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MEMORANDUM ON THE "CLUB DRUG ANTI-PROLIFERATION ACT OF 2000"

PREPARED JULY 2000

The Club Drug Anti-Proliferation Act of 2000 (H.R. 4553), was introduced on May 25, 2000, by Representative Judy Biggert of Illinois and co-sponsored by Representative James Rogan of California. The Act increases the penalties for federal crimes involving MDMA ("Ecstasy") and prohibits the dissemination of certain information concerning MDMA and other controlled substances.

Part I of this memorandum summarizes the provisions of the Act as introduced on May 25, 2000. Part II of this memorandum provides an analysis of those provisions.

I.

Summary of

The Club Drug Anti-Proliferation Act of 2000

Section 1. "Short Title"

The Act may be cited as the "Club Drug Anti-Proliferation Act of 2000."

Section 2. "Findings"

The Act summarily attributes the following findings to Congress:

> (1) The illegal importation of 3,4-methylenedioxymethamphetamine, commonly referred to as 'MDMA' or "Ecstasy', and paramethoxy-amphetamine, commonly referred to as 'PMA', have increased in recent years, as evidenced by the fact that 'club drug' seizures by US Customs have risen from less than 500,000 tablets during fiscal year 1997 to more than 4,000,000 tablets during the 5 months of fiscal year 2000.
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> (2) "Use of club drugs can cause long-lasting, and perhaps permanent, damage to the serotonin system of the brain, which is fundamental to the integration of information and emotion, and this damage can cause long-term problems with learning and memory."
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> (3) "Due to the popularity and marketability of club drugs, there are numerous Internet websites with information on its effects, production, and the locations of use, often referred to as 'raves.' The availability of this information targets the primary users of Ecstasy, who are most often college students, young professionals, and other young people from middle- to high-income families."
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> (4) Government must place greater emphasis on:
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> (A) Raising penalties associated with manufacture, distribution, and use of club drugs;
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> (B) Educating kids on the negative health effects of club drugs, "since the reputation of club drugs as a 'safe' drugs is its most dangerous component;"
>
> (C) Educating state and local police concerning club drug trafficking;
>
> (D) Reducing the number of deaths caused by club drug use and alcohol;
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> (E) Adequately funding research by the National Institute of Drug Abuse (NIDA) to:
>
> > (i) "identify those most vulnerable to using club drugs and develop science-based prevention approaches tailored to the specific needs of individuals at high risk;"
> >
> > (ii) "understand how club drugs produce its [*sic*] toxic effects and how to reverse neurotoxic damage;"
> >
> > (iii) "develop treatments, including new medications and behavioral treatment approaches;"
> >
> > (iv) "better understand the effects that club drugs have on the developing children and adolescents;"
> >
> > (v) "translate research findings into useful tools and ensure their effective dissemination."

Section 3. "Enhanced Punishment for Club Drug Traffickers"

Section 3 orders the US Sentencing Commission to amend the federal sentencing guidelines (hereinafter "Guidelines") related to offenses involving, MDMA or related drugs such MDA, or MDE/MDEA or any "Ecstasy" analogues, as well as PMA, "to provide for increased penalties such as that those penalties are comparable to the base offense levels for offenses involving any methamphetamine mixture."

Section 4. "Enhanced Punishment of GHB Traffickers

Section 4 orders the US Sentencing Commission to amend the Guidelines to increase the penalties for offenses involving gamma-hydroxybutyric acid (GHB) and/or gamma-butyrolactone (GBL).

Section 5. "Emergency Authority to Sentencing Commission"

Section 5 orders the US Sentencing Commission to make the above changes "as soon as practicable" after enactment of the Act.

Section 6. "Prohibition on Distribution of Information Relating to the Manufacture or Acquisition of Controlled Substances"

Section 6 would add a new section to 21 U.S.C. 843, making it a federal crime (punishable by up to 10 years in prison and a fine) for any person:

> (a) to teach or demonstrate the manufacture of a controlled substance, or to distribute by any means information pertaining to, in whole or in part, the manufacture, acquisition, or use of a controlled substance, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a crime; or
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> (b) to teach or demonstrate to any person the manufacture of a controlled substance, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture, acquisition, or use of a controlled substance, knowing or having reason to know that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes an offense.

