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Note

Lighten Up: Amending the Single Convention on Narcotic Drugs

Allison E. Don*

I. INTRODUCTION

Marijuana has been used by millions of people worldwide for thousands of years.¹ Its durability made it a popular material for clothing, rope and other commercial items. It was a dietary and medicinal staple in early civilizations.² George Washington, Thomas Jefferson and Ben Franklin all cultivated, utilized and encouraged the production of marijuana.³ Yet somehow, marijuana went from being a legal source of payment for taxes⁴ to a global problem warranting an international treaty banning its use.⁵ By the time the Single Convention on Narcotic Drugs was signed in 1961, marijuana had become illegal in most countries throughout the world.⁶

In 2012, despite being illegal in the United States at the federal level, Colorado and Washington's constituents passed a proposition that would permit the use of marijuana for recreational purposes within their

* University of Minnesota Law School, J.D. candidate 2015; Temple University, B.A. 2008. I would like to dedicate this Note to my fiancé, James Reyerson, with whom I share all my success. His encouragement and support through the ups and downs made this Note possible. I'd like to thank the editors and staff on the *Minnesota Journal of International Law* for their outstanding editorial contributions.

1. DAVID E. NEWTON, MARIJUANA preface at xiii (2013); see also Dennis S. Newitt, *The Medical Use of Marijuana: State Legislation, Judicial Interpretation and Federal Drug Laws*, 4 J. LEGAL ADVOC. & PRAC. 156, 156 (2002) ("The marijuana plant has been cultivated practically from the dawn of recorded history, at least 5000 years.").

2. See NEWTON, *supra* note 1, at 12–41 (explaining the importance of marijuana throughout early cultures). For an explanation of how marijuana can be used to produce industrial materials see *infra* note 9.

3. See NEWTON, *supra* note 1, at 32–33 (describing George Washington's, Thomas Jefferson's and Ben Franklin's involvement in the production and use of marijuana); see also MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA 16–19 (2012) (recounting George Washington's and Thomas Jefferson's encouragement of the growth of marijuana); LARRY SLOMAN, REEFER MADNESS: THE HISTORY OF MARIJUANA IN AMERICA 21 (1979) (quoting George Washington's diary entries regarding his cultivation of marijuana plants).

4. NEWTON, *supra* note 1, at 32 ("[F]or a period of more than two centuries after the establishment of the Jamestown and Massachusetts Bay settlements, hemp was so widely grown and used that it was legal tender for payment of taxes and fines.").

5. Single Convention on Narcotic Drugs art. 28, ¶ 3, Mar. 30, 1961, 18 U.S.T. 1407, 570 U.N.T.S. 151 [hereinafter Single Convention] ("The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.").

6. See Harry G. Levine, *The Secret of Worldwide Drug Prohibition: The Varieties and Uses of Drug Prohibition*, 7 INDEP. REV. 165, 168 (2002) (describing the adoption of global drug prohibition over the course of the last eight decades).

state lines.⁷ The months following were filled with questions. What would the Obama administration's response be? Would the rest of the country follow suit? How would this affect enforcement of federal laws? Yet little was said publicly about the potential ramifications the new legislation would have on the United States' obligations under the Single Convention.

This Note attempts to identify the obligations imposed by the Single Convention and analyze what affects Colorado and Washington's new legislation may have on those obligations while considering an international shift in attitude regarding recreational marijuana. Part I provides an overview of the worldwide history and evolution of marijuana and marijuana legislation including the Single Convention. Part II considers the relationship between the United States and the Single Convention in light of the liberal shift in marijuana laws within Colorado and Washington. This Part argues that the Single Convention should be amended to permit parties to freely legislate marijuana. Support is then offered for legalizing marijuana at the federal level within the United States. This Note concludes that the Single Convention should be amended to allow states to determine how marijuana should be used within their territories without fear of international ramifications and that following such amendment, the United States should allow for the recreational use of marijuana at the federal level.

A Custody Battle: How the United States Teamed Up With the World in a Fight Against the Single Convention over Marijuana

Marijuana's Origins

The use of marijuana by societies dates back thousands of years to what is now modern day Taipei, Taiwan.⁸ It was at the site of what is now Taiwan's capital that hemp⁹ fibers were discovered on excavated pottery.¹⁰ Analysis of those fibers showed that the marijuana was 12,000

7. Brian A. Shactman, *Washington State, Colorado Vote Yes to Legalizing Marijuana*, CNBC (Nov. 7, 2012, 1:58 PM), <http://www.cnbc.com/id/49729596>.

8. NEWTON, *supra* note 1, at 3.

9. Hemp and what modern day society considers "marijuana" are derived from the same plant, *Cannabis sativa*. *See id.* at 10; Itai Danovitch, *Sorting Through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 McGeorge L. Rev. 91, 93 (2012). The plant can grow between three and twenty feet tall, with a main stalk that can be up to two inches thick. NEWTON, *supra* note 1, at 10. When grown for hemp fibers, the plant is harvested before it has a chance to flower. *Id.* at 10–11. It can then be used to produce a variety of materials, including clothes, rope, netting and paper. *Id.* at 10. In contrast, marijuana is harvested later, after the plant has had time to fully mature and flower. KARA C. HAYNES ET AL., UNIV. OF VERMONT, VERMONT LEGISLATIVE RESEARCH SHOP 2 (2008) *available at* <http://www.uvm.edu/~vlrs/Agriculture/industrialhemp.pdf>. The main difference between hemp and marijuana is the level of tetrahydrocannabinol (THC) the plants produce. NEWTON, *supra* note 1, at 11. THC is the chemical responsible for the psychoactive effects associated with marijuana. Danovitch, *supra*, at 93. When found in nature, hemp contains approximately 0.3–1.0% THC. HAYNES ET AL., *supra*, at 2. By contrast, marijuana has been bred to contain upwards of 20% THC. NEWTON, *supra* note 1, at 11. For purposes of this Note, "hemp" will be used to refer to industrial uses of the plant while "marijuana" will be used to refer to the physical plant and all other uses.

10. NEWTON, *supra* note 1, at 3.

years old.¹¹ Written documents dating back to the 16th century B.C. and containing instructions for both the planting and harvesting of marijuana were also found, suggesting that marijuana was a vital part of ancient Chinese culture.¹²

From China, marijuana spread to India, Africa, South America, Mexico and Europe.¹³ Europeans relied heavily on the plant and its presence can be found throughout many facets of European history.¹⁴ For example, marijuana became so important within the shipping industry, which relied on hemp to produce sails and ropes, that around 1533, King Henry VIII enacted a law requiring English farmers to grow marijuana on their land.¹⁵ This law was subsequently renewed by Queen Elizabeth, solidifying marijuana's position within the European economy.¹⁶ Marijuana became such a mainstay in the culture, that once the British established themselves in what is now the United States, they began requiring that Jamestown colonists grow marijuana in order to supplement the crops already flourishing in Great Britain.¹⁷ By 1762, the colonies themselves began imposing their own penalties on farmers who didn't produce marijuana.¹⁸

Marijuana Legislation in the United States The Start of a Drug War

The Scythians were among the earliest known users of marijuana for recreational purposes.¹⁹ "In the fifth century B.C., the Greek historian Herodotus observed that the Scythians would hurl hemp seeds onto heated stones and then inhale the vapor to become intoxicated."²⁰ Other early instances of marijuana being used for its psychoactive properties can be found in China, India and Africa.²¹ In America, the use of recreational marijuana can be attributed to a combination of minority groups who introduced the practice of smoking marijuana for recreational purposes to the United States upon their immigration at the turn of the

11. *Id.*

12. *Id.* at 13–14.

13. Joseph E. Kohler, *The Highs and Lows of Marijuana Legislation in the United States*, 1 OHIO N.U. INTRAMURAL L. REV. 60, 61 (1970–71).

14. See NEWTON, *supra* note 1, at 26 (explaining that the *Magna Carta* and Gutenberg's first Bible were both printed on paper made from hemp).

15. See LEE, *supra* note 3, at 16; NEWTON, *supra* note 1, at 28.

16. See LEE, *supra* note 3, at 16; NEWTON, *supra* note 1, at 28.

17. See NEWTON, *supra* note 1, at 30 (explaining that in 1619 the Virginia Company required that Jamestown colonists grow 100 marijuana plants and that the governor establish another 5,000 marijuana plants).

18. See SLOMAN, *supra* note 3, at 21 (explaining that due to the use of hemp for clothes and paper, Virginia enacted penalties for colonists who didn't produce marijuana).

