

April 2021

POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action

Robert Mikos

Vanderbilt University, robert.a.mikos@vanderbilt.edu

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>



Part of the [Administrative Law Commons](#), [Agriculture Law Commons](#), [Criminal Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Robert Mikos, *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, 89 U. Cin. L. Rev. 668 (2021)

Available at: <https://scholarship.law.uc.edu/uclr/vol89/iss3/3>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

POTUS AND POT: WHY THE PRESIDENT COULD NOT LEGALIZE MARIJUANA THROUGH EXECUTIVE ACTION

*Robert A. Mikos**

Could the President legalize marijuana, without waiting for Congress to act? The 2020 Presidential Election showed that this question is far from hypothetical. Seeking to capitalize on frustration with the slow pace of federal legislative reform, several presidential candidates promised they would bypass the logjam in Congress and legalize marijuana through executive action instead.

This Essay warns that such promises are both misguided and dangerous because they ignore statutory and constitutional constraints on the President's authority to effect legal change. It explains why supporters of marijuana reform should be wary of legalizing the drug through executive action, even if that means having to wait for Congress to pass new legislation.

To be clear, this Essay is not a defense of our current federal marijuana policy. Federal marijuana policy is a mess, regardless of one's views on legalization. But proponents of reform need to recognize that Congress made this mess, and only Congress can clean it up. Proponents of reform should resist the temptation to embrace the imperial presidency to serve their short-term policy goals, for there is much more at stake here than marijuana policy.

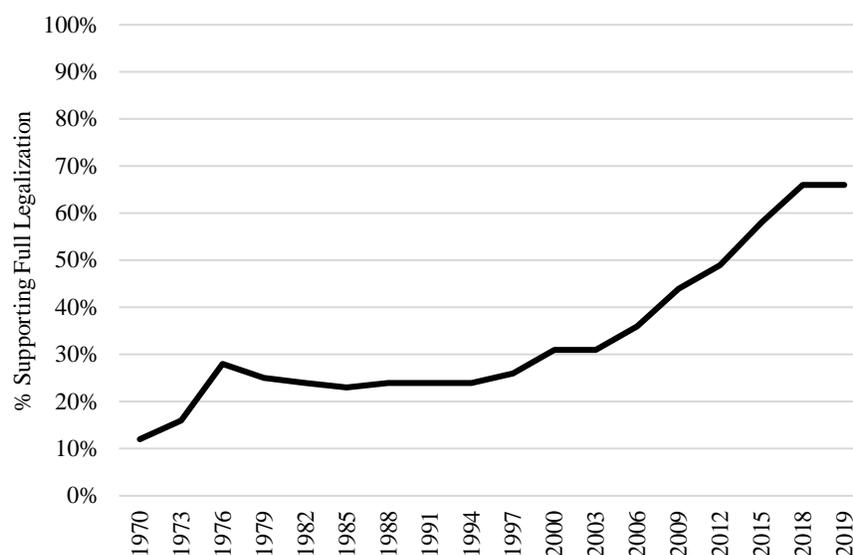
The Essay proceeds as follows. Section I sets the stage by discussing the growing interest in pursuing legalization via executive action. Section II then illuminates the current limits on the President's power to legalize marijuana. Finally, Section III explains why disregarding those limits is dangerous, and why marijuana reforms should run the gauntlet that is our national lawmaking process—even if that means we are stuck with an outdated federal marijuana policy for some time.

I. THE ALLURE OF LEGALIZING MARIJUANA THROUGH EXECUTIVE ACTION

Public support for legalizing marijuana—and not just for medical purposes—has skyrocketed over the past few decades, as shown by the Gallup polling data depicted in Figure 1.¹

* Professor of Law, Vanderbilt University. I thank Felix Chang and the editors of the University of Cincinnati Law Review for organizing the 2020 Corporate Law Symposium: *A Fresh Take on Cannabis Regulation*. This Essay is based on my keynote address at the symposium. I also thank Sam Heller and Ben Nicols for excellent research assistance.

1. Data for the graph are taken from Jeffrey Jones, *U.S. Support for Legal Marijuana Steady in*

Figure 1: Public Support for Legalization

Back in 1970, when Congress passed the Controlled Substances Act (CSA), the federal statute that bans the production, distribution, and possession of marijuana,² only twelve percent of Americans supported legalization. Now, by contrast, sixty-six percent of Americans do. In other words, nearly two-thirds of the American public now favors legalizing the drug, irrespective of the purposes for which it is used.

Just as remarkably, support for legalization is not confined to certain parts of the country. Before the 2020 elections, twelve states across the nation and the political spectrum had already legalized the drug for recreational purposes.³ Recent public opinion polls show that legalization draws strong support in a large number of other states as well, including some surprising places, like Arizona (62% favor legalization),⁴ Kansas

Past Year, GALLUP (Oct. 23, 2019), <https://news.gallup.com/poll/267698/support-legal-marijuana-steady-past-year.aspx>.

2. The statute is codified at 21 U.S.C. § 801 et seq.

3. These states include Alaska, California, Colorado, the District of Columbia, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. An additional twenty-two states have legalized the drug for medical purposes.

4. *Poll: Arizona Opposition to Marijuana Legalization Goes up in Smoke*, OH PREDICTIVE INSIGHTS (Jul. 21, 2020), <https://ohpredictive.com/press-releases/az-opposition-to-marijuana/>.

(61%),⁵ South Dakota (60%),⁶ Texas (54%),⁷ and Montana (54%).⁸ In fact, it is now difficult to find a state poll where the majority does *not* favor legalization.⁹

Even though few policy proposals draw as much support in as many parts of the country as does the legalization of marijuana,¹⁰ Congress has thus far failed to repeal the federal ban on the drug. Proposals to legalize marijuana at the federal level,¹¹ or at least to allow states to opt out of the federal ban,¹² have repeatedly stalled in Congress, rarely even making their way out of committee.¹³ In the quarter century since California adopted the first major state-level marijuana reform in 1996 – the Compassionate Use Act, which legalized medical marijuana in the state,¹⁴ Congress has made only two modest reforms to federal marijuana policy. Since 2014, it has attached a rider to the Department of Justice’s (DOJ) annual budget, blocking the agency from prosecuting violations of the federal marijuana ban, at least when the violators have acted in strict compliance with state medical marijuana laws.¹⁵ Additionally, in 2018,

5. JIAN SUN, THE DOCKING INST. OF PUB. AFFAIRS FORT HAYES ST. UNIV., KANSAS SPEAKS FALL 2019 STATEWIDE PUBLIC OPINION SURVEY (Nov. 2019), https://www.fhsu.edu/docking/Kansas-Speaks/kansas-speaks-report_fall-2019-final.