Section 7. "Antidrug Messages on Federal Government Internet Websites

Section 7 orders all federal agencies to place an antidrug message on their Web site and, where appropriate, a link to the Office of National Drug Control Policy (ONDCP) within 90 days of the Act's enactment.

Section 8. "Expansion of Club Drug Abuse Prevention Efforts

Section 8 would authorize five million dollars ($5,000,000) to the Substance Abuse and Mental Health Services Administration (SAMHSA) for school-based and community-based club drug "abuse and addiction prevention programs," and to fund training programs for state and local police, anti-drug coalitions, and parents, teaching them how to recognize signs of Ecstasy "abuse and addiction." The ONDCP is also ordered to address Ecstasy and PMA use by young people in its "National Youth Antidrug Campaign."

II .

Analysis of

The Club Drug Anti-Proliferation Act of 2000

Section 1. "Short Title"

No analysis required.

Section 2. "Findings"

Section 2 attributes to Congress various "findings," some of which are of a scientific or medical research nature. Rather than assert unsubstantiated "findings," Congress should order the FDA, NIH, and or the DEA to conduct a fact-finding hearing concerning MDMA's risk profile, addiction potential, and therapeutic or medical use potential.

In 1985, prior to scheduling MDMA, the DEA conducted administrative hearings on MDMA's proposed scheduling. Thirty-three witnesses testified and ninety-five exhibits were received into evidence. After receiving and considering all the evidence, Administrative Law Judge Francis Young issued his findings and recommendation.

In a comprehensive opinion, Judge Young found that MDMA did not meet any of the three criteria necessary for placement in Schedule I. Judge Young reported that MDMA had a safe and accepted medical use in the US under medical supervision. He found that the evidence failed to establish that MDMA had a high potential for abuse. Based on his thorough examination of the evidence, Judge Young recommended that MDMA be placed in Schedule III, which would allow doctors to use it in therapy and prescribe it, while making it unavailable to the public at large.[1]

John Lawn, then-Administrator of the DEA, rejected Judge Young's recommendation and placed MDMA in Schedule I. (50 *Fed. Reg*. 23118-23119, May 31, 1985.)

Since July 1, 1985 (when MDMA was first placed in Schedule I), the federal

government has blocked all but three clinical studies on MDMA.

The government should end its blockade on MDMA research. FDA, NIH and/or the DEA should examine the critical issues of MDMA's risk profile, addiction potential, and therapeutic use potential.

Section 3. "Enhanced Punishment for Ecstasy Traffickers"

Section 3 orders the US Sentencing Commission to amend the Guidelines for offenses involving MDMA and related drugs, as well as PMA, so that the penalties for such offenses "are comparable to the base offense levels for offenses involving any methamphetamine mixture."

The Guidelines use marijuana as a universal standard to which other, less common, drugs can be equated for purposes of sentencing. Presently, the Guidelines equate:

- 1 gram of methamphetamine mixture to 2 kilograms of marijuana.
- 1 gram of MDMA to 35 grams of marijuana
- 1 gram of MDA to 50 grams of marijuana
- 1 gram of MDEA to 30 grams of marijuana

Under the Act, punishment for a 'club drug' offense would be determined based on the *weight* of the entire 'club drug' pill, including adulterants, binders and cutting agents. Each gram of a 'club drug' mixture would be equated to 2 kilograms (2,000 grams) of marijuana, as opposed to the present 35 grams of marijuana for MDMA.

Thus, for the purposes of determining punishment under the Guidelines, the present punishment levels related to methamphetamine mixtures would also determine the punishment levels for the same amount (by weight) of any mixture containing a listed 'club drug' or MDMA or PMA analogue.

As discussed in the following section, this proposed "equivalency" has serious flaws.

Problems with Section 3 of the Act:

1. Equating 'club drugs' such as MDMA (or an Ecstasy analogue) to methamphetamine *by weight* fails to account for the significant difference in the two drugs' respective potency, and thus irrationally punishes Ecstasy offenders *much more harshly* than methamphetamine offenders.