19. NEWTON, *supra* note 1, at 19 (explaining that the Scythians lived in the southern part of modern day Russia).

20. SLOMAN, *supra* note 3, at 22; see also NEWTON, *supra* note 1, at 19.

21. See NEWTON, *supra* note 1, at 16–17, 21–22 (describing how the early Chinese pharmacopoeia, *Pen Ching*, provided a description of the hallucinogenic effects of marijuana; that Hindu texts, known as the Vedas, refer to the psychoactive effects marijuana possesses; and that in Africa, tribesmen would gather in groups, throw marijuana plants onto coals and breath in the fumes together).

century.²²

States slowly began legislating against marijuana as an indirect means of targeting the minority immigrants attempting to establish themselves within their borders.²³ States with borders to Mexico began to see an influx of Mexican immigrants as a result of the Mexican revolution in the early 1900s.²⁴ The Mexican immigrants traditionally used marijuana for its psychoactive properties and brought this tradition with them.²⁵ The influx of Mexican immigrants spawned animosity within the southern states and marijuana posed the perfect means of targeting the Mexican population.²⁶ In 1915, California became the first U.S. state to prohibit marijuana. By 1930, sixteen additional states had enacted marijuana laws in some form.²⁷

During this time, the federal government was initially too busy dealing with prohibition to be bothered with marijuana. The prohibition, which was spearheaded by Harry Anslinger, was nonetheless failing to gain public support and eventually Anslinger began looking for a new pet project.²⁸ Marijuana became Anslinger's new cause and in 1937, under his urging, the first federal legislation against marijuana, the Marijuana Tax Act, was enacted by Congress and imposed mandatory prison terms for both the possession and the sale of marijuana.²⁹

In 1970, the Controlled Substances Act (CSA) broke down all controlled substances into five categories, designated as Schedules I-V, based on the substances' dangers and/or benefits.³⁰ In an effort to better understand marijuana and place it into a schedule, Congress formed the National Commission on Marihuana³¹ and Drug Abuse and tasked the

22. See SLOMAN, *supra* note 3, at 29 (describing the combination of Mexican and black farm workers who smoked marijuana solely for recreational purposes).

23. See LEE, *supra* note 3, at 42 (explaining that in the early 1900s the federal government didn't see a problem with marijuana, but southern states, including California and Texas, made marijuana illegal).

24. *Id.* at 41.

25. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011-12 (1970).

26. James B. Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed Policy*, 21 COLUM. J.L. & SOC. PROBS. 417, 419 (1987-88) (describing how marijuana legislation was the result of racism towards Mexican immigrants).

27. Bonnie & Whitebread, *supra* note 25, at 1012.

28. See SLOMAN, *supra* note 3, at 35 (explaining that in 1928, Anslinger was pushing for "penalties of a fine not less than \$1,000 and imprisonment of not less than six months" for any involvement with liquor, but that by 1929 he was admitting that prohibition lacked public support).

29. Kohler, *supra* note 13, at 64-66 (explaining that minimum sentences for a first offense of possession of marijuana were between two and ten years, while minimum sentences for a first offense of selling marijuana were between five and twenty years). *But see* Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 LAW & SOC. INQUIRY 411, 435 (1999) ("[I]t seems inherently reductionist to theorize that a single individual or organization could *single-handedly* create a moral panic resulting in the passage of federal legislation.") (emphasis in original).

30. 21 U.S.C. § 812 (2012).

31. There have been variations on the spelling of "marijuana" over the years,

newly formed body with compiling a report on the dangers of marijuana.³² The resulting report found that marijuana “does not constitute a major threat to public health,”³³ and presented “little proven danger of physical or psychological harm.”³⁴ Despite these findings, marijuana was placed into Schedule I³⁵, reserved for substances with “a high potential for abuse,”³⁶ “no currently accepted medical use in treatment in the United States,”³⁷ and “a lack of accepted safety for use of the drug or other substance under medical supervision.”³⁸ The CSA continues to remain the major legislative body regulating drug use today.³⁹

Shortly after the adoption of the CSA, President Nixon declared a war on drugs.⁴⁰ After a plea to Congress, President Nixon successfully formed the Drug Enforcement Administration (DEA) to wage his newly confirmed war with marijuana as a major opponent.⁴¹

The Highs and Lows of Medical Marijuana Legislation in the United States

Dating back to the 1800s, medical marijuana has experienced a

appearing as “mariguan,” “marihuana,” and “mariahuana,” among others. *See* Alan Piper, *The Mysterious Origins of the Word ‘Marihuana’*, SINO-PLATONIC PAPERS, no. 153, July, 2005, at 2. Congress used the common spelling “marihuana” at the time the Commission was established and this Note refers to the Commission and its subsequent report as it originally appeared but will continue to use the now common spelling of “marijuana” throughout the remainder of the Note.

32. *See* Slaughter, *supra* note 26, at 422 (describing the formation of the National Commission on Marihuana and Drug Abuse). The newly formed body became commonly known as the “Shafer Commission” after Raymond Shafer, the former Pennsylvania Governor who acted as chair. *Id.*

33. NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 90 (1972).

34. *Id.* at 65. *But see generally* C.H. Ashton, *Cannabis: Dangers and Possible Uses*, 294 BRITISH MEDICAL JOURNAL 141, 141–42 (1987) (outlining the potential dangers of marijuana use).

35. 21 U.S.C. § 812(c)(10) (2012).

36. 21 U.S.C. § 812(b)(1)(A) (2012).

37. 21 U.S.C. § 812(b)(1)(B) (2012).

38. 21 U.S.C. § 812(b)(1)(c) (2012).

39. NEWTON, *supra* note 1, at 71 (“[T]he Controlled Substances Act of 1970 (CSA) . . . for more than four decades has provided the basic legislative framework for U.S. policy regarding illegal drug use.”).

40. Richard Nixon, President of the U.S., Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971) *available at* <http://www.presidency.ucsb.edu/ws/?pid=3047#axzz2gt7OAgIh> (“I began the meeting by making this statement, which I think needs to be made to the Nation: America’s public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive. I have asked the Congress to provide the legislative authority and the funds to fuel this kind of an offensive. This will be a worldwide offensive dealing with the problems of sources of supply . . .”).

41. U.S. DRUG ENFORCEMENT ADMINISTRATION, DEA HISTORY IN DEPTH: 1970–1975, at 13, *available at* <http://www.justice.gov/dea/about/history/1970-1975.pdf> (last visited Feb. 1, 2014) (“Reorganization Plan No. 2 of 1973, which becomes effective on July 1, 1973, among other things establishes a *Drug Enforcement Administration* in the Department of Justice.”) (emphasis in original); *see also* 21 U.S.C. § 812 (establishing marijuana as part of the CSA).

similarly tumultuous history in the United States.⁴² Medical literature from the early 1900s recommends using marijuana to treat a variety of ailments and diseases, including corns, delirium, epilepsy, impotence, bronchitis, menopause and whooping cough.⁴³ As a result, marijuana could be found at major pharmacies throughout the United States.⁴⁴ However, once marijuana was designated as a Schedule I narcotic under the CSA, all uses of marijuana, including medical, were criminalized.⁴⁵

Since the federal criminalization of marijuana, the United States has slowly started to revisit the use of marijuana for medical purposes at the State level.⁴⁶ The first ballot initiative was passed in 1996 by California and has been growing momentum ever since.⁴⁷ As support for the growing legislation, numerous instances of individual successes can be cited⁴⁸ along with clinical findings.⁴⁹ This has resulted in reactions from the federal government that can be considered borderline schizophrenic at times.⁵⁰ The United States Supreme Court, however, has remained

42. See NEWTON, *supra* note 1, at 36 (“The first medical conference in the United States devoted to the use of marijuana for medical purposes was held by the Ohio State Medical Society in 1860.”).

43. *Cannabis: A Century of Medical Uses*, THE ANTIQUE CANNABIS BOOK ch. 11, § 11.1.1, <http://antiquecannabisbook.com/chap11/MedUses.htm> (last updated Jan., 2014) (providing a list of medical uses for marijuana from the turn of the century).

44. See NEWTON, *supra* note 1, at 36 (“[W]ell-known pharmaceutical companies made available a variety of cannabis products beginning in the second half of the 19th century.”).

45. 21 U.S.C. 812(c)(10) (2012).

46. See Linda Simoni-Wastila & Francis B. Palumbo, *Medical Marijuana Legislation: What We Know – and Don’t*, 16 J. HEALTH CARE L. & POL’Y 59, 59 (2013) (“Over the past decade . . . states . . . have adopted medical marijuana legislation . . . that allows citizens to register, cultivate, and/or otherwise procure marijuana for personal medical use.”).