6. Joe Sneve, *Poll: Most South Dakota Voters Support Marijuana Legalization*, ARGUS LEADER (Sept. 18, 2020), <https://www.argusleader.com/story/news/2020/09/18/poll-most-south-dakota-voters-support-legalizing-marijuana/5828238002/>.

7. *Legalization of Marijuana*, THE UNIV. OF TEX. AT AUSTIN (Feb. 2019), <https://texaspolitics.utexas.edu/set/legalization-marijuana-february-2019>.

8. *Montana Poll Examines ERA Knowledge, Marijuana Legalization Data Regulations*, UNIV. OF MON., (Feb. 27, 2020), <https://www.umt.edu/news/2020/02/022820poll.php>.

9. Robert A. Mikos, *Marijuana Policy Should be Set by the Federal Government, Not the States*, in *DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM* 51 (Richard J. Ellis & Michael Nelson, eds.) (4th ed. 2020).

10. For an overview of the divisions in American public opinion on other issues, see generally *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RES. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions/>.

11. See, e.g., MORE Act of 2019, S. 2227, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2227>.

12. See STATES Act, S. 3032, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3032/all-info>. For my analysis of the STATES Act, see Robert A. Mikos, *Analysis of the Warren-Gardner STATES Act, MARIJUANA L., POL’Y, & AUTHORITY BLOG* (June 7, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/06/analysis-of-the-warren-gardner-states-act/>.

13. In early fall 2020, for example, House Democrats postponed a floor vote on the MORE Act until after the 2020 election, choosing instead to focus on other priorities, like the COVID-19 pandemic. See Madeleine Ngo & Natalie Andrews, *House Democrats Postpone Vote on Decriminalizing Marijuana*, WALL. ST. J. (Sept. 17, 2020, 6:19 PM), <https://www.wsj.com/articles/house-democrats-postpone-vote-on-decriminalizing-marijuana-11600381177>.

14. CAL. HEALTH & SAFETY CODE § 11362.5.

15. See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Although the terms of the spending rider are susceptible to different readings, at least one federal appeals court has interpreted it to bar the DOJ from using any funds to prosecute individuals “engaged in conduct permitted by the State Medical Marijuana Laws and who fully

Congress narrowed the definition of “marijuana” to exclude non-psychoactive cannabis plants, which Congress rechristened as “hemp.”¹⁶

While these two reforms should not be dismissed out of hand, they fall far short of legalizing marijuana writ large. Federal law continues to impose a variety of sanctions and limitations on individuals engaged in the possession, production, or distribution of marijuana, even when those individuals faithfully comply with all state marijuana laws. Among other disadvantages, state-licensed marijuana suppliers cannot easily obtain basic banking services;¹⁷ they cannot seek protection under federal bankruptcy¹⁸ or trademark laws¹⁹; they cannot deduct certain business expenses when calculating their federal tax liabilities;²⁰ they cannot apply for Small Business Administration loans, including any of the \$659 billion made available under the CARES Act in response to the 2020 coronavirus pandemic;²¹ and they face civil lawsuits brought by private plaintiffs seeking treble damages under the federal Civil RICO statute.²² While there may be a truce between the federal government and reform states, it is, at most, a limited truce.²³

Congress’s failure to pass marijuana reform legislation by this point may seem puzzling. However, the Constitution makes the passage of federal legislation difficult by design, regardless of the subject involved.²⁴ For example, the equal allocation of Senate seats gives small states an

complied with such laws.” *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

16. Agricultural Improvement Act of 2018, H.R. 2, 115th Cong. (2018) (enacted), <https://www.agriculture.senate.gov/imo/media/doc/Agriculture%20Improvement%20Act%20of%202018.pdf>. For an explanation of how the 2018 Farm Bill changed federal marijuana law, see Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 15 (2020).

17. See generally Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015).

18. E.g., *In re Arenas*, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015) (“Can a debtor in the marijuana business obtain relief in the federal bankruptcy court? No.”).

19. E.g., *In re Brown*, 119 U.S.P.Q.2d 1350 (T.T.A.B. 2016).

20. See generally Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014).

21. Kyle Jaeger, *Marijuana Businesses are Ineligible for Coronavirus Disaster Relief, Federal Agency Confirms*, MARIJUANA MOMENT (Mar. 24, 2020), <https://www.marijuanamoment.net/marijuana-businesses-are-ineligible-for-coronavirus-disaster-relief-federal-agency-confirms/>.

22. E.g., *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). See also Robert A. Mikos, *UPDATE: Plaintiff Loses Colorado RICO Lawsuit (Safe Streets)*, MARIJUANA L., POL’Y, & AUTHORITY BLOG (Nov. 1, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/11/update-plaintiff-loses-colorado-rico-lawsuit-safe-streets/>.

23. See Mikos, *supra* note 16, at 10-14.

24. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 34-60 (2006) (discussing features of national political process that hinder passage of federal laws); Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001) (observing that “the procedures established by the Constitution make adoption of [federal] law more difficult by requiring the participation and assent of multiple actors”).

outsized influence in Congress. This allows Senators from states like Wyoming, Idaho, and Nebraska—none of which has legalized even medical marijuana—to hold up the adoption of legislation that is popular elsewhere. The obstacles to passing federal legislation are hardly insurmountable—Congress does legislate, after all—but the process takes time and is not for the impatient.

The states have been quicker to adopt marijuana reforms largely because they face fewer anti-majoritarian obstacles in their lawmaking processes.²⁵ For example, the states do not (and may not) give less populous parts of the state a disproportionate vote in the state legislature, in the same way that the Constitution gives less populous states in the Union a disproportionate vote in the Senate.²⁶ Perhaps even more importantly, many states allow the people to enact laws directly, thereby bypassing the state legislature and any procedural obstacles that might hinder the passage of legislation therein.²⁷ Indeed, it is telling that many states have pursued marijuana reforms via ballot initiative, rather than through normal legislation passed by their state legislatures.²⁸

Given the growing popularity of marijuana legalization, it is hardly surprising that reform proponents are seeking other routes to legalize marijuana federally—routes that do not require running the “gauntlet” that is the national legislative process.²⁹ Seizing upon the pent-up demand for reform, several Presidential candidates during the fall 2020 election suggested that they would, if elected, quickly legalize marijuana, without waiting for Congress to act. For example, erstwhile Democratic candidate Senator Bernie Sanders boldly promised that, as President, he would “Legalize marijuana in the first 100 days with executive action.”³⁰ Indeed,

25. See Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1689 (2007) (comparing state and federal lawmaking procedures and observing that, “[i]n many respects, it is easier to pass populist legislation at the state level”).

