

Marijuana Legalization is an Opportunity to Modernize International Drug Treaties

By Wells Bennett and John Walsh

SUMMARY



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- Two U.S. states have legalized recreational marijuana, and more may follow; the Obama administration has conditionally accepted these experiments. Such actions are in obvious tension with three international treaties that together commit the United States to punish and even criminalize activity related to recreational marijuana.
- In essence, the administration asserts that its policy complies with the treaties because they leave room for flexibility and prosecutorial discretion. That argument makes sense on a short-term, wait-and-see basis, but it will rapidly become implausible and unsustainable if legalization spreads and succeeds.
- To avoid a damaging collision between international law and changing domestic and international consensus on marijuana policy, the United States should seriously consider narrowly crafted treaty changes. It and other drug treaty partners should begin now to discuss options for substantive alterations that create space within international law for conditional legalization and for other policy experimentation that seeks to further the treaties' ultimate aims of promoting human health and welfare.
- Making narrowly crafted treaty reforms, although certainly challenging, is not only possible but also offers an opportunity to demonstrate flexibility that international law—in more areas than just drug policy—will need in a changing global landscape. By contrast, asserting compliance while letting treaties fall into desuetude could set a risky precedent, one that—if domestic legalization proceeds—could harm international law and come back to bite the United States.

I. A CHOICE OF PATHS

In November 2012, voters of Colorado¹ and Washington State² approved ballot initiatives that legalized and regulated the production, distribution, possession, and use of marijuana for recreational purposes. These unprecedented actions posed a twofold predicament for the Obama administration. Colorado and Washington notwithstanding, marijuana remains illegal under a federal statute, namely the 1970 Controlled Substances Act (“CSA”), which explicitly prohibits the cultivation, distribution and possession of marijuana throughout the United States.³



That law also implements three drug control treaties to which the United States is a party: the 1961 Single Convention on Narcotic Drugs as Amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The first limits the use of marijuana “exclusively to medical and scientific purposes,” among other things;⁴ the third requires states to criminalize nearly all forms of marijuana activity, again apart from the medical and scientific.

How should the United States manage the increasingly uncomfortable fit between the state-level legalization of recreational marijuana and the United States’ obligation to prevent that very thing, under international accords that the American government itself has long championed?

1 As proposed, Amendment 64 (“Amendment 64”) to Colorado’s Constitution purported to “provid[e] for the regulation of marijuana; permit[] a person twenty-one years of age or older to consume or possess limited amounts of marijuana; provid[e] for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permit[] local governments to regulate or prohibit such facilities; [and] requir[e] the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana[.]”); see also generally Col. Const., art. 18, sec. 16 (codifying ballot measure).

2 According to its executive branch, Washington’s State’s Initiative Measure No. 502 (“Initiative 502”) would, among other things, “remove state-law prohibitions against producing, processing and selling marijuana, subject to licensing and regulation by the liquor control board ... and allow limited possession by persons aged twenty-one and over.” Ballot Measure Summary from Jeffrey T. Even, Deputy Solicitor General, to the Hon. Sam Reed, Secretary of State (July 15, 2011); see also generally Wash. Rev. Code § 69.50.401(3) (codifying ballot measure).

3 See generally 21 U.S.C. §§ 841, 844, 18 U.S.C. § 3607.

4 1961 Single Convention on Narcotic Drugs as Amended by the 1972 Protocol, art. 4. We refer to the drug treaties hereafter according to their years of conclusion, e.g., the “1961 Convention,” the “1971 Convention,” and the “1988 Convention.”

The answer matters. Tempting though it may be to view the tension between marijuana reform and the drug treaties as a technical problem, much more than procedural hygiene is at stake. Whether the United States and its foreign interlocutors can adapt the three conventions to rapidly increasing domestic tolerance for marijuana is a stress test, so to speak, for the adaptability of today's international legal framework. To preserve American interests in a host of other treaties—and in the compliance that underpins them—we think the administration and its treaty partners abroad should consider substantive changes to the treaties themselves, so as to give international drug law the flexibility it might well need in the years to come.

So far, the Obama administration has taken a different tack, preferring to work within the treaties rather than trying to adjust them. The CSA was the subject of a memo issued in August of 2013 by Deputy Attorney General James M. Cole.⁵ In it, the Justice Department announced criteria for the statute's enforcement in states opting for the legalize-and-regulate approach. Essentially, growers, sellers and users of marijuana could steer clear of the feds, provided they strictly hewed to the Washington or Colorado regulations; the latter seem to uphold, or at least not to offend, the Cole Memo's enforcement priorities. To be sure—and as Justice Department officials have been at pains to emphasize since—the federal statute remains very much on the books. And any marijuana-related conduct that transgresses adequately robust state regulations, or otherwise impinges on the Cole Memo's guiding principles, may provoke action by a United States attorney.

Does this arrangement square with international law? In public and in private, U.S. officials have maintained that the posture described by the Cole Memo is consistent with U.S. treaty obligations. They emphasize the United States' decades-long commitment to the accords' broader objectives, while highlighting the flexibility reserved to parties in seeking to achieve the treaties' aims. The government therefore claims to be acting lawfully; it has not sought to adjust the drug control treaties in light of the fluid state of play regarding marijuana. In fact, the United States explicitly opposes both the conclusion of any new drug treaty, and even the possibility of amending or revising the current treaty framework to account for changing domestic marijuana policy.

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⁵ The Cole Memo's text can be found at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

At the same time, as bold as the Colorado and Washington innovations are, these new regimes remain incipient and their durability is not assured. It is not farfetched to imagine that legalization in some states may not go well, souring the public on the whole idea.

As we explain below, the Obama administration's initial response to state-level marijuana legalization—conditional accommodation and an assertion of “flexible interpretation” of treaty commitments—made sense, and was justified under the circumstances. The alternatives certainly were worse. First, federal “success” in blocking the two states’ new laws, were it achievable, would really embody a defeat for federal interests; it would likely upend the regulatory components of the states’ new systems but leave intact the repeal of state prohibitions against marijuana.⁶ An aggressive push by the feds to counteract or undo the state initiatives—whether through preemption lawsuits or local intensification of federal enforcement—also would almost certainly have constituted a political debacle for the administration.⁷ At the same time, as bold as the Colorado and Washington innovations are, these new regimes remain incipient and their durability is not assured. It is not farfetched to imagine

that legalization in some states may not go well, souring the public on the whole idea. In that possible future scenario, the administration's choices—to provisionally accommodate the states within the confines of current federal law and to cast treaty concerns in terms of “flexible interpretation”—may come to look in hindsight like astute maneuvers to address the political exigencies of the day, going no further than immediate circumstances required.

But there's another possibility: the 2012 votes in Colorado and Washington may mark the beginning of a durable shift towards legalizing marijuana in the United States, with more states opting for similar legalize-and-regulate systems, and with Congress eventually revising federal law—at first to ease the constraints still imposed by federal marijuana prohibition,⁸ and

6 The Tenth Amendment to the U.S. Constitution prevents the federal government from commanding states to criminalize marijuana, and likewise from forcing the states to enforce federal laws criminalizing it. See Erwin Chemerinsky, Jolene Forman, Allen Hopper and Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, Legal Studies Research Paper Series No. 2014-2025 at 21 & n. 91 (citing *New York v. United States*, 505 U.S. 114, 162 (1992) and *Printz v. United States*, 521 U.S. 898, 912 (1997)).

