

AN ALTERNATIVE APPROACH TO BLANKET DRUG SCHEDULE: WHY SCHEDULING XYLAZINE SHOULD BE LEFT TO THE STATES

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INTRODUCTION

America is in the middle of a fentanyl epidemic. In 2021, synthetic opiates, primarily fentanyl, resulted in 70,601 reported overdose deaths.¹ Compared to the 9,173 overdose deaths attributed to heroin in 2021, fentanyl is the deadliest illicitly used opiate in America.² Despite fentanyl's lethal grip on the American public, an even more fatal drug cocktail is on the rise. Dr. Rahul Gupta, Director of the White House Office of National Drug Control Policy (ONDCP), warned the American public of a combination of fentanyl laced with xylazine, an "emerging threat" over illicit fentanyl.³ Xylazine is a tranquilizer used only in veterinary practice.⁴ According to some, xylazine mixed with fentanyl is contributing to the rapidly increasing fentanyl-related overdose deaths and is more deadly than consuming fentanyl alone.⁵

In response to this growing public health crisis, many states (including Ohio, Pennsylvania, West Virginia, and Florida) either temporarily or permanently labeled xylazine a scheduled drug.⁶ On March 28, 2023, Representative Jimmy Panetta introduced H. R. 1839, known as the "Combating Illicit Xylazine Act," in the U.S. House of Representatives.⁷ If enacted into law, the Combating Illicit Xylazine Act would foolishly label xylazine as a schedule III drug under the Controlled Substances Act (CSA).⁸ However, unlike fentanyl

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1. *Drug Overdose Deaths: Facts and Figures*, NAT'L INST. ON DRUG ABUSE, <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates> [https://perma.cc/H7NK-GCK8] (last visited Oct. 16, 2023).

2. *Id.*

3. *Biden-Harris Administration Designates Fentanyl Combined with Xylazine as an Emerging Threat to the United States*, THE WHITE HOUSE (Apr. 12, 2023), <https://www.whitehouse.gov/ondcp/briefing-room/2023/04/12/biden-harris-administration-designates-fentanyl-combined-with-xylazine-as-an-emerging-threat-to-the-united-states/> [https://perma.cc/7U7E-PQ87].

4. *Xylazine, Nat'l Inst. on Drug Abuse*, <https://nida.nih.gov/research-topics/xylazine> [https://perma.cc/BA8N-7JFP] (last visited Oct. 16, 2023).

5. THE WHITE HOUSE, *supra* note 3.

6. *State and Federal Actions to Respond to Xylazine*, NAT'L GOVERNORS ASS'N (May 9, 2023), <https://www.nga.org/news/commentary/state-and-federal-actions-to-respond-to-xylazine/> [https://perma.cc/4E3Q-MCCM].

7. H.R. 1839, 118th Cong. (2023).

8. *Id.*

or heroin, little is known about xylazine's potential for abuse, long-term effects in humans, or where illicit xylazine is coming from.⁹

There is little doubt that the short-term effects of xylazine mixed with fentanyl are disastrous.¹⁰ Some illicit substance users who ingested fentanyl mixed with xylazine developed severe skin ulcers or even soft tissue necrosis that presented as “rotting skin.”¹¹ However, there is a striking lack of scientific evidence definitively showing that xylazine is the cause of the increase in overdoses.¹² Furthermore, there is little data to show illicit drug users are intentionally seeking out xylazine or fentanyl mixed with xylazine.¹³ Yet, the U.S. government seeks to exert federal control over xylazine.¹⁴

Unquestionably, protecting public health and safety is of paramount importance to the U.S. government. Historically, however, the U.S. government has not fully considered alternative courses of action or the consequences before implementing fast-acting legislation.¹⁵ Presently, the economic impacts of scheduling xylazine under the CSA remain unknown.¹⁶ With only *two* domestic manufacturers of xylazine in the United States, any changes to the requirements set by the CSA will likely increase the cost of xylazine and drive domestic production of xylazine towards international importation.¹⁷ With a six-billion-dollar economic output in Texas alone, the domestic equine industry stands to experience an enormous impact if the supply of xylazine were to diminish overnight or increase in cost.¹⁸

By fast-tracking legislative control over xylazine, Congress is, once again, failing to consider alternative approaches to protecting public safety. The U.S. government is acutely aware of the danger fentanyl poses to public health and safety and even designated August 21st “Fentanyl Prevention and Awareness

9. Deidre McPhillips & Nadia Kounang, *Xylazine present in more than 1 in 10 fentanyl overdose deaths in the US*, CNN (June 29, 2023, 1:23 PM), <https://www.cnn.com/2023/06/29/health/xylazine-tranq-fentanyl-cdc-study/> [<https://perma.cc/27EN-H7NH>].

10. *Id.*

11. *Id.*

12. Mbabazi Kariisa et al., *Illicitly Manufactured Fentanyl–Involved Overdose Deaths with Detected Xylazine — United States, January 2019–June 2022*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 30, 2023), <https://www.cdc.gov/mmwr/volumes/72/wr/> [<https://perma.cc/LD4J-3RZR>].

13. *Id.*

14. H.R. 1839, 118th Cong. (2023).

15. Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, 42 CRIME & JUST. AM. 75, 123 (2013).

16. Way Koon Teoh et al., *Abuse of Xylazine by Human and its Emerging Problems: A Review from Forensic Perspective*, 18 MALAY. J. MED. HEALTH SCI. 190, 191 (2022).

17. Corinne Tolan, *Statement on Xylazine*, PA. VETERINARY MED. ASS'N (Apr. 28, 2023), <https://www.pavma.org/2023/04/28/statement-on-xylazine/> [<https://perma.cc/DCK8-K98U>].

18. Jim Heird, *Horses and the horse industry, Texas and beyond*, NAT'L LIBR. OF MED., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6898315/> [<https://perma.cc/B6BU-8A5G>] (last visited Oct. 17, 2023).