26. *Id.* at 1689-91.

27. *Id.*

28. See ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 291 (Wolters Kluwer 2017) (noting that “nearly half (14 of 29) of the state medical marijuana laws that were adopted through 2016 . . . were adopted via ballot initiative,” and that “all nine jurisdictions that [had] legalized recreational marijuana through 2016 had done so via ballot initiative”).

29. Apart from seeking executive action, legalization advocates have filed lawsuits asking the courts to declare that the federal marijuana ban is unconstitutional on various grounds. See, e.g., *Washington v. Sessions*, No. 17 Civ. 5625 (AKH), 2018 WL 1114758 (S.D.N.Y. Feb. 26, 2018) (dismissing complaint for failure to exhaust administrative remedies).

30. See *Legalizing Marijuana*, BERNIE SANDERS CAMPAIGN WEBSITE, <https://berniesanders.com/issues/legalizing-marijuana/> [<https://perma.cc/32D3-UQH7>] (last visited Jan. 24, 2021). Senator Sanders also promised to expunge past marijuana-related convictions, tax marijuana sales and reinvest those proceeds “in communities hardest hit by the War on Drugs”, and limit the concentration of the marijuana industry to ensure that it does not become another “big tobacco.” *Id.* Because it is unclear whether Senator Sanders intended to do such things through executive action rather than through new legislation, I will focus on the first prong of his campaign promise—i.e., to legalize

in a speech delivered just two days before Iowa's first-in-the-nation caucus, Sanders accelerated his timetable, promising that, "On my first day in office through executive order we will legalize marijuana in every state in this country."³¹ Sanders's promise was unequivocal: he claimed he could and would legalize marijuana—for recreational and medical use—quickly, and without "wait[ing] for Congress to act."³²

In similar fashion, Senator Elizabeth Warren embraced the idea of legalization through executive action. Although she held out hope that Congress might pass new legislation, Senator Warren made clear her view that new legislation was not necessary. Like Sanders, she promised that, if elected, she would act quickly to legalize marijuana using the President's executive authority. Elaborating somewhat, Warren promised that, as President, she would

act decisively on legalization starting on day one. I'll appoint agency heads, including at the Department of Justice, the Drug Enforcement Administration, the Food and Drug Administration, and the Office of National Drug Control Policy, who support legalization. In my first 100 days, I'll direct those agencies to begin the process of delisting marijuana via the federal rule-making process. And I'll reinstate the Obama administration's guidance on deferring to state policy on marijuana enforcement to prevent uncertainty in the states while legalization is pending at the federal level.³³

These promises to legalize marijuana in short order through executive action were praised by many (though not all) fans of legalization.³⁴

Of course, neither Sanders nor Warren appeared to benefit much from these bold promises, as former Vice President Joe Biden eventually won the Democratic nomination (and the Presidency) without committing

marijuana.

31. Tom Angell, *Bernie Sanders Pledges Legal Marijuana in All 50 States on Day One as President*, FORBES (Feb. 1, 2020), <https://www.forbes.com/sites/tomangell/2020/02/01/bernie-sanders-pledges-legal-marijuana-in-all-50-states-on-day-one-as-president/#1a5443391c16> (quoting Sanders).

32. See BERNIE SANDERS CAMPAIGN WEBSITE, *supra* note 30.

33. A *Just and Equitable Cannabis Industry*, ELIZABETH WARREN CAMPAIGN WEBSITE, <https://elizabethwarren.com/plans/cannabis> [<https://perma.cc/CU9U-V4NZ>] (last visited Jan. 24, 2021).

34. E.g., David Dayen, *Sanders and Warren Vow to Legalize Marijuana Through Executive Action*, THE AM. PROSPECT (Sept. 24, 2019), <https://prospect.org/day-one-agenda/sanders-warren-vow-to-legalize-marijuana/> ("Legalizing marijuana, and putting an end to a harmful drug war that has trapped millions of people in a spiral of incarceration and hardship, would be very powerful, and the option of taking executive action makes it more feasible."). *But see, e.g.*, Matt Welch, *Op-Ed: Can't remove the President from Power? Do the Reverse: Remove Power from the President*, LA TIMES (Feb. 6, 2020), <https://www.latimes.com/opinion/story/2020-02-06/executive-power-impeachment-donald-trump-joe-biden> ("Legalizing marijuana is a wonderful and long-overdue idea, but Sanders' way of getting there is not. Federal law, including the odious Controlled Substances Act, is constitutionally required to originate from or be struck down by either Congress or constitutional amendment.").

himself to legalizing marijuana through executive action.³⁵ Nonetheless, the calls for executive action to legalize marijuana are unlikely to subside as long as the federal ban remains on the books.

II. THE LIMITS ON POTUS'S POWER TO LEGALIZE POT

How exactly would a President legalize marijuana through executive action? Not surprisingly, the campaign promises mentioned above were short on specifics, but they appear to contemplate taking either or both of two actions: utilize the Attorney General's authority under the CSA to de-schedule marijuana, and/or suspend enforcement of federal laws that restrict marijuana-related activities. As explained below, however, neither action is presently authorized by statute or the Constitution.

A. *The President Cannot Swiftly De-schedule Marijuana Under the CSA*

Senators Sanders and Warren both assumed that, as President, they could simply order the Attorney General to de-schedule marijuana.³⁶ To appreciate this tactic and to grasp why the President could not actually do this, it is necessary to explain the CSA's byzantine scheduling system.³⁷

The CSA assigns all psychoactive drugs with abuse potential to one of five Schedules (I-V). Scheduling determines how a drug is regulated. The statute makes it a federal crime to manufacture, distribute, or even possess Schedule I drugs, at least outside the narrow confines of a federally approved research study. The CSA authorizes the manufacture, distribution, and possession of drugs on the other schedules for medical purposes, but it still subjects those drugs to a sliding scale of regulatory controls, with Schedule II drugs (like cocaine) being the most heavily restricted and Schedule V drugs (like Robitussin) the least.³⁸

35. Biden has taken a more equivocal stance on legalization, although he appears to support non-enforcement of the federal ban, which is one form of executive action arguably contemplated by Senator Warren, as discussed below. *See Combating the Climate Crisis and Pursuing Environmental Justice*, BIDEN-SANDERS UNITY TASK FORCE 9 (Aug. 2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> (“We will support legalization of medical marijuana, and believe states should be able to make their own decisions about recreational use. The Justice Department should not launch federal prosecutions of conduct that is legal at the state level.”).