7 The ballot initiatives in both states tallied impressive wins, with 55.3 percent of the vote in Colorado and 55.7 percent in Washington. Phillip Wallach and John Hudak, *Comparing Legal Marijuana Systems in Colorado and Washington*, Brookings (May 2013).

Public opinion in the United States is, moreover, clearly shifting in favor of legalizing marijuana. See generally William A. Galston and E.J. Dionne, Jr., *The New Politics of Marijuana Legalization: Why Opinion is Changing*, Brookings (May 2013). Even among those less likely to favor legalization, there is little appetite for federal intervention against states that have opted to legalize already. For example, according to a March 2013 Pew survey, 57 percent of Republicans say that the federal government should *not* enforce federal marijuana laws in states that have legalized.

8 Graham Boyd, Sarah Trumble and Lanae Erickson Hatafsky, *Marijuana Legalization: Does Congress Need to Act?* Third Way Foundation (June 2014) (proposing a statutory waiver mechanism for the CSA, for states liberalizing their rules regarding recreational marijuana).

ultimately to replace federal prohibition itself with a legalize-and-regulate framework. From the vantage point of October 2014, this future looks at least as plausible as a “crash and burn.”

If indeed Colorado and Washington *do* presage fundamental changes in U.S. marijuana law and policy, then the United States’ stance regarding its drug-control treaty obligations will need to measure up to the requirements of international law. The U.S. assertion of its treaty compliance on the basis of “flexible interpretation” can be questioned. The International Narcotics Control Board (“INCB” or the “Board”)—a body charged with monitoring drug-treaty compliance and assisting governments in upholding their obligations—has already made clear its view that the United States is now in contravention.⁹ If more U.S. states opt to legalize marijuana, the gap between the facts on the ground in the United States and the treaties’ proscriptions will become ever wider. The greater the gap, the greater the risk of sharper condemnation from the INCB; criticism or remedial action by drug-treaty partners and other nations; and rebukes (or, worse, shrugs) from countries that the United States seeks to call out for violating the drug treaties or other international agreements. It is a path the United States—with its strong interest in international institutions and the rule of law—should tread with great caution.

The United States therefore should begin, *now*, to explore options that would better align its evolving domestic approach to marijuana with its international commitments.

To be clear, this essay advances no claim about the desirability of legalizing and regulating marijuana. Indeed, the logic of our argument does not hinge upon one’s views as to the wisdom of legalizing marijuana, but instead upon recognizing that legalization has become a plausible scenario for the United States. Nor do we call for immediate, drastic treaty reforms or endorse particular approaches over others. Rather, our ambition in these pages is more modest: to encourage policy makers to rule treaty reform in as an option, rather than presumptively ruling it out.



⁹ See, e.g., 2013 INCB Annual Report at 96 (March 4, 2014) (characterizing implementation of Colorado and Washington initiatives as “not in conformity with the international drug control treaties,” and recommending that the United States “continue to ensure the full implementation of the international drug control treaties on its entire territory.”).

Below we proceed as follows. Section two provides an overview of the United States' current approach, and section three elaborates further on the valid reasons underlying it. The fourth section contrasts these reasons with some long-term downsides, which on balance warrant taking treaty reform seriously. A fifth section accordingly identifies some specific strategies the United States might pursue, and explains why some of those strategies, while challenging, could in fact be successfully carried out. The essay then concludes by arguing that incremental treaty adjustment serves more than the negative purpose of preventing suboptimal outcomes: it also provides an opportunity to demonstrate and perhaps improve adaptability in the international legal system on which American security and leadership increasingly rely.

II. THE U.S. POSITION NOW

We begin with some relevant history, leading up to the United States' thinking nowadays regarding marijuana and international law—as we understand it based upon public statements by U.S. officials.

The three drug treaties are not “self-executing.” That’s shorthand for the idea that, although still binding on the nation, certain treaties require legislation before they can be enforced domestically. The United States passed, and subsequently enforced, just such legislation in the form of the CSA.¹⁰ That is only half of the story, though. The other half has to do with human resources, and ensuring that the treaties’ vision is realized throughout the United States.

There are not remotely enough FBI or DEA personnel to pursue everyone who violates the CSA; instead federal authorities have prosecuted and sued CSA violators against a backdrop of state support. Much as the federal government did through CSA, state governments generally proscribed the cultivation, sale, purchase, and possession of marijuana, and took criminal and civil action against all four pursuant to their own laws. This made for an important and relatively stable division of labor, one that freed up federal officials to select their top-tier enforcement objectives, such as combating international drug trafficking.¹¹ Meanwhile, without disclaiming jurisdiction over other marijuana infractions, federal prosecutors deferred to

¹⁰ See 21 U.S.C. § 801(7) (finding that “[t]he 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.”); 21 U.S.C. § 802a (2), (3) (finding that, among other things, the 1971 Convention on Psychotropic Substances is not self-executing, and expressing intent of Congress that “the amendments made by this Act, together with existing law, will enable the United States to meet all of its obligations under the [1971] Convention and that no further legislation will be necessary for that purpose;” observing that control of psychotropic substances under the 1971 Convention would be carried out pursuant to the CSA’s framework); H.R. Rep. 112-324(I) at 3 (2011) (stating that “[t]he United States is a signatory to two leading international drug treaties: the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances. The first treaty has been extremely influential in standardizing national drug control laws. *The Controlled Substances Act was intended to fulfill our treaty obligations*”) (emphasis added).

¹¹ See, e.g., Prepared Remarks of John Ashcroft, Attorney General, DEA Drug Enforcement Rollout (March 19, 2002) (stating, among other things, that the Justice Department “will focus federal resources on targeting and eliminating root and branch ... major drug organizations.”).

their state and local counterparts, who could handle some of the big-time and most of the smaller-time violations: possession of lesser quantities of marijuana and the like.

So it was in the years after CSA and until the recent past. Though federal and state authorities brought different kinds of cases, with some overlap, their jurisdictions implied fairly comprehensive coverage. Growing, buying, selling or possessing marijuana likely would put you in the sights of an assistant U.S. attorney, a district attorney, or maybe both—but almost never neither. And this mattered, from the standpoint of international law. Together, federal and state prosecutors pretty consistently sought to suppress conduct frowned upon by the drug control treaties, or at least did not publicly send any signals that they might do otherwise.

The advent of medical marijuana in many states chipped away at this arrangement somewhat; the legalization and regulation of recreational marijuana, by means of Washington's Initiative 502 and Colorado's Amendment 64, chipped further. In response, the August 2013 Cole Memo laid out key guidance for federal prosecutors. It begins by re-affirming eight priorities that inform recent enforcement of the Controlled Substances Act.¹² Provided they do so in a fashion consistent with these priorities, states are allowed to eliminate their marijuana prohibitions and replace them with rigorous regulatory controls. The document is optimistic on that score: it surmises that in "jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten" the Justice Department's eight objectives. The memo even allows for the possibility that robust legal regimes "may affirmatively address" federal priorities, by, for example, "replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for."

The memo does not explicitly green light the Washington and Colorado approaches, nor does it forswear all federal oversight. But the implication is clear. The Cole Memo instructs United States attorneys, in exercising prosecutorial discretion, to take a case-by-case approach—by accounting for "whether [a marijuana operation] is demonstrably in compliance with a strong

¹² Specifically, the Cole Memo's enforcement priorities are:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement at 1-2 (August 29, 2013).

and effective state regulatory system,” and whether it undercuts the Justice Department’s enforcement objectives. The Washington and Colorado setups don’t undercut federal objectives, at least not on paper—thus leaving only the question whether that will prove true in practice. The Cole Memo accepts success of reform as a real possibility, and with it the corollary that federal civil or criminal enforcement risk might disappear, at least for individuals conforming to the two states’ marijuana rules.

