

## SYMPOSIUM ON DRUG DECRIMINALIZATION, LEGALIZATION, AND INTERNATIONAL LAW

### USING ONE DYING REGIME TO SAVE ANOTHER: THE INFLUENCE OF INTERNATIONAL DRUG CONVENTIONS ON UNITED STATES' CANNABIS RESEARCH POLICY

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Cannabis reforms are proliferating. A handful of nations have already legalized the drug for recreational purposes, and several more may soon follow suit. These national cannabis reforms are generating bottom-up pressure to liberalize the transnational legal order (TLO)<sup>1</sup> for cannabis prohibition, one that involves not only international law, but also domestic law and regulatory practice.<sup>2</sup> Based on a trio of international conventions, this TLO currently requires member states to limit access to marijuana, especially for non-medical or non-scientific purposes.<sup>3</sup> But even as it comes under attack from below, the existing cannabis prohibition TLO may be exerting its own downward pressure on national cannabis policies. This essay uses a timely case study involving the United States' marijuana research policy to explore the two-way relationship between international law and national cannabis policies in the dynamics of transnational legal ordering. It highlights an overlooked way the international conventions are currently helping to stifle national cannabis reforms, and it discusses the possible ramifications of that top-down pressure for the future of the cannabis prohibition TLO.

#### *The Controversy over the United States' Cannabis Research Policy*

For several decades, the federal Drug Enforcement Administration (DEA) has authorized only one entity to supply marijuana for research in the United States—the National Center for Natural Products Research at the University of Mississippi.<sup>4</sup> Critics complain that this government-licensed monopoly has impeded research into marijuana's medical applications. Among other reasons, the National Center produces a very limited quantity and

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<sup>1</sup> On the concept of transnational legal orders, see Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Schaffer, eds., 2015).

<sup>2</sup> Ely Aaronson, *The Strange Career of the Transnational Legal Order of Cannabis Prohibition*, in *TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE* 176 (Gregory Shaffer & Ely Aaronson, eds., 2020); John Walsh & Martin Jelsma, *Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System*, 1 *J. ILLICIT ECON. & DEV'T* 266 (2019).

<sup>3</sup> The International Narcotics Control Board (INCB), which monitors compliance with the conventions, has made clear its position that “[t]he legalization of non-medical use of cannabis contravenes the international drug control treaties,” and it has warned that these national reforms “undermine the international legal drug control framework.” INT'L NARCOTICS CONTROL BD., *2018 ANNUAL REPORT* 11 & 26.

<sup>4</sup> See Drug Enforcement Admin., *Applications To Manufacture Marijuana*, 81 Fed. Reg. 53,846 (Aug. 12, 2016) (“For nearly 50 years, the United States has relied on a single grower to produce marijuana used in research.”).

variety of marijuana products. These shortcomings have made it difficult, if not impossible, for researchers to rigorously test marijuana's potential medical utility.<sup>5</sup> Importantly, demonstrating such utility is an essential step to removing the drug from Schedule I, the most tightly restricted category under the federal Controlled Substances Act (CSA).<sup>6</sup>

Seeking to facilitate more research on the drug, in the waning days of the Obama Administration, the DEA announced that it would license additional entities to supply marijuana for research studies.<sup>7</sup> The "Obama policy" would require these new licensees to comply with a host of regulations, including obtaining "prior, written approval from [the] DEA" before distributing marijuana to researchers.<sup>8</sup>

The change in policy was applauded by scientists, who claimed it would dramatically boost research on marijuana.<sup>9</sup> It was also hailed by reformers, who hoped new research might demonstrate marijuana's medical benefits, and thereby convince federal policymakers to move the drug to a less tightly controlled schedule under the CSA.<sup>10</sup> Indeed, fueling these hopes, more than thirty entities quickly submitted applications to become federally licensed marijuana suppliers.

