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Marijuana Legalization and Decriminalization: A Paradigm Shift in Federal Policy

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Good governance is about good stewardship, and that means that government executives should always look at how best to use the government's vast assets, including personnel, money, and materials. To this end, continued opposition by the Drug Enforcement Administration (DEA) to the legalization of marijuana is not only a losing battle, but also a waste of taxpayer money—especially when the president, the Congress, and nearly half of the state legislatures are responding to the will of the people by decriminalizing nonviolent crimes such as marijuana drug use and possession. Our federal tax dollars would be better spent by focusing on responding to the current widespread increase of heroin use in ways that will prevent continued abuse, reduce harm to users, and provide greater public safety.

One of the tools that policymakers in government public safety and intelligence circles always seek to have in their toolbox is a predictive analysis or an over-the-horizon view of the landscape so that resource decisions based on realistic threats can be developed. These analyses often involve the combination of hard numbers, such as dollars in the budget, and softer criteria that provide patterns and indicators, to reach a strategic or policy decision. By using these same methodologies, an objective analyst can see a clearly emerging picture: Marijuana decriminalization and legalization have gone past being a trend and are settling in as federal policy,

especially with the costs outweighing the benefits of incarcerating so many otherwise nonviolent offenders.

The paradigm has shifted, and the public is no longer interested in demonizing marijuana, especially after learning about the positive medicinal benefits of the substance. The tipping point for this paradigm shift began with the state legislatures' decriminalization and legalization of recreational use and medicinal marijuana. These efforts were given a boost when President Obama stated that marijuana is no more dangerous than alcohol. While this assertion may be scientifically debatable, it nonetheless provided validation to the legislatures of those states that recently passed decriminalization laws. Combined, these moves provided a platform for the federal government to begin the slow process of reversing federal policy regarding marijuana enforcement, despite complaints from many in law enforcement.

The first and perhaps most important indicator that demonstrates the public's disinclination to criminalize marijuana use was the decision by the states of Colorado and Washington to legalize it for "recreational" use.¹

The second was Attorney General Eric Holder's decision to stop prosecuting offenses related to medical marijuana in those states where its medicinal use has been legalized. This was evidenced in an August 29, 2013, memorandum



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that separated the “seriously ill and their caregivers” from “for-profit commercial enterprises,” stressing that the latter is a more “appropriate target” for the Drug Enforcement Administration.² By issuing the memorandum, Holder took the first step toward realigning federal drug enforcement policy. Soon thereafter he also acknowledged that the national incarceration rate was out of control, especially with regard to nonviolent offenders. The change is expected to cut many federal drug sentences by an average of nearly two years, thereby reducing the prisoner population and the costs associated with those incarcerations. This was not only a pragmatic move, but a fiscally necessary one as well.

From a policy point of view, the federal government, especially the executive branch law enforcement agencies, needs to adopt and adhere to the directives of the legislatures and stop clinging to archaic ideologies that are counterproductive and seen as authoritative and repressive. Our current federal policy regarding marijuana is schizophrenic and is regarded by the international community as hypocritical.

The actions of Colorado and Washington state have also allowed several nations to follow suit, most notably in Uruguay, where marijuana legalization became national policy in 2012. Concurrent with the legalization of small, user-amounts of marijuana, Colombia and Mexico have subsequently called for a review of international drug enforcement policies to reassess whether marijuana should continue to be afforded the same level of enforcement effort as was previously given.³ Many nations are also taking note that despite the US government’s liberalized policy accommodations for states that have decriminalized and legalized marijuana, the US simultaneously holds its international law enforcement partners to a different and separate standard. These incongruities translate into seemingly hypocritical policies that must be reconciled if the US intends to maintain a leadership role for counter-drug matters around the world.

RECALIBRATION OF MARIJUANA POLICIES

Under the terms of the Controlled Substances Act, the DEA, in consultation with Congress and other agencies, assigns drugs to various “schedules” according to several criteria. Since the passage of the act in 1970, marijuana has been consigned to Schedule I, the most restrictive category, because it allegedly has “a high potential for abuse” and “no currently accepted medical use in treatment in the United States.” Drugs in the less restrictive Schedule II include cocaine, methamphetamine, oxycodone, morphine, and fentanyl, the latter drug being approximately 100 times stronger than morphine and exponentially more dangerous.⁴

Like it or not, the DEA is fighting an uphill battle by enforcing marijuana laws in the face of a new era of understanding, education, and public sentiment, all of which represent a complete U-turn from the beliefs of the 1970s. The agency must accept that the American people, through their duly elected representatives, simply do not wish to have our federal government continue to spend time, money, and resources fighting marijuana possession and use, especially in light of the convincing evidence that the substance provides epileptics, veterans with PTSD, those suffering the pains of cancer, and others with alternative medicinal choices.

Notwithstanding the enormous contributions the DEA has made to public safety since its inception in 1973, the agency will be hard pressed to continue to ignore the autonomy of 23 states when it comes to this issue. It may also be time for the agency to realign its strategic thinking, adjust its policies to adopt this new paradigm, and develop a new approach for dealing with marijuana legalization as a state issue rather than a federal crime.

Continued institutional resistance may jeopardize the vital relationship the agency has with Congress and cause additional, seemingly punitive cuts from the DEA’s budget. Already, DEA administrator Michelle Leonhart is under attack by some in Congress who are calling for her dismissal.⁵ Taking a career law enforcement agent

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away from the helm of the agency and into the hands of a non-law-enforcement political appointee could lead to a solution that may be far too permissive and sound the death knell for a strong counter-drug advocacy in the federal government. The DEA may have gone out on a proverbial limb when it reportedly criticized President Obama's assertions regarding the dangers of marijuana, but looking back, it may well see that non-acceptance of public sentiment may be more like a walk onto a gang-plank that has adverse consequences not only on the DEA but also on federal counter-drug law enforcement in general.

