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Can a State Ferry Marijuana Across Federal Waters? What About the Air?

Ilya Shapiro

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A year ago, voters made Massachusetts one of eight states (plus D.C.) to legalize recreational marijuana.

For all its predecessors, the prospect of legal marijuana for both medical and recreational use has meant increased tax revenue, new jobs, and a reduction in black market sales.

Technical issues inevitably arise—How to tax different products and concentrations? What constitutes impaired driving?—but with another nine months to go before the initiative takes full effect, there should be plenty of time to implement this reform.

The Bay State does face one unique issue: how to transport marijuana from the mainland to surrounding islands like Nantucket and Martha's Vineyard. The problem is that transporting marijuana by sea or air—across waters under federal jurisdiction—is illegal.

If distributors were to ferry marijuana across Nantucket Sound, the Coast Guard would have full authority to seize and enforce the federal prohibition. Flying cannabis to the island is just as risky a proposition because federal law prohibits pilots from knowingly flying planes that contain illegal substances on board.

Curiously, however, the applicable regulation says that it “does not apply to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency.” This raises the obvious question of whether state-legalized marijuana is actually allowed to be transported by air.

The language of this regulation is ambiguous regarding what I've taken to calling “Schroedinger's Weed”—both legal and illegal at the same time—and the FAA hasn't provided any guidance on the matter.

Even without such guidance, marijuana businesses in Alaska have been taking advantage of the regulatory language in a different way, specifically the part about “knowing” transport. Alaskan businesses simply inform airport police that they are transporting marijuana, while also providing their proper (state) Marijuana Control Board documentation. None of the parties inform the airplane owner or pilots, keeping them unaware of the marijuana.

This type of plausible deniability is likely not viable long-term or on a large scale because the room for error is high and, after all, it remains a legal grey area. A possible alternative would be to narrowly tailor state laws that expressly makes legal the transportation of marijuana within and between any state territory—whether in Alaska, Massachusetts, or anywhere else.

That would create a bona fide “authorized” use by state statute and explicitly invoke the regulatory safe harbor without ambiguity—and it’s hard to imagine congressional will to close the alleged loophole.

If the Massachusetts legislature declines to enact such a law, then the only completely secure legal option would be to grow and sell all marijuana on the islands themselves rather than transporting it in. Even there, however, there would have to be an initial import of marijuana seeds, which may trigger the same federal air and maritime laws (but may be easier to conceal).

Moreover, under regulations being developed for the Massachusetts market, all marijuana must first be tested in a certified lab before being introduced for consumer consumption.

The establishment of such testing facilities on the individual islands would make Nantucket or Martha’s Vineyard weed considerably more expensive. These islands are known as being playgrounds for the rich, to be sure, but such impediments may still make marijuana commercially unfeasible, particularly in competition with the black market.

Still, the Cannabis Control Commission, a Massachusetts state agency, is determining ways to ensure that Nantucket and other state islands have access to marijuana—and there have been moves for statutory reform in the state legislature. Meanwhile, Mass Medi-Spa Inc., a marijuana dispensary, is planning on opening in Nantucket within the next year regardless of the state of the laws.

Let’s hope that their vision for pro-federalism, pro-liberty policy reform doesn’t go up in smoke.

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Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.