John E. Ingersoll
Director
Bureau of Narcotics & Dangerous Drugs

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Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

Petition to decontrol marihuana; Interpretation of Section 201 of the Controlled Substances Act of 1970.

Your memorandum of August 9, 1972, to Assistant Attorney General Cramton indicated that the Attorney General would be requested to render an opinion on a question involving the interpretation of section 201 of the Controlled Substances Act of 1970, 21 U.S.C. 811. In essence the question is whether a petition to decontrol or substantially lessen control of marihuana must be accepted by the Attorney General and referred to the Secretary of Health, Education, and Welfare for his recommendation, without regard to the controls on marihuana required by the Single Convention on Narcotic Drugs, to which the United States is a party.

Prior to receipt of a request for a formal opinion, this Office has studied the matter and, for the reasons set forth below, has concluded that, in view of the obligations imposed by the Single Convention, the Attorney General may reject the petition to decontrol marihuana without following the referral provisions of section 201.

BACKGROUND

The National Organization for the Reform of Marijuana Laws has filed a petition to have marihuana removed from the controls of the Controlled Substances Act of 1970 (hereinafter - the Act) or, alternatively, to reschedule it from Schedule I to Schedule V under the Act, thereby lessening the statutory control to which it would be subjected. The procedures for scheduling and rescheduling

a substance are contained in section 201 of the Act, 21 U.S.C. 811. While the Attorney General retains primary authority for scheduling procedures, certain important inputs in the decision-making process are delegated to the Secretary of Health, Education, and Welfare. In particular, under subsection 201(b), the Attorney General is instructed to request from the Secretary a scientific and medical evaluation of a substance and recommendations as to its proper scheduling. Subsection 201(b) further provides that the Secretary's recommendations "shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance." 21 U.S.C. 211(b). In a letter accompanying the petition, attorneys for the petitioners specifically request that the recommendations of the Secretary of Health, Education, and Welfare be sought.

In its proposed decision, the Bureau of Narcotics and Dangerous Drugs refuses to accept the petition for filing. This decision would preclude any consideration of medical and scientific matters by HEW. In reaching this decision, the Bureau relies primarily on the language of subsection 201(d) and subsection 202(b) of the Act.

Subsection 201(d) provides:

> "If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 202(b) of this title [21 U.S.C. 812(b)] and without regard to the procedures prescribed by subsections (a) and (b) of this section." 21 U.S.C. 811(d).

Subsection 202(b) provides in pertinent part:

> "Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, . . . a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance." (The findings re- required for each of the 5 schedules are listed). 21 U.S.C. 812(b).

The Bureau apparently interprets the language of these provisions to mean that where a drug or substance is subject to control under an international agreement to which the United States is a party, the Attorney General need not follow the rule-making procedures for scheduling a substance outlined in sections 201 and 202 of the Act. Consequently, a petitioner has no right as a matter of law to require the Attorney General to consider a petition for scheduling or rescheduling such a substance. In the case of marihuana, international control is imposed by the Single Convention on Narcotic Drugs. 18 U.S.T. 1407.

The Special Action Office for Drug Abuse Prevention disagrees with the Bureau's interpretation of the scheduling provisions. In its view, a proper interpretation of the Act would require that the petition be accepted and that the Attorney General seek the medical and scientific evaluation of marihuana from HEW in accordance with the procedures set forth in subsection 201(a) and subsection 201(b).

In support of its position, the Special Action Office argues that Congress could not have intended that the elaborate procedures for scheduling and rescheduling be completely negated each time a substance is subject to some sort of international control. It is pointed out that a great percentage of substances scheduled under the

Act are subject to international control under the Single Convention. If the Bureau's interpretation is accepted, the Special Action Office fears that none of these substances would benefit from the rescheduling procedures.

The Special Action Office further maintains that subsection 201(d) was intended to give the Attorney General the authority to bypass normal scheduling procedures only where a substance is newly added to international schedules under the Single Convention. The wording utilized by the drafters of subsection 201(d) ("the Attorney General shall issue an order controlling such drug") lends support to this interpretation inasmuch as it appears to apply only to those situations in which the Attorney General must initiate control, not to those situations where a re-affirmation of control might be required (as in a petition to reschedule or remove from the schedules a given substance).