For international-law purposes, that was the kicker. Responding to a post-hearing query from congressional overseers, Cole asserted simply that his eponymous enforcement guidance did “not violate the United States’ treaty obligations. Marijuana continues to be a schedule I controlled substance under federal law,” he wrote, “and the Department of Justice is continuing to enforce federal drug laws.”¹³ But that was just the thing: it now seemed the Justice Department might not do that in Colorado and Washington, in a certain class of cases, and that the states’ authorities certainly wouldn’t, either.

The United States recently has sketched out its position in greater detail than Cole’s bare-bones answers, although still only in broad strokes. Exhibit A: remarks at a public panel discussion, in March of this year, by William Brownfield, the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs.¹⁴ Brownfield recapped an argument he had put to the International Narcotics Control Board the prior year,¹⁵ as to why the United States considered itself to be in compliance with the drug treaties. In particular, he stated that they offered “substantial” discretion to member states, as to the best means of carrying

13 See James Cole, Assistant Attorney General, Response to Questions for the Record, *Conflicts Between State and Federal Marijuana Laws*, Hearing Before the United States Senate Committee on the Judiciary at 4 (June 18, 2014). The inquiry came from the Senate Judiciary Committee’s Ranking Member, Senator Charles Grassley of Iowa; the Assistant Attorney General’s response was as follows:

Question:

What is the Department of Justice’s position as to whether the policy announced in the August 29, 2013 Cole Memorandum violates the United States’ treaty obligations, including the Single Convention on Narcotic Drugs, which requires the United States to limit exclusively to medical and scientific purposes the use and possession of certain drugs, including marijuana, or otherwise violates international law? What is the basis for its position? Did the Department consult with the State Department in advance of announcing its policy? If so, what was the State Department’s position?

Response:

The Department, together with the Department of State and the Office of National Drug Control Policy, has met with the International Narcotics Control Board, the body responsible for monitoring compliance with the UN drug treaties, and presented the view of the United States that the enforcement guidance issued on August 29, 2013, does not violate the United States’ treaty obligations. Marijuana continues to be a schedule I controlled substance under federal law, and the Department of Justice is continuing to enforce federal drug laws. More generally, the Department and the Administration are committed to continuing to fully cooperate with the international community to combat drug trafficking, including marijuana trafficking.

Id.

14 Remarks by William Brownfield, Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, “Focus on the International Drug Policy Debate,” Center for Strategic and International Studies (March 31, 2014).

15 Formal exchanges between drug treaty parties and the Board occur behind closed doors.

out the treaties' objectives (among other things, reducing the "use of potentially dangerous drugs"); he also referred to the treaties' recognition of parties' constitutional limitations, and asserted the United States' right to decide how best to allocate its scarce law enforcement and other resources.

Brownfield also laid out the United States' long game, which he had put to another drug treaty-based body, the Commission on Narcotic Drugs, only weeks before.

The plan going forward, he said, is to try to build an international consensus founded on four policy "pillars." The first is to defend the treaties' "integrity"—not to conclude new ones, and perhaps not even to change them at all. "While it is possible to correct an old document," explained Brownfield, "it is a lot easier to adjust it than to completely create a new one." Next he urged "flexible interpretation." Borrowing constitutional lingo—and further implying reluctance towards structural reform—Brownfield characterized the treaties as "living documents" that should be re-interpreted from time to time, in light of changed circumstances. His third pillar was "tolerating different national strategies or policies"; the fourth, countering transnational criminal networks. The four-tiered policy approach, coupled with his appeals to discretion and states' rights to set enforcement goals, left little doubt as to Brownfield's point: the drug control treaties give the United States wiggle room—enough, in any case, to allow the Cole Memo, Washington, and Colorado.¹⁶

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In many respects, the INCB had repudiated these arguments before Brownfield made them public. Well in advance of the votes in Colorado and Washington, the Board tut-tutted over the passage of state-level medical marijuana reforms.¹⁷ And, after the 2012 state votes, the Board's then-president, Raymond Yans, also had warned bluntly that permitting recreational use of marijuana "would be a violation of international law, namely the United Nations Single Convention on Narcotic Drugs of 1961, to which the United States is party."¹⁸ He also asserted that the "United States has a treaty obligation to ensure the implementation of the treaties

16 Brownfield had advanced similar arguments before in other venues. See, e.g., "LiveAtState: Drug Policy Reform in the Hemisphere," (June 26, 2013) (noting states' legalization of marijuana, and arguing that United States should "comply with international obligations that are in force," but that "this should not require fundamental changes in the international conventions themselves.").

17 See 2011 INCB Annual Report at 13 (February 28, 2012) (requesting, with regard to state-led medical marijuana schemes, that the United States government "ensure the implementation of all control measures for cannabis plant and cannabis, as required by the 1961 Convention as amended by the 1972 Protocol, in all states and territories falling within its legislative authority, as the United States is a party to that convention."); see also *id.* at 58 (medical marijuana regimes in 16 states and the District of Columbia "fall short" of treaty requirements).

18 Press Release, "INCB president calls on the United States Government to address initiatives aimed at permitting recreational drug use" (March 14, 2013).

on the entirety of its territory.”¹⁹ No one was surprised, then, when the Board’s annual report covering developments in 2013 (released in March 2014) also disapproved of the legalization-and-regulation move as “not in conformity” with the drug treaties, and recommended that the United States fully implement its treaty obligations “on its entire territory.”²⁰ Together, the Board and Yans gestured in the direction of a legal argument: with the repeal of state-level prohibitions, on the one hand, and the elaboration of accommodating federal enforcement criteria, on the other, the United States had established a zone in which marijuana indeed could be cultivated, sold, bought, and possessed for purely recreational purposes, contradicting the treaty obligations not to do so.²¹

The United States only last month doubled down on the approach announced by Brownfield, critiqued by the Board and decried by Yans. In September, President Obama announced key findings regarding foreign nations whose territories are focal points of illicit production and transshipment of drugs. Along the way, he also declared that “[t]he frameworks established by the U.N. conventions are as applicable to the contemporary world as when they were negotiated and signed by the vast majority of U.N. member states.”²² Blasting away any ambiguity, the President also asserted that

The United States shares the view of most countries that the U.N. drug conventions—*without negotiation or amendment*—are resilient enough to unify countries that often hold divergent views of the causes of the international narcotics problem, while at the same time providing a framework upon which to build the best solutions to it. The U.N. drug conventions, which recognize that the suppression of international drug trafficking demands urgent attention and the highest priority, allow sovereign nations the flexibility to develop and adapt new policies and programs in keeping with their own national circumstances while retaining their focus on achieving the conventions’ aim of ensuring the availability of controlled substances for medical and scientific purposes, preventing abuse and addiction, and suppressing drug trafficking and related criminal activities. The United States supports the view of most countries

19 *Id.* Yans referred not to the drug control treaties themselves, but instead seemingly to the 1969 Vienna Convention on the Law of Treaties—which the United States signed but did not ratify, but which nevertheless is widely considered a key instrument in treaty interpretation. Article 29 of the Vienna Convention says “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

20 2013 INCB Annual Report at 96. This in turn had been all but telegraphed by the Board’s reporting in the prior year. See 2012 INCB Annual Report at 63 (March 5, 2013) (noting ballot initiatives and reiterating that “legalization of cannabis for non-medical and non-scientific purposes would be in contravention to the provisions of the 1961 Convention as amended by the 1972 Protocol.”).