36. On his website, for example, Senator Sanders explained that he would “Immediately issu[e] an executive order that directs the Attorney General to declassify marijuana as a controlled substance.” BERNIE SANDERS CAMPAIGN WEBSITE, *supra* note 30. For her part, Senator Warren indicated that, as President, she would “direct [the relevant] agencies to begin the process of delisting marijuana via the federal rule-making process.” ELIZABETH WARREN CAMPAIGN WEBSITE, *supra* note 33.

37. For a more thorough discussion of the CSA's scheduling process and criteria, see MIKOS, *supra* note 28, at 272-77.

38. *See* U.S. DEP'T OF JUST., CONTROLLED SUBSTANCES (2020), https://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf (providing list of controlled

When Congress passed the CSA in 1970, it made the initial scheduling assignments for each drug covered by the statute. It placed marijuana on Schedule I, reflecting its view at the time that the drug was harmful and had no redeeming medical utility because it had not yet been demonstrated to treat any medical condition.³⁹ However, Congress also empowered the Attorney General, working in consultation with the Secretary of Health and Human Services (HHS), to re-schedule or even de-schedule a drug, when new scientific evidence suggested the change was warranted, such as when science suggested the drug no longer fit the criteria of the Schedule to which it had previously been assigned.⁴⁰

De-scheduling would remove marijuana from the ambit of the CSA. Marijuana suppliers would no longer face various sanctions that follow automatically from marijuana's present status as a Schedule I drug, including not only the CSA's criminal sanctions, but also the tax penalties the Internal Revenue Code imposes on unlawful drug dealers. De-scheduling would also ease access to banking services for the licensed marijuana industry because the proceeds of marijuana sales would no longer be considered tainted. In fact, if the drug were de-scheduled and the CSA no longer applied to marijuana, most of the sanctions that federal law now imposes on marijuana-related activities would go away.⁴¹ In short, de-scheduling really would legalize marijuana under federal law, both for medical and recreational use.

But there are several limitations on the Executive's scheduling authority under the CSA, which make legalizing marijuana through administrative de-scheduling a pipe dream. To illustrate, consider just three of those limitations.

First, the CSA's scheduling criteria make it impossible to administratively de-schedule any drug that is commonly used for recreational purposes because the CSA equates recreational drug use with drug abuse.⁴² Additionally, the statute requires that all drugs with abuse

substances by Schedule).

39. 21 U.S.C. § 812(b) (enumerating criteria for inclusion on each Schedule).

40. The Attorney General has delegated most of its scheduling authority to the Drug Enforcement Administration. 28 C.F.R. § 0.100(b). The Secretary of Health and Human Services has delegated its function to the Food and Drug Administration and the National Institute of Drug Abuse.

41. Most, but not all. The Food, Drug, and Cosmetic Act would still likely prohibit the sale of CBD, one of the chemicals commonly found in marijuana, for human consumption. *See generally* Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823 (2019).

42. *See, e.g.*, FOOD & DRUG ADMIN., ASSESSMENT OF ABUSE POTENTIAL OF DRUGS: GUIDANCE FOR INDUSTRY 4 (Jan. 2017), <https://www.fda.gov/media/116739/download> ("Drug abuse is defined as the intentional, non-therapeutic use of a drug product or substance, even once, to achieve a desired psychological or physiological effect."); DEP'T. OF HEALTH & HUMAN SERVS., *Basis for the Recommendation for Maintaining Marijuana in Schedule I of the Controlled Substances Act*, 81 Fed. Reg. 53690, 53690 (Aug. 12, 2016) (noting that one factor demonstrating that a drug has a potential for abuse

potential be placed on one of its five schedules.⁴³ To be sure, the CSA assigns drugs with a relatively low potential for abuse (like Robitussin) to one of the lower Schedules (III-V). But drugs with a low potential for abuse are still “controlled substances” and may not be removed altogether from the ambit of the statute.⁴⁴ In other words, they must still be controlled.

Notably, Congress made only two exceptions to the general rule that all recreational drugs must be controlled under the CSA. Namely, it declared in the statute that “The term ‘controlled substance’ . . . does not include distilled spirits, wine, malt beverages, or tobacco.”⁴⁵ Without this express statutory exemption, both alcohol and tobacco would now be subject to the controls imposed by the CSA. Indeed, the statute would probably prohibit the manufacture, distribution, and possession of alcohol and tobacco, because both have a high potential for abuse and lack any redeeming medical utility—making them appropriate for inclusion on Schedule I.⁴⁶ The fact that Congress felt it necessary to exempt alcohol and tobacco from the list of controlled substances reinforces the notion that it would take an act of Congress to remove any other recreational drug. Therefore, the Attorney General does not have the authority to de-schedule marijuana on their own.

Just to be clear, I believe marijuana is less dangerous than the other drugs on Schedule I, and many drugs on lower schedules as well. But recognizing that marijuana’s abuse potential is lower than that of other controlled substances does not somehow empower the Attorney General to remove the drug from the CSA administratively. At most, it merely enables the Attorney General to move marijuana to one of the lower schedules.⁴⁷ But while rescheduling marijuana would legalize the drug

is that “Individuals are taking the drug . . . on their own initiative rather than on the basis of medical advice”).

43. The statute defines “controlled substance” in circular fashion, as “a drug or other substance . . . included in schedule I, II, III, IV, or V.” 21 U.S.C. § 802(6). In other words, a “controlled substance” is one that is subject to controls. However, “potential for abuse” appears to be a key part of that definition, because it is one of the prime criteria for scheduling. *Id.* at § 812(b).

44. *Id.* at § 811(a)(2) (declaring that the Attorney General may remove a drug from the list of controlled substances only if the drug “does not meet the requirements for inclusion in any schedule”).

45. *Id.* at § 802(6).

46. *Id.* at § 812(b).