ANALYSIS OF THE ACT

In a number of provisions of the Controlled Substances Act, the drafters showed their concern with maintaining United States obligations under international agreements. The initial section of the Act contains a declaration that "the United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances." Section 101(7) of the Act, 21 U.S.C. 801(7). The Single Convention as well as other conventions and protocols to which this country is a party are also mentioned in a provision regulating export of controlled substances. Section 1003(a)(1) of the Act, 21 U.S.C. 953(a)(1). Moreover, in making determinations as to the fitness of registrants to receive licenses for manufacture or export and import of controlled substances, the Attorney General is instructed to ensure consistency "with United States obligations under international treaties, conventions, or protocols." Section 303(a) of the Act, 21 U.S.C. 823(a); Section 1008(a) of the Act, 21 U.S.C. 958(a). These references to international obligations are in addition to the references in section 201 and section 202 of the

Act with which we are immediately concerned here. They indicate not only a Congressional awareness of international obligations, but an affirmative desire on the part of Congress to ensure that our laws comply with them.

This conclusion is buttressed by statements made in the House and Senate reports on the Act. Both mention the need to comply with international obligations as one of the reasons for federal legislation in this area. Senate Report, 91st Cong., 1st Sess., No. 91-613, at 4 (1969); House Report, 91st Cong., 2d Sess., No. 91-1444, Pt. 1, at 29 (1970).

In light of the above, an interpretation of section 201 of the Act which assures full compliance with international obligations would, in our view, be consistent with the overall congressional intent. Closer analysis of the wording of section 201 and its legislative history provides additional support for such an interpretation.

It has been argued that subsection 201(d) was intended to exclude from the normal scheduling procedures set forth under subsections 201(a) and 201(b) only those substances which have been newly added to an international schedule under the Single Convention. There are a number of difficulties with this interpretation.

First, the express language of subsection 201(d) is not limited in its application to substances newly added to international schedules. Instead, it would appear to apply to any "control" "required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part . . . ."

Second, such a narrow interpretation of subsection (d) leads to an apparent inconsistency with subsection 201(a), which defines the authority and procedures for adding new substances to the schedules, and for transferring or removing substances from the schedules, "except as provided in subsections (d) and (e)." If section 201(d)

was not intended to apply to petitions for removal of substances from the schedules, the exception language in subsection 201(a) becomes partially meaningless. A narrow interpretation of subsection 201(d) leads to a similar inconsistency with subsection 202(b) of the Act. This latter subsection provides that the required findings must be made before a substance is placed on any of the 5 schedules except where control is required by international obligations. The exception is not limited to substances newly added to an international control list.

Third, if section 201(d) does not apply to petitions to reschedule or de-schedule substances, there is a substantial possibility that such scheduling proceedings will result in violation of our treaty obligations. Such a result could occur because the procedures of subsection 201(b) call for the Secretary of Health, Education, and Welfare to make recommendations for the proper scheduling of a substance based on scientific and medical evaluation, not based on any treaty obligations. From the language, it would appear that if a recommendation is made by HEW not to control a substance, the Attorney General must comply with it, regardless of treaty obligations. Section 201(b) of the Act, 21 U.S.C. 811(b). In the absence of strong evidence that such an end was desired, we cannot assume that Congress carefully prescribed a procedure for full compliance with international obligations where a substance was newly added to an international schedule, while at the same time totally ignoring international control obligations where a petition for rescheduling or de-scheduling a substance is filed. Given the wording of subsection 201(d), in the context of the other provisions, it is our view that the subsection is intended to give the Attorney General final authority to ensure compliance with treaty obligations in all cases in which the propriety of the scheduling of a substance is at issue under subsection 201(a). The available legislative history relating to subsection 201(d) supports such a reading of the provision.

There can be no dispute that Congress intended subsection 201(d) to permit rapid control of substances newly added to an international schedule. House Report, Pt. 1, at 6, 36. But language in the Report clearly shows a much broader application was intended:

> "Under subsection (d), where control of a drug or other substance by the United States is required by reason of its obligations under an international treaty, convention, or protocol which is in effect on the effective date of part B of the bill (i.e., the date of its enactment), the bill does not require that the Attorney General seek an evaluation and recommendation by the Secretary of Health, Education, and Welfare, or pursue the procedures for control prescribed by the bill but he may include the drug or other substance under any of the five schedules of the bill which he considers most appropriate to carry out the obligations of the United States under the international instrument, and he may do so without making the specific findings otherwise required for inclusion of a drug or other substance in that schedule. The reference to treaties, conventions, or protocols in effect upon enactment of the bill is intended to refer to the Single Convention on Narcotic Drugs, 1961, and to those predecessor conventions or protocols as to which the United States may still have an obligation. This would include any obligations of the United States that might arise after enactment of the bill by reason of changes in the schedules of the Single Convention by the international organs specified in the convention under the authority of the provisions of the convention in effect as to the United States on the date of enactment of the bill." House Report, Pt. 1, at 36.