21 Yans reiterated the point even as he surrendered his post as board president earlier this year and took up a position as a regular board member. See, e.g., Raymond Yans, Keynote Address, Fourth World Forum against Drugs, “The Conventions and the Legalization of the Non-Medical Use of Drugs” (May 20, 2014).

22 “Presidential Determination—Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015” (September 15, 2014).

that revising the U.N. drug conventions is not a prerequisite to advancing the common and shared responsibility of international cooperation designed to enhance the positive goals we have set to counter illegal drugs and crime.²³



III. VIABLE IN THE SHORT RUN...

Is the United States' current policy workable? In the short run, we think it probably is.

Consider Brownfield's claim that the United States is acting lawfully. He did not set out its legal basis in detail, but nevertheless dropped hints with comments regarding flexibility and scarce criminal justice resources. Some of the treaties' features are consistent with his views. The 1961 and 1971 Conventions do not specifically address the issue of enforcement discretion, and thus don't obviously seem to cabin its ordinary exercise by governments; for its part, the 1988 Convention explicitly recognized states' discretion with respect to Convention-required offenses.²⁴ And, as Brownfield's "four pillar" approach suggested, the drug control system is indeed concerned with international trafficking networks, as illustrated by the 1988 Convention. The latter's purpose—announced by its second article, and important for the treaty's interpretation—is to enable interstate cooperation so as to "address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension."²⁵ The United States' approach is rather broad-brush, to be sure. But it has a discernable basis in international law.

²³ *Id* (emphasis added).

²⁴ 1988 Convention, art. 3(6).

²⁵ 1961 Convention, art. 2(1). 1988 Convention, art. 2(6) p.1.

We also might evaluate it in light of the roads not taken, which in the rearview mirror look vastly worse than the one the United States ultimately did take. One much discussed but wisely passed over option: in early 2013, there was a call in some quarters for the Obama administration to pursue legal action founded on so-called federal “preemption” doctrines²⁶—asking a court to declare that the CSA effectively wiped out Initiative 502 and Amendment 64—or through federal enforcement, whereby federal prosecutors would make an example of some unlucky Coloradan or Washingtonian who bought or sold marijuana in compliance with state law but in violation of federal law.²⁷

The “find some fall guy” strategy had an arbitrary feel.²⁸ Neither the criminal nor the civil approach was a surefire winner legally, owing mostly to the CSA’s rather abstruse language regarding preemption.²⁹ Both would have replaced one legal problem—a clash between Washington and Colorado law and more rigid federal and international law—with something worse. Whether won with prosecution or a civil lawsuit, victory on preemption grounds would gut Washington and Colorado *regulation* of marijuana but would not restore their earlier *prohibitions* against marijuana. And that in turn would mean relegating essentially all civil and criminal marijuana enforcement in those jurisdictions to federal authorities—something the latter certainly did not want, and could not accomplish for practical as well as political reasons.

26 These come from the Constitution’s “Supremacy Clause,” U.S. Const., art. VI, which says:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding

Interpreting this language, courts have concluded that federal statutes will trump state law, either when Congress explicitly or implicitly requires as much, or a federal regulatory scheme is so pervasive as to occupy an entire field of law.

27 The thinking was that a defendant might cite his or her full obeisance to state law, in a motion to dismiss—which the courts would then reject, on federal preemption grounds. See Charlie Savage, “Administration Weighs Legal Action Against States that Legalized Marijuana Use,” *New York Times* (December 6, 2012).

28 See Stuart Taylor, “Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck” at 3 & n. 6, the Brookings Institution (April 2013) (“any federal effort to prosecute a few recreational users to strike fear into others—an option reportedly discussed at high levels of the administration—would smack of arbitrary and selective prosecution.”).

29 The statute provides, in pertinent part:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C § 903. It does not appear that a “positive conflict” exists as between the legalizing states’ rules, and the CSA’s prohibitions. Certainly one can comply with both the state and federal law at the same time, by not growing, buying, selling or possessing marijuana at *all*. Of course the whole point of the Colorado and Washington State regimes is to permit—and thus at least nominally to encourage—those very things. Still, compliance is possible. And that stands greatly to weaken, if not to defeat, a federal preemption claim. See Chemerinsky *et al.*, *Cooperative Federalism* at 24 (“It is not physically impossible to comply with both the CSA and state marijuana laws that do not prohibit all that the CSA prohibits; nothing in the more liberal state laws requires anyone to act contrary to the CSA. Only if a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law would it be impossible for a citizen to comply with both state and federal law.”)

When their international relations require it, aggrieved states certainly know how to make loud noises about other states' flouting of international norms.

The preemption strategy thus meant leaping out of the frying pan and into the fire, and ultimately achieving little, in treaty compliance terms.³⁰

Pragmatism likewise counseled against an immediate push to revise the treaties, given the incipient nature of changes, and also given the time and effort needed to build a case for reform that could achieve political traction in the Senate. That chamber, to put it charitably, can be a difficult environment for treaties.

The diplomatic costs of the United States' position also have not been intolerably high. The INCB has disagreed with the United States' legal arguments,

but its critiques have not been unusually aggressive; the Board has not, for example, paired its objections with a threat to exercise its rather gentle, purely recommendatory and rarely invoked sanctions power, regarding the import and export of drugs.³¹ And while the Board's former president, Yans, has spoken more harshly of U.S. policy than the Board has as a whole, he has also reserved his most high-pitched condemnations for the government of Uruguay, which in December 2013 became the first country to approve legislation that legalizes and regulates marijuana at the national level.³² At the same time, most other parties to the drug control treaties have kept mum about Washington and Colorado, at least publicly. The quiet hardly serves to affirm the United States' position, of course, but it certainly doesn't register dissent, either: when their international relations require it, aggrieved states certainly know how to make loud noises about other states' flouting of international norms.³³

Lastly, there is this surpassingly important fact: so far only two jurisdictions in the United States have established a legalized, regulated regime for recreational marijuana. (Nearly

30 See Taylor at 3 (observing practical and political hurdles to federal enforcement of the CSA as against Colorado and Washington marijuana regimes).

31 The 1961 Convention empowers the INCB to "call the attention of the Parties, the Council and the Commission to the matter" whenever the "aims" of that treaty are "seriously endangered" and other remedial efforts have proven ineffective; more seriously, the board can recommend to other treaty parties that they cease importing or exporting drugs from another party that is seriously comprising the 1961 Convention. 1961 Convention, art. 14(1)(a). So far as we are aware, the INCB has exercised this authority only once, with respect to Afghanistan.