47. The Attorney General might not even be able to do that, because the statute requires demonstrating that a controlled substance has medical utility – i.e., that it has been demonstrated to treat some medical condition effectively – to move it off of Schedule I. That has been a sticking point in previous attempts to reschedule marijuana. For example, the last time the DEA rejected a petition to reschedule marijuana, it observed that

Congress established one schedule, schedule I, for drugs of abuse with ‘no currently accepted medical use in treatment in the United States.’ . . . Thus, any attempt to compare the relative abuse potential of a schedule I substance to that of a substance in another schedule is inconsequential, since a schedule I substance must remain in schedule I until it has been found to have a currently

for medical use, it would not legalize the drug for recreational purposes, as Presidential hopefuls Sanders and Warren promised to do via executive action.

Second, the CSA requires the Attorney General to comply with international drug control treaties when making scheduling decisions. In particular, Section 811(d)(1) states that, “If control is required by United States obligations under international treaties . . . the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations.”⁴⁸ In effect, this provision incorporates international law into domestic law.

Section 811(d)(1) effectively bars the Attorney General from de-scheduling marijuana, because international treaties oblige member nations to ban recreational use of all drugs.⁴⁹ The International Narcotics Control Board, which monitors treaty compliance for the United Nations, has already warned that the “the legalization of non-medical use of cannabis contravenes the international drug control treaties.”⁵⁰ Hence, as long as international drug control treaties require member nations to ban recreational marijuana – or at least, as long as the United States remains a party to such treaties – the Attorney General, and by extension the President, would lack the power to remove marijuana from the CSA.

This constraint on the executive branch’s scheduling authority has been misunderstood and overlooked. For example, John Hudak of the Brookings Institution has recently suggested that “The Single Convention [on Narcotics] has absolutely no impact on President Sanders’s or any president’s ability” to legalize marijuana, reasoning that while the international conventions bar member states from legalizing marijuana, “there’s really no enforcement mechanism in international organizations to do anything about it.”⁵¹ Hudak is undoubtedly correct that the United States would face no sanctions for violating its obligations under international drug control conventions. But he fails to realize that an executive order to de-schedule marijuana would not just violate international law, it would violate domestic law as well. In fact, the D.C.

accepted medical use in treatment in the United States.

Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688, 53747 (Aug. 12, 2016).

48. 21 U.S.C. § 811(d)(1) (emphasis added).

49. U.N. Office on Drugs & Crime, *Single Convention on Narcotic Drugs of 1961 Art. 28*, https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf. [<https://perma.cc/9H54-GYSQ>].

50. INT’L NARCOTICS CONTROL BD., 2018 ANNUAL REPORT 11, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2018.html>.

51. Kyle Jaeger, *Could Bernie Sanders Actually Legalize Marijuana Nationwide on Day One as President?*, MARIJUANA MOMENT (Feb. 4, 2020), <https://www.marijuanamoment.net/could-bernie-sanders-actually-legalize-marijuana-nationwide-on-day-one-as-president/> (quoting Hudak).

Circuit, one of the most prominent federal courts of appeals, has held that Section 811(d)(1) effectively bars the Attorney General even from moving marijuana below Schedule II of CSA.⁵²

Of course, the President could remove this limitation on the Attorney General's scheduling authority by withdrawing the United States from the international drug control treaties.⁵³ But withdrawing from the treaties would be a drastic step, and it is not one that anyone has seriously contemplated, whether as part of a plan to legalize marijuana through executive action or otherwise.

Third, apart from the substantive constraints just discussed, Congress has also imposed some procedural requirements that would make it impossible to de-schedule marijuana on the aggressive timeline envisioned by Senator Sanders. For one thing, before issuing any scheduling decision, the Attorney General would first have to seek the Secretary of Health and Human Services' written "scientific and medical evaluation" of marijuana⁵⁴—basically, the Secretary's opinion on marijuana's abuse potential, its medical utility, and its dependence liability. Furthermore, the Attorney General would have to defer to the Secretary's findings when making their scheduling decision.⁵⁵ That could pose a problem if the Secretary is unwilling to certify that marijuana has no abuse potential. In addition, the Attorney General must also comply with the Administrative Procedure Act (APA), which, among other things, requires giving the public notice of and an opportunity to comment upon any proposed rule to reschedule marijuana.⁵⁶

While these procedural hurdles are not insurmountable, it would take time to complete each of these steps. Consider that it took the DEA and FDA nearly five years to complete their response to the last petition to re-schedule marijuana.⁵⁷ The aggressive timetable envisioned by Senator Sanders, promising legalization anywhere from 1 to 100 days after inauguration, is wildly optimistic. It would be impossible for the agencies involved to satisfy the procedural requirements of the CSA and APA in such a short period of time. Recognizing that it would take time, perhaps even years, to de-schedule marijuana administratively reduces the appeal of legalizing marijuana via executive action.

There are other limits on the Attorney General's scheduling authority

52. Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Admin., 559 F.2d 735, 757 (D.C. Cir. 1977) (describing the limitations on the DEA's scheduling authority stemming from treaty obligations).

53. Withdrawing from the conventions likely would not require congressional assent. Cf. *Goldwater v. Carter*, 444 U.S. 996 (1979).

54. 21 U.S.C. § 811(b).

55. *Id.*

56. See generally 5 U.S.C. § 551, et seq.

57. Dep't of Health & Human Servs., *supra* note 42.

under the CSA, but these examples should suffice to show that the President may not legalize marijuana for recreational use by de-scheduling the drug, at least in the short time frame envisioned by proponents of executive action.

B. The President Cannot Suspend Enforcement of All Federal Laws Restricting Marijuana

A second possibility would be to leave the federal ban on the books, but to stop enforcing that ban. Senator Warren indicated that non-enforcement would be part of her strategy to legalize marijuana via executive action, alongside de-scheduling. (Senator Sanders did not mention non-enforcement during his campaign, perhaps trusting that his plan to swiftly de-schedule would make enforcement a non-issue.) In particular, she indicated that she would “reinstate the Obama administration’s guidance on deferring to state policy on marijuana enforcement.”⁵⁸

During the Obama Administration, the senior leadership of the DOJ issued a series of enforcement memoranda to all United States Attorneys. In a nutshell, these memoranda encouraged federal prosecutors not to pursue legal action against marijuana traffickers who comply with “strong and effective” state regulations, so long as their violations do not implicate other federal enforcement priorities, such as preventing “the distribution of marijuana to minors.”⁵⁹ In other words, as long as no state law was violated, the DOJ should not prosecute federal marijuana crimes.

