Force of Law vs. Law Enforcement

The cannabis conundrum of legal half measures

by David Bush

Maybe there is cause for optimism about cannabis reform. Maybe not. It depends on how you look at it.

When Everything Happens But Nothing Gets Done

The proposals introduced in the current U.S. Congress to end cannabis prohibition, or at least to chip away at it, are impressive. Since January of this year, no fewer than five cannabis reform bills have been introduced in both chambers. Another two bills were introduced in the House of Representatives, only.

The proposals cover a lot of territory. They include the Industrial Hemp Farming Act, which would carve industrial hemp out of the Controlled Substances Act (CSA) entirely; and the Respect State Marijuana Laws Act, which would render the CSA inapplicable to anyone producing, possessing, distributing, dispensing or delivering any cannabis (marijuana or hemp) in compliance with state law. Other proposals would delist medical marijuana and avoid regulation of Cannabidiol (CBD) under the Food, Drug and Cosmetics Act. Yet other legislative acts aim to exempt marijuana from application of the notorious section 280E of the Internal Revenue Code, which disallows most ordinary business tax write-offs. Still another bill would free health care professionals employed by the Department of Veterans Affairs to recommend medical marijuana to their patients, and would grant licenses to authorize medical research on marijuana and marijuana derivatives.

Chances are, most or all the bills currently pending in Congress are unlikely to be passed, or even voted upon, or even granted a committee hearing. The political will for enduring cannabis reform is still not there.

Cannabis prohibition remains a constant in our lives, as dependable as death and taxes and just as repugnant. We search our collective memories in vain for a time when there was any meaningful amendment to the CSA. Cannabis has been a national outlaw ever since Congress passed the Marijuana Tax Act in 1937. Its status as Public Enemy No. 1 was reaffirmed in 1970, when Congress enacted the CSA. The current momentum in Congress is to propose myriad initiatives to end cannabis prohibition, but not to actually pass anything. The stalemate in Washington is palpable.

Change is still happening. Otherwise, we would not be writing essays about cannabis business regulations in magazines distributed to pot shops. But there is something funny going on. The law itself is not changing, just how we enforce it.

Executive Action: Prosecutorial Discretion on a Grand Scale

In 2009, the Department of Justice (DOJ) issued what became known as the Ogden Memorandum. A few renegade states, Colorado and California among them, had decided to allow their citizens to use marijuana for medical purposes, federal law be damned. The Ogden Memorandum stated that the DOJ would rather spend its law enforcement resources elsewhere than busting sick people. Two years later, in 2011, the DOJ "clarified" the Ogden Memorandum by insisting that it really meant what it said the first time. More states began to experiment with medical marijuana. Then in 2012, Colorado voters upped the ante by approving Amendment 64, allowing the sale and use of marijuana by any consenting adult, sick or not, federal law be damned again. The pressure for national cannabis legal reform grew.

The answer of the feds was to punt again, only harder. In 2013, the DOJ issued the famous Cole Memorandum. It expanded the policy of federal non-interference to essentially all state-legal marijuana activities, so long as certain federal law enforcement priorities were not implicated. In 2014,

the DOJ issued yet another memorandum that extended application of the Cole Memorandum to native American lands. The policy proclamations constituted an exercise of prosecutorial discretion on a grand scale. Why fuss with changing bad laws when one could simply decline to enforce them?

Legislative Appropriations: Cutting Off the Hand That Feeds

Not to be outdone by the executive branch of government, Congress generously decided to pitch its own special brand of non-interference. In 2014, certain enterprising elected representatives realized that while they might lack the political capital (read: courage) to actually vote on true cannabis reform, they could do the next best thing, through their legendary Power of the Purse. They would deprive the DOJ of funding to enforce the very laws that many privately agreed ought to be abolished. The crack in the dam started modestly enough. In 2014, Congress sneaked through a one-page provision in the gargantuan Farm Bill, authorizing state departments of agriculture and state universities to grow industrial hemp for purposes of research and development (but only for the next five years). The same year, Congress appropriated funds for the DOJ that contained two novel conditions. The first was that no money could be spent to go after people using medical marijuana in states where it was legal. The other was that no money could be spent to stop cultivation of industrial hemp for R&D under the Farm Bill.

In 2015, the House of Representatives passed the same two funding restrictions as it had approved in 2014, and then went further. Two additional restrictions precluded the DOJ from enforcing the CSA against any state-legal commercial hemp farming, and against any state-legal production, possession, use or distribution of CBD. The trouble started when the bill wandered over to the Senate. The Senate, being the more conservative body, promptly dropped the two new additions. It still has not voted.

The Strange Case of CBD

There is yet a third approach taken by the feds to support cannabis reform short of actually changing the law. It is simply to look the other way. Such is the strange case of CBD, another cannabinoid typically extracted from the leaves and flowers of Cannabis. Under federal law, CBD is every bit as much a schedule I controlled substance as THC Δ 9, the stuff that gave life to "Reefer Madness" and the unfair and illogical prohibition that followed. Yet CBD is produced wherever cannabis cultivation is state-legal. Extracts of CBD are openly imported from abroad. CBD products are marketed through the internet and shipped across the country. CBD vendors boldly proclaim that their special brand of cannabinoids are "legal in all 50 states," even though all cannabinoids are extracts of marijuana and therefore, are also marijuana. Were this happening with other, more recognizable (or less sympathetic) forms of the evil weed, law enforcement authorities might go ballistic. But for years, they have quietly stood aside and let commerce in CBD continue.

Conclusion

It has been 239 years since Thomas Jefferson penned the famous words in the Declaration of Independence that humankind is endowed with certain "inalienable rights," and that governments are instituted to secure those rights "from the consent of the governed." Whenever government becomes "destructive of those ends," the people retain the right "to alter or abolish it, and to institute new government." What goes for bad government should apply with equal force to bad laws. Laws that fail to benefit the governed are bad and should be changed.

Marijuana prohibition is the epitome of bad law. But we do ourselves no justice in the long run by our current approach to this nonsense. We grant law enforcement authorities broad discretion not to enforce the law, or we deprive them of the means to enforce the law, or we just encourage them to look the other way when violations occur. These are not solutions, but new problems disguised as reform. They breed contempt for the law and are anathema to free society. We need cannabis reform. But bad laws should be changed, not ignored.

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