Day.”¹⁹ Adulterated with xylazine or not, fentanyl remains the deadliest illicitly consumed opiate for the last decade.²⁰ Clearly, the known danger is fentanyl,²¹ yet Congress is shifting its attention to xylazine.²² Unlike fentanyl, xylazine is not included in overdose death statistics.²³ Unlike fentanyl, the U.S. government lacks scientific research on how xylazine works in humans,²⁴ and this uncertainty revolving around xylazine has to be resolved before Congress has the option to pass the Combatting Illicit Xylazine Act.²⁵ Although xylazine may have negative impacts on the human body, it is imperative that the U.S. government keeps its attention directed toward ongoing threats to public health, like fentanyl.

This Note argues that scheduling xylazine should be left to the states and not imposed on all states under the CSA. Part I of this Note provides a background on the U.S. government’s history in implementing legislation to control drugs. This section further identifies the U.S. government’s tendency to enforce overly strict drug policies that are effectively moot years later. Part II of this Note then examines xylazine as a drug and provides a comparative analysis between xylazine and fentanyl. This part of the Note further examines the weaknesses present in the Combating Xylazine Act. Part III explains how a drug is incorporated into the CSA. It then identifies the dangers of controlling xylazine and the possible consequences of international importation of xylazine into the U.S. Part IV argues that xylazine should be treated similarly to gabapentin and should not be labeled under the CSA. Furthermore, Part IV offers an alternative solution under the federal sentencing guidelines to allow possession of illicit xylazine to be an enhancement to possession of an illegal substance. Overall, the U.S. Congress needs to break the cycle of exaggerated drug regulation and consider more appropriate alternatives to protecting public health than enacting rushed and poorly researched legislation like the Combatting Illicit Xylazine Act.

I. THE U.S. GOVERNMENT’S APPROACH TO DRUG LEGISLATION

Since their inception in the early twentieth century, U.S. drug policies and legislation have followed a common theme: Congress imposes harsh penalties for the use/possession of a particular drug, only to later relax drug policies to align with public perception. The resulting fallout of these penalties has come

19. *National Fentanyl Prevention and Awareness Day Toolkit*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 21, 2024), <https://www.cdc.gov/overdose-prevention/php/toolkits/fentanyl-prevention-awareness-day.html> [<https://perma.cc/9HSF-CD53>].

20. *Drug Overdose Deaths: Facts and Figures*, *supra* note 1.

21. *Id.*

22. H.R. 1839, 118th Cong. (2023).

23. *Id.*

24. Rahul Gupta et al., *Xylazine — Medical and Public Health Imperatives*, 388 N. ENGL. J. MED. 2209, 2210 (2023).

25. 21 U.S.C. § 811(c).

at the cost of over a trillion dollars,²⁶ and one of the world's highest imprisonment rates at 355 per 100,000 people.²⁷ Despite these draconian drug policies, very little legislation for addiction treatment has ever been enacted.²⁸ Rather than determining how to *treat* Americans who abuse drugs, the U.S. government adopts policies that criminalize narcotics and drug abuse in a vain attempt to “solve” the nation's drug problem.²⁹ This trend dates as far back as the early twentieth century when Congress passed the Harrison Narcotics Act.³⁰

A. *The Harrison Act and the Eighteenth Amendment*

The Harrison Act, passed in 1914, is largely viewed as the beginning of the U.S. War on Drugs.³¹ However, the purpose behind the Harrison Act began three decades prior and is deeply entwined with the racial profiling of Chinese nationals.³² The Angell Treaty, passed in 1887, prohibited Chinese nationals from importing opium into the United States.³³ At the same time, however, the Angell Treaty allowed Americans to take up the importation of opium into the U.S.³⁴ Congress considered smoking opium a “vice activity that most American citizens ... saw as a detriment to society.”³⁵ Congress was wrong.³⁶ The Angell Treaty had the opposite effect.³⁷ Opium importation and the amount of opium used by non-Chinese nationals actually increased post-Angell Treaty.³⁸ However, the U.S., unlike other countries, did not experience as wide of an opium epidemic as other countries.³⁹ The total number of opium addicts per capita in the U.S., one-tenth of one percent, was significantly lower than other countries.⁴⁰

26. Juhohn Lee, *America has spent over a trillion dollars fighting the war on drugs. 50 years later, drug use in the U.S. is climbing again.*, CNBC (June 17, 2021, 1:15 PM), <https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html> [<https://perma.cc/P5HG-RNE4>].

27. Ashley Nellis, *Mass Incarceration Trends*, THE SENT'G PROJECT (May 21, 2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends/> [<https://perma.cc/X7MG-VD4D>].

28. David T. Courtwright, *A Century of American Narcotic Policy*, in 2 TREATING DRUG PROBLEMS: COMMISSIONED PAPERS ON HISTORICAL, INSTITUTIONAL, AND ECONOMIC CONTEXTS OF DRUG TREATMENT 9 (Dean R. Gerstein & Henrick J. Harwood eds., 1992).

29. *Id.* at 1.

30. *Id.* at 9.

31. Audrey Redford & Benjamin Powel, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 INDEP. REV., 509 (2016).

32. *Id.* at 512.

33. Treaty as to Commercial Intercourse and Judicial Procedure, China-U.S., Feb. 23, 1887, 24 Stat. 409.

34. Redford & Powel, *supra* note 31, at 513.

35. *Id.* at 512.

36. *Id.* at 517.

37. *Id.*

38. *Id.*

39. *Id.* at 523.

40. *Id.*

In response to international pressures, Congress passed the Opium Exclusion Act of 1909, the first nationwide ban on opium importation regardless of nationality.⁴¹ In 1909, following a conference in Shanghai, China, U.S. opium commissioner Hamilton Wright explained “the reason why we had to press for the passage of the opium exclusion law—so as to ‘save our face’ in Shanghai.”⁴² Although the Opium Exclusion Act did see its intended effect of reducing opium consumption nationwide, much like the Angell Treaty, opium users quickly moved on to more potent forms of opiates, such as heroin and morphine.⁴³ By the turn of the twentieth century, 300,000 Americans were addicted to opiates.⁴⁴