While the Obama non-enforcement policy did not remove the federal marijuana ban from the code books, it lessened one of the biggest concerns facing state-licensed marijuana suppliers—the threat of federal criminal prosecution. In so doing, it helped spur the creation of the state-licensed marijuana industry we have today. As I have observed elsewhere, the memoranda “signaled that the federal government was willing to call a ‘Truce’ in its longstanding war on marijuana.”⁶⁰ After the first memorandum was announced in 2009, states began to authorize and regulate the commercial production and sale of marijuana, something they had been reluctant to do while the DOJ was still enforcing the federal

58. ELIZABETH WARREN CAMPAIGN WEBSITE, *supra* note 33.

59. *See, e.g.*, Memorandum from James M. Cole, Att’y General, to U.S. Att’ys on Guidance Regarding Marijuana Enforcement, 1 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. *See also* Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011) (analyzing DOJ enforcement guidance).

60. Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 10 (2020).

ban.⁶¹ And once the states authorized the commercial supply of marijuana, thousands of private companies lined up to grow and sell the drug under the watchful eye of state regulators.⁶² Simply put, the policy achieved a form of de-facto legalization.⁶³

But the DOJ non-enforcement policy was limited, just like the spending restrictions Congress would later impose on the agency (discussed above). While it effectively mooted the criminal sanctions enforced by the DOJ, the DOJ policy did not lift any of the civil sanctions enforced by other federal agencies, including the Internal Revenue Service, which continued to apply the tax code's punitive accounting rules against the state-licensed marijuana industry;⁶⁴ the Federal Reserve, which continued to limit access to federal payment systems for banks serving the industry;⁶⁵ the Patent and Trademark Office, which continued to refuse registration of trademarks used on marijuana products;⁶⁶ and the Department of Veterans Affairs, which continued to bar its physicians from recommending marijuana to their patients.⁶⁷

To suspend all the sanctions federal law now imposes on marijuana activities would require a more audacious program of non-enforcement, one that coordinates the enforcement activity of a broad cadre of actors including, but not limited to, the DOJ. Perhaps Senator Warren had such coordination in mind when she promised to “appoint agency heads including at the Department of Justice, the Drug Enforcement Administration, the Food and Drug Administration, and the Office of National Drug Control Policy, who support legalization.”⁶⁸ But achieving de facto legalization through a coordinated strategy of non-enforcement is both impractical and unconstitutional.

61. *Id.* at 5-8.

62. Colorado alone has licensed more than 1,000 firms to cultivate, process, and / or distribute medical or recreational marijuana. See *MED Resources and Statistics*, COLO. DEP'T REVENUE, <https://www.colorado.gov/pacific/enforcement/med-resources-and-statistics> (last visited Aug. 3, 2020).

63. Although the enforcement memoranda were rescinded by Attorney General Jeff Sessions in early 2018, the DOJ has not changed its enforcement practices. In other words, it still turns a blind eye to violations of the federal marijuana ban, albeit it is less open and transparent about it. See Robert A. Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, MARIJUANA L., POL'Y, & AUTHORITY BLOG (Jan. 5, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations/>.

64. See Leff, *supra* note 20.

65. See Hill, *supra* note 17, at 627-30.

66. See *In re PharmaCann, LLC*, 123 U.S.P.Q. (BNA) 1122, 1124 (T.T.A.B. 2017) (“We must determine the eligibility of marijuana-related marks for federal registration by reference to the CSA as it is written, not as it might be enforced at any point in time by any particular Justice Department.”).

67. *VA and Marijuana—What Veterans Need to Know*, U.S. DEP'T VETERANS AFF., <https://www.publichealth.va.gov/marijuana.asp> (last visited Sept. 5, 2020).

68. ELIZABETH WARREN CAMPAIGN WEBSITE, *supra* note 33. It is worth noting, however that neither Warren nor Sanders has explicitly called for expanding the scope of the Obama Administration non-enforcement policy.

It is impractical because the President wields only partial control over the sanctions federal law now imposes on marijuana activities. Most obviously, the President cannot stop private parties from using the federal ban in litigation with marijuana suppliers (and users). For example, private plaintiffs have sued state-licensed marijuana businesses under the federal civil RICO statute, alleging that sales of marijuana constitute racketeering activity, for which they can recover treble damages.⁶⁹ Private parties have also used the federal marijuana ban as a defense to infringement of trademarks owned by marijuana businesses.⁷⁰ Even the President's ability to control officials of the federal government is far from absolute. For example, the President could not simply order the Chairman of the Federal Reserve to change Fed policy and start offering marijuana banks access to federal payment systems.⁷¹ In short, it may prove impossible to effectively legalize marijuana by ignoring the federal ban—in other words, without formally removing the ban from the code books.

Such an aggressive non-enforcement policy would also be unconstitutional because it would usurp Congress's legislative power. In effect, Senators Warren and Sanders promised to nullify federal statutes that Congress duly enacted pursuant to its constitutional authority.⁷² The Obama policy raised similar separation of powers concerns, but that policy was easier to defend because it was limited in scope. The memoranda issued by the DOJ during the Obama Administration did not purport to legalize marijuana, and, as noted above, those memoranda contained several provisos, i.e., they did not purport to suspend all enforcement of the federal marijuana ban.⁷³ Indeed, to a large extent, the Obama policy simply reflected the reality that United States Attorneys must ignore some violations of federal law because Congress has not provided the DOJ enough resources to prosecute every violation—not even close.⁷⁴

69. See sources cited *supra*, note 22. For more details on the application of the federal civil RICO statute to the cannabis industry, see Mikos, *supra* note 59, at 649-56.

70. *Kiva Health Brands LLC v. Kiva Brands Inc.*, 439 F. Supp. 3d 1185, 1198 (N.D. Cal. 2020) (“When a mark is used for cannabis products, the Lanham Act does not recognize the user's trademark priority.”).

71. It is questionable whether the President could even get all United States Attorneys to suspend enforcement of the federal marijuana ban. See Mikos, *supra* note 59, at 643-46 (illuminating limits on Attorney General's ability to control local federal prosecutors).

72. See *Raich v. Gonzales*, 545 U.S. 1 (2005) (upholding CSA's ban on marijuana as valid exercise of Congress's Commerce Clause authority).

73. See Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. CRIM. L. REV. 183 (2016).

74. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463-69 (2009) (explaining that the federal government currently only has enough law enforcement resources to prosecute a tiny fraction

I recognize there is no bright line separating the President's power to enforce the law from Congress's power to make the law. When examined closely, many enforcement decisions resemble acts of legislation. But wherever the line may be drawn between the executive and the legislative powers, a Presidential order suspending enforcement of all congressional statutes governing marijuana, just because the President disagrees with the policy behind those statutes, would test the outer limits of even the most capacious definition of executive authority.