47. Anna Wilde Mathews, *Is Marijuana a Medicine?*, WALL ST. J., January 18, 2010 available at <http://online.wsj.com/article/SB10001424052748703626604575011223512854284.html> (stating that California passed a medical marijuana initiative in 1996 and, at the time of print, the 14th state was primed to legalize marijuana for medical purposes with two additional states also considering similar legislation).

48. See *id.* (recounting the experiences of Charlene DeGidio, a Washington resident, who found relief for her neuropathic pain through the use of marijuana suggested by a doctor and Glenn Osaki who credits marijuana with being more effective and faster at treating pain and nausea resulting from the chemotherapy he undergoes after having his colon removed due to cancer; also citing a trial of 50 AIDS patients where “52% of those who smoked marijuana reported a 30% or greater reduction in pain.”).

49. See Arthur Livermore, *Medical Marijuana: A Perspective*, in NEWTON, *supra* note 1, at 128 (“Clinical uses of marijuana are not limited to pain reduction, appetite enhancement, and controlling chemotherapy induced vomiting. Cannabis protects nerve cells from damage and is also effective in reducing tumor growth. Multiple sclerosis patients use cannabis to treat peripheral neuropathy. It is effective in the treatment of movement disorders, glaucoma, asthma, bipolar disorder, depression, epilepsy, post-traumatic stress disorder (PTSD), arthritis, Parkinson’s disease, Alzheimer’s disease, amyotrophic lateral sclerosis, alcohol abuse, insomnia, digestive diseases, gliomas, skin tumors, sleep apnea, and anorexia nervosa.”).

50. In 2009, the Department of Justice issued a federal memo stating that “federal resources should not be used to prosecute people whose actions are in compliance with state laws providing for use of medical marijuana.” See Simoni-Wastila, *supra* note 46, at 66–67. Two years later, Deputy Attorney General James M. Cole issued a second memo to all United States Attorneys informing them that it was “likely not an efficient use of

loyal to the CSA by holding that “marijuana has ‘no currently accepted medical use’ at all”⁵¹ and also holding that the commerce clause doesn’t offer a viable defense to medical marijuana.⁵² Despite these holdings and amid federal uncertainty, 20 states and the District of Columbia all currently have some form of medical marijuana legislation.⁵³

Marijuana Goes Legal

In the face of confusion over the status of medical marijuana, some western states began an initiative to legalize marijuana for recreational use at the state level.⁵⁴ During elections in November of 2012, Washington, Colorado, and Oregon all had the legalization of marijuana for commercial sale on their respective ballots.⁵⁵ In both Washington and Colorado, the initiatives were passed and the two states hoped to generate substantial tax revenue via their newest commercial commodity.⁵⁶ The only hurdle in the way was the federal ban of the substance.⁵⁷

In September of 2013, Colorado became the first state to adopt final rules for the new marijuana legislation.⁵⁸ These rules, issued by the Colorado Department of Revenue’s new Marijuana Enforcement Division, cover topics such as licensing, business records, reporting,

federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana” Memorandum for United States Attorneys from James M. Cole, Deputy Attorney General, to all United States Attorneys (June 29, 2011). This same memo seemed to contradict its own guidance and the 2009 memo by also stating that “[p]ersons who are in the business of cultivating, selling or distributing marijuana . . . are in violation of the [CSA] . . . and . . . subject to federal enforcement action, including potential prosecution. State laws . . . are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA.” *Id.*

51. U.S. v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 490 (2001) (quoting 21 U.S.C. § 812).

52. See *Gonzales v. Raich*, 545 U.S. 1, 20 (2005) (stating that the CSA doesn’t violate the commerce clause, but rather “is squarely within Congress’ commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market . . .”).

53. Medical Marijuana, 20 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits* (Sept. 16, 2013), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

54. Jonathan J. Cooper & Kristen Wyatt, *Legalize Pot Vote Coming Up In 3 States* (Sept. 19, 2012) available at http://www.nbcnews.com/id/49092106/ns/us_news-life/t/legalize-pot-vote-coming-states/ (stating that Washington, Colorado and Oregon are all putting forth ballot initiatives that would legalize the recreational use of marijuana).

55. Brian A. Shactman, *Washington State, Colorado Vote Yes to Legalizing Marijuana* (Nov. 7, 2012) available at <http://www.cnn.com/id/49729596>.

56. *Id.* (describing Colorado’s belief that the state would be able to generate \$40 million a year from the taxation of marijuana which it would then put into the public school system).

57. See *id.* (explaining the uncertainty felt in both Colorado and Washington resulting from the inconsistent enforcement of federal marijuana laws as they pertain to medical marijuana at the state level).

58. John Ingold, *Colorado First State in Country to Finalize Rules for Recreational Pot*, THE DENVER POST, Sept. 10, 2013 available at http://www.denverpost.com/breakingnews/ci_24062676/colorado-first-state-country-finalize-rules-recreational-pot (describing the release of a 136 page document laying out Colorado’s agreed upon final rules governing recreational marijuana businesses on Sept. 9, 2013).

labeling, product safety, and advertising.⁵⁹ On December 6, 2013, Washington adopted their final rules which mirror many of Colorado's rules.⁶⁰

As Colorado and Washington began to draft rules regulating the newly passed marijuana legislation, the rest of the nation speculated over what the federal response would be.⁶¹ Ten months after the initiatives were passed, speculation was quiet as Deputy Attorney General Cole issued a formal memorandum to United States Attorneys across the nation.⁶² At the onset, Mr. Cole made clear that "Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime The Department of Justice is committed to enforcement of the CSA consistent with those determinations."⁶³ The four-page memo proceeded to outline current federal priorities in regards to marijuana enforcement.⁶⁴ The memo then addressed the burning question of whether the federal government would take action, stating that "[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."⁶⁵ Specifically addressing the issue of prosecution, the memo instructed prosecutors to disregard both the size and/or commercial nature of an enterprise, and instead look to "whether the operation is demonstrably in compliance with a strong and effective state regulatory system."⁶⁶ The federal government had officially taken their stance, and Colorado and

59. See Statement of Adoption from Barbara J. Brohl, Executive Director and State Licensing Authority, to Ron Kammerzell, Senior Director of Enforcement (Sept. 9, 2013) (listing the new permanent rules regarding recreational marijuana).

60. See generally Chapter 314-55 WAC: Marijuana Licenses, Application Process, Requirements, and Reporting, Doc. No. OTS-5501.4 (setting requirements for cultivating marijuana for sale, minimum records a marijuana retailer must maintain, monthly reports retailers must file, minimum and maximum serving sizes, packaging and labeling requirements, changes in ownership, business name, or location, and advertising).

61. See Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 Or. L. Rev. 1029, 1030 (2012-2013) (outlining the various hypotheses, ranging from the federal government attempting to block the law through the courts to allowing Colorado and Washington to pursue their legislation uninterrupted).

62. Memorandum from James M. Cole, Deputy Attorney General, to all United States Attorneys (Aug. 29, 2013).

63. *Id.* at 1.

64. *Id.* at 1-2 (listing the eight priorities as "[1] Preventing the distribution of marijuana to minors; [2] Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [3] Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; [4] Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; [5] Preventing violence and the use of firearms in the cultivation and distribution of marijuana; [6] Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [7] Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [8] Preventing marijuana possession or use on federal property.").

65. *Id.* at 3.

66. *Id.*

Washington could seemingly proceed with their new legislation.⁶⁷

C. International Legislation

The Inception of the Single Convention on Narcotic Drugs

While the United States established a war against marijuana starting in the 1930's and culminating with Nixon's declaration of a 'war on drugs', the international community was also setting boundaries.⁶⁸ Although there were numerous international conventions addressing drugs,⁶⁹ the most influential treaty was adopted in 1961: the United Nations Single Convention on Narcotic Drugs ("Single Convention").⁷⁰ The Single Convention was the result of years of preparation by the United Nations, culminating in an international meeting where representatives from 73 nations shared growing concerns surrounding narcotics at the United Nations Headquarters in New York.⁷¹ The result was an international treaty signed by 61 countries which replaced nine multilateral drug treaties from 1912 on.⁷²

The Single Convention was adopted with the goal of limiting designated drugs exclusively to medical and scientific uses.⁷³ By dividing drugs into one of four Schedules, the treaty lays out unique controls for different drugs.⁷⁴ Marijuana can be found in both Schedule I and Schedule IV, which the treaty reserves for the most dangerous drugs.⁷⁵

67. *See generally id.* (expressing the view that the federal government would allow states to construct their own marijuana legislation, regulation and enforcement).