As drug use continued to increase and pressure from other countries mounted, Congress took up the Harrison Narcotic Act of 1914.⁴⁵ Many of the issues brought in opposition to the Harrison Act revolved around state policing powers, the impact on the medical industry to prescribe opiates, and the Harrison Act’s inclusion of non-habit-forming narcotics like cannabis.⁴⁶ Despite these concerns, Protestant missionaries and other religiously affiliated lobbying groups expressed the need to resolve “the obvious damage this ‘sinful, depraved and immoral behavior’ caused among the ‘inferior races.’”⁴⁷ As a result, the Harrison Act passed as an interstate commerce regulation.⁴⁸ Administered by the U.S. Treasury Department, the Harrison Act required any prescriber or seller of narcotics to register with the government, maintain accurate records, and pay a tax on narcotic sales.⁴⁹ Importantly, any person who possessed narcotics caught without a registration was presumptively found guilty of violating the Harrison Act and, if convicted, was subject to a fine or up to five years imprisonment.⁵⁰

The list of unintended consequences after 1914 is long. In particular, the Harrison Act allowed medical professionals to prescribe narcotics only through their professional practices.⁵¹ The Harrison Act prohibited medical professionals from prescribing drugs to patients to maintain their addiction.⁵² The ultimate result of this prohibition was driving the market for drugs into an unsafe and criminal environment.⁵³

This trend of making a drug illegal, only for the public to move to crime to illegally obtain that drug, is further exemplified during the Prohibition Era. In January 1919, the states ratified the Eighteenth Amendment, which prohibited

41. *Id.* at 521.

42. *Id.*

43. *Id.* at 523.

44. Courtwright, *supra* note 28, at 2.

45. H.R. 6282 63rd Cong. (1914).

46. Redford & Powell, *supra* note 31, at 525.

47. *Id.*

48. *Id.*

49. H.R. 6282, 63rd Cong. (1914).

50. *Id.*

51. *Id.*

52. *Id.*

53. Redford & Powell, *supra* note 31, at 526.

manufacturing, selling, and transporting “intoxicating liquors” throughout the United States.⁵⁴ The Eighteenth Amendment originally provided Congress and the States the power to enforce this Amendment by their own legislative powers.⁵⁵ However, states were stripped of their legislative powers to enforce the Eighteenth Amendment through the enactment of the Volstead Act in October of 1919.⁵⁶ After Congress overrode President Woodrow Wilson’s veto, the Volstead Act enforced a nationwide ban on alcohol content in excess of 0.5%.⁵⁷ Any person caught with alcohol was guilty of a misdemeanor crime of maintaining a public nuisance.⁵⁸

From the start, many Americans doubted the national prohibition of alcohol.⁵⁹ Many Americans opposed the prohibition and swiftly switched to consuming illicitly produced alcohol.⁶⁰ Similar to the opium bans from the 1880s, the Volstead Act had the opposite intended effect on the general public. Rates of gangsterism, public corruption, and methanol poisoning rose quickly, and most Americans outright ignored the prohibition of alcohol.⁶¹ The Volstead Act nearly annihilated the brewery, winery, and distillery industries.⁶² By 1926, the 1,300 breweries that were open in 1916 closed, and the federal tax revenues from distilled spirits and fermented liquors dropped nearly \$500 million.⁶³ Soon after the Volstead Act passed Congress, even the most enthusiastic supporters of prohibition lost confidence in the Eighteenth Amendment.⁶⁴ By 1932, Franklin D. Roosevelt proclaimed, “The 18th Amendment is doomed.”⁶⁵ On December 5, 1933, just fourteen years since its enactment, the states ratified the Twenty-first Amendment, ending the national prohibition of alcohol. Conversely, no one spoke up for those who used narcotics.⁶⁶

B. *The War on Drugs*

The most famous examples of the U.S. government enacting overzealous drug policies are the Comprehensive Crime Control Act of 1984 (which included the Sentencing Reform Act of 1984),⁶⁷ the Anti-Drug Abuse Act of

54. U.S. CONST. amend. XVIII, § 1 (repealed 1933).

55. *Id.* § 2.

56. H.R. 6810, 66th Cong. (1919).

57. *Id.*

58. *Id.*

59. Courtwright, *supra* note 28, at 11.

60. *Id.*

61. *Id.*

62. Jack S. Blocker Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 236 (2006).

63. *Id.*

64. Courtwright, *supra* note 28, at 11.

65. *Id.* at 12.

66. *Id.*

67. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended in scattered sections in U.S. Code).

1986,⁶⁸ and the Omnibus Anti-Drug Abuse Act of 1988.⁶⁹ These Acts originated from President Richard Nixon's declaration of the War on Drugs in 1971 and dramatically increased the sentencing length of drug-related offenses.⁷⁰ During the late 1960s, recreational drug use, mainly marijuana, was relatively common.⁷¹ In response to the increase of recreational drug use, Attorney General John Mitchell spoke about the Controlled Dangerous Substances Act of 1969 Bill in September of 1969 to the Subcommittee on Juvenile Delinquency of the Senate Committee on the Judiciary.⁷² In his statement, Attorney General Mitchell discussed an exponential increase in juvenile arrests for drug-related offenses.⁷³ He illustrated a 1,644% increase in total marijuana-related arrests from 1958 to 1968.⁷⁴ Using the marijuana-related arrest statistics, Attorney General Mitchell correlated the increase in marijuana-related offenses to an increase in other drug use, such as heroin.⁷⁵ Without providing statistics for any increases in other dangerous drug use, Attorney General Mitchell argued the necessity of strengthening the administrative control of drugs by eliminating inconsistencies in drug offense statutes.⁷⁶

Following Attorney General Mitchell's arguments, Congress passed the first rendition of the CSA in 1970.⁷⁷ In an effort to combine all previous federal drug laws and allow for federal law enforcement of controlled substances, the 1970 CSA established federal regulations of manufacturing, importing/exporting, and using regulated substances.⁷⁸ President Nixon's declaration that drug abuse is public enemy number one galvanized media outlets and propelled the topic of 'drugs' to the forefront of American concern.⁷⁹ The Comprehensive Drug Abuse Prevention and Control Act repealed nearly all then-existing drug policies and created a "unified framework" of federal drug

68. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections in U.S. Code).

69. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections in U.S. Code).

70. JAN M. CHAIKEN & DOUGLAS C. McDONALD, *DRUG LAW VIOLATORS*, 1980-86, 1 (Fed. Just. Stat., 1988).

71. Nicole R. Ortiz & Charles V. Preuss, *Controlled Substance Act*, NAT'L LIBR. OF MED., <https://www.ncbi.nlm.nih.gov/books/NBK574544/#article-131542.s2> [https://perma.cc/NF3B-JNYE] (last updated Feb. 9, 2024).

