March 14, 1995

Senator John Warner
225 Russell Office Building
U.S. Senate
Washington, D.C. 20510

Dear Sen. Warner:

Thank you for your letter of March 8 and the accompanying response from DEA Administrator Constantine to my inquiry of October 15, 1994. I have additional questions, and I also greatly appreciate your invitation to contact you for further assistance.

It is my position that the Department of Justice has a statutory obligation under 21 USC §811 (a) to reassess the scheduling status of controlled substances when a preponderance of evidence suggests that a substance may be mis-scheduled. Does DEA Administrator Constantine acknowledge this statutory responsibility?

My letter of October 15th summarized evidence from eminently qualified sources, including the Congressional Office of Technology Assessment, pharmacological journals, the findings of 45 state legislatures, and legislation of the 103rd Congress, which recognizes a disparity between the abuse potential of marijuana and other Schedule I substances. Consequently, I believe the Administrator has a responsibility to begin a rescheduling process for marijuana and all cannabinoids.

Administrator Constantine confirms the abuse potential of marijuana was not an issue in recent rescheduling litigation. As such, the recent Court of Appeals decision provided by the Administrator has no legal significance, nor do any of the stipulations made by litigants for the purposes of those proceedings.

Administrator Constantine's position is that the issue is moot because marijuana's lack of accepted medical use alone prevents scheduling anywhere other than Schedule I, and the Administrator question's the relevance of the OTA report cited in my letter of October 15.

Administrator Constantine's argument is specious and lacks legal foundation. The construction of 21 USC §812, which designates the findings required for placement in a particular schedule, is conjunctive, not disjunctive. All of the findings must be listed for a substance to be scheduled.

Furthermore, the Administrator's argument has been rejected once before by the U.S. Court of Appeals in the case of NORML v. DEA, 559 F.2d 735 (1977):

> Admittedly, Section 202(b), 21 USC §812(b), which sets forth the criteria for placement in each of the five CSA schedules, established medical use as the factor that distinguishes substances in Schedule II from those in Schedule I. However, placement in Schedule I does not appear to flow inevitably from lack of currently accepted medical use. Like that of Section 201(c) [21 USC §811(c)], the structure of Section 202(b) contemplates balancing of medical usefulness along with several other considerations, including potential for abuse and danger of dependence. To treat medical use as the controlling factor in classification decisions is to render irrelevant the other "findings" required by Section 202(b). The legislative history of the CSA indicates that medical use is but one factor to be considered, and by no means the most important one.

The Appeals Court indicates in a footnote that according to the House of Representatives, "[a] key criterion for controlling a substance * * * is the substance's potential for abuse." (H.R. Rep. No. 91-1444, U.S. Code Cong. & Admin. News 1970, p.4601.)

Administrator Constantine questions the relevance of the 1993 Office of Technology Report cited in my letter of October 15. Actually, two OTA reports are relevant to this discussion:

> Biological Components of Substance Abuse and Addiction, OTA-BP-BBS-117, September 1993.
>
> Technologies for Understanding and Preventing Substance Abuse and Addiction, OTA-EHR-597, September 1994.

These reports were requested by the House Committee on Government Operations, the Senate Committee on Labor and Human Resources, and the Senate Committee on Governmental Affairs. The two OTA reports review available scientific research, in both the natural and social sciences, and provide Congress with performance and theory evaluation data previously missing from the creation, funding and implementation of national drug policy.

As a member of the Senate Armed Services Committee you are aware of the international importance of drug issues. Scarce funds are diverted from military budgets for interdiction of marijuana smugglers. The finding that marijuana has a high potential for abuse has important foreign policy and intelligence ramifications, establishing as it does that eradication of foreign marijuana production is a national security interest of the United States. It is not in our national interest for foreign nations to discover that the United States is misleading the world community about the dangers of marijuana.

More specifically, several findings in the OTA reports directly address the factors listed in 21 USC §811(c) that are

determinative of control or removal from schedules. My letter of October 15 provided evidence supporting a reassessment of marijuana's status regarding factors 1,2,3 and 7. The 1994 OTA report presents further information supporting a reassessment of marijuana regarding factors 4, 5, and 6. The social science data reported in the 1994 OTA report, including commentary on the National Household Survey, provides further evidence that marijuana is not properly scheduled in accordance with the provisions of §811(c). Had the Administrator reviewed the OTA reports before questioning their relevance?

