

Appendix 2: Conflict of Laws: A Quick Orientation to Marijuana Law at the Federal Level and in Colorado and Washington State

A. The Federal Controlled Substances Act

In the beginning, marijuana was legal. That started changing in the early 1900s, with all 50 states eventually adopting bans on growing, distributing, and possessing marijuana. Federal restrictions on marijuana originated in 1937 and were codified in 1970 as part of the Controlled Substances Act (CSA).

It classifies drugs into five schedules, depending on their medicinal value, potential for abuse, and health effects, with marijuana classified alongside heroin, LSD, and many others in “Schedule I.” Growing, distributing, and possessing marijuana are illegal with a few very limited exceptions⁷⁵ because—in the view of the federal government—unlike the drugs classified in Schedules II through V, marijuana has a “high potential for abuse,” “no currently accepted medical use in the treatment in the United States,” and there is “a lack of accepted safety for use of the drug . . . under medical supervision.”⁷⁶

The CSA authorizes the DEA to reclassify drugs to less restrictive schedules according to various statutory criteria. A federal appeals court on January 13, 2013, denied a petition to require the DEA to initiate proceedings to move marijuana to Schedule III, IV, or V, which would allow physicians to write prescriptions. The court began by noting that “[t]here is a serious debate in the United States over the efficacy of marijuana for medical uses,” and implied that there was evidence that “marijuana could have some medical benefits,” with more than 200 peer-reviewed published studies claim to show marijuana’s efficacy for various medical uses. But the court held that it was obliged to defer to the DEA’s finding that there was no “currently accepted medical use” because there were no scientifically rigorous, “adequate and well-controlled studies *proving* efficacy” (emphasis added).⁷⁷

The other major federal legal obstacles to medical and recreational marijuana are several international treaties signed and energetically promoted by the United States.⁷⁸ These treaties place on the United States an obligation to enforce its own

75. For the exceptions, see *Mikos 2012* at 6.

76. 21 U.S.C. § 811(c)(2), (3).

77. *Americans for Safe Access v. DEA*, 706 F.3d 438 (DC Cir. 2013) at 1, 5, 34-35). The studies included a March 1999 report from the National Institute of Medicine of the National Academy of Sciences calling for more studies while finding that for certain patients “cannabinoid drugs might offer broad-spectrum relief not found in any other single medication.” *Id.* at 34-35.

78. The most important of these is the Single Convention on Narcotic Drugs of 1961, updated in 1972, with

laws, but they neither bind the states nor require the federal government to cast aside prosecutorial discretion and bring every conceivable marijuana prosecution, any more than the CSA itself does. Detailed analysis of these treaties is beyond the scope of this paper.

Despite the persistence of major criminal penalties for large-scale marijuana trafficking, surveys suggest that more than two-fifths of Americans over the age of 12 have tried marijuana at least once and more than seventeen million have used it in the past month. And the trend in public opinion has been moving toward decriminalization (and, now, partial legalization) since Oregon's legislature in 1973, followed by fifteen other states, reduced to the equivalent of a traffic ticket the penalties for possession of small amounts of marijuana.

B. The New Recreational Marijuana Laws in Colorado and Washington

The legalization movement crossed its most important threshold so far with the Colorado and Washington ballot initiatives last November. Both partially legalized recreational use, and both license and regulate growers and suppliers in ways roughly modeled on the regulation of alcohol. The Colorado law, which amended the state constitution, is called Amendment 64, or the "Regulate Marijuana Like Alcohol Act of 2012." The Washington law is called Initiative 502, or I-502.⁷⁹

Both states' initiatives have already removed all remaining criminal penalties for possessing up to an ounce of marijuana for people of age 21 and older and, as noted above, Colorado has also removed penalties for any resident who—with no license required—grows up to six plants at a time "in an enclosed, locked space" and gives away up to an ounce at a time. The Washington law will continue to ban home-grown marijuana (except under the separate, preexisting medical marijuana regime) and all distribution (including gifts) outside the regulated system.⁸⁰ Unlicensed selling will remain a crime in both states.

The Colorado and Washington laws do not allow anyone to take marijuana across state lines, to consume it in public, or to drive under the influence. A Colorado task force has recommended that nonresidents be allowed to buy small quantities of marijuana for use while in Colorado, a sensitive subject known as marijuana tourism on

184 countries as parties. See *What Everyone Needs to Know* at 145-49.

79. For details of the two initiatives, see <http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251633708470/> and <http://liq.wa.gov/marijuana/I-502/>

80. So it is now legal in Washington to use recreational marijuana but not to obtain it until the regulated industry comes into being in December 2013.

which detailed rules remain to be worked out.

Both laws also will open the way for regulated and taxed recreational marijuana industries, with licenses available only to residents. Advisory and regulatory bodies are still working out detailed rules regarding inspections of facilities, books, and records, chemical testing of marijuana products, standards of ingredients and quality, labeling requirements, limits on retail store signs, advertising, and promotion, security requirements, and more.

Retail outlets in both states will probably be prohibited from displaying marijuana and related products or depictions of them to the general public and from admitting or advertising to people under age 21. Labeling requirements will include the potency of products in terms of levels of THC, the psychoactive component of the cannabis plant, just as liquor regulations require the labeling of alcohol content.

The Colorado amendment delegates broad rule-making discretion to the Department of Revenue, which has overseen medical marijuana since 2010, and tasks the agency to issue its rules for recreational marijuana businesses by July 1 and to begin issuing licenses by January 1, 2014. The amendment authorizes local governments to regulate the time, place, manner, and number of marijuana businesses and prohibits marijuana businesses within 1,000 feet of a school, park, playground or child care center.

The Washington law, which for the first two years can be amended only by a two-thirds vote of the legislature, assigns the State Liquor Control Board to write regulations by December 1, 2013, and start issuing in December licenses for a limited number of recreational marijuana businesses. By imposing substantial regulatory costs, both states may allow only fairly large enterprises to participate in the marijuana market, except for Colorado's grow-your-own market. This will make their licensed marijuana businesses easy targets for federal drug enforcers, unless the states can persuade the Obama Administration to leave alone those that comply with state law.

The Colorado law, which as noted above allows home growers to give away up to an ounce at a time, can be construed to authorize sales of up to an ounce at a time from licensed retailers' mobile vans or cars (since the law does not explicitly require licensed retailers to operate from fixed addresses). So Colorado's Amendment 64 might allow for distribution by many more small operators than Washington's new law, which requires that marijuana retailers be at fixed addresses and sell nothing but marijuana and related products.⁸¹

Both states hope to collect copious tax revenues as well as application and licensing fees from their planned new, for-profit recreational marijuana industries. Indeed, a major selling point for legalization has been that it will redirect from Mexican drug cartels to popular state programs some of the billions of dollars that marijuana users will continue

81. *Voter's Guide*.

to spend one way or another.

But some experts warn that the revenues are likely to be smaller than projected and may not even cover the costs of regulating the marijuana businesses. There have also been warnings that the two states' hunger for tax revenues may tempt them to be less than vigilant about preventing exports across state lines, which will be difficult to prevent in any case.

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