72. *Controlled Dangerous Substances Act of 1969: Hearing on S. 2637 Before the S. Comm. on the Judiciary*, 91st Cong. (1969) (statement of John Mitchell, Att'y Gen. of the United States).

73. *Id.* at 2.

74. *Id.*

75. *Id.* at 3.

76. *Id.* at 6.

77. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections in U.S. Code).

78. *Id.*

79. Richard R. Clayton, *Cocaine Use in the United States: In a Blizzard or Just Being Snowed?*, 61 NAT'L INST. ON DRUG ABUSE RSCH. MONOGRAPH SERIES 8 (Nicholas J. Kozel & Edgar H. Adams, eds., 1985).

control regulations.⁸⁰ The CSA was included within Title II of the Comprehensive Drug Abuse Prevention and Control Act.⁸¹ The CSA recognizes two interests in regulating drugs. On one side, there is an interest in regulating legal drugs that have a legitimate purpose in medicine and contribute to public health.⁸² On the other side, the CSA criminalizes the manufacture, importation, distribution, and possession of drugs that negatively impact public health.⁸³ Importantly, the CSA balances these two interests through two overlapping legal frameworks: registration and trafficking provisions.⁸⁴ The CSA's registration provision regulates entities whose businesses involve substances specifically labeled to be included with the CSA.⁸⁵ The CSA's increase in drug regulation and criminalization of illicit drugs marked the beginning of a quarter-century crusade to combat illicit drug use and illegal drug trafficking in the U.S.

Through the 1980s and the early 1990s, public and federal attention zeroed in on the prevalence of cocaine use.⁸⁶ The proliferation of crack cocaine during this timeframe resulted in a marked increase in violent crime in the U.S.⁸⁷ Between 1985 and 1992, robbery rates in U.S. cities with populations greater than 250,000 increased by 22.8%.⁸⁸ In his 1986 address to the nation, President Ronald Reagan remarked on the perceived increase in drug use and violence and labeled crack cocaine an "uncontrolled fire."⁸⁹ Seemingly inspired by President Reagan's declarations, Congress passed three separate acts that, at face value, would deter and reduce illicit drug use and crime.

The Comprehensive Crime Control Act (CCCA) of 1984 was first introduced in the Senate on August 4, 1983.⁹⁰ Passed in February of 1984, the CCCA provided new bail procedures in federal court, added an insanity defense for mentally ill defendants, and increased penalties for particular drug offenses.⁹¹ One key provision of the CCCA was the implementation of sentencing reform.⁹²

The Sentencing Reform Act (SRA) created the United States Sentencing Commission (USSC) as "an independent agency in the judicial branch

80. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 116TH CONGRESS 2 (2019).

81. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections in U.S. Code).

82. LAMPE, *supra* note 80, at 1–2.

83. *Id.* at 2.

84. *Id.* at 1.

85. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1253 (1970) (codified as amended in scattered in 21 U.S.C. § 822(a)(1)).

86. Clayton, *supra* note 79, at 20.

87. Eric Baumer et al., *The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross-City Longitudinal Analysis*, 35 J. RSCH CRIME & DELINQUENCY 316, 318 (1998).

88. *Id.*

89. Ronald Reagan, President, U.S., Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986).

90. S. 1762, 98th Cong. (1984).

91. *Id.*

92. *Id.*

composed of seven voting and two non-voting, ex officio members.”⁹³ The USSC is tasked with developing guidelines that champion the basic principles of criminal deterrence.⁹⁴ The three objectives of the SRA include: “honesty in sentencing” by avoiding “confusion and implicit deception” from indeterminate sentencing, “reasonable uniformity in sentencing,” and “proportionality in sentencing.”⁹⁵ These three objectives are intended to further the USSC’s purpose of promoting justice over offenders convicted of federal crimes.⁹⁶ In upholding these objectives, the SRA sought to use a guideline that contained a defined list of relevant distinctions among different forms of criminal conduct and apply the appropriate sentence.⁹⁷ The resulting solution is a variable chart called the “Guidelines Manual” (Federal Sentencing Guidelines).⁹⁸

Following the Comprehensive Crime Control Act, Congress enacted the Anti-Drug Abuse Act of 1986.⁹⁹ This act amended the CSA with the Narcotics Penalties and Enforcement Act (NPEA).¹⁰⁰ This amendment added mandatory minimum sentences for particular cocaine-related offenses.¹⁰¹ Although the mandatory minimum sentences applied to both powder and crack cocaine, the amount of powder cocaine needed to trigger the mandatory minimum sentence, compared to crack cocaine, was 100 to 1.¹⁰² For example, a ten-year mandatory minimum sentence required five kilograms of cocaine powder or fifty grams of crack cocaine.¹⁰³ Soon after the NPEA, the USSC raised concerns over the disparities between powder and crack cocaine.¹⁰⁴ These concerns were centered around the belief that “crack offenders were disproportionately Black” and that implementing these mandatory minimums would create a ““of unfairness.””¹⁰⁵ Despite the USSC’s and the public’s growing concerns, Congress passed the Omnibus Anti-Drug Abuse Act of 1988 (OADAA) to establish the policy goal of a drug-free America.¹⁰⁶ The OADAA created the Office of National Drug Control Policy and restored the use of the death penalty by the federal government.¹⁰⁷ Furthermore, the OADAA amended 21 U.S.C. § 844 to make

93. U.S. SENT’G COMM’N, GUIDELINES MANUAL, ch.1 (Nov. 2021).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. H.R. 5484, 99th Cong. (1986).

100. Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 (1986) (codified as amended in scattered sections of U.S.C.).

101. *Id.*

102. *Id.*

103. *Id.*

104. MICHAEL A. FOSTER & JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10611, CRACK COCAINE OFFENSES AND THE FIRST STEP ACT OF 2018: OVERVIEW AND IMPLICATIONS OF *TERRY V. UNITED STATES* 2 (2021).

105. *Id.*

106. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections in U.S.C.).