But almost four years after the Obama policy was announced, the National Center remains the only federally approved supplier of marijuana. Following the election of Donald J. Trump in fall 2016, the Department of Justice (DOJ) warned the DEA that its new policy violated the international drug control conventions. In a June 2018 memorandum, the DOJ opined that the conventions—which Congress had expressly incorporated into the CSA's licensing rules<sup>11</sup>—demanded that the DEA impose different, and generally more cumbersome, controls on licensees:

[T]he DEA must change its current practices and the policy it announced in 2016 to comply with the Single Convention [on Narcotic Drugs]. DEA must adopt a framework in which it purchases and takes possession of the entire marijuana crop of each licensee after the crop is harvested. In addition, DEA must generally monopolize the import, export, wholesale trade, and stock maintenance of lawfully grown marijuana.<sup>12</sup>

Based on the DOJ's interpretation of the treaties, the DEA quietly scuttled the Obama policy. It approved none of the thirty (and growing) applications it had received since that policy was announced, leaving the National Center as the only source of marijuana for use in federally approved research projects. Curiously, the DEA did not even communicate with the companies and universities that had applied for a license until one of them sued the agency in June 2019 demanding to be apprised of the status of its application.<sup>13</sup>

<sup>5</sup> E.g., John Hudak & Grace Wallack, [Ending the U.S. Government's War on Medical Marijuana Research](#) BROOKINGS (Oct. 2015); Alex Kreit, [Controlled Substances, Uncontrolled Law](#), 6 ALB. GOV'T L. REV. 332 (2013).

<sup>6</sup> 21 U.S.C. §812(b)(1).

<sup>7</sup> 81 Fed. Reg. at 53,846–48.

<sup>8</sup> *Id.* at 53,848 (emphasis omitted).

<sup>9</sup> Catherine Saint Louis & Matt Apuzzo, [Obama Administration Set to Remove Barrier to Marijuana Research](#), N.Y. TIMES (Aug. 10, 2016).

<sup>10</sup> The DEA has repeatedly cited the lack of scientific studies demonstrating that marijuana has an "accepted medical use" as a justification for its refusal to reschedule the drug under the CSA. See, e.g., Drug Enforcement Admin., [Denial of Petition to Initiate Proceedings to Reschedule Marijuana](#), 81 Fed. Reg. 53,688 (Aug. 12, 2016).

<sup>11</sup> 21 U.S.C. §823(a) ("The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971.") (emphases added).

<sup>12</sup> Henry C. Whitaker, Deputy Assistant Attorney General, Office of Legal Counsel, [Licensing Marijuana Cultivation in Compliance with the Single Convention on Narcotics](#) (June 6, 2018) (citing Article 23 of the 1961 Single Convention).

<sup>13</sup> See [In re Scottsdale Research Institute, LLC](#), No. 19-1120, Amended Petition for a Writ of Mandamus (D.C. Cir., June 11, 2019).

Because of pressure from that lawsuit and from Congress, which had grown increasingly frustrated with the DEA's restrictive research protocols,<sup>14</sup> the Trump Administration eventually proposed its own policy to boost the supply of marijuana for research. But the Trump policy was far more restrictive than the Obama policy, again, ostensibly due to the Trump Administration's professed concern for international law. For example, the proposal would require licensed marijuana producers to "deliver their total crops of cannabis to DEA", at which point the DEA would "purchase and take physical possession" of the crops, which it would then re-distribute to researchers.<sup>15</sup> Notably, the DEA has never before insisted on taking delivery of and assuming physical control over the marijuana produced for research. For example, it had previously allowed the National Center to distribute supplies directly to researchers. Aside from concerns over the new, onerous controls imposed by the Trump policy, the process of revising (yet again) the rules governing the licensing of marijuana suppliers has clearly delayed fulfillment of the federal government's longtime promise to expand access to the drug. The Trump policy was first announced in March 2020—more than forty months after the Obama policy was issued—and it will take additional months (if not years) to finalize.

#### *Motivations Behind this Invocation of International Law*

While the DEA insists the new controls it has proposed are required by international law, and thus, that it had no choice but to scuttle the more flexible Obama policy, closer examination of the Trump Administration's motivations for the controls and the drug conventions that supposedly demand them suggests a more cynical explanation. The Trump Administration may be using international law as a convenient excuse to block policy reform that the Administration opposes on substantive grounds, but which it could not otherwise block—at least not without incurring domestic political costs.<sup>16</sup>

For one thing, compared to its predecessor, the Trump Administration has been far more hostile toward marijuana. For example, Jeff Sessions, the Attorney General at the time the DOJ issued its strict interpretation of the Single Convention, proclaimed that marijuana is "only slightly less awful" than heroin.<sup>17</sup> Not surprisingly, Sessions opposed relaxing the nation's outright ban on marijuana, but he struggled to convince Congress to re-ignite its war on the drug.<sup>18</sup> But because Congress had already required the DEA to comply with international conventions, Sessions did not need to convince Congress that the Obama research policy was somehow harmful, say, because licensees might divert marijuana onto the illicit market. He could kill the policy just by citing international law.