According to the DEA, a typical dose of "pure" methamphetamine is 5 milligrams.[2] MDMA, however, is approximately twenty-five times *less potent* than methamphetamine—the typical dose of MDMA being 125 milligrams.[3] Thus, 1 gram of methamphetamine provides 200 individual doses, while 1 gram of MDMA provides only 8 doses.

As a consequence, the Act does *not* punish MDMA offenders "comparable" to methamphetamine offenders, but instead imposes a significantly harsher punishment on a person convicted of manufacturing or selling MDMA rather than the "highly addictive,"[4] and more harmful drug, methamphetamine.

Under Section 3 of the Act, a person convicted of selling MDMA would receive the same punishment as a person convicted of selling *25 times* more doses of methamphetamine. This is irrational, and also contradicts the Act's stated purpose of making MDMA penalties "comparable to the base offense levels for offenses involving any methamphetamine mixture."

2. Equating 'club drugs' such as MDMA to methamphetamine based on *weight* may encourage drug manufacturers and sellers to switch from producing and selling MDMA to producing and selling the more harmful drug, methamphetamine.

Under Section 3, an offender convicted of selling 20 doses of MDMA (2.5 grams) would be punished the same as an offender convicted of selling 500 doses of methamphetamine (2.5 grams). This wide disparity of punishment will encourage dealers to switch from selling MDMA (which is nonaddictive and rarely provokes violence in users) to selling methamphetamine (which is addictive and can produce violence in users). This is not only bad social policy, it also increases the

likelihood that young people who believe they are purchasing Ecstasy will actually be sold the far more potent, addictive, and harmful drug, methamphetamine.

Section 4. "Enhanced Punishment of GHB Traffickers"

Section 4 of the Act does not propose a specified equivalency between GHB/GBL and marijuana. Presently, the Guidelines do not include GHB or GBL on the Drug Equivalency Table. The Act correctly leaves it to the members of the US Sentencing Commission to determine the appropriate equivalency.

Section 5. "Emergency Authority to Sentencing Commission"

By imposing a time pressure on the Sentencing Commission, Section 5 raises the risk that the Commission will act without making a thorough fact finding.

Section 6. Prohibition on Distribution of Information Relating to the Manufacture or Acquisition of Controlled Substances

Section 6 of the Act would make it a federal crime (punishable by up to 10 years in prison and a fine) for any person:

> (a) to teach or demonstrate the manufacture of a controlled substance, or to distribute by any means information pertaining to, in whole or in part, the manufacture, acquisition, or use of a controlled substance, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a crime; or
>
> (b) to teach or demonstrate to any person the manufacture of a controlled substance, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture, acquisition, or use of a controlled substance, knowing or having reason to know that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes an offense.

These provisions are nearly identical to provisions in the Methamphetamine Anti-Proliferation Acts pending in the House of Representatives (see HR.2987) and in the Senate (see S.486), as well as in the Bankruptcy Reform Act. These provisions have drawn criticism from civil liberties organizations, including the American Civil Liberties Union, the Electronic Frontier Foundation, the National Association of Criminal Defense Lawyers, and the American Booksellers Association.

Problems with Section 6 of the Act:

Section 6's prohibition on information violates the First Amendment, the due process prohibition against vague criminal laws, and law with respect to information in the public domain.

The Act's "prohibition on distribution of information" is an overly broad regulation on speech that violates the First Amendment.

Additionally, the information ban violates the due process prohibition against vague criminal laws, and established legal precedent with respect to information that has entered the public domain.

Section 6's "prohibition on distribution of information" is an overboard restriction on free expression that violates the core principle of the First Amendment, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[5] The US Supreme Court has stressed the importance of not allowing the government to interfere with that interchange, stressing "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[6] The Act's information ban is, therefore, particularly troublesome given that drug policy is currently a pressing matter of national concern and debate.