A couple of examples will help to show why a broad non-enforcement strategy would exceed the scope of presidential authority. Consider, first, Section 280E of the Internal Revenue Code, the provision that bars marijuana suppliers from deducting certain expenses when calculating their federal taxes. In relevant part, Section 280E states that,

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law. . . .⁷⁵

The language of this provision is mandatory. It does not give the IRS discretion to ignore its directives; for example, it says that “No deduction . . . shall be allowed” for certain types of expenses.⁷⁶ While scholars and tax practitioners have devised clever schemes to try to circumvent Section 280E (none has worked thus far),⁷⁷ no one has suggested that the IRS could simply ignore this provision of the tax code and treat marijuana suppliers like other federally lawful businesses.

Or consider the federal Bankruptcy Code. The United States Trustee insists that state-licensed marijuana business may not petition for bankruptcy relief, in part because a bankruptcy trustee might be required “to violate federal criminal law”, say, if it were forced to liquidate the business's inventory and sell its marijuana.⁷⁸ Taken at face value, the Trustee's objection suggests that an aggressive non-enforcement policy would entail more than just turning a blind eye to violations of federal law; in some cases, it might entail participating in such violations as

of all federal marijuana crimes).

75. 26 U.S.C. § 280E.

76. Section 280E is thus consistent with other rules that limit the IRS's authority to shape federal tax policy. *See generally* James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235 (2015) (recognizing, but also critiquing, rules limiting the IRS's policy-making authority).

77. *See, e.g.*, Leff, *supra* note 20; Robert A. Mikos, *Interesting New Tax Court Decision on Section 280E, MARIJUANA L., POL'Y, & AUTHORITY BLOG* (Jan. 23, 2019), <https://my.vanderbilt.edu/marijuanalaw/2019/01/564/>.

78. Clifford J. White, III & John Shehan, *Why Marijuana Assets May Not be Administered in Bankruptcy*, https://www.justice.gov/ust/file/abi_201712.pdf/download (last visited Jan. 27, 2021).

well.⁷⁹

In sum, the President's authority to legalize marijuana through executive action is far more limited than Presidential aspirants and marijuana legalization advocates have previously acknowledged. Issuing an executive order to immediately legalize marijuana, either by de-scheduling the drug or by suspending enforcement of existing laws, would be unavailing and unlawful.

III. THE DANGERS OF THE IMPERIAL PRESIDENCY

Although legalizing marijuana through executive action would be unlawful, reform proponents might still be tempted to try it. After all, there may be no litigant who would have standing to challenge any of the executive actions considered above, such as a Presidential order to de-schedule marijuana, or to stop enforcing Section 280E against the marijuana industry.⁸⁰ The realization that the President might get away with it could embolden the push to pursue legalization through executive action, especially since relatively pro-reform Democrats captured only a slim majority in Congress in the 2020 election.

Tempting as it is, however, advocates of reform should eschew the idea of legalizing marijuana through executive action. Ignoring the limits on Presidential power discussed above takes us further down the path of the imperial presidency, with consequences that could reverberate far beyond marijuana policy. An example from the Trump Administration should serve to illustrate some of the risks involved.⁸¹

79. In analyzing whether state marijuana reforms are preempted, for example, I have explained that there is a big difference between state laws that merely tolerate federal crimes, e.g., those that repeal state sanctions on marijuana trafficking, and state laws that actively facilitate those crimes, e.g., those that call for the state to operate a marijuana dispensary. *See* Mikos, *supra* note 74, at 1453-60.

80. Even members of Congress likely would not have standing to challenge such orders. *See generally* Vicki Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L. J. 845 (2018).

81. There are other examples from current and past Administrations that reinforce the point. For instance, President Trump has attempted to nullify the Johnson Amendment, a 1954 congressional tax statute that bars non-profit organizations, including churches, from campaigning directly on behalf of candidates in political elections. 26 U.S.C. § 501(c)(3). Congress has refused to repeal the Amendment, but Trump has vowed to "destroy" it, and he has even issued an Executive Order that urged the IRS to ignore the Amendment (though without much effect). *See* Salvador Rizzo, *President Trump's Shifting Claim that 'we got rid' of the Johnson Amendment*, WASH. POST (May 9, 2019).

The Obama Administration also utilized non-enforcement to achieve some of its policy goals. Apart from suspending enforcement of the federal marijuana ban, President Obama also suspended enforcement of the removal provisions of the 1952 Immigration and Nationality Act against between 800,000 and 1,800,000 undocumented immigrants who had been brought to this country when they were minors. Many conservatives claimed that President Obama had thereby usurped Congress's legislative authority and disregarded his duty to take care that the laws be faithfully executed. *See, e.g.,* Robert J. Delahunty & John C. Woo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) ("The President's claim of prosecutorial

In late August 2020, less than three months before the 2020 presidential election, the Secretary of HHS announced that the agency was granting Emergency Use Authorization (EUA) to treat COVID-19 with convalescent plasma.⁸² Although the Food, Drug, and Cosmetic Act (FDCA) imposes demanding scientific criteria for approving new treatments—criteria that would normally take years to satisfy—the statute authorizes the Secretary to permit the use of an unapproved treatment during a public health emergency, as long as a set of somewhat lower standards are met. Namely, the FDCA provides that the Secretary may issue an EUA if, after reviewing “the totality of scientific evidence” and consulting with the heads of multiple agencies, the Secretary determines that the new drug “may be effective in . . . treating” the illness creating the emergency, and the “known and potential benefits” of the medicine “outweigh the known and potential risks.”⁸⁴

While the Secretary touted convalescent plasma as a “major therapeutic breakthrough,” “the manner in which the EUA was granted raised a series of questions about the agency’s independence from political pressure.”⁸⁵ Scientists from around the world, including one of the scientists who had been conducting clinical trials on convalescent plasma, claimed that the Secretary had “grossly misrepresented” the efficacy of the treatment and the preliminary data gleaned from those trials.⁸⁶ Even senior career federal health officials warned that the data did not yet support issuing the EUA.⁸⁷ Doubts about the soundness of the Secretary’s decision were fueled by President Trump’s attempts to pressure the agency to approve the treatment.⁸⁸ Trump had hyped the promise of convalescent plasma long before the HHS issued the EUA,⁸⁹ and in the days leading up to the Secretary’s announcement, the President had openly criticized the agency

discretion in immigration matters threatens to vest the Executive Branch with broad domestic policy authority that the Constitution does not grant it.”)