The Trump Administration's professed concern for the conventions is also suspect because its interpretation of the conventions is highly debatable. The Obama Administration DEA had concluded that "it would be consistent with the purposes of articles 23 and 28 of the Single Convention" if the DEA did not assume direct physical control of marijuana, "provided the [licensed] growers agree that they may only distribute marijuana with prior, written

<sup>14</sup> For example, a bill introduced in the House of Representatives in January 2019 would require the DEA to license at least three new marijuana suppliers within one year. See [Medical Cannabis Research Act of 2019](#), H.R. 601.

<sup>15</sup> Drug Enforcement Admin., [Controls To Enhance the Cultivation of Marijuana for Research in the United States](#), 85 Fed. Reg. 16292, 16294 (Mar. 23, 2020).

<sup>16</sup> As Robert Putnam recognized in his seminal game-theoretic account of the interplay between foreign and domestic affairs, "[i]nternational negotiations sometimes enable government leaders to do what they privately wish to do, but are powerless to do domestically." Robert D. Putnam, [Diplomacy and Domestic Politics: The Logic of Two-Level Games](#), 42 INT'L ORG. 427, 457 (1988).

<sup>17</sup> Robert A. Mikos, [Risky Business? The Trump Administration and the State-Licensed Marijuana Industry](#), 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (April 29, 2017).

<sup>18</sup> E.g., Tom Angell, [Congress Protects Medical Marijuana from Jeff Sessions in New Federal Spending Bill](#), FORBES (Mar. 21, 2018).

approval from DEA.”<sup>19</sup> In fact, arguably *every* Presidential Administration since (and including) Nixon interpreted the Convention language more flexibly than did Trump. After all, the DOJ’s 2018 opinion condemned not just the Obama policy, but the DEA’s original marijuana licensing policy as well.<sup>20</sup> Even the Trump Administration’s own Department of State (DOS) rejected the DOJ’s strict reading of the conventions. When consulted for its opinion, the DOS Legal Adviser concluded that the drug treaties afforded nations far more latitude in licensing and regulating marijuana suppliers than the DOJ itself surmised.<sup>21</sup>

In addition, at least a handful of other parties to the Convention have adopted licensing policies for marijuana research that are in tension with the DOJ’s current interpretation of the treaties. For example, the United Kingdom, Australia, Israel, and Canada do not assume direct physical control over the marijuana their licensees produce for research.<sup>22</sup> The International Narcotics Control Board (INCB) has never objected to these research policies (or that of the United States), even though, if the DOJ really is correct, it would mean the United States has been in breach for nearly half a century. The INCB’s forbearance may reflect the fact that the treaties are not designed to stifle scientific research on marijuana, and they do not bar nations from legalizing medical use of the drug, so long as there is a scientific basis for such use.

In short, the Trump Administration did not have to adopt such a restrictive interpretation of the drug conventions. Rather, it may have done so because a restrictive reading enabled it to block a marijuana policy it opposed (the Obama policy) without having to go through a Congress that, increasingly, does not share its dim assessment of the drug.

### *Ramifications for the TLO*

Although it might not have been motivated by concern for the cannabis prohibition TLO,<sup>23</sup> as opposed to a concern for national cannabis prohibition, the Trump Administration’s invocation of the international drug conventions could still help prolong the restrictive TLO’s life. By blocking the Obama research policy and any subsequent reforms that policy could have spawned, the Trump Administration may have reduced the pressure the United States is applying to liberalize the TLO. (It has not, of course, eliminated that pressure, which continues to be exerted by myriad state reforms in the United States.)

