

Can President Biden Legalize Marijuana?

Can the President unilaterally legalize marijuana under federal law? In early November, Congressional researchers concluded that, while President Biden cannot directly remove marijuana from control under federal controlled substances laws, he could order executive agencies to consider either moving marijuana to a different schedule so that it could be legally possessed and sold or changing their enforcement approach. However, the report also concluded that the President has no power to change state law or compel the states to adopt federal policies.

The [report](#) was prepared by the Congressional Research Service (“CRS”), which serves as a non-partisan shared staff providing policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation. CRS is one of three major legislative agencies that support Congress, along with the Congressional Budget Office (which provides Congress with budget-related information, reports on fiscal, budgetary, and programmatic issues, and analyses of budget policy options, costs, and effects) and the Government Accountability Office (which assists Congress in reviewing and monitoring the activities of government by conducting independent audits, investigations, and evaluations of federal programs). Collectively, the three agencies employ more than 4,000 people.

Under federal law, unless a statutory exemption applies, most cannabis and cannabis derivatives are classified as marijuana, a Schedule I controlled substance under the Controlled Substances Act (“CSA”). Substances become subject to the CSA through placement in one of five lists, known as Schedules I-V. A lower schedule number carries greater restrictions. For example, Schedule I controlled substances have (a) a high potential for abuse; (b) no “currently accepted medical use” and (c) a “lack of accepted safety for use.” It is illegal to produce, dispense, and possess such substances except in the context of federally approved scientific studies. By contrast, substances in Schedules II through V have accepted medical uses and may be dispensed by prescription for medical purposes.

A substance can be placed on a CSA schedule, moved to a different schedule, or removed entirely from the CSA’s coverage either by legislation or through an administrative rulemaking process overseen by the Drug Enforcement Administration (“DEA”) and based on criteria set out in the CSA. Congress placed marijuana in Schedule I in 1970 when it enacted the CSA. Since that time, the DEA has denied multiple requests to move marijuana to a less restrictive schedule or to remove marijuana from CSA control altogether. As an example, the Congressional Farm Bill of 2018 amended the CSA to provide that hemp—defined to include cannabis products containing no more than 0.3 percent of the psychoactive cannabinoid delta-9 tetrahydrocannabinol (“THC”)—is not a controlled substance subject to the CSA. (Hemp products may, however, be subject to regulation under other provisions of federal law.)

Although the CRS report found that the President cannot deschedule marijuana unilaterally via executive order, the report also found that “he might order executive agencies to consider either altering the scheduling of marijuana or changing their enforcement approach.” Because the President does possess a large degree of indirect influence over scheduling decisions, he could appoint agency officials who favor descheduling, or use executive orders to direct DEA, HHS, and FDA to consider administrative descheduling of marijuana. The notice-and-comment rulemaking process would take time, and would be subject to judicial review if challenged, but could be done consistently with the CSA’s procedural requirements.

However, while the President is limited in what he can do about existing federal laws, the report notes that “he has substantial control over how the law is enforced.” The Constitution grants the President broad clemency power with respect to all federal offenses (except cases of impeachment). “The President may grant a pardon at any time after an offense is committed: before the pardon recipient is charged with a crime, after a charge but prior to conviction, or following conviction. The power is not limited to pardons for individual offenders: the President may also issue a general amnesty to a class of people.”

The CRS report also finds that in addition to, or instead of, granting clemency, the President could direct the Department of Justice (“DOJ”) to exercise its discretion not to prosecute some or all marijuana-related offenses. The DOJ actually has taken this route several times in recent years. In 2009, DOJ Deputy Attorney General David Ogden advised prosecutors to focus their efforts on large-scale criminal drug operations rather than on individuals whose actions complied with state laws. In 2013 Deputy Attorney General James Cole issued a memorandum to prosecutors reflecting a further shift of government priorities away from strict enforcement of federal marijuana laws and toward a more “hands-off” approach in “jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of marijuana.” Subsequently, in 2018, Attorney General Jeff Sessions rescinded the previous guidance, and directed federal prosecutors to “follow the well-established principles that govern all federal prosecutions.” So, President Biden could follow these precedents and request that the DOJ once again limit prosecution of marijuana offenses to the most egregious activities.

In addition, while Congress cannot directly change state laws, it may be able to override state laws via preemption or enact measures designed to encourage the states to change their own laws. Congress can expressly preempt state laws in areas it is Constitutionally authorized to legislate, such as interstate commerce. For a recent example, the 2018 Farm Bill carved out hemp containing no more than 0.3 percent THC from the CSA’s regulation of marijuana and prohibited states from banning the interstate transport of hemp. As for the second option, Congress can use its spending power to encourage states to adopt certain policies by conditioning federal funds on the enactment of desired state-level legislation.

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