82. FOOD & DRUG ADMIN., EUA 26382: EMERGENCY USE AUTHORITY REQUEST FOR COVID-19 CONVALESCENT PLASMA, <https://www.fda.gov/media/141480/download>.

83. The criteria for approval of new drugs are found in 21 U.S.C. § 355.

84. *Id.* at § 360 (c)(2)(A), (B).

85. Rachel Sachs, *Understanding the FDA’s Controversial Convalescent Plasma Authorization*, HEALTH AFFAIRS BLOG (Aug. 27, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200827.190308/full/>.

86. Katie Thomas & Sheri Fink, *F.D.A. ‘Grossly Misrepresented’ Blood Plasma Data, Scientists Say*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/08/24/health/fda-blood-plasma.html>. The accusations prompted the Secretary to walk back some of the claims that had been made during a press conference announcing the EUA. *Id.*

87. See Noah Weiland et al., *F.D.A.’s Emergency Approval of Blood Plasma Is Now on Hold*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/us/politics/blood-plasma-covid-19.html>.

88. See *id.*

89. See Katie Thomas & Noah Weiland, *As Trump Praises Plasma, Researchers Struggle to Finish Critical Studies*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/health/trump-plasma.html>.

for taking too much time to approve the treatment.⁹⁰ While the Secretary insisted that he made the EUA decision based on science, and not politics, his assurances did not quell the controversy.⁹¹

Whether he had any influence or not, the President's attempt to dictate the outcome of the FDCA drug approval process has obvious harms. It undermines the integrity of the administrative process Congress designed to assess the safety and efficacy of new drugs and treatments.⁹² In the wake of this controversy, for example, the American public has expressed growing distrust of the process now being used to assess the safety and efficacy of COVID-19 vaccines. Between May and September 2020, the percentage of Americans who said they would get vaccinated dropped from seventy-two percent (72%) to fifty-one percent (51%),⁹³ a trend which greatly hinders the prospects for returning to the old normal once a vaccine is approved.

President Trump's push to approve COVID-19 treatments (and a vaccine) bears more than a passing resemblance to the push to legalize marijuana through executive action discussed earlier. Both are motivated by a desire to enact a popular policy—expanding access to marijuana or to a COVID-19 treatment—more quickly than would be possible (if at all) if the executive branch followed the administrative process required by congressional statutes. In so doing, both pushes threaten to undermine public trust in the careful processes Congress has established to approve and control drugs and medical treatments.

I recognize that those processes may be flawed. The CSA, for example, myopically focuses on the medical use of drugs and recognizes no social value whatsoever in the recreational use of psychoactive substances.⁹⁴ The statute, in fact, considers *all* recreational use to be a harm, as explained earlier. A strong argument can be made that we should revise the CSA to accommodate non-medical use of drugs. In similar fashion,

90. *See, e.g.*, Sachs, *supra* note 85 (“The deep state, or whoever, over at the FDA is making it very difficult for drug companies to get people in order to test the vaccines and therapeutics. Obviously, they are hoping to delay the answer until after November 3rd.”) (quoting tweet from President Trump).

91. *Id.* (observing that “it is difficult to disentangle [the EUA decision] from the overt political pressure imposed by the President regarding both this therapy and others”).

92. *Id.* (noting that trust is “One of the most valuable assets of the FDA”).

93. Alec Tyson et al., *U.S. Public Now Divided Over Whether to Get COVID-19 Vaccine*, PEW RES. CTR. (Sept. 17, 2020), <https://www.pewresearch.org/science/2020/09/17/u-s-public-now-divided-over-whether-to-get-covid-19-vaccine/>.

94. Oddly, HHS has acknowledged that marijuana use is “pleasurable to many humans.” Dep’t of Health & Human Servs., *supra* note 42, at 53693. The agency has also surmised that marijuana use causes “Increased merriment . . . and even exhilaration”, “Disinhibition, relaxation, increased sociability, and talkativeness”, “Enhanced sensory perception, which can generate an increased appreciation of music, art and touch,” and “Heightened imagination which can lead to a subjective sense of increased creativity.” *Id.* at 53693-94. However, rather than viewing these effects as evidence of marijuana’s benefits, the agency instead considers them evidence of marijuana’s harms, because they demonstrate the drug’s high potential for abuse – i.e., its appeal as a recreational drug.

perhaps we should lower the bar for approving experimental treatments, especially during national health emergencies like the current pandemic. But these are policy changes that Congress needs to make; they are not changes the President can (or should) pursue unilaterally, in disregard of the limitations imposed by congressional statutes.

Entertaining proposals to legalize marijuana through executive action ultimately draws attention away from what is needed to reform federal marijuana policy: the adoption of new congressional legislation. Suggesting that the President could somehow legalize marijuana without Congress likely only reduces the urgency for Congress to act. After all, it enables members of Congress to shift some of the blame for the persistence of the federal marijuana ban onto the President, rather than taking full responsibility for that ban, as they should.

New congressional legislation will also be necessary if, as many believe it should, the federal government is to regulate, and not just legalize, marijuana. For example, both Senator Sanders and Senator Warren have suggested that the federal government should tax marijuana sales and redistribute the tax proceeds to communities that were disproportionately harmed by the war on drugs.⁹⁵ Senator Sanders has urged the federal government to impose caps on the concentration of the legal marijuana industry to prevent the rise of another Big Tobacco.⁹⁶ But these policies could not be adopted through executive action alone, and to their credit, neither Sanders nor Warren has ever suggested this would be possible. In short, it will take passage of new legislation, like the MORE Act, to both legalize marijuana and establish a more just regulatory regime to govern the substance at the federal level.

Marshalling legislative reform through Congress will, of course, take time. But the deliberateness of the federal lawmaking process is a feature of our constitutional structure, not a design defect. Requiring all legislation to be passed through Congress is one way the Constitution helps to protect individual liberty and our federal system of government.⁹⁷ Bypassing that process to achieve short-term policy goals – to accelerate the legalization of marijuana at the federal level – is fraught with ramifications that extend far beyond the narrow context of marijuana.

95. BERNIE SANDERS CAMPAIGN WEBSITE, *supra* note 30; ELIZABETH WARREN CAMPAIGN WEBSITE, *supra* note 33.

96. BERNIE SANDERS CAMPAIGN WEBSITE, *supra* note 30.

97. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013) (“What we commonly call ‘gridlock’ is not necessarily a sign of constitutional dysfunction.”).