



Does the President Have the Power to Legalize Marijuana?

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The legal status of marijuana has been a topic of recurring interest in recent years, as [states](#), [federal legislators](#), and [federal executive agencies](#) consider how to regulate cannabis and its derivatives. What role can the President play in determining the legal status of a controlled substance such as marijuana? That question came to the forefront during the 2020 Democratic presidential primary, with multiple candidates [supporting legalization](#) of marijuana and several pledging to legalize the substance nationwide if elected, either indirectly through [administrative proceedings](#) or directly by [executive order](#). More recently, some commentators have called on President Biden to [end criminal penalties for marijuana possession and use](#) or [grant clemency to federal marijuana offenders](#). Although the President cannot directly remove marijuana from control under federal controlled substances law, he might order executive agencies to consider either altering the scheduling of marijuana or changing their enforcement approach.

This Sidebar outlines the laws that apply to controlled substances like marijuana, then analyzes several approaches a president might take to change controlled substances law as written or as enforced. The Sidebar closes with a discussion of key considerations for Congress related to presidential power over controlled substances regulation.

Controlled Substances Law

Federal Law: the Controlled Substances Act

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). (The CSA generally uses an alternative spelling, “marihuana,” but this Sidebar uses the more common spelling.) The CSA imposes a [comprehensive regulatory framework](#) on certain drugs and other substances—whether medical or recreational, legally or illicitly distributed—that pose a significant risk of abuse and dependence. The framework broadly aims to protect public health from those risks while ensuring that patients have access to pharmaceutical controlled substances for medical purposes. To advance those related goals, the CSA (1) requires entities engaged in *legitimate* activities involving controlled substances to [register with the government](#) and take steps to prevent diversion and misuse and (2) imposes [criminal penalties](#) for *unauthorized* activities involving controlled substances.

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Substances become subject to the CSA through placement in one of five lists, known as [Schedules I through V](#). A [lower schedule number carries greater restrictions](#), so controlled substances in Schedule I are subject to the most stringent controls. Schedule I controlled substances have [no currently accepted medical use](#), and 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.

As discussed further below, a substance can be placed in a CSA schedule, moved to a different schedule, or removed from control under the CSA either by [legislation](#) or through an [administrative rulemaking](#) process overseen by the Drug Enforcement Administration (DEA). [Congress placed marijuana in Schedule I](#) in 1970 when it enacted the CSA. Since that time, DEA has denied multiple [petitions from stakeholders](#) seeking to move marijuana to a less restrictive schedule or remove the substance from control under the CSA. In 2018, Congress [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](#).)

State Laws

In addition to the federal CSA, each state has its own controlled substances laws. As a general matter, state controlled substances laws often mirror federal law and are relatively uniform across jurisdictions because almost all states have adopted a version of the [Uniform Controlled Substances Act](#). However, there is [not a complete overlap](#) between drugs subject to federal and state control.

[Marijuana regulation](#) is one area where the gap between federal and state controlled substance laws is particularly salient. In sharp contrast to the stringent federal control of marijuana, in recent decades [nearly all the states](#) have changed their laws to permit the use of marijuana (or other cannabis products) for medical purposes. In addition, 18 states and the District of Columbia have passed laws removing certain state criminal prohibitions on recreational marijuana use by adults.

Notably, however, [states cannot actually legalize marijuana](#), because the states cannot change federal law and the Constitution’s [Supremacy Clause](#) dictates that federal law takes precedence over conflicting state laws. As long as marijuana is a Schedule I controlled substance under the CSA, all unauthorized activities involving marijuana are [federal crimes](#) anywhere in the United States, including in states that have purported to legalize medical or recreational marijuana.

Presidential Power to Legalize or Decriminalize Marijuana

Discussion of whether the President can legalize or decriminalize marijuana raises the question of what it means to “legalize” or “decriminalize” a Schedule I controlled substance. “Legalization” of marijuana could mean moving the substance from Schedule I to another schedule of the CSA so that it would be legal to produce, distribute, and possess marijuana for medical purposes, subject to the CSA’s registration requirements; or it could mean removing marijuana from control under the CSA altogether. “[Decriminalization](#)” generally refers to maintaining some form of prohibition of marijuana but enforcing the ban only through non-criminal sanctions, such as civil monetary penalties.

Descheduling or Rescheduling Under the CSA

Either Congress or the executive branch has the authority to reschedule or deschedule marijuana under the CSA. Congress can change the status of a controlled substance through legislation: Congress included marijuana in Schedule I by legislation when it enacted the CSA, and has more recently passed legislation to impose controls on other substances, including [synthetic cannabinoids](#) and [fentanyl analogues](#). In the

alternative, the CSA empowers DEA to make scheduling decisions through the [notice-and-comment rulemaking](#) process, in consultation with the Department of Health and Human Services (HHS) (HHS has [delegated](#) its factfinding role in this process to the Food and Drug Administration (FDA)).

If the President sought to act in the area of controlled substances regulation, he would likely do so by [executive order](#). However, the Supreme Court has [held](#) that the President has the power to issue an executive order only if authorized by “an act of Congress or . . . the Constitution itself.” The CSA does not provide a direct role for the President in the classification of controlled substances, nor does [Article II](#) of the Constitution grant the President power in this area (federal controlled substances law is an [exercise](#) of Congress’s power to regulate [interstate commerce](#)). Thus, it does not appear that the President could directly deschedule or reschedule marijuana by executive order.