107. *Id.*

crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession and added a definition of conspiracy to distribute charge.¹⁰⁸

The USSC's and the public's growing concerns over the disparity between the sentencing requirements were not addressed by Congress until the Fair Sentencing Act of 2010 (FSA).¹⁰⁹ Among other changes, the FSA reduced the amount of crack cocaine needed to trigger a 10-year mandatory minimum from 100 to 18.¹¹⁰ However, this period of 22 years resulted in a foundational change in the disparate treatment of Black Americans.

In 1985, one year after the Comprehensive Crime Control Act of 1984 (CCCA) was passed, federal prisons saw a 32% increase in their population.¹¹¹ Following the enactment of the CCCA, the Anti-Drug Abuse Act of 1986 (ADAA), and the OADAA, federal prisons saw a population increase of 133.8%.¹¹² In 1980, non-white Americans accounted for 25% of total federal drug arrests.¹¹³ By 1995, non-white Americans accounted for 40% of total federal drug arrests.¹¹⁴ From prohibition to the "crack epidemic," the common theme amongst these drug policies is the U.S. government's initial heavy-handed approach and numerous unintended adverse effects on Americans.¹¹⁵

In time, these adverse effects become so great that subsequent reversal becomes the solution.¹¹⁶ Repeatedly, the U.S. government perceived a threat to public health, and implemented a policy that was summarily repealed years later.¹¹⁷ By continuing this trend, the U.S. government not only wastes resources in enforcing these policies; the diversion of the government's attention from other ongoing problems, such as the opioid epidemic, comes at a cost of American lives.¹¹⁸

II. THE OPIOID CRISIS

Unlike the perceived threat of crack cocaine in the 1980s, the ongoing opioid epidemic has an iron grip on the U.S. and is a real threat to public

108. *Id.*

109. FOSTER & LAMPE, *supra* note 104.

110. *Id.*

111. Ronald Ostrow, *1984 Crime Control Act Leads to 32% Rise in Prisoners*, L.A. TIMES (Jan. 9, 1984, 3:00 AM), www.latimes.com/archives/la-xpm-1986-01-09-mn-14186-story.html [<https://perma.cc/XSB2-AXJG>].

112. ROBYN COHEN, U.S. BUREAU OF JUST. STAT., PRISONERS IN 1990 1 (1990) (showcasing an exponential increase in federal prison populations from 1980 to 1990).

113. FED. BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES 1996 284 (1996).

114. *Id.*

115. *See* Courtwright, *supra* note 28, at 11-12 (discussing the failures of Prohibition).

116. *See id.*

117. *See, e.g., id.*

118. *See id.* at 12.

health.¹¹⁹ Almost 645,000 people died from an opioid overdose between 1999 and 2021.¹²⁰ Critically, the rate of Americans dying from opioid overdoses is exponentially increasing.¹²¹ Compared to 47,600 opioid overdoses in 2017, 81,806 people died from an opioid overdose in 2022 alone.¹²² In response to the growing crisis, Congress enacted multiple laws, such as the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act,¹²³ in an attempt to create the infrastructure necessary to reduce the growing number of opioid-related deaths.¹²⁴ Although the number of opioid-related overdoses is increasing, since the enactment of policies like SUPPORT, the rate of increase for total opioid-related overdoses has dropped.¹²⁵

A. Xylazine

With the rate of opioid-related overdoses dropping, the U.S. government is continuing to explore alternative methods to attack the U.S. opioid crisis.¹²⁶ Beginning in 2019, xylazine was increasingly found mixed with illicitly manufactured fentanyl.¹²⁷ Xylazine is a clonidine analog, N-(2, 6-dimethylphenyl)-5, 6-dihydro-4H-1, 3-thiazin-2-amine, discovered by Farbenfabriken Bayer in 1961.¹²⁸ Xylazine acts as a central nervous system depressant and an anesthetic.¹²⁹ Because xylazine depresses the central nervous

119. See *Understanding the Opioid Overdose Epidemic*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 5, 2024), <https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html> [<https://perma.cc/M7XZ-82HM>].

120. *Id.*

121. See *Drug Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (June 30, 2023), <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/KWS8-UFPP>].

122. *Id.*

123. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. 115-271, 132 Stat. 3894 (2018) (codified as amended in scattered sections in U.S.C.) (increasing funding for public health programs to increase awareness about substance use disorders, train healthcare providers in treating patients with substance use disorders, and provide treatment services for patients undergoing drug recovery).

124. Noelia Duchovny & Ryan Mutter, *The Opioid Crisis and Recent Federal Policy Responses*, CONGRESSIONAL BUDGET OFFICE 3 (Sept. 2022), <https://www.cbo.gov/system/files/2022-09/58221-opioid-crisis.pdf> [<https://perma.cc/ZBP6-ZKE4>].

125. *Understanding the Opioid Overdose Epidemic*, *supra* note 119.

126. See *ICYMI: The Biden-Harris Administration Announces \$450M to Support President Biden's Unity Agenda Efforts to Beat the Overdose Epidemic & Save Lives*, THE WHITE HOUSE (Sept. 1, 2023), <https://www.whitehouse.gov/ondcp/briefing-room/2023/09/01/icymi-biden-%E2%81%A0harris-administration-announces-450m-to-support-president-bidens-unity-agenda-efforts-to-beat-the-overdose-epidemic-save-lives/> [<https://perma.cc/977Q-MV2X>].

127. *Xylazine*, NAT'L INST. ON DRUG ABUSE, <https://nida.nih.gov/research-topics/xylazine> [<https://perma.cc/ZZ4Y-UTHN>] (last visited Oct. 16, 2023).

128. Way Koon Teoh et al., *Abuse of Xylazine by Human and its Emerging Problems: A Review from Forensic Perspective* 18 MALAY. J. MED. HEALTH SCI. 190, 190-91 (2022).