The clear implication of this language is that subsection 201(d) is coextensive with subsection 201(a), including but not limited to cases where a substance is newly added to an international schedule. To the same effect, see language from the House debates, 116 Cong. Rec. H-9105, H-9117 (daily ed., Sept. 23, 1970).

The Special Action Office has advanced the argument that Congress would not have included the elaborate procedures for scheduling and rescheduling substances had it intended to have international obligations control the outcome in the majority of cases. It is true that the schedules of the Single Convention include most of the drugs listed under the five control schedules of the Act. Nonetheless, with respect to all new substances and variations of existing drugs which are not yet subject to international control, the procedures set up under subsection 201(a) and subsection 201(b) would still apply. There is evidence that a primary intent of the Congress was to make these procedures available for such newly developed drugs. In summarizing the provisions of the Act, the House Report stated as follows:

> "A procedure is established for classification of future drugs which create abuse problems. Under this procedure, if the Attorney General feels that a drug should be controlled, he will gather data, and request a scientific and medical evaluation by the Secretary of HEW. If the Secretary of HEW determines, on the basis of these and any other data, that the drug should not be controlled, the Attorney General may publish notice in the Federal Register and proceed in accordance with rule-making procedures, which provide notice and opportunity for a hearing, to list the drug for control."

"An exception is made in the case of treaty obligations of the United States. If a drug is required to be controlled pursuant to an international treaty, convention, or protocol in effect on the enactment of the bill, the drug will be controlled in conformity with the treaty or other international agreement obligations." House Report, Pt. 1, at 4.

In showing the primary intent of the Congress to provide procedures for controlling newly developed drugs, this language in the House Report also explains the wording of section 201(d), which appears to stress affirmative action by the Attorney General to impose control over not yet controlled substances. When Congress added language to subsection 201(a) to permit the re-examination of the scheduling of substances already under control, it intended that the obligation of the Attorney General to assure compliance with treaty obligations remain coextensive with this reexamination authority. Any other interpretation of section 201 would lead to the illogical and inconsistent results which we have described above.

It is our conclusion that the language of section 201, read together with subsection 202(b) and the remaining provisions of the Act, imposes on the Attorney General the obligation to control a drug under the schedule most appropriate to carry out our international obligations. Any determination of the proper schedule consistent with international obligations should be made without regard to the procedures prescribed in subsections 201(a) and 201(b). The Attorney General's obligation remains regardless of whether the initial scheduling of a substance, the transfer of a substance from one schedule to another, or the removal of a substance from all schedules, is involved. The petition of the National Organization for the Reform of Marijuana Laws to remove marihuana from the schedules, or transfer it from Schedule I to Schedule V, requires that the

Attorney General make an initial determination of the extent of the treaty obligations of the United States. Clearly if the current scheduling of marihuana is required by these obligations, the petition should be denied without further procedural steps.

The decision of Congress to include marihuana in Schedule I presumably was made with an awareness of international obligations. 1/ Nonetheless, it is possible that Congress has placed marihuana on a schedule imposing stricter controls than international obligations require. If the Attorney General were to find that classification under Schedule V were sufficient to satisfy these obligations, the scheduling procedures outlined in section 201 of the Act could still be followed in determining whether a rescheduling from Schedule I to Schedule V is warranted.

The precise nature of United States treaty obligations are examined below in order to determine whether such a rescheduling would be permissible.

1/ There is evidence that at least some members of Congress thought that the decision on the scheduling of marihuana would be reviewable. In a letter published in the House Report, the HEW Assistant Secretary for Health and Scientific Affairs indicated that marihuana should initially be included in Schedule I pending the completion of certain studies on the effect of the drug. It was suggested that the Attorney General could later revise the scheduling of the drug under section 201 procedures. House Report, Pt. 1, at 61. Assuming that Congress did expect the marihuana classification to be open for review, that review can effect changes only to the extent they are consistent with treaty obligations.

OBLIGATION OF THE UNITED STATES TO CONTROL MARIHUANA UNDER THE SINGLE CONVENTION

The United States has been a party to the Single Convention on Narcotic Drugs since 1967. 18 U.S.T. 1407 (1967). The Convention was drafted at an international conference held in New York in 1961 and was intended to replace a number of existing international agreements governing narcotic drugs.

Marihuana is listed in Schedules I and IV of the Convention under the name "cannabis". Article I, paragraph (b) contains the following definition of the term:

> "Cannabis" means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.