32 In late 2013, when Uruguay passed legislation creating a nationwide, regulated marijuana market, Yans accused the country of having "pirate attitudes." "'Stop Lying': Uruguay President Chides U.N. Official Over Marijuana Law," *Russia Today* (December 14, 2013). Uruguay's president, Jose Mujica, cried foul and faulted Yans for a double standard—observing that neither Yans nor his organization had heaped comparable scorn on the United States, after the Washington and Colorado measures had passed. *Id.*

33 The drug control treaties leave them options in this respect: the 1961 Convention, for example, authorizes states to bring legal disputes before the International Court of Justice. 1961 Convention, art. 48(1)-(2). The 1988 Convention does the same—although the United States, pursuant to Convention-established procedures, declared at the time of its ratification that it would not be bound by language giving the Court authority to decide disputes. 1988 Convention, art. 32(1)-(2); Declaration of the United States, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en#EndDec

half the states permit medical access to marijuana.) Of the pair, Colorado is off to a faster start, while licensed retail sales in Washington have only recently gotten underway. It is too early to know how these experiments will play out. Things might go badly. If implementation proceeds sluggishly, or worse, incompetently, then neighboring states might start to re-think the wisdom of a legalize-and-regulate approach. And any activity that offends Cole Memo guidance likely will bring on civil and criminal action by federal prosecutors; that too could imperil the spread of legalized, regulated marijuana, or even reverse the policy trajectory altogether. The whole thing could go belly up. If it does, then the United States' ongoing preference for working within the treaties, rather than changing them, will seem prudent indeed.

The words read like a rallying cry, meant to enlist like-minded states in a concerted effort to suppress illicit drug activity to the greatest extent possible.

IV. ...BUT DOUBTFUL IN THE LONG RUN

With all that said, there are nevertheless at least three reasons to doubt current policy's staying power over time.

First, policy durability depends in part on a firm legal basis. And although the question is surely debatable, we do not ultimately find the United States' legal arguments persuasive. A detailed parsing of those arguments is beyond the scope of this essay. But suffice it to say we see some real hurdles for Assistant Secretary Brownfield's appeals to the drug treaties' policy goals and to the parties' flexibility. The broader policy claims touted by the United States, regarding fighting transnational drug networks and so forth, are fine so far as they go; the 1988 Convention seeks to address such problems. The trouble is that the treaties also embody another policy objective, one rather hard to square with the Cole Memo, Washington and Colorado.

The 1961 and 1988 Conventions both gesture towards it in their preambles. The former speaks of "addiction to narcotic drugs," marijuana included, as a "serious evil for the individual," one "fraught with social and economic danger to mankind"; the latter deems "narcotic drugs"—again including marijuana—to be a "serious threat to the health and welfare of human beings, with adverse effects on "the economic, cultural and political foundations of society."³⁴ The

³⁴ Preamble, 1961 Convention; Preamble, 1988 Convention; see *also* Vienna Convention on the Law of Treaties, art. 31(1), (2) (stating that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in light of its object and purpose[;]" and that the "context for the purpose of the interpretation of a treaty shall comprise, in addition to the text ... its preamble and annexes[.]").



words read like a rallying cry, meant to enlist like-minded states in a concerted effort to suppress illicit drug activity to the greatest extent possible.

Treaty provisions are along those lines. For example, Article 4 of the 1961 Convention imposes “general obligations” on the parties, namely that each

shall take such legislative and administrative measures as may be necessary:
(c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

Marijuana counts as a “drug” for purposes of this language, the interpretation of which depends in part upon the “subject to the provisions” phrase. We thus must look elsewhere in the 1961 Convention to get a sense of how parties must handle drugs like marijuana. Article 36, paragraph one, discusses “penal provisions.” Here, subject in part to their “constitutional limitations,”³⁵ parties are required to take steps necessary to make (among other things) the cultivation, sale, purchase, and possession of drugs contrary to the 1961 Convention’s provisions into “punishable offenses.” The 1988 Convention is more explicit. Its third article requires signatories to “*establish as criminal offences under [their] domestic law*” the growing,

35 This March, while summarizing the United States’ views, Brownfield also had cited the treaties’ allowances for parties’ “constitutional limitations.” As noted earlier, one such limitation—federalism—generally precludes the United States’ federal government from compelling individual states to enact particular policies or to enforce federal law. But we find no specific treaty language commanding the United States to take actions contrary to principles of federalism, for example to challenge Colorado or Washington policies in court. And at any rate, so far as we are aware, the *federal government’s* enactment, and enforcement, of legislation penalizing the offenses described in Article 36, paragraph one would not contravene the U.S. Constitution. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that congressional power to regulate interstate commerce authorized federal criminal proscription of the cultivation and use of marijuana for medical purposes, pursuant to California law). Elsewhere during his March comments Brownfield acknowledged that the actions of states in any case would be attributed to the federal sovereign, explaining that the drug treaties “explicitly and expressly hold national governments responsible for the conduct, if you will, of the entire nation including [sic] state municipal and local governments.”

buying, selling or possessing of drugs including marijuana, contrary to the provisions of the 1961 Convention.³⁶

This and similar provisions drive home the point: the drug treaties together countenance medical and scientific uses, but disapprove of nearly all others. And they plainly obligate signatories to enact laws punishing participants in recreational marijuana markets. The CSA does just that, of course, but under the Cole Memo, the statute seemingly will not be enforced against certain persons, who participate in sufficiently rigorous state regulatory schemes allowing for the production, sale, purchase, or possession of recreational marijuana.

It is true that the treaties build in policy latitude—but we think even that only goes so far. For example, the 1961 Convention doesn't block parties from allocating enforcement resources. And it says that when “abusers” of drugs commit Convention offenses, states may then provide, as alternatives to conviction or punishment, for certain treatment or rehabilitation measures.³⁷ But this latter arrangement (and similar ones contemplated by related provisions in the drug treaties) most naturally applies to people seeking help to quit marijuana, not to

36 Article 3 to the 1988 Convention accomplishes this in an uneven, complicated fashion. Article 3(1) reads, in pertinent part:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- a) i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;
- iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above[.]

The 1988 Convention approaches possession of drugs for personal consumption rather differently. Article 3(2) says, in full: Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Notwithstanding this language, there is an argument that states nevertheless lawfully may decriminalize the possession of marijuana for personal consumption. See, e.g., Neil Boister, *Decriminalising the Personal Use of Cannabis in the United Kingdom: Does International Law Leave Room for Manoeuvre?*, Crim. L. Rev. 171, 171-183 (2001); Cf. Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances at 82 (1988) (“1988 Convention Commentary”) (“In contrast to the position under the 1961 and 1971 Conventions, however, paragraph 2 clearly requires parties to criminalize [intentional possession, purchase or cultivation of controlled substances for personal consumption] unless it would be contrary to the constitutional principles and basic concepts of their legal systems to do so.”). There is indeed some support for this argument. But whatever its merits, growing, buying or possessing marijuana *for one's own personal use* is but one piece of the regulatory picture, so far as Colorado and Washington are concerned; their new schemes also involve other, quite clearly treaty-proscribed attributes, including the cultivation, preparation, and commercial sale of marijuana.

37 1961 Convention, art. 36(1)(b).

recreational users seeking enjoyment or commercial growers and state regulators seeking revenue. It is one thing to stay enforcement's hand, and instead to invoke alternatives to incarceration; but it is quite another to announce, in so many words, a qualified tolerance of the cultivation, sale, purchase and possession of marijuana, within the confines of a strictly regulated but still legalized market.

This brings us to the prosecutorial discretion—something the 1961 Convention didn't take on specifically, but that the 1988 Convention did. As noted above, the following words from the latter treaty may have informed Assistant Secretary Brownfield's appeal to "policy flexibility," with regard to Washington and Colorado and the United States' enforcement priorities:

The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.

