



# Sky High? The Federal-State Marijuana Law Conflict and Airline Travelers

By Jennifer L. Petrusis

America's relationship with marijuana continues to evolve as more states legalize the drug. The November 2020 election saw four more states (Arizona, Montana, New Jersey, and South Dakota) authorize the recreational and medical use of marijuana.

However, marijuana possession remains illegal under federal law, and the conflict between state and federal laws has created confusion for airline travelers carrying marijuana, especially regarding enforcement of those laws. Even if a particular state has legalized marijuana use, an airline passenger located in that state cannot carry marijuana onto an airplane or in a checked bag. If the Transportation Security Administration (TSA) notices marijuana during a security screening, it will report the violation to local law enforcement, which will then evaluate whether the traveler is in compliance with local and state laws.

The practical issues surrounding whether and how federal laws prohibiting marijuana possession are enforced during air travel have created a large gray legal area for travelers, leaving them to wonder what will happen to them if they violate those laws. The answer to that is, it depends.

## Federal-State Law Conflict

State laws regarding possession of marijuana and its permitted uses already vary greatly. As of November 2020, a total of 15 states and the District of Columbia have legalized marijuana for medical or recreational use. A total of 35 states and the District of Columbia currently permit the medical use of marijuana. Still other states have opted to decriminalize marijuana rather than legalize it, which means that an individual might face noncriminal penalties such as fines for violating marijuana-related laws. The quantity of marijuana an individual may possess varies and, in the case of Illinois, depends on whether the individual is a resident.<sup>1</sup>

At the federal level, however, the use, possession, and distribution of marijuana remain illegal. The Controlled Substances Act of 1970 classifies marijuana as a Schedule I substance,<sup>2</sup> which means that the U.S. government deems the drug to have a high potential for abuse, deems the drug to have no currently accepted medical use in treatment in the United States, and deems there to be a lack of accepted safety for the drug's use under medical supervision.<sup>3</sup> Other examples

of Schedule I drugs include heroin,<sup>4</sup> LSD,<sup>5</sup> Ecstasy,<sup>6</sup> and peyote.<sup>7</sup> Additionally, federal law does not make a distinction between recreational and medical marijuana; all marijuana, no matter the reason for its use, is illegal under federal law.<sup>8</sup>

Since 1972, there have been several attempts to remove marijuana from the Controlled Substances Act or to reclassify it to a lower schedule. In October 2020, the U.S. Supreme Court denied certiorari in the *Washington v. Barr* matter, a case that challenged the designation of marijuana as a Schedule I substance.<sup>9</sup>

## Penalties for Traveling with Marijuana

The conflict between state and federal marijuana laws has raised an interesting issue for air travelers regarding whether they may carry marijuana onto an airplane if they are traveling to and from, or within, states that have legalized marijuana. The answer is no. U.S. air space is governed by federal law, and under federal law it is illegal to possess or transport any amount of marijuana. Theoretically, an airline passenger possessing marijuana could be arrested by a federal agent for violating the Controlled Substances Act. Even if a passenger is flying entirely within a state that permits possession of marijuana, the passenger is subject to federal law restrictions while on the airplane. The criminal penalties for simple possession of a substance prohibited under the Controlled Substances Act include a possible fine of \$1,000 or imprisonment of not more than one year, or both, for a first offense.<sup>10</sup>

If a passenger is flying from one state to another, a more serious federal crime is potentially implicated. Transporting marijuana across state lines could be considered drug trafficking, which carries a minimum penalty of up to five years in prison and a \$250,000 fine for a first offense.<sup>11</sup>

Recognizing federal prohibitions on marijuana, certain aircraft carriers have adopted policies banning all marijuana, including medical marijuana, from their aircraft. For example, Delta Airlines warns its passengers that items restricted or completely prohibited by TSA are not allowed on its aircraft.<sup>12</sup> American Airlines also

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warns its passengers that they are not permitted to transport marijuana on its flights.<sup>13</sup>

