

The Black, White and Gray of Cannabis Regulation

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by David B. Bush

Talk about cannabis, especially in the realm of industrial hemp, invariably leads somebody to offer up the bromide that there are “gray areas” of the law. The law is vague and confusing, so it is said, which creates uncertainty about what is legal and what is illegal. But when I read the black letter of the law, I find little if anything that anyone would ever call gray. Federal drug laws may be a lot of things, including silly, counterproductive, and downright bad, but they are not vague or confusing. I find no shades of gray.

Make no mistake about it, cannabis plants, all cannabis plants, are classified under federal law as marijuana, a Schedule I controlled substance. Not only that, but most parts of the cannabis plants are also considered marijuana; in particular, the leaves and flowers. Nor does the law stop there. “Every compound, manufacture, salt, derivative, mixture, or preparation” of marijuana is also classified as marijuana.

All varieties of cannabis plants contain dozens or hundreds of chemical constituents. These include cannabinoids, nitrogenous compounds, amino acids, proteins, glycoproteins, enzymes, sugars, hydrocarbons, alcohols, aldehydes, ketones, simple acids, fatty acids, esters, lactones, steroids, terpenes, non-cannabinoid phenols, flavonoids, vitamins, and pigments. To the extent that any are derived from the leaves or flowers of cannabis, federal law classifies them as

marijuana. One might challenge the wisdom of that definition all day long, I certainly do, but disagreement over what the law says does not make it any less clear.

Colorado is experiencing a boom in the market for cannabinoid products derived from cannabis. Most noteworthy perhaps is Δ -9 tetrahydrocannabinol, the multisyllabic psychoactive goody that we have all come to know and love as THC, popularly consumed throughout the ages for its recreational and medical benefits. But there is a veritable alphabet soup of cannabinoids found in cannabis besides THC, dozens or hundreds of them. They include tetrahydrocannabivarin (THCV), cannabidiol (CBD), cannabinol (CBN), cannabichromene (CBC), cannabigerol (CBG) and a host of others. Every single cannabinoid meets the federal definition of marijuana, because they are all derived from the leaves and flowers of cannabis. Every single one of them is a Schedule I controlled substance, making their unauthorized manufacture, possession and distribution a federal crime.

There is a flawed popular perception that the key to illegality in the world of cannabis is THC. But THC appears nowhere in the federal definition of marijuana. Federal law does not care whether a cannabis plant is chock full of THC or has any measurable concentration of the substance at all. It simply does not matter whether the stuff made from cannabis could give one a buzz or not. It is all equally illegal in the eyes of the law.

Many wish to believe that industrial hemp is different. A number of states, including Colorado, define industrial hemp to mean cannabis with a below-threshold concentration of THC in the plant tissue, generally recognized as no more than 0.3 percent by dry weight. Other than the narrow exception for academic research and development articulated in the 2014 Farm Bill, no similar distinction exists in federal law. But low concentrations of THC in industrial hemp does not help the plant avoid the onus of federal prohibition. Cannabinoid products are all classified as marijuana, regardless of the variety of plant from which they were made and regardless how much or how little THC the plant or the product made from it might contain.

Manufacture of cannabinoid products in Colorado is booming. But they are not being regulated in a consistent manner. Cannabinoid products made from what the state has defined as marijuana are strictly controlled under complex and pervasive regulations promulgated and administered by the Marijuana Enforcement Division in the Department of Revenue. In contrast, the only aspect of state-defined industrial hemp that is subject to regulation is cultivation, by the Department of Agriculture. Processing and sale of cannabinoid products made from industrial hemp is not regulated at all. In fact, Colorado law actually accords statutory immunity to anyone who processes and sells products made from legally registered and cultivated industrial hemp. Section 108(2) of the hemp regulatory statutes provides as follows: “[A] person engaged in processing, selling, transporting, possessing, or otherwise distributing industrial hemp cultivated by a person registered under this article, or selling industrial hemp products produced therefrom, is not subject to any civil or criminal actions under Colorado law for engaging in such activities.”

The stark difference in Colorado between the regulation of marijuana and industrial hemp presents a particular challenge to federal drug enforcement. In a now-famous memorandum authored by Deputy Attorney General James M. Cole on August 29, 2013, the U.S. Department of Justice effectively gave the nod to states such as Colorado to experiment with regulated

cannabis markets. Federal law enforcement policy since issuance of the Cole Memorandum generally has been to avoid prosecution in states where cannabis is legal, provided that actors play by state rules and avoid implicating certain federal law enforcement priorities. One of the enumerated law enforcement priorities is to prevent the diversion of marijuana from a state where it is legal to another state where it is not. Therein lies the problem in Colorado. Diversion of cannabinoid products made from industrial hemp is now occurring on a large scale.

Transporting cannabinoid products made from industrial hemp across state lines places them in the stream of interstate commerce, where federal law, not Colorado law, controls. And federal law is clear: any product made from the leaves or flowers of any cannabis plant is marijuana. Interstate sales of cannabinoid products cannot be characterized as anything other than trafficking in a Schedule I controlled substance. Such activities not only break federal law, but they implicate at least one of the law enforcement priorities set forth in the Cole Memorandum, against diverting marijuana out of state.

So far, the federal government has been remarkably tolerant of interstate sales of cannabinoid products, other than for those rich in THC. Relatively few attempts have been made to impede their transport outside of Colorado. But that does not reflect any change in the law, only a relatively lax attitude by the current administration in Washington. That could change dramatically with the next administration, or for that matter, at any time. The current situation cannot continue. It exposes the regulated cannabis market in Colorado to the risk of significant intervention by federal law enforcement.

Recent calls have been made in some circles in Colorado for implementation of regulations that would apply to all cannabinoid products, without regard to the source material from which they were made. Such regulations would include licensing, standards for quality and content, labeling, and prohibitions against export out of state, as long as the products remained federally illegal. Not surprisingly, some in the industrial hemp sector have reacted with vehement indignation to such proposals. The very thought of having their industry lumped in with marijuana offends their self-image of moral superiority and entitlement to special protection. But the reality is otherwise. There is but one plant, cannabis. There is but one body of federal law against it. Cannabis has but one future. We must all sink or swim from the same boat.

Federal drug laws are bad and need to be changed. Prohibitions against cannabis, all cannabis, both marijuana and industrial hemp, should be abolished. But until that day comes, the State of Colorado must rationalize its current regulatory system to avoid implicating federal law enforcement priorities set forth in the Cole Memorandum.

As an industrial hemp attorney, I support regulation of the processing and sale of cannabinoid products, including those made from industrial hemp. I have little doubt that it is coming. Resistance to regulation might delay the day of reckoning, but cannot forestall the inevitable. The industrial hemp sector can choose to be part of the problem, by denying that there is one. Or it can be part of the solution, by working to create a sound, reasonable and fair system of regulation. I would respectfully counsel the latter.

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