68. *See* United Nations Secretariat, *The Drug Abuse Problem: International Policy*, 34 INT'L REV. CRIM. POL'Y 43, 43 (1978) (recounting the evolution of international drug policy from 1909 through 1972. In 1909, the Shanghai Conference included 13 countries and addressed the growing opium problem. By 1972, there were approximately 100 countries discussing hundreds of natural and synthetic drugs).

69. *See generally* United Nations Office on Drugs and Crime, *Chronology: 100 Years of Drug Control* (providing an overview of international drug control from 1909 through 2008).

70. *See generally* Single Convention, *supra* note 5.

71. *See* Robert W. Gregg, *The Politics of International Drug Control*, 49 A.B.A. J. 176, 176-77 (1963) (stating that 73 nations attended the Conference); *see also* U.N.T.S., Chapter VI Narcotic Drugs and Psychotropic Substances, Single Convention on Narcotic Drugs *available at* http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=VI-15&chapter=6&lang=en [hereinafter Chapter VI] (describing the date and location of the Conference).

72. Single Convention, *supra* note 5, at art. 44(1) (listing the nine treaties terminated by The Single Convention); *see also* Chapter VI, *supra* note 71 (stating that 61 countries originally signed the Single Convention).

73. Single Convention, *supra* note 5, at Preamble (“[r]ecognizing that addiction to narcotic drugs constitutes a serious evil . . . [c]onscious of [the] duty to prevent and combat this evil, . . . [d]esir[e] to conclude a generally acceptable international convention . . . limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives . . .”).

74. *See id.* at art. 2 (establishing and describing Schedules I—IV).

75. *Id.* at 26, 30 (listing the drugs placed into Schedule I and Schedule IV, respectively); *see also id.* at art. 2(5) (“The drugs in Schedule IV shall also be included in Schedule I and subject to all measures of control applicable to drugs in the latter Schedule, and in addition thereto: a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included;”).

By strategically placing marijuana in Schedule I, the Single Convention establishes that it is “particularly liable to abuse and to produce ill effects . . . and that such liability is not offset by substantial therapeutic advantages.”⁷⁶

By becoming a party to the Single Convention, governments take on specific established obligations.⁷⁷ These obligations require that States “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”⁷⁸ The Single Convention also lays out guidelines pertaining to punishment, stating that each adopting country will implement adequate punishments, with the recommendation of imprisonment, for intentional violations.⁷⁹ Marijuana is afforded its own article, in which the Single Convention mandates that in addition to the already established obligations, “[t]he Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.”⁸⁰

In order to ensure compliance with the Single Convention, the International Narcotics Control Board (“the Board”) and the Commission on Narcotic Drugs of the Economic and Social Council (“the Commission”) were established.⁸¹ The Commission is entrusted with maintaining the Single Convention, including amending the Schedules and providing recommendations for scientific research.⁸² The Single Convention provides the Board with specific powers in order to secure compliance should the Single Convention’s goals become threatened.⁸³

In 1961, the United States decided not to sign the Single Convention due to “a last-minute move to dilute the strength of some of the prohibitions”⁸⁴ However, Harry Anslinger, motivated by the influx of marijuana use on college campuses, called for Senate support of the

76. *Id.* at art. 3(5).

77. *Id.* at art. 4.

78. *Id.* at art. 4(c).

79. *See id.* at art. 36(1)(a), p.18 (listing “cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs” as violations requiring the implementation of penal sanctions); *see also id.* at art. 36(2)(a)(ii) (“Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion [sic] with the offences referred to in this article, shall be punishable offences . . .”).

80. *Id.* at art. 28(3).

81. Single Convention, *supra* note 5, at art. 5.

82. *Id.* at art. 8 (providing general guidance on the Commission’s role).

83. *See generally id.* at art. 14 (describing the means with which the Board may secure treaty compliance). In the event that there has been a potential violation of the treaty, the Board may begin attempts to gain compliance with private consultations with the government in breach, progressing to a request that remedial measures be adopted by the government in question. If compliance is not obtained, the Board may, for assessment purposes, propose that a study be carried out within the nation in question. If the above remedies prove to be unsuccessful, the Board may involve other parties to the treaty, recommending that they cease the import and export of drugs to and from the country in breach. *Id.*

84. SLOMAN, *supra* note 3, at 226.

treaty in 1967.⁸⁵ Mr. Anslinger met no opposition before the Foreign Relations Committee, and “the treaty passed the Senate by a vote of 84 to 0.”⁸⁶ As a result, on May 25, 1967, the United States became a party to the Single Convention.⁸⁷

The Board’s Backlash to Washington and Colorado

As a party to the Single Convention, the Board took a strong interest in the progression of state legislation legalizing marijuana in Washington and Colorado. In March, 2013, the President of the Board stressed that “the 1961 Convention limits the licit use of narcotic drugs – *including cannabis* – to medical and scientific purposes.”⁸⁸ The President of the INCB’s position requires that he “monitor the implementation of the three international drug control conventions.”⁸⁹ In keeping with this mandate, the President explained that “the 1961 Convention . . . needs to be implemented worldwide, on the national level, but also on the sub-national level.”⁹⁰ A formal request was issued for “the Government of the United States [to] take effective measures to ensure the implementation of all control measures for cannabis plants and cannabis, as required under the 1961 Convention, in all states and territories falling within its legislative authority.”⁹¹ By distributing the Deputy Attorney General’s memo stating that as long as states enacted strong regulatory systems in distributing marijuana, the federal government would not intervene, the United States seemed to be disregarding the Board’s guidance that had been urged six months earlier.⁹²

iii. International Movement Towards Legalization

Meanwhile, the United States hasn’t been the only country pioneering marijuana legalization.⁹³ In late July, 2013, Uruguay’s “lower

85. *Id.* at 227 (“Another important reason for becoming a party to the 1961 convention is the marijuana problem. . . . Several groups in the United States are loudly agitating to liberalize controls, and, in fact, to legalize its use. In the convention it is very specific that we must prevent its misuse. If the United States becomes a party to the 1961 convention we will be able to use our treaty obligations to resist legalized use of marijuana. This discussion is going on all over the country, in many universities, and in fringe groups, and it is rather disturbing.” (statements of Harry Anslinger to the Senate Foreign Relations Committee, April 27, 1967)).

86. *Id.*

87. See Chapter VI, *supra* note 71 (listing May 25, 1967 as the date of accession for the United States).

88. Raymond Yans, President, International Narcotics Control Board, Report of the International Narcotics Control Board, at 7 (Mar. 11–15, 2013) (emphasis in original).

89. U.N. Information Service, *INCB President Calls on the United States Government to Address Initiatives Aimed at Permitting Recreational Drug Use*, U.N. Doc. UNIS/NAR/1164 (Mar. 14, 2013).

90. Yans, *supra* note 88, at 7.

91. U.N. International Narcotics Control Board, *Report of the International Narcotics Control Board for 2012*, ¶ 473, U.N. Doc. E/INCB/2012/1 (Mar. 5, 2013).

92. See U.N. Information Service, *supra* note 89 (stating that the President of the International Narcotics Control Board hoped to see the U.S. government maintain its treaty obligations).

93. See James P. Gray, *Our Top Ten Drug Policy Goals*, 91 Or. L. Rev. 1327, 1335 (2013) (stating that Mexico, Uruguay and Guatemala are all discussing national marijuana legislation); see also Daniel Robelo, *Demand Reduction or Redirection? Channeling Illicit Drug Demand Towards a Regulated Supply to Diminish Violence in Latin America*, 91 Or.

house passed a marijuana legalization bill . . . bringing the South American nation one step closer to becoming the first to legally regulate production, distribution and sale of the drug.⁹⁴ Upon House approval, the bill was considered by the Senate, which passed the final bill on December 10, 2013.⁹⁵ After the bill passed both the House and Senate, President Jose Mujica signed the bill into law on December 23, 2013, making Uruguay the first nation in the world to legalize marijuana.⁹⁶

Uruguay's new law authorizes citizens over 18 to harvest their own marijuana plants, with a maximum of six plants and personal use up to 40 grams.⁹⁷ Licensed pharmacies will be the only entities permitted to sell marijuana to the public, with sales anticipated to commence as early as April of 2014.⁹⁸ Regulatory bodies, including the National Institute of Cannabis, will be tasked with ensuring compliance with the Bill's regulations.⁹⁹ The National Integrated Health System will be charged with promoting health and preventing cannabis abuse.¹⁰⁰

The INCB attempted to intervene and stop Uruguay's attempt to legalize marijuana during the early stages of the process.¹⁰¹ However, Uruguay resisted the involvement of the INCB, declining a meeting with the international body before the House began deliberations.¹⁰² The INCB continued to "urge[] the Uruguayan authorities to ensure that the

L. Rev. 1227, 1238-39 (2013) (explaining that Mexico began talks of marijuana legislation weeks following the passage of Colorado and Washington's initiatives as a means for controlling the drug-related violence in Mexico).