Although the President may not unilaterally deschedule or reschedule a controlled substance, he does possess a large degree of indirect influence over scheduling decisions. The President could pursue the [appointment](#) of 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. In the alternative, the President could work with Congress to pursue descheduling through an amendment to the CSA.

Presidential Pardons and Prosecutorial Discretion

Just as the CSA does not grant the President the authority to unilaterally change the classification of a controlled substance, it also creates no presidential power to alter the general penalties applicable to controlled substances offenses. While the President cannot change the law as written, he has substantial control over how the law is enforced. For instance, the Constitution grants the President the power “[to grant Reprieves and Pardons](#) for Offences against the United States.” That clemency power extends to all federal offenses, “except in 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. It therefore appears that the President could provide clemency for some or all past federal marijuana-related offenses without making any changes to the CSA. However, such an exercise of the clemency power might not address all possible [collateral legal consequences](#) of marijuana-related activities, because some of those consequences do not depend on a person being charged with or convicted of a CSA violation. Clemency also would not prevent prosecution of future offenses if the same President or a future administration ended the policy of amnesty. Furthermore, the presidential clemency power extends only to federal offenses; it does not affect offenses under state law.

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. Although DOJ generally enjoys [significant independence](#), particularly with respect to its handling of specific cases, the President has the authority to direct DOJ as part of his constitutional duty to “[take Care that the Laws be faithfully executed](#).” DOJ is primarily responsible for prosecuting criminal violations of the CSA and possesses significant prosecutorial discretion in doing so. Under the Obama administration, DOJ issued [several guidance memoranda](#) outlining enforcement priorities related to marijuana. Although that guidance expressly reserved DOJ’s full authority to enforce the CSA, it suggested that prosecutors should not prioritize enforcement against low-risk activities, including individual use of medical marijuana. Under the Trump Administration, DOJ [rescinded the Obama-era guidance](#) in 2018, but retains broad discretion to decide what federal offenses to prosecute. Like the pardon power, DOJ prosecutorial discretion would limit prosecution only for federal offenses, and would provide no guarantee against future changes to DOJ’s enforcement policy.

State Law

If the President worked with DEA or Congress to remove marijuana from Schedule I of the CSA, it might raise the question of how the change in federal law would interact with state laws that criminalize some or all marijuana-related activities. Under the United States' [federalist system of government](#), the President has no direct power to change state law or compel the states to adopt federal policies. Pursuant to the [Supremacy Clause](#), Congress *can* preempt state law through federal statutes like the CSA. However, the CSA provides that it [does not preempt state laws](#) “unless there is a positive conflict between [the CSA] and that State law so that the two cannot consistently stand together.” If marijuana were rescheduled or descheduled at the federal level, it would be possible for people to comply with both the CSA and more stringent state laws—for example, by abstaining from using marijuana. Thus, that change to federal law standing alone would not alter the status of marijuana under state law.

Considerations for Congress

If Congress wishes to remove or scale back federal legal restrictions on marijuana beyond what the executive branch chooses to pursue, it has significant authority to do so. While the CSA does not grant the President the power to change the status of a controlled substance or the punishments for controlled substance offenses, Congress unquestionably holds the power to [amend the CSA](#) to reschedule or deschedule a controlled substance or change applicable penalties. If the legislature decides to relax federal regulation of marijuana, bills currently pending before Congress would move marijuana to a [less restrictive schedule](#) or [remove the substance from control](#) entirely. (Amending the CSA would not change the status of cannabis under other federal laws, including the [Federal Food Drug & Cosmetic Act](#).) In the alternative, Congress could choose to limit the enforcement of federal marijuana law without altering the substance's classification under the CSA. For example, an [appropriations rider](#) enacted every year since FY2014 prohibits DOJ from using taxpayer funds to prevent the states from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”

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. With respect to the first option, when legislating pursuant to an enumerated power, Congress can expressly [preempt state laws](#) and could likely amend the CSA to override state marijuana controls. As an analogous precedent, the [2018 farm bill](#) carved out non-psychoactive hemp from the CSA's regulation of marijuana and prohibited the states from banning the interstate transport of hemp. As for the second option, Congress can use its [spending power](#) to encourage the states to adopt certain policies by conditioning federal funds on the enactment of desired legislation.

If, in the alternative, Congress seeks to maintain existing controls, it would have some authority to do so even if the executive branch decided to reduce legal restrictions on marijuana or limit enforcement of marijuana laws. The CSA is a statutory regime, and Congress has the ultimate authority over what substances are subject to federal control. Thus, if DEA chose to move marijuana to a less restrictive CSA schedule or remove it from control entirely, Congress could potentially [overturn DEA's determination](#) or enact legislation directly placing marijuana in Congress's preferred schedule. However, if the executive branch elected to issue pardons or grant amnesty for marijuana offenses, or to exercise [prosecutorial discretion](#) to [decline to prosecute such offenses](#), Congress's options would be more limited. Congress could restrict funding to DOJ if it disagreed with the agency's enforcement strategy, but the legislature cannot directly force DOJ to pursue certain cases. As for the pardon power, the main checks on executive clemency are political, and there is no way for Congress to [rescind a pardon](#) once it has issued.

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