Finally, pilots and aircraft owners are subject to additional federal prohibitions against knowing transportation of marijuana on an aircraft. Federal law requires the Federal Aviation Administration to permanently revoke the certificate of a pilot who has knowingly transported a quantity of marijuana that amounts to more than simple possession,<sup>14</sup> and the U.S. Court of Appeals for the D.C. Circuit upheld revocation of a pilot's certificate when the pilot knowingly transported three chocolate bars containing THC.<sup>15</sup>

### Enforcement at Airports

Actual enforcement of federal marijuana regulations inside the airport, however, has become a gray legal area. According to its website, TSA security officers do not search for marijuana or other illegal drugs. Rather, TSA's screening procedures are focused on security and are designed to detect potential threats to aviation and passengers. However, if an illegal substance is discovered during a security screening, TSA officers are required to report the suspected violation of federal law to local, state, or federal authorities.<sup>16</sup>

TSA officers do not have the authority to arrest passengers, regardless of the circumstances. Therefore, TSA officers must rely upon other law enforcement agencies, usually the local law enforcement agency at the airport, to enforce prohibitions on marijuana. Practically speaking, this means that it will be up to local law enforcement whether and to what extent marijuana regulations are enforced at the airport.

For example, after voters legalized marijuana in Massachusetts, a Boston-based spokesman for TSA told the *Boston Globe* that if a TSA officer found marijuana in a traveler's bag, the officer would refer the matter to the Massachusetts State Police, and then it is up to local law enforcement to decide how to respond. A State Police spokesman then explained that if a state trooper determines the traveler is at least 21 and the amount of marijuana is an ounce or less, the traveler will be allowed to keep the marijuana because the traveler would not be breaking state law.<sup>17</sup>

In California, it is legal for individuals 21 years of age or older to possess up to an ounce of marijuana for personal consumption. The Los Angeles International Airport (LAX) "Marijuana Policy" states that LAX police officers have no jurisdiction to arrest individuals if they are complying with state law, but it also warns that TSA screening stations are under federal jurisdiction. It appears from LAX's policy that Airport police officers will take no action if TSA alerts them to the presence of marijuana in a passenger's bag as long as the passenger is otherwise in compliance with California law. Similarly, Portland International Airport (PDX) informs travelers that Port of Portland Police may be called by TSA officers regarding a report of

marijuana at a checkpoint and that Port of Portland Police would then determine whether the traveler's possession of marijuana is legal under Oregon law.

Some local jurisdictions have enacted ordinances making it clear that marijuana is illegal at the airport even if marijuana is legal in that state. For example, it is unlawful to possess marijuana at Las Vegas's McCarran International Airport (LAS) pursuant to the Clark County Code. Denver International Airport (DEN) also banned possession of marijuana on its property and set a maximum fine of \$999 for violators.

Several airports have installed "amnesty boxes" near TSA security checkpoints to provide travelers an opportunity to dispose of marijuana or other illegal drugs before boarding their flight and violating federal law. These amnesty boxes have been installed at Chicago's O'Hare Airport (ORD), at the Colorado Springs Airport (COS), and at LAS. The boxes typically have a secure mailbox-like compartment, are made of metal, and are bolted to the floor.

### Cloudy Future

Given the uncertainty and inconsistency surrounding enforcement of marijuana laws at airports, travelers are left wondering how likely it is that they will be cited or arrested for violating federal marijuana laws.

Confusion regarding enforcement of federal marijuana laws has existed for several years as the federal government flip-flops on whether it will enforce federal laws against the drug in states that have legalized it. In 2013, the Obama administration announced an update to the federal marijuana enforcement policy in light of states legalizing the possession of small amounts of marijuana. In a Department of Justice memorandum, the agency reiterated that marijuana remains an illegal drug under the Controlled Substances Act but that it would generally let state and local authorities address marijuana activity through enforcement of state laws.<sup>18</sup> In 2018, Attorney General Jeff Sessions issued a memorandum regarding federal marijuana enforcement.<sup>19</sup> The memorandum announced the rescission of previous guidance given under Obama, and it directed all U.S. attorneys to use previously established prosecutorial principles. In 2019, attorney general nominee William Barr told the Senate Judiciary Committee that he did not plan on using federal resources to "go after" marijuana businesses that otherwise comply with state marijuana laws.<sup>20</sup> He also acknowledged that maintaining a system where marijuana is illegal under federal law and simultaneously legalized in several states for adult recreational use is "untenable."<sup>21</sup> On December 14, 2020, President Trump announced Barr's resignation, with Deputy Attorney General Jeff Rosen filling in as acting attorney general until President-Elect Biden was sworn in. Biden indicated during his campaign that he would support decriminalization.