Note the qualification. The decision not to prosecute an otherwise clear-cut marijuana offense cannot be made willy-nilly, but instead should "maximize" the effect of law enforcement activities "in respect" of that offense; the goal of deterrence should be kept in mind, too. The relationship between the two quoted phrases is somewhat hard to parse, though it certainly encompasses at least some authority to allocate resources or set enforcement priorities—much as Brownfield has claimed. Even so, we fail to see how the Cole Memo policy would deter anyone, per the treaty requirements, from growing, selling, buying or possessing marijuana for recreational purposes;³⁸ the memo essentially explains how Coloradans and Washingtonians (and adult visitors to those states) can engage in that very conduct without facing federal prosecution.

Wherever the limits of the United States' enforcement discretion under the drug treaties might be drawn precisely, we know that such discretion by definition cannot be an across-the-board, categorical affair, when the issue is federal tolerance of regulated, comprehensive marijuana markets established by state law. And that's just it: if more states take a legalize-and-regulate approach, a federal-level decision not to prosecute similarly situated persons could start to look like blanket non-enforcement of implementing legislation—something that, in our view, the drug treaties do not contemplate.

38 The treaty language here has to do not only with calibrating enforcement priorities à la the Cole Memo, but also with ensuring that prosecutors can conclude plea deals with low-level drug ring operators. 1988 Convention Commentary at 94. Article 3(6) allows such persons to plead guilty to lesser or even unrelated, offenses, despite involvement in larger trafficking efforts that the 1988 Convention seeks to suppress. *Id.*

The prospect of future marijuana regulation raises a second, more fundamental reason to rethink things: the nation's experiment with legalizing and regulating marijuana might actually go well.

The prospect of future marijuana regulation raises a second, more fundamental reason to rethink things: the nation's experiment with legalizing and regulating marijuana might actually go well. Suppose Colorado and Washington both operate their regulated marijuana markets smartly, without offending federal enforcement prerogatives, and—most importantly—without compromising public health and safety. We don't think this is a fanciful or improbable scenario. Our Brookings colleague John Hudak was the first to examine Colorado's implementation effort up close. And he tentatively concluded that so far, the state's initial rollout has been imperfect but quite effective.³⁹ If this path continues or even bends towards

improvement, then other states may soon elect to follow Washington and Colorado's lead. And that, in turn, stands to exacerbate an already visible tension between obligations imposed by the drug treaties, and the federal government's enforcement posture towards legalizing states.

To put the point another way, if Colorado and Washington augur a real trend, then the costs to the United States of treaty breach could be swiftly ratcheted upwards. The INCB could raise the volume and severity of its criticisms; we wouldn't be surprised to hear protests from more prohibitionist countries about the United States' treaty compliance, or to see other nations start pushing the limits of other no less important treaties to which the United States is party. When some or all of this happens, the United States won't get very far in emphasizing the CSA's theoretical application nationwide, subject to enforcement priorities enunciated in the Cole Memo; or in appealing to larger objectives woven throughout the drug treaties, and their conferral of policy flexibility. What if twenty or thirty states successfully establish, and police, regulated markets for marijuana production and sale?

Having that scenario in mind, we lastly emphasize the United States' unique relationship both to the drug treaties and to the wider international community. The United States was a—if not *the*—key protagonist in developing the 1961, 1971, and 1988 Conventions, as well as the 1972 protocol amending the 1961 Convention; the United States has for decades been widely and correctly viewed as the treaties' chief champion and defender.⁴⁰ That fact feeds back onto this

39 See generally John Hudak, *Colorado's Rollout of Marijuana is Succeeding*, Brookings (July 2014).

40 See David Bewley-Taylor and Martin Jelsma, *Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation* at 8 (March 2011) ("Further, as in other areas of UN activity during this period, [the Single Convention] greatly reflected the aspirations and goals of the United States; now a superpower on the world stage and the undisputed driving force of international drug control"); see also Commentary on the Single Convention on Narcotic Drugs, 1961 at 463 & n. 6 (1973) ("1961 Convention Commentary") (noting that the United Nations Economic and Social Council called the conference that yielded the 1972 protocol amending the 1961 Convention "on the initiative of the United States[.]")

one: The United States also occupies a singular place in international relations. It can summon powers no other nation can summon, but it also confronts risks no other nation confronts.⁴¹ For that oft-cited reason, the United States has a profound interest in ensuring that counterparties perform their treaty obligations. Reciprocity is always a big deal for any nation that trades promises with other ones—but it is perhaps uniquely so for ours.

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These factors mean that caution is in order regarding international law and the viability of the Cole Memo in the longer run. If the United States can “flexibly interpret” the drug treaties with regard to marijuana, then Mexico is entitled to no less—though it might view the limits of its flexibility differently, or apply it to another controlled substance within the treaties’ purview. Or imagine that a foreign nation’s controversial policy butts up against seemingly contrary language, in a treaty covering an extremely important global issue *other* than drug control. Likely the United States will have a tougher time objecting when, rather than conceding the problem or changing course, that nation’s foreign ministry invokes the need to “tolera[te] different national approaches;” or recasts the relevant treaty as a “living document” subject to periodic, unilateral reinterpretation.

This is not to suggest that compliance challenges or complexity should always trigger a call to reshape the United States’ treaty commitments. Practice and prudence both support a more nuanced, case-specific approach than that. Sometimes the United States has sought to make significant adjustments to multilateral frameworks or even quit them; other times, the United States has weighed costs and benefits, and pressed on within the treaty despite consequential breaches—in situations much more obvious (and less open to reasonable contention) than that regarding marijuana.

But in those instances, the United States’ compliance failures often have come despite some hard striving by the federal government. The State Department, to name one well known example, tries mightily to make state law enforcement officers aware of the United States’ obligations under the Vienna Convention on Consular Relations—notwithstanding some

41 See, e.g., David Koplow, *Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?*, Fletcher Forum on World Affairs at 69 (2013) (“The United States depends upon the international legal structure more than anyone else; Americans have the biggest interest in promoting a stable, robust, reliable system for international exchange.”); see also G. John Ikenberry, *After Victory* at 53-54 (2000) (arguing that “if the leading state calculates that its heightened postwar power advantages are only momentary, an institutionalized order might lock in favorable arrangements that continue beyond the zenith of its power.”)



repeated and well-known violations of that treaty by the likes of Texas, Virginia, and Arizona.⁴² In this case, though, no external factors—federalism, say, or a contrary ruling from the U.S. Supreme Court—have frustrated a strong push by the executive branch to vindicate the drug treaties; the decision not to assert federal supremacy was in fact taken unilaterally by the Obama administration. Given the circumstances, we believe it was the correct decision. The Cole Memo nevertheless establishes at least some friction with a treaty obligation, by holding back on CSA enforcement, so as to accommodate state-level regulation of marijuana. Again, the reasons why are entirely understandable: given the incipient nature of the changes to which the Cole Memo was reacting, the United States essentially opted to take a wait-and-see approach as to how problematic the treaty questions might become.

So far as we are aware, this strategy is without precedent in U.S. treaty practice. The United States should approach it carefully and deliberatively, given the country's outsized interest in reciprocal performance of treaty obligations. That depends in part on being able to credibly call out other nations for treaty failings—something which in turn depends on strictly performing our own obligations, or at least making a good show of trying hard to do so before coming up short.