However, the alliance between the TLO and national policy-makers in the United States may soon come to an end. Two-thirds of Americans now support legalization of marijuana for all purposes, and even higher percentages favor legalization for medical purposes.<sup>24</sup> To satisfy the growing public demand for legalization in the United States, a future Administration might be tempted to adopt a more flexible reading of the drug conventions, one that would permit modest reforms (like the Obama policy) or even more audacious ones. For example, former Democratic Presidential hopeful Senator Bernie Sanders promised voters that, if elected, he would “[l]egalize

<sup>19</sup> 81 Fed. Reg. at 53848.

<sup>20</sup> See [Whitaker](#), *supra*, note 12 (acknowledging that under the DOJ’s interpretation of the Single Convention, the DEA’s longstanding marijuana licensing policy violated international law).

<sup>21</sup> See *id.* at 10, 16, & 19–20 (referencing Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Jennifer G. Newstead, Legal Adviser, Department of State (Apr. 17, 2018)).

<sup>22</sup> *Id.* at 20.

<sup>23</sup> Some skepticism about the sincerity of the Trump Administration’s motives for quashing the Obama research policy seems warranted, given the hostility the Trump Administration (or at least, elements within it) has shown towards international law in other contexts. See HAROLD H. KOH, [THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW](#) (2018).

<sup>24</sup> See Jeffrey M. Jones, [U.S. Support for Legal Marijuana Steady in Past Year](#), GALLUP NEWS: POLITICS (Oct. 23, 2019).

marijuana in the first 100 days [of his Administration] via executive action”<sup>25</sup>—even though such a move would plainly violate the drug conventions (and would therefore likely exceed the President’s statutory authority as well).<sup>26</sup>

Or Congress could choose to simply ignore the drug conventions. Although the Congress that enacted the CSA in 1970 tied the DEA to the mast of the restrictive TLO by requiring the agency to comply with the international conventions, the present Congress is not bound by that choice. Indeed, Congress has already taken actions that probably put the United States in violation of the drug conventions. For example, over the objections of then-Attorney General Jeff Sessions, Congress barred the DOJ from prosecuting anyone acting in compliance with state medical marijuana laws, even though the INCB has declared that “[m]ost medical cannabis programmes in the United States do not comply with the requirements of the international drug control treaties.”<sup>27</sup>

Besides the Executive and Congress, American states could continue to push back against and undermine the cannabis prohibition TLO. More than thirty states have already legalized marijuana for medical use, and more than ten of those states have legalized it for recreational use as well.<sup>28</sup> Notwithstanding the INCB’s admonition that these state measures put the United States in breach of its treaty obligations, the federal government has no easy way to stop the states from legalizing marijuana – even if it were inclined to do so. It cannot simply order the states to ban the drug, and it would have to dramatically increase the DEA’s enforcement budget to wage an effective crackdown on the booming state-licensed marijuana industry.<sup>29</sup>

### *Conclusion*

Although the cannabis prohibition TLO appears to be on its last legs, it is helping to preserve national prohibition in the United States against populist demands for legalization. This essay has shown how key federal officials have used the international drug conventions as a convenient means to block domestic reforms that would appear to have strong public support. However, it also explains why this tactic may not preserve the national prohibition or the TLO for much longer. In the near future, Executive officials, Congress, and the states might decide to disregard concern for the international conventions in pursuit of populist reforms, thereby adding more pressure to end the restrictive TLO.

<sup>25</sup> [Bernie Sanders for President Campaign Website](#).

<sup>26</sup> The CSA bars the DEA from de- or re-scheduling marijuana if doing so would be inconsistent with the international drug conventions. [21 U.S.C. § 811](#).

<sup>27</sup> [INT’L NARCOTICS CONTROL BD.](#), *supra* note 3, at 9. See also Wells Bennett & John Walsh, [Marijuana Legalization is an Opportunity to Modernize International Drug Treaties](#), BROOKINGS (Oct. 2014) (explaining the tension between non-enforcement of the federal marijuana ban and the United States’ treaty obligations).

<sup>28</sup> See Robert A. Mikos, [Only One State Has Not Yet Legalized Marijuana in Some Form . . .](#), MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (July 16, 2018).

<sup>29</sup> See generally Robert A. Mikos, [On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime](#), 62 VAND. L. REV. 1419 (2009).