By its terms, the definition clearly would not cover a preparation made only from the leaves of the cannabis plant. The Convention does not list any specific mandatory controls which adhering States must adopt with respect to the leaves by themselves. Art. 28, para. 3. Seizing on this point, the petitioners' brief appears to suggest that the United States is not required to impose any controls on marihuana "since it is the leaves of the marihuana plant that are commonly used in the United States." Petitioners' Brief, at 82. But at an earlier point in the brief, petitioners concede that marihuana in use in this country consists of a mixture of crushed leaves, flowers, and twigs from the hemp plant. Id., at 57. The Presidential Commission on Marihuana also found that the preparation normally includes quantities of the flowers and their resinous secretions. First Report of the National Commission on Marihuana and Drug Abuse, Marihuana, A Signal of Misunderstanding, 50 (March, 1972). Consequently, any consideration of the obligations of the United States under the Convention must start from the assumption that "marihuana" in use in this country does fall within the definition of "cannabis".

As a drug listed in Schedules I and IV of the Convention, cannabis is subject to all the controls imposed on these categories of substances as well as the special regulations of Article 28. See Art 2, paras. 1, 5, 6, and 7. The catalogue of controls imposed is extensive. A State is required to submit estimates of legitimate scientific and medical needs for the drug (Art. 19), provide statistics on production, use, import, export, seizures and available stocks of the drug (Art. 20), and establish quotas on import and manufacture of the substance (Art. 21). Under Articles 29-31, a State must establish a licensing system for all those engaged in manufacture, distribution, import or export of cannabis. Article 36 requires that a State adopt penal provisions making violations of the above controls punishable offenses

Under the Controlled Substances Act, substantial controls are imposed on the production, importation, distribution, and use of substances included on any of the five schedules established by the Act. The controls imposed on substances listed in Schedules III-V are, however, not as stringent as those imposed on substances in Schedules I and II. Thus, for example, the Attorney General is instructed to weigh United States obligations under international agreements in determining whether to license an applicant to manufacture or import and export controlled substances under Schedules I and II. 21 U.S.C. 823(a), 958(a). No such language is contained in the provisions governing license applicants for substances controlled under Schedules III-V. 21 U.S.C. 823(d), 958(c).

Other regulations which apply only to drugs listed on Schedules I and II are the production quotas, 21 U.S.C. 826, the order forms required for transferring controlled substances, 21 U.S.C. 828, and a provision applying to the manufacture or distribution of a substance with the intent that it be imported into the United States or with knowledge that it will be so imported, 21 U.S.C. 959.

It would appear that full compliance with our obligations under the Single Convention could not be achieved unless marihuana is listed under Schedule I or Schedule II

of the Act. It is clear, for example, that the quotas on manufacture and importation of a substance required by the Convention could not be maintained under existing statutory authority were marihuana listed in Schedules III, IV, or V.

The primary distinction between substances included on Schedule I and those included on Schedule II is that the latter are considered to have a legitimate medical use and may be dispensed to an individual with a prescription if the Food and Drug Administration classifies the substance as a prescription drug. 21 U.S.C. 812(b), 829(a). Use of marihuana as a drug under these controlled circumstances would not violate our obligations under the Single Convention since Article 4 of that instrument specifically permits medical and scientific uses of drugs.

CONCLUSIONS

Through the language of sections 201 and 202 of the Act, Congress has imposed on the Attorney General the obligation to ensure that substances are controlled under one of the five schedules of the Act in a manner consistent with our international treaty obligations. A petition to reschedule a substance, or remove it from all schedules, need not be treated in accordance with the scheduling procedures of subsections 201(a) and 201(b) where the action requested in the petition would be inconsistent with treaty obligations. We reach this conclusion in light of the language contained in subsection 201(d) as well as subsections 201(a) and 202(b).

The petition of the National Organization for the Reform of Marijuana Laws seeks the removal of marihuana from all schedules, or, alternatively, its rescheduling under Schedule V. Either action would result in a failure on the part of the United States to live up to its obligations under the Single Convention. Consequently, the Attorney General may reject the petition without regard to the referral procedures which section 201 otherwise requires.

Should the petition be modified to seek a rescheduling consistent with our international obligations, the Attorney General would be obliged to follow the prescribed procedures in obtaining a medical and scientific evaluation from the Secretary of Health, Education, and Welfare. As we have noted, the rescheduling of marihuana to Schedule II or the descheduling of those marihuana mixtures containing only leaves (no flowers or resins) would be actions consistent with our international obligations.