⁴² See David Koplow, *Indisputable Violations* at 61-64 (recounting repeated Consular Relations Convention violations and litigation, including the well-known *Avena*, *Breard* and *LaGrand* disputes before International Court of Justice, and related capital prosecutions within the United States). As Koplow explains:

Department of State officials, who are keenly aware of the reciprocity value of adherence to the treaty as a lifeline for Americans arrested abroad, have little power to ensure adherence to the treaty mandate inside the domestic U.S. system. The Department of State has prepared and promulgated voluminous training materials to inform and instruct local law enforcement officials about the VCCR. It has recently released the third edition of its manual *Consular Notification and Access*, distributed over one million sets of briefing materials, and issued 70,000 pocket cards for law enforcement officials to carry. But the Department of State cannot ensure that the training is undertaken or heeded.”)

Id. at 61. As is well known, though it has clung tightly to the Vienna Convention, the United States in 2005 quit a related protocol that gave the International Court of Justice jurisdiction to hear disputes arising under the Convention. The latter was in part responsible for the international litigation over the United States' respect for the Convention in some high-profile capital cases.

Again, we think the United States *can* sustain the status quo in the short term. But today's model likely won't hold up year in and year out, for the reasons we describe above. The government therefore ought to start thinking about some of the fundamental treaty reforms that its public statements seemingly have downplayed. Better to have weighed such options early on, should existing policy's downsides start to overtake its upsides—as we predict they could.

V. GOING FORWARD: TREATY REFORM AS A POLICY OPTION

So what *are* those options? Here is a non-exhaustive list: amending the drug treaties; denouncing them and then acceding to them once more, while taking necessary reservations to account for legalized marijuana; reaching an agreement *inter se*, as between the United States and drug treaty states also desiring to revamp their domestic marijuana policies; or modifying the scheduling of marijuana within the treaties.

Many of these alternatives have been canvassed and explained in depth elsewhere. We also suspect officials at the U.S. State Department are aware of the choices, as well as the mechanics and politics that figure into each.⁴³ Again, the threshold question is *whether* to consider treaty changes at all; our objective here is not to scrutinize the various options or to advocate one course or another, but instead merely to raise treaty reform's stature generally. Accordingly we will not delve deeply into the possible paths forward, other than to note in passing one of the (to us) more viable ones.

Before doing so we must acknowledge an unhappy political truth. Winning Senate approval—as some would-be treaty reform options appear to require—will be difficult. Today's treaty politics are no less paralyzed and depressing than other politics in the Senate. (The sad stories of the long-languishing Convention on the Law of the Sea and the Convention on the Rights of Persons with Disabilities both come to mind.) Though we strongly hope otherwise, we expect this discouraging state of affairs will persist. Assistant Secretary Brownfield has cited the perennial Senate logjam as a reason to re-interpret the treaties with respect to marijuana unilaterally, rather than to try to change them through amendment or other treaty-based mechanisms. We don't agree with his prescription, but he wasn't wrong about the political hurdles. They stand high indeed.

But high does not mean insurmountable. With sufficient time and effort, proponents could muster the coalition needed to push substantive treaty changes through the Senate. If

43 See, e.g., Dave Bewley-Taylor, Tom Blickman, and Martin Jelsma, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute (2014) at 60-71 (discussing modification to cannabis scheduling, denunciation of the drug treaties followed by reservations needed to account for evolving cannabis policies, amendment, modification *inter se*, and denunciation).

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anything, the legalize-and-regulate movement has proven itself capable of attracting support from otherwise distant and even warring political camps.⁴⁴ Moreover, if the scenario in which more and more states adopt a legalize-and-regulate approach is indeed the one that plays out, the political calculus of elected officials in Washington can also be expected to evolve. Along the same lines, in this scenario, the costs of treaty breach—and therefore the costs of Senate inaction—would be on the rise. So while we don't discount the reluctance that many legislators likely will harbor, given the political risks that will still attach to marijuana legalization in many jurisdictions, we also think that persuading senators to relax existing prohibitions will be easier than getting them to sign off on a brand new international framework. Domestic politics will make treaty reform hard—but even with that taken into account, some options still strike us as doable.

The feasibility will turn in large part on what the proposed change looks like exactly. Imagine a rather modest amendment to the drug treaties: one that would codify, with regard to marijuana only, enough enforcement flexibility to leave space for more jurisdictions to follow a legalize-and-regulate approach. The proposal could be tailored as needed, so as to avoid precedent-setting for other, more dangerous substances and to calm anxieties about fundamentally warping the larger drug control structure. Of course, identifying such limits will be required whether one seeks to interpret or to change the treaties—but the latter avenue allows for relatively more specificity, and therefore more certainty.

⁴⁴ Marijuana reform has minted some unusual legislative alliances. By way of example, shortly before they both retired, Representatives Ron Paul (R-Tex.) and Barney Frank (D-Mass.) cosponsored legislation that, if passed, would have repealed the CSA as to marijuana and relegated all regulation of marijuana to the states. See Ending Federal Prohibition of Marijuana Act of 2011, H. Res. 2306, 112th Cong. (June 23, 2011).

Also suggestive of changing politics in this area—if not as surprising from a purely partisan standpoint—the Republican-controlled House recently approved an amendment, introduced by Rep. Dana Rohrabacher (R-Ca.) and co-sponsored by Rep. Sam Farr (D-Ca.), to bar the Justice Department from using appropriated funds to prevent certain states from “implementing their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana.” H. Amdt. 748, 113th Cong. (May 30, 2014).

The drug treaties contain some rather complex procedures for amendment.⁴⁵ Beyond the procedural gymnastics involved, the international politics of amendment likely would be tough, too. There's unhelpful precedent: a staunch, U.S.-led opposition to Bolivia's 2009 proposal to amend the drug treaties so as to permit coca leaf-chewing. Having spearheaded this effort—which the United States justified as necessary to ensure the treaties' continued “integrity”⁴⁶—it could be awkward for the United States to push an amendment to loosen the drug treaties' marijuana rules.

45 The amendment procedure is complex because the drug treaties can be, and have been, lawfully amended through mechanisms not explicitly established by the treaties' provisions. Give or take some varying details, all three set up basically the following process: Upon submission to the United Nations Economic and Social Council (“ECOSOC”), a proposed amendment is either circulated among the parties directly, or the council immediately calls a conference of the parties to consider the amendment. If circulated, would-be amendments are subject to lengthy waiting periods (18 months in the case of the 1961 and 1971 Conventions, 24 months in the case of the 1988 Convention), but will enter into force afterwards automatically—provided no party objects. Hearing even one objection, the council thereafter may call a conference to take up the proposal.

There's another way to go about amending the treaties. Their internal amendment rules do not affect ECOSOC's independent powers under the U.N. Charter, either to submit draft conventions to the U.N. General Assembly, or to call a conference of the drug treaties' parties. 1961 Convention Commentary at 462 (“Not only could the procedure provided in Article 62, paragraph 3 of the Charter be applied, in addition to that provided for in article 47, but any other procedure by which multilateral treaties can be revised under international law, always provided that no amendment, however adopted, would be binding upon a Party not accepting it.”); Charter of the United Nations, art. 62(3)-(4). It seems nations took just that route in revising the 1961 Convention: shortly after its entry into force, ECOSOC called a conference “on the initiative of the United States of America, which proposed amendments to the Single Convention,” that conference lead to the 1972 protocol amending the 1961 Convention. See *id.* at 463 & n. 6; see also generally Final Act of the United Nations Conference to Consider Amendments to the Single Convention on Narcotic Drugs, para. 1 (“The Economic and Social Council of the United Nations, noting that amendments had been proposed to the Single Convention on Narcotic Drugs, 1961, and bearing in mind article 47 of that Convention, decided by its resolution 1577 (L) of 21 May 1971 to call, in accordance with Article 62, paragraph 4, of the Charter of the United Nations a conference of plenipotentiaries to consider all amendments proposed to the Single Convention on Narcotic Drugs, 1961.”)