To this end, it may be in the best interest of all parties involved on either side of the issue to engage in a "time-out" of sorts in order to reassess the merits of particular arguments, specifically regarding medicinal marijuana, followed by recreational use, followed by a review of international norms regarding marijuana policy. Objective leadership must prevail over archaic propaganda.

Moratorium on Marijuana Enforcement

The DEA should agree to observe a one-year moratorium on the enforcement of federal marijuana laws in states where medicinal marijuana has been legalized. This would be the first step toward establishing a dialogue among opposing parties. This step would not be seen as a weakening of DEA's law enforcement authority but more as a strengthening of its public service mission by listening to the appeals of the public and the state legislatures, all of which have acted within the parameters of their individual state regulatory structures.

Designation of a Marijuana Arbitrator

The administrator of the DEA should, in consultation with Congress, appoint an independent arbitrator to establish parameters for the reevaluation of the three critical components of a possible restructuring of US federal marijuana policy. The DEA arbitrator should develop a panel of experts, including academicians, medical and psychological professionals, jurists, diplomats, legislators, and others to review

the appropriateness of marijuana as an accepted medicinal substance; the positive and negative consequences of marijuana as a recreational drug; the rescheduling of marijuana into another category within the Controlled Substances Act; and the impact of legalization on US obligations to international drug enforcement treaties. Special attention should be given to the 1972 Shafer Commission Report to determine if any of its findings can be disputed or validated, given what has been learned about marijuana in the last four decades.⁶

Rescheduling Marijuana

In April 2014, Holder stated that the Justice Department is disposed to work with Congress should the legislature wish to reschedule marijuana into a less dangerous but nonetheless regulated category within the Controlled Substances Act.⁷ Rescheduling would not mean the government would give free rein to the marijuana industry, but it would mean that the federal government at all levels is listening to the public and the Congress and, most of all, is making well-reasoned decisions that are not seemingly based on maintaining the status quo. It is also in the best interests of DEA's organizational and political survival.

Cannabis Tax

Finding ways to get ahead of legalization and capitalizing on the potential federal tax revenues would provide the DEA with even more needed funding. Similar to the Diversion Control Fee Account generated from the registration fees paid to DEA by physicians, pharmacists, and others, a Marijuana Tax Account could provide the agency with much-needed resources to confront drug-related terrorism and other more pressing drug threats.⁸

Federal marijuana tax revenues could include collecting a percentage of profits from the production and sale of cannabis or hemp products and from marijuana derivatives such as hashish oil and hashish. It could also include importation taxes for any marijuana that arrives in the US from outside its borders, possibly as part of regional trade pacts such as NAFTA.

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Provisional Federally Approved Dispensaries

The federal government should take steps to allow, on a noninterference basis, state government-approved medicinal marijuana dispensaries by assigning established marijuana research organizations to track, evaluate, and report on the benefits or detriments of such facilities.

Revision of International Treaties

The attorney general, the secretary of state, the Congress, and several key international partners such as Canada, Colombia, Mexico, Jamaica, and others should appoint a separate panel of diplomats and other experts to review current US compliance to international drug enforcement treaty obligations with regard to marijuana and to make appropriate changes to those treaties or enact new treaties that take into account the realities of current shifts in public views and international norms, as well as adjust, if necessary, conditions for US foreign aid with regard to marijuana. Current US compliance with marijuana regulation in treaties should include a review of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.⁹

CONCLUSION

Times change, people change, and what was once the norm is no longer valid. There was a time when Japan and Germany were mortal enemies of the United States, and many lives from all three nations were lost as a result of World War II. However, as time passed, the three nations reconciled their differences and adjusted to the new realities of the postwar era. Nonetheless, many Americans who lived through the war experience vehemently resisted aid and assistance to the defeated nations and fought against normalizing relationships with those who had once been our mortal enemies. Over time, our combined societies adjusted to the new norms and developed

prosperous relationships based on objective, cooperative, and mutually beneficial agreements.

This analogy is especially meaningful in the context of recalibrating federal marijuana enforcement policy in the US. There was a time in the 1960s and 1970s when anyone who used marijuana was considered a radical, a hippie, or generally an anti-government sort. Social issues of the era, such as resistance to US involvement in Vietnam, caused the government to respond with draconian measures in an attempt to control the uncontrollable. Those measures included designating marijuana as among the most dangerous drugs in existence, when clearly it is not, compared objectively to substances such as heroin, methamphetamine, and others, including some prescription drugs.

Many marijuana users were also stigmatized and jailed, even though most presented no demonstrable threat to overall public safety or national security. In those days, our nation was extremely conservative, paranoid, and fearful of suspected communists, drug users, anti-war activists, and anyone who wore long hair or listened to rock music. Times have changed, and American society now accepts that people are different and those differences account for varied forms of behavior and dress. Not all "drug" users are the same. As a society, we have learned that our diversity is not to be feared but embraced as another aspect of our social strength.

Our federal government in its entirety must adapt to these new norms as the public already has. It must put aside pride and prejudices and instead take objective views and positions regarding the use of marijuana as a medicinal substance, and perhaps even as a recreational substance used as many use alcohol, and take steps to normalize its approved use to cure numerous ailments that, from a purely humanitarian point of view, would improve the quality of life of many who are suffering from various illnesses.

US federal marijuana policy adjustment would also provide worldwide credibility to our nation, instead of ridicule in the face of conflicting domestic and international

policies. It is time for our government to do what is right and demonstrate to the public and to the world that democracy works, and that democracy includes accepting the will of the people through changes made by duly elected legislative officials.

ENDNOTES

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