adult-use marijuana laws to 37 and 17, respectively. (This tally includes the District of Columbia and excludes U.S. territories, tribal nations and states that limit medical use to CBD.)

When California legalized medical cannabis in 1996, and Colorado and Washington legalized cannabis for adult use in 2012, U.S. Supreme Court Justice Louis Brandeis' 1932 laboratory metaphor seemed apt. (In his dissent in *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311, he wrote: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.") That metaphor has now run its course.

Today, the national landscape is a patchwork of nonuniform marijuana laws and rules, as each jurisdiction has adopted its own approach to regulating the supply chain. Here, the benefits of federalism are on display, as are its flaws and limitations—at least when states are called upon to regulate activity banned at the national level.

Since 2013, the federal government has taken a mostly hands-off approach to marijuana-related businesses (MRBs) that operate in compliance with state law. In effect, MRBs are tolerated despite violating the CSA. Although most industry participants no longer fear a federal crackdown, marijuana's Schedule I status continues to pose serious impediments and challenges.

For example, MRBs have limited access to banking services, cannot utilize the federal bankruptcy system, pay taxes on a disproportionate share of revenue and are ineligible for Small Business Administration loans. Those factors lead to higher retail prices, which drives consumers to the illicit market—the source of the outbreak of vaping-related illness in 2019. The same economic pressures also limit capital-raising options, stifle research and impede job creation.

Another byproduct of federal prohibition is that MRBs face contract-enforceability risk. In the last five years, the sector has seen much wider adoption of written agreements as attorneys have moved legacy clients away from handshake deals and as new participants have entered the market. The benefits of written contracts are obvious. Due to prohibition, however, a contract involving marijuana is subject to attack on illegality grounds.

Illegality-based challenges are jurisdiction-specific and depend on the substantive law of the contract, the conflict of laws analysis applicable to the case and the forum. A number of states, including California, Illinois and Oregon, have sought to preempt such challenges through legislation. Those statutes are effective for intrastate agreements in state court actions within those jurisdictions, but the analysis is more complex in states without such legislation. In addition, several recent decisions indicate that the illegality doctrine is alive and well in federal court, at least where enforcement of the contract would require a party to violate the CSA.

Experienced attorneys in the cannabis space mitigate illegality risk at the drafting stage. For example, it is now common to see pre-dispute arbitration clauses and express waivers of the illegality defense in marijuana-related agreements. Those strategies are effective but not bulletproof, so MRBs continue to enter into agreements with less than full confidence.

To manage uncertainty, companies adopt strategies and practices that come at a price. In the case of MRBs, the clash between state and federal laws has created distortive effects felt by all industry participants, including licensed operators and their employees, investors, service providers and even regulators.

Marijuana's Schedule I status means that interstate commerce is prohibited. The result is domestic balkanization. Closed borders create market inefficiencies and economic waste, and have led to attempted state-sponsored protectionism that runs afoul of the Dormant Commerce Clause.

For residents of jurisdictions that lack medical cannabis programs, another byproduct of closed borders is the denial of access to medicine. Glaucoma patients in Idaho and people suffering from multiple sclerosis in Kansas do not have the same treatment options as their counterparts in Nevada and Pennsylvania.

Although the typical process for amending the CSA schedules is through administrative rulemaking, Congress can amend the schedules directly. It has done so several times, most notably when descheduling hemp under the 2018 Farm Bill. Given the repeated rejection of administrative petitions and the U.S. Supreme Court's recent decision not to consider a constitutional challenge to prohibition (*Marvin Washington, et al. v. Barr, et al.* (2nd Cir. 2019) 925 F.3d 109, *cert. denied* (Oct. 13, 2020) --- S.Ct. ---, 2020 WL 6037234 (Mem)), the most likely path to descheduling is through the legislative branch.

On December 4, 2020, the U.S. House of Representatives passed the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act. Among other things, that bill deschedules and decriminalizes marijuana and establishes policies to begin redressing the racially disparate impact of the War on Drugs. The fate of the MORE Act in the U.S. Senate is uncertain and may hinge on the outcome of the Georgia runoff elections on January 5, 2021.

The federal government's primary argument against descheduling is that marijuana lacks medical efficacy and may be unsafe. Last week, the United States may have tacitly retreated from that stance when it supported the U.N. Commission on Narcotic Drugs' decision to remove marijuana from the most restrictive international classification under the Single Convention on Narcotic Drugs of 1961.

According to an October 2020 Gallup poll, two-thirds of U.S. adults now favor ending prohibition, and the number of state-legal marijuana programs speaks for itself. Thus, federal descheduling aligns with the *volonté générale*. With federal descheduling (should it occur) comes federal regulation and a new but different set of problems.

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