The U.S. Senate approved the 1972 protocol pursuant to the U.S. Constitution's supermajority requirement. See President Gerald R. Ford, Proclamation of Ratification for the 1972 Protocol (Aug. 29, 1975) (explaining that the Senate, “by its resolution of September 18, 1972, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the [1972 Protocol]”). The same could prove true, and the domestic political climate could prove to be quite challenging, if ECOSOC were to call a conference regarding marijuana reform pursuant to its own authority. Having said that, we acknowledge an argument that the 1961 Convention might *not* require a U.S.-floated marijuana reform amendment to obtain further Senate approval—though only in the unlikely event that the amendment is circulated amongst the parties and, after the passage of necessary time, no other nation takes objection. See Curtis Bradley, *Tacit Treaty Amendments and Constitutional Process*, Working Paper, Duke Law Workshop on Delegating Sovereignty at 4-5 (2006) (evaluating claim that the Senate, having approved of a treaty containing “automatic” amendment procedures, effectively has consented to amendment pursuant to such procedures in advance).

46 See “Bolivia: Coca-chewing protest outside US embassy,” BBC News (January 26, 2011) (reporting statement by U.S. Embassy in Bolivia that “[t]he position of the US government in not supporting the amendment is based on the importance of maintaining the integrity of the UN convention, which is an important tool in the fight against drug-trafficking.”); Outcome of Proceedings, Meeting of E.U. Horizontal Working Party on Drugs and the USA (July 13, 2011) (“Asked to provide the US position towards the Bolivian government's intention to re-accede the 1961 Convention with an exemption on coca leaf, the US delegation explained that there was still time to define the final position, but it was a priority for the US to presume the integrity of the 1961 Convention and other international instruments and Bolivia should respect the principles and purposes of the 1961 Convention. According to the speaker, as coca leaf remained a controlled substance, international measures which would diminish this control, would be problematic for the US.”)

But there is another precedent to consider, too. Decades before Bolivia's 2009 amendment bid, there was another campaign to revise the 1961 Single Convention—one led by the United States in the early 1970s and that culminated in a conference involving 97 parties agreeing upon the 1972 Amending Protocol. To be sure, the drug treaties are not easy to amend. But the United States played a central role in amending them before; it could do the same once again.

To be sure, the drug treaties are not easy to amend. But the United States played a central role in amending them before; it could do the same once again.

Such a revision would bring some needed coherence to the current policy, and in that respect it might be a relatively easier sell. It is difficult to understand why the United States (and, presumably, all other parties) should be entitled to the “flexibility” needed to enact “different national strategies” vis-à-vis marijuana, notwithstanding contrary treaty language; but at the same time should stoutly resist any attempts to re-work the treaties so as to bring parties’ international obligations better into line with their shifting domestic policies and practices. Said differently, if flexible, unilateral re-interpretation doesn’t offend the “integrity” of the treaties in principle then amendment—a *process established in the treaties themselves*—should not offend it either, especially when a proposed amendment would only codify the *status quo*, and not undercut the United States’ current drug policy priorities.

This raises a related point: the United States has unique leverage. Exit or the credible threat of exit, for example, has brought about key changes in other multilateral treaties, including those establishing international organizations.⁴⁷ To be clear: we do not mean to draw any broad analogies between those situations and this one, or to recommend threatening exit as even a tentative negotiating strategy. But it would be wrong to downplay the importance, to other drug treaty signatories, of the United States’ continued law enforcement and other drug treaty-based cooperation worldwide. Those signatories have a strong interest in keeping the United States within the drug treaties, and happily so. All of that stands to help the United States in building the international consensus needed to pass an amendment along the lines set forth above.

⁴⁷ See “Laurence R. Helfer, Terminating Treaties,” in *The Oxford Guide to Treaties* 634-649, 646 (Duncan Hollis ed., Oxford University Press, 2012) (arguing that exit or its threat may lend support to the exiting state, in pressing demands upon other treaty parties; and observing that the United States used exit or its threat in obtaining desired concessions with regard to the International Labor Organization, the United Nations Educational, Social and Cultural Organization and the General Agreement on Tariffs and Trade.)

VI. A STRESS TEST WE CAN PASS

In making the case for the United States to proactively open the door to future change in the drug treaties, we have emphasized, so far, the negative value of avoiding conflict and instability. We would be remiss not to end on an equally important positive note. The political changes and incentives in play in the marijuana-policy debate open a real opportunity to demonstrate and improve the adaptability of the international legal system—a system on which the United States relies more and more.

No treaty can survive the collapse of a political consensus supporting it. And no treaty *system* can endure if it cannot cope with changing political conditions. Sustainability in international law depends not only on commitment but also on resilience and adaptability.

At this writing, one or two more U.S. states may be about to adopt a version of marijuana legalization. If states continue to legalize, and if the federal government continues to allow their reforms to proceed, the short run for treaty reform may come quite soon. This is why we refer to the challenge of marijuana legalization as a “stress test” for the adaptability of international law. Should legalization prove politically popular or socially successful, it *will* spread to more states and nations; should it spread, then one way or another both domestic and international politics *will* find ways to accommodate it—either by adapting formal legal commitments or by cutting new, informal channels around those commitments. The latter would weaken international law; the former would strengthen it.

Marijuana-related reform to the drug treaties offers, in several respects, good odds of achieving constructive adaptation. Reform need not entail any wholesale reconsideration of international drug policy, nor need any brand new treaty be negotiated. Modest incrementalism can do the job. In the United States, moreover, a growing political constituency, embracing members of both political parties, favors reform, so the issue is less partisan than many. Persuading the Senate to make more room for U.S. experimentation by revising an existing treaty is a lighter lift than persuading it to undertake entirely new treaty obligations. And, if the United States plays its cards right (with, as we have suggested, suitably narrow and hedged legal changes), we believe a consensus abroad for modest change could become within reach. In any case, broaching the subject relatively early on—by ruling treaty change in, now, as a possibility, instead of ruling it out as a non-starter—may itself open the door to a new international conversation about modernizing and adapting drug treaties. In other words, marijuana offers as good a chance as we are likely to see of setting a precedent for

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The international legal system, however suspicious of it many Americans may be, has always mattered and has never mattered more than now. For example, the campaign against ISIS and the Ukraine crisis underscore all too dramatically the continuing importance of multilateral security commitments. If anything, international law's remit is growing as environmental, social, economic, and security problems transcend national borders. From global warming to sanctions on Iran and Russia to the campaign against terrorism and military intervention in a host

of theaters, the United States and its allies increasingly rely on international agreements and commitments to legitimize and amplify joint action against common threats.

Of course, marijuana and the international narcotics treaties are only one small piece of that puzzle. But they are a highly visible piece, and they offer a real opportunity to demonstrate adaptation *through* international legal channels, rather than *around* them. Laying groundwork for manageably incremental changes—by beginning conversations with treaty partners and other constituencies about where flexibility might lie—would reaffirm American commitment to constructive adaptation, and to building consensus. Conversely, pushing the outer boundaries of the drug treaties' flexibility could weaken the international order and damage American interests.

To put the point another way: Marijuana policy reform is a stress test that the United States and the international order should, and realistically can, pass.

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