94. Eloisa Capurro, Dario Klein & Catherine E. Shoichet, *Uruguay's Lower House Votes to Legalize Marijuana*, CNN.COM (Aug. 2, 2013), <http://edition.cnn.com/2013/07/31/world/americas/uruguay-marijuana-legalization>.

95. Steven Nelson, *Uruguay's President Quietly Signs Marijuana Legalization Bill*, U.S. NEWS & WORLD REP. (Dec. 26, 2013), <http://www.usnews.com/news/articles/2013/12/26/uruguays-president-quietly-signs-marijuana-legalization-bill>.

96. *Id.*

97. See Proyecto de Ley sobre Cannabis 2012 [Cannabis Bill 2012], Asamblea General de la Republica de Uruguay [General Assembly of the Republic of Uruguay], Artículo 4, 3 (2012) (Uru.), available at http://medios.presidencia.gub.uy/jmportal/2012/noticias/NOG830/proyecto_1eyl.pdf [hereinafter *Cannabis Bill 2012*].

98. Nelson, *supra* note 95.

99. See Cannabis Bill 2012, *supra* note 97, at Título III [Title 3].

100. See *id.* at Artículo 7 [Article 7].

101. U.N. International Narcotics Control Board, *supra* note 91, at ¶513 ("The Board noted with concern that in August 2012, the Government of Uruguay presented to its national congress a proposed law to legalize the production and sale of cannabis in the country. According to the proposed law, the Government would assume control and regulation over the activities of importing, producing, acquiring title to, storing, selling and distributing cannabis herb and its derivatives. If adopted, the law could be in contravention of the international drug control conventions to which Uruguay is a party. The Board, in line with its mandate, has sought a dialogue with the Government of Uruguay to promote the country's compliance with the provisions of the international drug control treaties, in particular the 1961 Convention.").

102. See U.N. Information Service, *INCB President Urges Uruguay to Remain Within the International Drug Control Treaties, Noting Draft Cannabis Legislation*, U.N. Doc. UNIS/NAR/1176 (Aug. 1, 2013) ("The Board regrets that the Government of Uruguay refused to receive an INCB mission before the draft law was submitted to Parliament for deliberation.").

country remains fully compliant with international law . . . ¹⁰³ and reminded them that “the draft legislation, if adopted, might have serious consequences for the health and welfare of the population”¹⁰⁴ The INCB insinuated that there might be repercussions if the legislation were ultimately passed, but failed to elaborate on what exactly those repercussions would be.¹⁰⁵

When the Uruguayan Senate approved the bill, INCB President Raymond Yans accused the Uruguayan government of ignoring “negative impacts on health”¹⁰⁶ as well as “available scientific evidence, including that presented to the parliamentary committees by Uruguay’s own scientific community.”¹⁰⁷ He also predicted that Uruguay’s newest law will negatively affect the nation’s youth in particular, by “encouraging early experimentation . . . and thus contributing to developmental problems and earlier onset of addiction and other disorders.”¹⁰⁸ Noticeably absent from the statement released by the INCB was any mention of tangible repercussions for Uruguay’s breach of the Single Convention; rather the international body simply “reiterate[d] its call to the Government of Uruguay to engage with the Board with a view to ensure that Uruguay continues to respect and implement the treaties to which it is a Party.”¹⁰⁹

While Uruguay has been making headlines, the Netherlands have been quietly enjoying marijuana for decades.¹¹⁰ During the mid-1970’s, in an effort to minimize heroin use, the Netherlands adopted a decriminalization policy towards marijuana, with the belief that marijuana would provide a less harmful alternative to more destructive drugs.¹¹¹ As a party to the Single Convention, the Dutch government maintained marijuana’s status as an illegal substance but simply refused to prosecute violations, a practice still in effect today.¹¹²

103. *Id.*

104. *Id.*

105. *Id.* (“The Board calls upon the authorities of Uruguay to carefully consider all possible repercussions before taking a decision.”).

106. U.N. Information Service, *Uruguay is Breaking the International Conventions on Drug Control with the Cannabis Legislation Approved by its Congress*, U.N. Doc. UNIS/NAR/1190 (Dec. 11, 2013) (internal quotation marks omitted).

107. *Id.* (internal quotation marks omitted).

108. *Id.* (internal quotation marks omitted).

109. *Id.*

110. Stephen B. Duke, *Cannabis Captiva: Freeing the World from Marijuana Prohibition*, 11 *Geo. J. Int’l Aff.* 83, 87 (2010) (stating that marijuana in the Netherlands was “decriminalized decades ago.”).

111. *See Lee, supra* note 3, at 182-83 (explaining that the Dutch hired a psychiatrist to head a team to research the causes of drug use. The team recommended decriminalization, which the Dutch government adopted, believing marijuana to be a safer drug than heroin or cocaine).

112. *Id.* at 183 (“In 1976, the Dutch parliament essentially legalized marijuana possession for personal use and retail sale, while increasing police efforts against (and penalties for) hard drugs. Technically cannabis remained illegal in keeping with Holland’s commitment to the United Nations Single Convention on Narcotic Drugs, but the Dutch Ministry of Justice simply chose not to enforce the law against marijuana”); *see also* Kurt V. Laker, *Smoke and Mirrors: The Self-Examination of Canadian Marijuana Policy in the*

In addition to decriminalizing marijuana, the Netherlands also tolerate “coffee shops” which sell marijuana commercially.¹¹³ Assuming the coffee shops follow a few well established rules, they are left alone by law enforcement and can run a profitable business.¹¹⁴ The acceptance of coffee shops allows marijuana users a safe environment in which to purchase the substance without risking exposure to increasingly dangerous drugs at the hands of street-level dealers.¹¹⁵

In contrast to the strong urging the INCB has directed towards Uruguay, the INCB has been relatively quiet about the decriminalization of marijuana in the Netherlands.¹¹⁶ Meanwhile, the Netherlands has overtly challenged the INCB, saying that “. . . the INCB has a role to play in further stimulating evidence-based approaches . . .”¹¹⁷ and that there is a “necessity [for] a flexible approach.”¹¹⁸ The Netherlands has suggested that their country’s decriminalization of marijuana is one of the “new, innovative and effective measures to reverse the adverse consequences of drug use and reduce drug-related harm”¹¹⁹ and that the coffee shops have “had a positive impact on the health and wellbeing in the Netherlands.”¹²⁰

D. Interpreting International Treaties

Article VI of the Constitution of the United States says that treaties are “the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .”¹²¹ Exactly what that means can be confusing. In 1829, the Supreme Court of the United States (“the Court”) held that a treaty by itself was not a legislative act carrying immediate effect upon the parties involved and their territories.¹²² Rather, the Court stated, a treaty “is carried into execution by the sovereign power of the respective

Context of Decriminalization in the Netherlands, 14 *Ind. Int’l & Comp. L. Rev.* 341, 367-68 (2003) (stating that although marijuana remained illegal in the Netherlands, an administrative mandate prevented the prosecution of such crimes which allows the Netherlands to remain in compliance with the Single Convention).

113. See Lee, *supra* note 3, at 183 (explaining that coffee shops in the Netherlands could sell marijuana without being prosecuted).

114. *Id.* (citing the basic rules for coffee shops in the Netherlands as “a ban on advertising, no underage sales, a five-gram limit on individual transactions, and absolutely no white powder or needles on the premises.”).

115. See Laker, *supra* note 112, at 368 (explaining that marijuana users would be forced to expose themselves to dealers engaged in the sale of harder drugs if a retail outlet weren’t available).

116. See *supra* notes 112-116 and accompanying text; *but see* U.N. International Narcotics Control Board, *supra* note 91, at ¶757 (“[the Board’s] position continues to be that such ‘coffee shops’ are in violation of the provisions of the international drug control conventions.”).

117. *Dutch Response to INCB Statement*, CND BLOG (March 16, 2009), <http://www.cndblog.org/2009/03/dutch-response-to-incb-statement.html>.