Under the provisions of Section 6, a person who has concluded from the scientific evidence that marijuana has medicinal properties that may benefit sick people or ameliorate their suffering, have to self-censor his or her expression in favor of state propositions for medical marijuana out of fear that such speech might encourage someone to try marijuana as medicine in violation of this provision.

Under the Act's information prohibition, a physician in a state such as California (where medical marijuana use *is* protected by *state* law), could be arrested and imprisoned for ten years simply for recommending that his or her patient use marijuana to medicate a particular illness or disease.

Similarly, numerous public health authorities believe that a policy of "harm reduction"[7] is a workable, practical way to

reduce the personal and societal harm of drug misuse. Under the Act, harm reduction advocates who distribute accurate information aimed at educating those who choose to use 'club drugs' or other controlled substances—would risk arrest and imprisonment.

Thus, in application, the information ban is a "gag rule," the operative effect of which will be to silence providers of health information.

A criminal law is unconstitutionally vague if it either: (1) fails to "provide fair warning" of what is prohibited, or (2) fails to "provide explicit standards" that limit the discretion of those who must enforce the law. (See, *Grayned v. City of Rockport* (1972) 408 U.S. 104, 108-109.) The Act's "prohibition on distribution of information" violates both aspects of the protection against vague criminal laws.

Section 6 does not provide fair warning of *what* sort of speech or "information" is prohibited.

Is a doctor who publishes a medical report in the *Journal of the American Medical Association* on death due to dehydration during Ecstasy use at a rave and insists that hydration level must be maintained, subject to arrest? Are the editors of the *Journal* subject to arrest?

Will a parent who discusses harm reduction with his or her adolescent after the adolescent asks the parent about 'club drugs' risk arrest and imprisonment for 10 years? What about the person who runs the Web site that the parent visits in order to get more information about reducing the harms associated with using 'club drugs?'

Indeed, Section 6's ban on certain information concerning controlled substances is so overbroad and vague that it would even infringe on the First Amendment rights of artists, writers, and scholars, who have long explored the relationship between drugs, creativity, epistemology, religion, and society.

For example, French poet and writer Charles Baudelaire wrote of the effects of opium and hashish in his classic book *Artificial Paradise.* At one point in his text, Baudelaire explains how the Arabs prepare hashish concentrate:

> Hashish concentrate, such as the Arabs prepare it, is obtained by boiling the tops of the flowering [*Cannabis*] plant in butter with a little water. Following complete evaporation of all moisture, it is strained, and yields a preparation that looks like greenish-yellow pomade, and retains the disagreeable odor of hashish and rancid butter. In this form it is taken in small balls of two to four grams. . . .[8]

Under Section 6's information prohibition, publishers of works like Baudelaire's will risk prosecution.

Religious scholars who write on the Rastafarian religion, on Native American religion, or on Shamanism, will risk prosecution for including accurate information on the use of marijuana, peyote, or ayahuasca.

Indeed, to assure that they won't be prosecuted, US libraries and booksellers will have to discard books by authors such as William Burroughs, Jean Cocteau, Aldous Huxley, and William James (to name just a few authors who have written detailed accounts of drug use that have undoubtedly inspired and facilitated drug use by others).

These scenarios illustrate the vagueness and overbroadness of the Act's "prohibition on distribution of information"—vagaries that make it impossible for a law-abiding person to discern the line between legal and illegal expression concerning controlled substances.

Section 6's vagueness is exacerbated by the fact that it seeks to ban "in whole or in part" information on manufacturing, distributing, or using a 'club drug' or any controlled substance. The phrase "in whole or in part" is unconstitutionally vague. Just what "part" of information need one teach or disseminate before subjecting oneself to arrest and imprisonment for ten years?

Section 6 also violates the due process protection against vague criminal laws by failing to "provide explicit standards" that limit the discretion of federal agents who are charged with enforcing the provision. For the reasons discussed above, Section 6 provides no guidelines to law enforcement agents who are instead left with unfettered discretion in making arrests. How will a law enforcement agent determine who has crossed the vague and blurry line that Section 6 seeks to draw between "legal" speech and "criminal" speech that can subject the speaker to ten years imprisonment?