129. *Id.* at 190.

system, the Food and Drug Administration banned the use of xylazine in humans.¹³⁰ Although banned in humans, xylazine is the oldest, and one of the most commonly used, alpha2-adrenergic agonist (anesthetic) in veterinary medicine to induce short-term sedation, anesthesia, and analgesia.¹³¹ Consequently, xylazine is well documented in veterinary practice and widely used during animal surgical procedures.¹³²

Most commonly, veterinarians and farmers use xylazine as a short-term preanesthetic before administering general or local anesthesia to large animals such as horses, cattle, and exotic animals.¹³³ Licit xylazine for veterinarians is used as an injectable liquid solution.¹³⁴ By contrast, xylazine powder is illicitly used as a cutting agent in fentanyl and is difficult to distinguish from other drugs.¹³⁵ Like fentanyl, xylazine is quickly absorbed and can be injected into muscles or veins, insufflated, ingested, or smoked.¹³⁶

Fentanyl, a synthetic opiate that was initially manufactured in the early 1960s, is one hundred times more potent than morphine and fifty times more potent than heroin.¹³⁷ Similar to morphine, fentanyl is used in medical practice to treat severe pain.¹³⁸ Like other analgesics, fentanyl creates short-term feelings of euphoria, sedation, and pain relief.¹³⁹ Although pharmaceutical data for xylazine is generally limited to its effects in animals, xylazine is believed to prolong the effects of illicit consumption of fentanyl.¹⁴⁰ Some studies show that the depressive effects of xylazine may begin within minutes and extend the feelings or “high” of fentanyl for six or more hours.¹⁴¹ For this reason, some illicit drug users may intentionally seek out xylazine-laced fentanyl.¹⁴² However, a survey conducted over social media websites indicates that many illicit drug users avoid xylazine because it worsens the effects of withdrawal.¹⁴³

When xylazine is combined with other central nervous system depressants (e.g., opioids, benzodiazepines, or alcohol), the drug overdose symptoms are synonymous with an opioid overdose.¹⁴⁴ These overdose symptoms include

130. *Id.* at 191.

131. MARK PAPICH, *PAPICH HANDBOOK OF VETERINARY DRUGS* 978 (5th ed. 2021).

132. *See id.*; *see also* Teoh et al., *supra* note 128, at 191.

133. Teoh et al., *supra* note 128, at 191.

134. Bhavani Nagendra Papudesi et al., *Xylazine Toxicity*, NAT'L LIBR. OF MED. (July 17, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK594271/> [<https://perma.cc/A2QY-YAAU>].

135. *Id.*

136. *Id.*

137. *Fentanyl DrugFacts*, NAT'L INST. OF HEALTH (June 2021), <https://nida.nih.gov/publications/drugfacts/fentanyl> [<https://perma.cc/YWE5-4C48>].

138. *Id.*

139. *Id.*

140. Papudesi et al., *supra* note 134.

141. *Id.*

142. *Id.*

143. Anthony Spadaro et al., *Self-reported Xylazine Experiences: A Mixed Methods Study of Reddit Subscribers*, NAT'L LIBR. OF MED. (Mar. 14, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10055471/> [<https://perma.cc/KW7E-PZRM>].

144. Papudesi et al., *supra* note 134.

muscle relaxation, respiratory depression, cardiac arrhythmias, or cardiac arrest.¹⁴⁵ However, unlike other illicit drugs, chronic use of xylazine mixed with fentanyl can also lead to skin ulcers, abscesses, and, in severe cases, necrosis of the skin.¹⁴⁶ Despite the high risk of using xylazine combined with fentanyl, the prevalence of xylazine in illicitly manufactured fentanyl has increased by 276% from January 2019 (at 2.9%) to June 2022 (at 10.9%).¹⁴⁷ Furthermore, xylazine's presence in illicitly manufactured fentanyl is spreading from the northeast to the south and west.¹⁴⁸ However, the U.S. government has not been able to determine how or why xylazine's prevalence has exponentially increased.¹⁴⁹ Critically, xylazine's lack of use in humans creates a void of research and understanding of xylazine's long-term effects.¹⁵⁰

With the current information on xylazine, the U.S. government finds itself in a familiar position. As with the Angell Treaty, the Harrison Act, and the War on Drugs, here, the U.S. government simply lacks the requisite knowledge to adequately control and manage this increase in illicit xylazine use. Instead of repeating history and enacting legislation whose effects extend beyond its original purpose, the U.S. government needs to spend more time and resources looking into xylazine's effects and how illicit xylazine is entering the U.S.

III. THE COMBATING ILLICIT XYLAZINE ACT

Despite the general lack of knowledge surrounding xylazine, in response to the growing presence of xylazine, Senator Catherine Cortez Masto introduced the Combating Illicit Xylazine Act in the Senate on March 28, 2023.¹⁵¹ The Act labels illicit xylazine as an urgent threat to public health and safety.¹⁵² Cosponsored by 95 members of the House of Representatives, as of November 6, 2024, the Combating Illicit Xylazine Act remained in front of the Subcommittee on Health.¹⁵³ Since then, no further actions have taken place within Congress.¹⁵⁴

The Act is predicated on the vague finding that the “proliferation of xylazine as an additive to illicit drugs such as fentanyl and other narcotics threatens to exacerbate the opioid public health emergency.”¹⁵⁵ The Combating Illicit Xylazine Act claims that “prompt action” in controlling illicit xylazine by

145. *Id.*

146. *Id.*

147. Kariisa et al., *supra* note 12.

148. Papudesi et al., *supra* note 134.

149. OFF. OF NAT'L DRUG CONTROL POLICY, EXEC. OFF. OF THE PRESIDENT, FENTANYL ADULTERATED OR ASSOCIATED WITH XYLAZINE RESPONSE PLAN (2023).

150. *Id.*

151. H.R. 1839, 118th Cong. (2023).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

scheduling xylazine under the CSA will limit the further spread of xylazine and save lives.¹⁵⁶ However, incorporating xylazine into the CSA is not as simple as enacting the Combating Illicit Xylazine Act. Nor is doing so the most effective process to protect public health and safety.