118. *Id.*

119. *Id.*

120. *Id.*

121. U.S. CONST. art. VI, cl. 2.

122. *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (“A treaty is . . . a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished . . .”) (overruled in part on different grounds by *U.S. v. Percheman*, 32 U.S. 51 (1833)).

parties to the instrument.”¹²³ This concept is referred to as a treaty being “non-self-executing.”¹²⁴ When courts are permitted to rely on a treaty without any accompanying legislation, the treaty is thought to be “self-executing.”¹²⁵ The Supreme Court has confirmed these categories of treaties by explaining that “while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’”¹²⁶

Whether a treaty is considered to be non-self-executing or self-executing depends on numerous factors. The specificity with which the treaty was written may be looked to, as well as the country interpreting the treaty.¹²⁷ In the United States, the President and Senate alone hold treaty-making power, which forces the courts to tread carefully when interpreting treaties so as not to run the risk of legislating.¹²⁸ At the state level, “courts have imposed quite rigorous requirement in many cases, suggesting a veiled attempt at limiting treaty application in United States courts.”¹²⁹

The Current and Future Relationship Between the United States, The Single Convention and Marijuana

Why the United States is in Violation of The Single Convention

At the time of accession to a treaty, a state may propose a reservation that their accession is contingent upon.¹³⁰ There is also an opportunity upon accession for parties to provide optional declarations which “allow States . . . to assume additional or different commitments on joining the treaty than those they would have absent a declaration.”¹³¹ In 1967, the United States became a party to the Single Convention with no reservations or declarations, thus agreeing to be bound by the treaty as it was written.¹³²

123. *Id.*

124. Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts – Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 *Wm. & Mary L. Rev.* 1401, 1405 (1995) (“When domestic law requires implementing legislation to make the provision effective locally, the treaty provision is ‘non-self-executing.’”).

125. *Id.* (“When, without additional implementing legislation, domestic law permits courts to use a treaty provision as the rule of decision, the treaty provision is ‘self-executing.’”).

126. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (2005)).

127. *See* McDonnell, *supra* note 124, at 1405, 1424 (stating that international treaties give rise to an international obligation but that the means with which each country fulfills that obligation are the responsibility of the individual country; courts look for specific treaty language in deciding whether the treaty is self-executing or non-self-executing).

128. *Id.* at 1424.

129. *Id.*

130. *See* MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 23 (2003) (“There may, however, be certain provisions of a treaty that one or more parties refuse to accept; such refusals are commonly called reservations.”).

131. *THE OXFORD GUIDE TO TREATIES* 691 (ed. Duncan B. Hollis) (2012).

132. *See* Chapter VI, *supra* note 71 (showing the United States’ accession in 1967

Through accession without any reservations or declarations, the United States agreed to be bound by the entirety of the Single Convention.¹³³ Thus, the United States has committed itself to criminalizing the use of narcotics, including marijuana, outside of the medical and scientific fields.¹³⁴ By legalizing marijuana for recreational use and commercial sale, outside the scope of approved uses the treaty specifies, both Colorado and Washington clearly placed the United States in violation of the Single Convention. This violation has not gone unnoticed, with the President of the Board reasserting that “the United States has a treaty obligation to ensure the implementation of the treaties on the entirety of its territory.”¹³⁵

Arguing that the treaty was not self-executing and therefore needed to be adopted through domestic legislation does not provide the United States with an exemption to its obligations under the Single Convention. The Court has confirmed that unless a treaty contains language which signifies it to be ‘self-executing’, treaties are not regarded as national law until Congress has “enacted implementing statutes.”¹³⁶ Assuming the Single Convention to be a ‘non-self-executing’ treaty, Congress would have to adopt at least one statute in order for the treaty to have full effect in the domestic legal system.

Three years after becoming a party to the Single Convention, Congress passed the CSA which fully adopt the Single Convention into domestic law.¹³⁷ The CSA was enacted to “conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”¹³⁸ Several provisions were “adopted to effectuate [the United States’] treaty obligations under Single Convention on Narcotic Drugs”¹³⁹ and Congress made mention of the Single Convention throughout the legislation.¹⁴⁰ By executing the treaty into the United States’ legal system vis-à-vis the CSA, all obligations the United States assumed by becoming a party to the treaty were realized.

Options for “Fixing” the United States’ Treaty Violation
Too Late to Make a Reservation

When becoming party to a treaty, there exists an option to make “a

with no reservations or declarations).

133. See Single Convention, *supra* note 5, at Article 40 (establishing the procedure for accession).

134. *Id.*, at art. 4(c) (“limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”); see also *id.* at art 36(a) (“each Party shall adopt such measures as will ensure that . . . any . . . action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.”).

135. U.N. Information Service, *supra* note 89.

136. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (2005)).

137. 21 U.S.C. § 812.

138. *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

139. *United States v. Feld*, 514 F. Supp. 283, 288 (E.D.N.Y. 1981).

140. 21 U.S.C.A. § 801(7); 21 U.S.C.A. § 802(31); 21 U.S.C.A. § 827(e); 21 U.S.C.A. § 852; 21 U.S.C.A. § 872 (d).

unilateral statement . . . whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state.”¹⁴¹ This option is known as a reservation which allows a state to “fine-tune or adjust the way in which a multilateral treaty will apply to it.”¹⁴² In relation to the Single Convention, at least three countries entered into reservations stating that the use of marijuana would be permitted within their territories for non-medical or scientific purposes; the United States was not one of them.¹⁴³

Initial logic would hold that the United States could simply enter into a reservation now permitting the use of marijuana for recreational purposes. However, the Single Convention expressly prohibits the statement of reservations following initial accession to the treaty, stating that reservations may be made “at the time of signature, ratification or accession.”¹⁴⁴ By not stating a reservation pertaining to marijuana at the time of accession, the United States was barred from doing so in the future.¹⁴⁵ Thus, a reservation permitting the use of recreational marijuana is not a feasible means of avoiding the obligations under the Single Convention.

ii. Why Withdraw Isn’t Worth It

Another option is to withdraw from the Single Convention altogether, thus leaving the treaty intact but removing any legal obligations formed on behalf of the United States.¹⁴⁶ The process of withdraw, referred to as denunciation in the Single Convention, simply calls for a written statement to the Secretary-General of the United Nations.¹⁴⁷ The withdrawing party will then be relieved of all obligations no later than six months following receipt of the statement by the Secretary-General.¹⁴⁸

Withdraw, or denunciation, is always an option but does not “affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”¹⁴⁹ Thus, the United States would remain responsible for the current breach emanating from Washington and Colorado despite a potential decision to withdraw.¹⁵⁰

141. Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

142. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 68 (2005).

143. See Chapter VI, *supra* note 71 (listing Bangladesh, India and Pakistan as taking reservations concerning the use of marijuana for non-medical purposes).

144. Single Convention, *supra* note 5, art. 49(1).

145. *Id.* at art. 50(2) (“Any State may at the time of signature, ratification or accession make reservations”); see also *id.* at art. 50(1) (“No reservations other than those made in accordance with article 49 . . . shall be permitted.”).

146. See AUST, *supra* note 142, at 100 (explaining that one party’s withdraw from a multilateral treaty does “not normally result in [the treaty’s] termination.”); see also THE OXFORD GUIDE TO TREATIES, *supra* note 131, at 758 (“In the multilateral context, the withdrawing party becomes free of its performance obligations *vis-à-vis* other parties”) (emphasis in original).

147. Single Convention, *supra* note 5, art. 46(1).

148. *Id.* at art. 46(2).

149. Vienna Convention, *supra* note 141, art. 70(1)(b).

150. See THE OXFORD GUIDE TO TREATIES, *supra* note 131, 641 (explaining that

Withdraw also carries with it certain negative consequences, such as international isolation, trade sanctions, removal of financial assistance and a damaged reputation.¹⁵¹ By recently withdrawing from, or failing to ratify, at least 10 treaties, the United States has already “cast doubt on its commitment to multilateral cooperation.”¹⁵² As withdraw is not a feasible means to circumvent accountability for the current violation, the potential ramifications of withdraw from the Single Convention outweigh any benefits.

iii. Amending the Single Convention is the Best Option

In light of the newly passed legislation within the United States concerning recreational marijuana and proposed legislation in the international community, the best means of aligning the Single Convention with evolving norms is to amend the treaty.¹⁵³ Amendments allow for formal changes to be made to a treaty while maintaining the treaty’s existence.¹⁵⁴ This allows for adjustment as “parties’ understanding of the issue”¹⁵⁵ change or circumstances surrounding the issue change without requiring the drafting of a new treaty or termination of an existing one. By amending the Single Convention to allow for the recreational use of marijuana, the United States and other countries considering such legislation would be able to continue the legislative process without any international obligations impeding the progression towards marijuana legalization.