Given the heated nature of the public debate over drug use and drug policy, the prohibition's vagueness invites bad faith arrests by law enforcement agents—arrests aimed not at securing valid convictions, but rather at chilling expression and deterring efforts by individuals and organizations advocating for changes in national drug policy.

Finally, the provision prohibiting certain information about controlled substances violates established legal precedent regarding information that has entered the public domain.

Information on many controlled substances has been in the public domain for decades, if not centuries. Medicinal preparations of *Cannabis*, for example, were listed in the official *Pharmacopoeia of the United States* as "approved therapeutic agents," and became the most widely used analgesics in the United States prior to 1937 when the federal Marijuana Tax Act was passed. (Subsequently, *Cannabis* was erased from the *Pharmacopoeia*.)

Likewise, information on manufacturing many controlled substances is in the public domain. For example, MDMA was patented in Germany by Merck Pharmaceutical Co., in 1914, and anyone can examine the now expired patent to learn one way of manufacturing MDMA.

Once truthful information has entered the public domain, the government cannot constitutionally restrain its further dissemination.[9]

Section 7. "Antidrug Messages on Federal Government Internet Websites"

No analysis necessary.

Section 8. "Expansion of Ecstasy and Liquid Ecstasy Abuse Prevention Efforts"

The Center for Cognitive Liberty & Ethics supports truthful drug education. Section 8, however, appears to equate drug education with a continuation of the federal government's failed "just say no" "drug education" program.

The Substance Abuse and Mental Health Services Administration (SAMHSA) and the National Institute of Drug Abuse (NIDA) should take the lead in disseminating harm reduction information and in making grants available to organizations that disseminate harm reduction information both nationally and in their local community.

Notes

[1] *In the Matter of MDMA Scheduling*, United States Department of Justice, Drug Enforcement Administration, Docket No. 84-48 (1985-86).

[2] (See, Guidelines, Sec. 2D1.1, Official Commentary, "Typical Weight Per Unit Table.")

[3] See, Shulgin and Shulgin, *PIHKAL*, (Berkeley/CA: Tranform Press (1991), 736-738.)

[4] According to the Office of National Drug Control Policy (ONDCP), methamphetamine is "a highly addictive

stimulant." (See, Office of National Drug Control Policy, *National Drug Control Strategy: 2000 Annual Report*, 19.) Whereas MDMA is a "psychoactive drug possessing stimulant and mild hallucinogenic properties." (Ibid., 21.)

[5] *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269.

[6] *FCC v. League of Women Voters* (1984) 468 U.S. 364, 381-82 (quoting *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-02 (footnote omitted)).

[7] Harm reduction policy is still under active development. One study noted the following basic components as common to most harm reduction policies:

> 1. Nonmedical use of psychoactive drugs is inevitable in any society that has access to such drugs. Drug policies cannot be based on a utopian belief that nonmedical drug use will be eliminated.
> 2. Nonmedical drug use will inevitably produce important social and individual harm. Drug policies cannot be based on a utopian belief that all drug users will always use drugs safely.
> 3. Drug policies must be pragmatic They must be assessed on their actual consequences, not on whether they symbolically send the right, the wrong, or mixed messages.
> 4. Drug users are an integral part of the larger community. Protecting the health of the community as a whole therefore requires protecting the health of drug users, and this requires integrating the drug users within the community rather than attempting to isolate them from it.
> 5. Drug use leads to individual and social harms through many different mechanisms, so a wide range of interventions is needed to address these harms. These interventions include providing health care (including drug abuse treatment) to current drug users; reducing the numbers of persons who are likely to begin using some drugs; and, particularly, enabling users to switch to safer forms of drug use. It is not always necessary to reduce nonmedical drug use in order to reduce harms. (Des Jarlais, Don C. "Harm Reduction: A Framework for Incorporating Science into Drug Policy." *American Journal of Public Health* 85 (1995), 10-12.)

[8] C. Baudelaire, *Artificial Paradise* (New York: Herder and Herder, 1971), 39.

[9] *Smith v. Daily Mail Publishing* (1977) 443 U.S. 97.

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