A. Scheduling

Entities working with “controlled substances” must register with the government, protect themselves from diversion and misuse of controlled substances, and report dispensing, storage, and record-keeping information to the government.¹⁵⁷ The CSA’s trafficking provision establishes penalties for the production, distribution, and possession of controlled substances found outside the CSA’s scope.¹⁵⁸

Furthermore, the CSA does not apply to all drugs.¹⁵⁹ Not all prescription drugs fall within the scope of the CSA.¹⁶⁰ However, many recreational drugs, also known as “nonpharmaceutical drugs,” are controlled substances due to their perceived and scientifically researched negative impacts on public health.¹⁶¹ For a specific drug or class of drugs to be included within the CSA, it must be specifically labeled and incorporated into the scope of the CSA.¹⁶² Generally, the CSA’s scope includes drugs that are deemed to require additional controls to prevent abuse and other negative impacts on public health.¹⁶³ Under the CSA, controlled drugs are categorized within different “schedules” numbered I through V.¹⁶⁴

Before a drug is listed under a schedule in the CSA, 21 U.S.C. § 811 requires the complex process of labeling a drug as “controlled” under the CSA.¹⁶⁵ The Secretary of Health and Human Services must provide the Attorney General with a recommendation sound in scientific and medical evidence.¹⁶⁶ When the Secretary of Health and Human Services recommends that a drug should be “controlled,” the Attorney General determines whether a drug falls within the scope of the CSA.¹⁶⁷ If the Secretary of Health and Human Services recommends that a particular drug should not be scheduled, then the Attorney General cannot control the drug under the CSA.¹⁶⁸

156. *Id.*

157. Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 21 U.S.C. § 812(b)(1).

165. 21 U.S.C. § 811.

166. *Id.*

167. 21 U.S.C. § 811(a).

168. *Id.* § 811(b).

The largest hurdle to overcome to incorporate xylazine into the CSA are the eight factors under 21 U.S.C. § 811(c).¹⁶⁹ If the Secretary of Health and Human Services recommends a drug should be scheduled under the CSA, 21 U.S.C. 811(c) provides the Attorney General eight factors to determine whether a drug should be, or should not be, scheduled under the CSA.¹⁷⁰ These eight factors are as follows:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.¹⁷¹

The Attorney General's analysis of these eight factors determines what schedule within the CSA a drug is labeled under.¹⁷² If the Attorney General agrees¹⁷³ with the recommendation of the Secretary of Health and Human Services, then the drug is added to the recommended schedule.¹⁷⁴ After a drug is considered a controlled substance under the CSA, the federal government—most importantly, the Drug Enforcement Administration—has the authority to enforce regulations and enact controlling measures against the drug.¹⁷⁵

Schedule I-controlled drugs are substances that have no accepted medical use in treatment in the U.S. and have a very high potential for abuse/addiction.¹⁷⁶ No prescriptions can ever be written for a Schedule I drug.¹⁷⁷ Heroin, psychedelic drugs (such as MDMA and LSD), and, controversially, marijuana are all listed as Schedule I drugs.¹⁷⁸

169. *Id.* § 811(c).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* § 811(c) (providing that where there is substantial evidence of potential abuse but the Secretary of Health and Human Services recommends to the Attorney General that a drug should *not* be controlled, the Attorney General may initiate proceedings for control or removal of a drug under 21 U.S.C. § 811(a)).

174. *Id.* § 811(j).

175. Registration and Reregistration Fees for Controlled Substance and List 1 Chemical Registrants, 85 Fed. Reg. 44710 (2020).

176. 21 U.S.C. § 812(b)(1).

177. *Id.*

178. Nicole R. Ortiz, *Controlled Substances Act*, NAT'L LIBR. OF MED. (Mar. 24, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK574544/> [<https://perma.cc/JX6R-N3JF>].

Schedule II-controlled drugs have a high potential for abuse and addiction but do have limited medical use in the U.S.¹⁷⁹ Examples of Schedule II drugs include cocaine, methamphetamine, and many opioids such as fentanyl, morphine, and oxycodone.¹⁸⁰ Schedule II drugs require a new, original prescription, transmitted from the practitioner each time a patient needs to refill their prescription.¹⁸¹

Schedule III-controlled drugs have a moderate risk of abuse and addiction. Like Schedule II drugs, Schedule III drugs do have an accepted medical use in the U.S.¹⁸² Some Schedule III drugs include ketamine, buprenorphine, and anabolic steroids.¹⁸³ Prescriptions for Schedule III drugs can be transmitted orally, electronically, or in writing.¹⁸⁴ Furthermore, a prescription for a Schedule III drug can be reused up to five times within six months before a new prescription is needed, and all Schedule III, IV, and V prescriptions can be transmitted to a new pharmacy once.¹⁸⁵

Schedule IV and Schedule V drugs have a low potential for abuse relative to drugs in Schedules I, II, and III.¹⁸⁶ Benzodiazepines such as alprazolam, diazepam, and tramadol are Schedule IV controlled drugs.¹⁸⁷ Whereas cough suppressants containing codeine, pregabalin, and lacosamide are Schedule V drugs.¹⁸⁸

Regardless of the respective Schedule a drug is listed under, the drug must be thoroughly researched.¹⁸⁹ The research required takes time.¹⁹⁰ On average, researching a drug takes over nine years.¹⁹¹ Even with emergency authorization, a fast-tracked clinical trial will take, on average, over six years.¹⁹²

B. Need for Research

Largely because xylazine was never intended for human use, there is little available information to adequately answer § 811(c)'s factors.¹⁹³ Researching a drug's chemical makeup, testing its significance for abuse, determining

179. 21 U.S.C. § 812(b)(2).

180. Ortiz, *supra* note 178.

181. *Id.*

182. 21 U.S.C. § 812(b)(3).

183. Ortiz, *supra* note 178.

184. *Id.*

185. *Id.*

186. 21 U.S.C. § 812(b)(4)-(5).

187. *Id.*

188. Ortiz, *supra* note 178.

189. *The Drug Development Process*, U.S. FOOD & DRUG ADMIN. (Jan. 4, 2018), <https://www.fda.gov/patients/drug-development-process/step-1-discovery-and-development> [<https://perma.cc/F9FG-YU5A>].

190. See Dean Brown, et al., *Clinical development times for innovative drugs*, 21 NATURE REVIEWS DRUG DISCOVERY 793 (2022)

191. *Id.* at 794.