The criteria presented by OTA for the evaluation of a drug's abuse liability is the basis for my claim that marijuana does not have a significant potential for abuse. Administrator Constantine questions the relevance of these standards. Is the Administrator aware that OTA's source for these standards is the College on the Problems of Drug Dependence (CPDD)? Is the Administrator aware that the standards of the CPDD are the basis for all medical and scientific evaluations by the Department of Health and Human Services of a drug's abuse potential? On what basis does the Administrator claim that these standards are not relevant to the scheduling of marijuana under the provisions of the Controlled Substances Act?

The comments of the Office of Technology Assessment in its 1993 report indicate that marijuana does not meet CPDD's criteria for a drug with significant abuse potential. Subsequent research does not dispute this observation.

The National Institute on Drug Abuse published a research monograph (#52) on "Testing Drugs for Physical Dependency and Abuse Liability" in 1984. It states that: "It is important, however, in testing drugs for physical dependence liability, to ensure that the same test paradigm is employed throughout, so that the behavioral influences are kept constant for all the drugs under comparison."

In citing the recent troubling increases in adolescent marijuana use, Administrator Constantine suggests the increases justify applying a different standard to marijuana than to other drugs. Certainly if the Administrator was familiar with the 1993 OTA report, he is suggesting that adolescent marijuana use justifies a different standard for marijuana than the one applied to all other drugs in the United States. Is this a correct deduction about DEA's policy in regard to marijuana, and if so what is the legal basis for this apparent disregard for equal protection under the U.S. Constitution?

Finally, anticipating additional time-worn arguments, rulings of the Court of Appeals in both NORML v. Ingersoll 497 F2d. 654 (1974) and NORML v. DEA 559 F2d. 735 (1977) have established that the Administrator can not shirk his responsibilities under the CSA by presupposing the outcome of the process he is responsible for implementing.

The legislative history and the rulings of the Appeals Court are quite clear. The Department of Health and Human Services is to make medical and scientific judgments about the findings used in scheduling drugs under the Controlled Substances Act. If possible findings from a scientific and medical review clash with statute, case law, or treaty obligations, then those problems can be dealt with when the findings are presented. It is my position that DEA has a duty to consider rescheduling even if only toward the objective of possible modification of legislation or treaty action.

The recent Court of Appeals ruling in Alliance for Cannabis Therapeutics v. DEA is irrelevant because it merely upholds DEA's right to ignore an administrative law judge's recommendation and derive its own, reasonable, standards for defining imprecise statutory language about "accepted medical use." According to statute, though, DEA can not challenge any scientific or medical findings determined by HHS. Once HHS has evaluated the abuse potential of marijuana, the agency may decide to use different standards to evaluate marijuana's medical utility than those employed by DEA. The Court decision presented by the Administrator in no way makes the issue of marijuana's rescheduling moot; it would have no bearing on a finding by HHS (if made) that marijuana has accepted medical use or the standards HHS might use to establish such a finding.

It is my position that marijuana's medical use is irrelevant to Schedule I status, and that it is legally impossible to retain marijuana and cannabinoids in Schedule I or Schedule II if it is shown that they do not have a high potential for abuse. This is a matter to be debated after HHS has conducted a scientific and medical inquiry, not before.

I would greatly appreciate answers from Administrator Constantine to the questions and issues raised in this letter. I also request that the Department of Justice enter into an agreement with me to take the following action:

1) initiate a formal review by HHS of marijuana and cannabinoids under the provisions of the CSA, based on recent research findings which appear to differentiate marijuana's abuse potential from other Schedule I drugs.

2) formulate a rule in accordance with law in response to the HHS findings.

3) subject that rule to a hearing and public comment, even if the proposed rule seeks to maintain the current scheduling status.

Furthermore, I request an opportunity to review the scope and content of DEA's request for HHS review prior to its submission, and/or an opportunity to append it with comment.

Certainly I am aware of provisions of the statute and the Code of Federal Regulations that enable me to file a rescheduling petition and bring about the HHS review I seek. However I have great difficulty with the concept that as a private citizen I must personally bear the burden of a public servant's failure to exercise his statutory responsibilities, especially in a matter of great public interest.

The law says that the Attorney General "shall apply the provisions" of the CSA to the scheduled drugs. This responsibility has been delegated to the Administrator of the DEA. I have brought this responsibility to the Administrator's attention, and provided substantive evidence from credible, authoritative sources that marijuana may be improperly scheduled under present law. The Administrator has refused to exercise his responsibility, citing a legal doctrine that was rejected by the U.S. Court of Appeals in 1977.

This letter restates the case for the Administrator's legal obligations under the CSA, refutes his earlier argument opposed to the requested actions, and suggests specific remedies that should be in the interest of all parties.

I would appreciate your assistance in obtaining Administrator Constantine's response to my proposed remedies to this situation.

Sincerely,

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