Article 47 within the Single Convention provides instructions for amending the treaty, stating that “[a]ny [p]arty may propose an amendment to this Convention.”¹⁵⁶ In order to make such a proposal, the amendment itself and the reasons behind the amendment must be transferred to the Secretary-General of the United Nations in writing who will then disseminate the proposed amendment to the other parties of the treaty and the Commission. At this point, the Commission has the power to decide if a conference should be held to discuss the proposal or if the parties should simply be asked if they are willing to accept.¹⁵⁷ If there is

“States also remain responsible for any breaches that occurred prior to . . . the notice period, a responsibility that survives the State’s withdrawal or the treaty’s end.”)

151. See Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1583 (2005) (stating that North Korea experienced isolation after withdrawing from the Nuclear Non-Proliferation Treaty); see also *id.* at 1618 (stating that the ramifications of withdraw may include “coercion, threats, or other unfriendly acts by states that oppose[] . . . [the] denunciation. Such states may use a variety of methods - trade sanctions, withholding military aid or financial assistance, or threats

to terminate other cooperative relationships . . . ”); see also *id.* at 1621 (explaining that treaty exit may cause “other states [to] be reluctant to enter into future agreements with” the exiting party); see also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 296 (2007) (explaining that Afghanistan was isolated after parties to the Hague Hijacking Convention 1970 ended agreements with the state due to its violations of the treaty).

152. *Id.* at 1623-24.

153. See *supra* pp. 23-28 (outlining international legislation and treatment of marijuana laws).

154. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 262 (2007) [hereinafter *MODERN TREATY LAW*].

155. THE OXFORD GUIDE TO TREATIES, *supra* note 131131, 347.

156. Single Convention, *supra* note 5, at art. 47(1).

157. *Id.* at art. 47(1)(a) – 47(1)(b).

no objection within 18 months, the amendment becomes fully adopted; if there is an objection, the Commission may then choose to hold a conference to review the proposal.¹⁵⁸

With 153 current parties to the Single Convention, arriving at a consensus may prove difficult. This does not preclude the option to amend as “amendments require agreement between treaty parties, but not necessarily between all parties.” Once an amendment has been proposed and adopted, parties are free to decide if they will become a party to the amendment.¹⁵⁹ Those who opt not to join the amendment remain bound by the treaty’s original obligations.¹⁶⁰ By proposing an amendment that would permit the use of marijuana for recreational purposes, those countries who wish to pursue such legislation would be permitted to do so and those countries who remain in opposition would be able to remain parties to the original treaty preventing the use of recreational marijuana.¹⁶¹

Support for Legalization Within the United States from a Policy Standpoint

The need for amendment is evident as numerous countries move towards marijuana legalization.¹⁶² Within the United States, a movement towards federal legalization is desirable for numerous reasons. Particularly, legalization would increase tax revenues, lower drug use rates while also lowering the rate of international violence.

Marijuana is Costing Taxpayers Money

The United States has one of the busiest criminal justice systems in the world, resulting in an estimated 12.2 million arrests in 2012 alone.¹⁶³ Of these arrests, 1,552,432 were for drug abuse violations with almost half for marijuana related crimes.¹⁶⁴ The money spent, on a national level, for this level of enforcement of marijuana laws alone is up to \$7.7 billion a year.¹⁶⁵

158. *Id.* at art. 47(2).

159. THE OXFORD GUIDE TO TREATIES, *supra* note 131131, 350.

160. MODERN TREATY LAW, *supra* note 154154, at 262.

161. An amendment that would allow parties to freely legislate recreational marijuana could be drafted in numerous forms. This note does not concern potential amendments, but rather focuses on the need for amendment. That being established, potential amendments could be proposed for the removal of marijuana from Schedules I and IV within the treaty and placing it within Schedule III. This would allow for the distribution and exportation of marijuana. An amendment could also propose to remove marijuana entirely from the treaty. Single Convention, *supra* note 5, at art. 3(6)(b).

162. *See supra* note 7093 and accompanying text.

163. Press Release, Federal Bureau of Investigation, FBI Releases 2012 Crime Statistics (Sept. 15, 2013), *available at* <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-crime-statistics>.

164. “Marijuana related crimes” specifically include the sale, manufacturing and possession of marijuana. *See* FBI, Uniform Crime Reports, *Crime in the United States 2012*, *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (citing figures of 1,552,432 total drug violations with marijuana accounting for 48.3 percent of the total number of drug violations).

165. Matthew A. Christiansen, *A Great Schism: Social Norms and MJ Prohibition*, 4 Harv. L. & Pol’y Rev. 229, 237 (2010); *see also* James Austin, The JFA Institute,

The excessive spending for the enforcement of marijuana prohibition is not only costing taxpayers, but it's also taking away from potential tax revenue. "[I]f it were taxed similarly to alcohol and tobacco, marijuana would provide \$6.2 billion in additional revenue each year . . ."166 The potential for generated revenue, coupled with savings gained by no longer having the necessity for strict enforcement of marijuana prohibition could potentially amount to an "annual budget increase of nearly \$14 billion."167

In order to identify where some of these saving would be coming from, it's important to take a closer look at spending within the federal prison system. There are well over 200,000 inmates incarcerated at the federal level; 51% of those inmates' most serious charge is a drug offense.168 Depending on the level of security they're housed in, each inmate costs the federal government between \$21,000 and \$33,000 a year. This kind of expenditure led to the Obama administration having "to request \$6.9 billion for the Bureau of Prisons in fiscal [year] 2013."169 The expensive reality doesn't stop there, "[f]ederal prison costs are expected to rise to 30 percent of the Department of Justice's budget by 2020."170

The potential savings to not only taxpayers but also to the criminal justice system by essentially eliminating the prohibition on marijuana171 can be better illustrated through comparisons to the Netherlands, where marijuana has been decriminalized since the 1970s. For instance, in 2009, the United States incarcerated 743 people for every 100,000. In 2010, the Netherlands incarcerated 94 people for every 100,000.172 While prison

Rethinking the Consequences of Decriminalizing Marijuana 3 (stating that "national criminal justice expenditures for enforcing marijuana laws is \$7.6 billion per year with \$3.7 billion being allocated to police, \$853 million to the courts, and \$3.1 billion to corrections.").

166. Christiansen, *supra* note 165165, at 237.

167. *Id.* For further analysis of the economic benefits of eliminating the federal prohibition on marijuana see Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175 *passim* (1995); but cf. Mark A.R. Kleiman & Aaron J. Saiger, *Drug Legalization: The Importance of Asking the Right Question*, 18 HOFSTRA L. REV. 527, 531 (1990) (explaining that "supporters of existing prohibitions contend that the benefits of prohibition justify its costs." Such claimed benefits include "public health and well-being . . .").

168. Ezra Klein & Evan Soltas, *11 Facts about America's Prison Population*, THE WASHINGTON POST, (Aug. 13, 2013).

169. *Id.* (quoting Brad Plumer, *The War on Drugs is Breaking the Justice Department's Budget*, THE WASHINGTON POST, Aug. 12, 2013).

170. *Id.*

171. This note argues that marijuana legislation should follow the recent legislation of both Washington and Colorado by legalizing consumption for recreational use. The Netherlands provides the best comparison for per se legalization based on their national policy of decriminalization. However, because marijuana remains illegal in the Netherlands, I will refer to 'eliminating prohibition of marijuana' and the like when comparing the two since it would be misleading to that claim marijuana is legal in the Netherlands.

172. Netherlands Compared with the United States, available at http://www.drugwarfacts.org/cms/netherlands_v_us#sthash.JesOt4Ay.KRzRCWcf.dpbs. It is worth noting that the global average rate of incarceration is 166 per 100,000 while the "average among European Community member states [where marijuana remains largely criminalized] is 135" per 100,000. Steven Raphael & Michael A Stoll, *Why Are So Many*

populations fluctuate from year to year and are impacted by numerous factors¹⁷³, the stark difference in incarceration rates between the Netherlands and the United States is hard to ignore. On the expense side of things, the Netherlands spends approximately \$307 per capita on their criminal justice system while the United States spends approximately \$552.¹⁷⁴ By adopting federal legislation similar to that of Washington and Colorado, the federal government would be lightening the current load on the prison system while simultaneously generating revenue.