Over the past couple of years, federal legislators

have attempted to create certainty by passing legislation that would exempt from federal enforcement marijuana-related activities that comply with state, territorial, or tribal laws. In 2018 and then again in 2019, the Strengthening the Tenth Amendment Through States (STATES) Act was introduced by Senator Elizabeth Warren (D-MA) and Senator Cory Gardner (R-CO) to amend the Controlled Substances Act so that its provisions would no longer apply to individuals who were in compliance with state or tribal marijuana laws. On December 4, 2020, the House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, which would effectively end the federal prohibition of marijuana by removing marijuana from the Controlled Substances Act. However, the Senate did not pass the MORE Act before Congress adjourned. It is likely to be introduced again in the 117th Congress, and it appears that the changes to the Senate makeup have improved its chances of enactment. Another bill, the Regulate Marijuana Like Alcohol Act, which would also remove marijuana from the Controlled Substances Act and would remove enforcement authority from the Drug Enforcement Administration, did not advance in the 116th Congress.

In the meantime, marijuana remains illegal under federal law, but there is no clear direction on whether federal prohibitions on marijuana will be enforced against air travelers.

## Endnotes

1. Cannabis Regulation and Tax Act, 410 ILL. COMP. STAT. 705/1-999.
2. 21 U.S.C. § 812(c) (Schedule I(c)(10)).
3. *Id.* § 812(b)(1).
4. *Id.* § 812(c) (Schedule I(b)(10)).
5. *Id.* (Schedule I(c)(9)).
6. *Id.* (Schedule I(c)(1)).
7. *Id.* (Schedule I(c)(12)).
8. However, in 2014, Congress passed the Rohrabacher-Farr amendment as part of an omnibus spending bill to prohibit the Justice Department from expending funds to prevent states from implementing laws that authorize medical marijuana. See Pub. L. No. 113-235, § 538, 128 Stat. 2130.
9. 925 F.3d 109 (2d Cir. 2019), *cert. denied* (Oct. 13, 2020), 2020 WL 6037234.
10. 21 U.S.C. § 844.
11. *Id.* § 841.
12. *Prohibited or Restricted Items*, DELTA.COM (2021), <https://www.delta.com/us/en/baggage/prohibited-or-restricted-items/overview> (last visited Feb. 8, 2021).
13. *Restricted Items*, AA.COM, <https://www.aa.com/i18n/travel-info/baggage/restricted-items.jsp> (last visited Feb. 3, 2021).
14. 49 U.S.C. § 44710.
15. *Siegel v. Adm'r of the Fed. Aviation Admin. & Nat'l Transp. Safety Bd.*, 916 F.3d 1107 (D.C. Cir. 2019) (finding that Federal Aviation Administration had the authority to revoke a pilot's certificate for simple possession of chocolate bars infused with THC).
16. *What Can I Bring?*, TSA.gov, <https://www.tsa.gov/travel/security-screening/whatcanibring/all-list> (last visited Feb. 3, 2021).
17. Joshua Miller, *What Happens If You Bring Pot to Logan?*, BOSTON GLOBE (Feb. 9, 2017), <https://www.bostonglobe.com/metro/2017/02/09/flying-with-pot-cleared-for-takeoff/Z5vW2gdCXnzHyTzYnLF4dM/story.html>.
18. Press Release, U.S. Dep't of Justice, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.
19. Press Release, U.S. Dep't of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.
20. *Confirmation Hearing on the Nomination of Hon. William Pelham Barr to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (statement of William Barr, Nominee, U.S. Attorney General).
21. *Id.* (statement of William Barr, Nominee, U.S. Attorney General).