The Status of Marijuana as an Illegal Substance Has No Deterrent Effect

Proponents of maintaining marijuana as an illegal substance claim that social stigmas associated with breaking the law will prevent individuals from experimenting with and using marijuana.¹⁷⁵ However, there is no empirical evidence to support this claim. Recent figures show that in the United States, despite marijuana legislation, high school aged children who view smoking marijuana as risky behavior has steadily declined since the early 90's.¹⁷⁶ Although marijuana laws have been in effect for over 70 years, there is further evidence of increasing acceptance of the substance with fifty-eight percent of the population believing marijuana should be legal.¹⁷⁷

Marijuana usage among the population as a whole also shows that marijuana laws have no deterrent effect within the United States. In 2012, 7.6 million people over the age of 12 reported using marijuana 20 or more days a month, up from 4.8 million in 2002.¹⁷⁸ There has also been a rise in the number of individuals who use marijuana 300 or more days a year from 3.1 million in 2002 to 5.4 million in 2012.¹⁷⁹ These figures continue to rise despite an increase in marijuana enforcement. Between 1996 and 2006, there were nine million arrests for marijuana violations. Despite these arrests and their alleged deterrent effect, 25 million people used marijuana in 2007.¹⁸⁰

Americans in Prison?, in *DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM* 27, 27 (Steven Raphael & Michael A. Stoll eds.) (2009).

173. For a general overview and comparison of international crime statistics, *see generally* EUROPEAN INST. FOR CRIME PREVENTION AND CONTROL, *INTERNATIONAL STATISTICS ON CRIME AND JUSTICE* (Stefan Harrendorf et al. eds. 2010).

174. *Id.* Conversions from euros to dollars were made using the current exchange rate of 1.38.

175. *See* Christiansen, *supra* note 165165, at 239 (describing how formalized laws encourage compliance by their very nature).

176. Monitoring the Future, Marijuana: Trends in Annual Use, Risk, Disapproval and Availability, available at www.monitoringthefuture.org (go to Tables and Figures; New 2012 Data – Drug Trends; cited statistics can be found in Figure 1).

177. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, available at <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>.

178. Substance Abuse and Mental Health Services Administration, Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings, available at <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm#ch5.3>.

179. *Id.*

180. *See* Christiansen, *supra* note 165165, at 240.

Growing public acceptance of marijuana in the United States is evident beyond the realm of private use. In 1987, Judge Douglas Ginsburg was nominated for a seat on the United States Supreme Court by then President Ronald Reagan. Nine days after his nomination, Judge Ginsburg withdrew his name after receiving backlash for his prior marijuana use.¹⁸¹ Four years later, then President George H. W. Bush nominated Judge Clarence Thomas. When it became public that Judge Thomas had previously smoked marijuana, President Bush stated that it was not an issue that warranted disqualification.¹⁸² Shortly after, Senator Bill Clinton admitted to marijuana experimentation and was later elected as the successor to George H. W. Bush as President of the United States.¹⁸³ Public acceptance of marijuana in the United States has become so widespread that for the last 16 years the public has chosen as its President an admitted prior marijuana user.¹⁸⁴

Legalization May Decrease Overall Drug Use

There is a great deal of speculation as to the effects marijuana legalization would have, but the best indication is to look to the Netherlands where marijuana has been decriminalized since 1976.¹⁸⁵ Following the adoption of decriminalization, marijuana use in the Netherlands actually declined and has since stabilized with no tangible increase or decrease in use.¹⁸⁶ More importantly, by providing an alternative means of obtaining marijuana, the Netherlands has successfully isolated casual marijuana users to the ‘coffee shops’ found throughout the country “‘where it is as absurd to ask for hard drugs as it is at an average butcher’s [shop] to ask for a zebra-steak.’”¹⁸⁷ By preventing exposure to drug dealers peddling ‘hard drugs,’¹⁸⁸ decriminalization successfully decreased the demand for harder drugs, particularly heroin, because users were no longer being introduced to

181. *Id.* (“Judge Ginsburg’s admission that he had smoked marijuana several times, embarrassed Mr. Reagan . . .”).

182. Stephen Labaton, *Thomas Smoked Marijuana but Retains Bush Support*, N.Y. TIMES, July 11, 1991 (“The White House said today that Judge Clarence Thomas, President Bush’s Supreme Court nominee, had smoked marijuana while in college, but that the President had decided that it was ‘a minor matter’ that should not disqualify him.”).

183. *Clinton Tried Marijuana as a Student, He Says*, N.Y. TIMES, Mar. 30, 1992.

184. *See* Christiansen, *supra* note 165165, at 241.

185. *See* Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 Hofstra L. Rev. 717, 731 (1990) (explaining that in 1976 the Netherlands established guidelines for investigations and prosecutions which placed “possession of less than 30 grams of cannabis products . . . on the lowest priority level, meaning that no active criminal investigation or prosecution would be undertaken.”).

186. *See* Dana Graham, *Decriminalization of Marijuana: An Analysis of Laws in the United States and the Netherlands and Suggestions for Reform*, 23 Loy. L. A. Int’l & Comp. L. Rev., 297, 322 (2001) (stating that marijuana use declined after Dutch laws were implemented decriminalizing marijuana possession); *see also* Laker, *supra* note 112112, at 369 (citing a stabilization of marijuana use in the Netherlands).

187. Vliet, *supra* note 185185, at 730 (quoting A. JANSEN, CANNABIS IN AMSTERDAM: EEN GEOGRAFIE VAN HASHISH EN MARIJUANA 57 (1989)); *see also* Laker, *supra* note 112112, at 369 (stating that decriminalization prevented casual experimenters from becoming entangled in the drug world).

188. ‘Hard drugs’ include heroin, cocaine, crack cocaine, methamphetamine and LSD.

'hard drugs' by the dealers they previously had to associate with in order to purchase marijuana.¹⁸⁹

U.S. Legalization Would Reduce Violence on an International Level

The black market for marijuana in the United States has led to the formation of drug cartels in Mexico. The cartels smuggle marijuana into the United States and the proceeds from the sale are then smuggled back into Mexico where they account for over sixty percent of the cartels overall revenue.¹⁹⁰ Without any legal avenues for settling disputes among rival cartels, they are ultimately pitted against each other in a violent fight for control over territory, smuggling routes and cities along the border between the United States and Mexico.¹⁹¹ The resulting violence has caused approximately "60,000 drug-related murders since . . . 2006."¹⁹² In 2011, Mexico's former President, Vicente Fox, explained that "[t]he drug consumer in the U.S. yields billions of dollars, money that goes back to Mexico to bribe police and money that buys guns So when you question yourselves about what is going on in Mexico, it depends very much on what happens in this nation."¹⁹³ By not forcing marijuana producers underground, the United States could substantially alleviate the violence in Mexico.¹⁹⁴

Conclusion

Colorado and Washington took a leap of faith in approving the use of marijuana for recreational purposes despite conflicting federal law. The United States signaled a potential shift in its perspective by publicly condoning the new legislation. The United States is not alone; the international community has shown an increased approval, and in some instances outright support, of recreational marijuana. This growing international support warrants an amendment to the Single Convention in order to allow states to legislate recreational marijuana as they see fit without the constraints of international obligations.

Amending the Single Convention would allow the United States to pursue federal legislation similar to that of Colorado and Washington. By legalizing marijuana on the federal level, the United States would see positive gains both domestically and internationally. The United States would stand to gain significant revenue while simultaneously decreasing its prison population and international violence. Such potentially significant ramifications warrant an amendment to the Single Convention in order to permit states to weigh these benefits in their own territories

189. See Laker, *supra* note 112112, at 369-70; see also Vliet, *supra* note 185185, at 738 (describing how Dutch marijuana users rarely turn to harder drugs).

190. See Christiansen, *supra* note 165165, at 237.

191. See Jeffrey A. Miron, *Commentary: Legalize Drugs to Stop Violence*, available at <http://www.cnn.com/2009/POLITICS/03/24/miron.legalization.drugs/>.

192. Ioan Grillo, *From Mexico to Moscow, the World Turns on to U.S. Marijuana Legalization*, TIME WORLD, (Nov. 8, 2012) available at <http://world.time.com/2012/11/08/from-mexico-to-moscow-the-world-turns-on-to-u-s-marijuana-legalization/>.

193. *Id.* (quoting President Vicente Fox).

194. See Miron, *supra* note 191191 (explaining the only way of reducing violence is to legalize drugs).

without being held hostage by an international treaty that's no longer in line with popular opinion.