192. *Id.*

193. 21 U.S.C. § 811(c).

xylazine's risk to the public, and developing reversal drugs to combat abuse all require a substantial financial investment.¹⁹⁴ In a preliminary study, xylazine has been shown to have a potential for abuse.¹⁹⁵ Generally, the effects of withdrawal following abrupt cessation of xylazine are physiological in nature, and the symptoms felt are not alleviated through opiate treatment.¹⁹⁶ However, there is very little scientific evidence of xylazine's pharmacological effect in humans.¹⁹⁷ Although some effects of prolonged consumption of xylazine are documented, such as necrosis of the skin,¹⁹⁸ the lack of scientific evidence cannot attribute any particular symptom to xylazine.¹⁹⁹ Overall, millions of dollars worth of research, which requires further federal approval, is required before xylazine can be adequately analyzed through the eight factors under 21 U.S.C. § 811(c).²⁰⁰ Furthermore, additional resources will be required to support the enforcement of combating illicit xylazine. During the time it would take to adequately research xylazine to the CSA's requirements, overdose deaths are *going* to increase.²⁰¹ This is because fentanyl is the illicitly consumed substance that kills over 100,000 Americans each year, not xylazine.²⁰²

C. Costs to Domestic Production

Attempting to compensate for the research costs through licit use of xylazine will not work either. The CSA provides the Drug Enforcement Administration (DEA) authorization to charge reasonable fees relating to the registration and control of the manufacture, distribution, dispensing, import, and export of controlled substances and listed chemicals.²⁰³ Generally, the DEA's fees range from \$3,699 per year for manufacturers of controlled substances to \$888 every three years for "business activities involving dispensing."²⁰⁴ Although these fees may seem marginal, many veterinarians are worried that any increase in the price of xylazine will impact the supply available to veterinarians.²⁰⁵ Many veterinarians already pay the DEA's registration fees to dispense controlled substances.²⁰⁶ However, because xylazine is not controlled,

194. Kariisa et al., *supra* note 12.

195. Rahul Gupta et al., *Xylazine — Medical and Public Health Imperatives*, 388 N. ENGL. J. MED. 2209, 2210 (2023).

196. *Id.* at 2209-11.

197. *Id.* at 2211.

198. Papudesi et al., *supra* note 134.

199. *See* Gupta, *supra* note 195.

200. *Id.*

201. *Drug Overdose Death Rates*, *supra* note 121.

202. *Id.*

203. 21 U.S.C. § 821; 21 U.S.C. § 958(f).

204. Registration and Reregistration Fees for Controlled Substance and List 1 Chemical Registrants, 85 Fed. Reg. 44710, 44711 (July 24, 2020).

205. Tolan, *supra* note 17.

206. *Id.*

manufacturers of xylazine do not pay the fees or follow the restricted protocols of manufacturing a controlled substance.²⁰⁷

There are only two manufacturers of xylazine in the United States.²⁰⁸ Any changes to the manufacturing process, whether it be additional registration costs or other requirements under the CSA, can severely impact the production of xylazine.²⁰⁹ For example, Ohio issued a special notice on April 17, 2023, that required xylazine manufacturers and distributors to operate under the same regulations as controlled-substance manufacturers and distributors.²¹⁰ Under this notice, distributors of xylazine now must conduct criminal background checks on all of their employees, update storage facilities to comply with Ohio law, report wholesale orders of xylazine, and much more within 30 days of the rule's enactment.²¹¹ Veterinarians worry that xylazine's supply would be severely affected if the Combating Illicit Xylazine Act was applied nationwide.²¹²

If domestic production of xylazine stopped, veterinarians and other pharmaceutical companies would have to import xylazine from other countries.²¹³ Importing drugs into the United States poses a myriad of risks, and any imported xylazine would take a considerable amount of time before it reaches veterinarians (on top of delays from the CSA's requirements).²¹⁴ Due to the U.S. Food and Drug Administration's (FDA) regulatory requirements, the only drugs that can be legally imported into the U.S. come from registered manufacturers whose quality controls are equal to domestic drug manufacturers.²¹⁵ Veterinarians worry that any shortage in the supply of xylazine would greatly impact their ability to practice.²¹⁶ According to some veterinarians, not having access to xylazine places both animals and humans at risk.²¹⁷ For example, an increase in xylazine costs could lead to veterinarians using less effective drugs in practice and increase the threat of harm in treating large animals.²¹⁸ On top of increasing risk, the \$50 billion American horse industry will be greatly impacted by any xylazine shortage.²¹⁹ The U.S.

207. *See id.*

208. *Id.*

209. *Id.*

210. OHIO BD. OF PHARMACY, SPECIAL NOTICE: XYLAZINE SCHEDULING & LICENSEE COMPLIANCE (2023).

211. *Id.*

212. Tolan, *supra* note 17.

213. *See id.*

214. *Imported Drugs Raise Safety Concerns*, U.S. FOOD & DRUG ADMIN. (Mar. 1, 2018), <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/imported-drugs-raise-safety-concerns> [<https://perma.cc/4SPF-Y8JF>].

215. *Id.*

216. Tolan, *supra* note 17.

217. *Id.*

218. *Id.*

219. *See* Hannah Lochner et al., *Economic Impact of the Horse Industry*, UNIV. OF MINN. EXTENSION, <https://extension.umn.edu/horse-ownership/economic-impact-horse-industry/> [<https://perma.cc/MJ7P-98RE>] (last visited Oct. 24, 2024).

Department of Health and Human Services Office reported the current impact of the ongoing drug shortage of other prescription medications may lead to an overall increase in drug prices by 16.6%.²²⁰

Moreover, xylazine imported into the United States would likely come from China.²²¹ According to the DEA, a kilogram of xylazine powder can be purchased from Chinese suppliers for \$6–\$20 U.S. dollars.²²² However, China is also a supplier of illicit xylazine and fentanyl.²²³ On October 3, 2023, the U.S. Treasury Department issued a press release designating twenty-eight individuals and a “China-based network responsible for the manufacturing and distribution of ton quantities of fentanyl, methamphetamine, and MDMA precursors.”²²⁴ These Chinese entities were also involved in trafficking xylazine.²²⁵ Although there is simply not enough information to definitively pinpoint where illicit xylazine originates from, there are many indications that illicit xylazine is following illicit fentanyl.²²⁶ Therefore, a significant amount of xylazine is likely originating from China. By allowing China to supply the U.S. with licit xylazine, the U.S. government would be directly supporting further importation of illicit xylazine into the United States. This likely possibility is already finding support through the DEA’s and Department of Homeland Security’s (DHS) efforts to combat the importation of illicit xylazine.

According to the DEA and DHS, xylazine, which is intended for illicit human consumption, is entering the United States in solid form, liquid form, and, “to a lesser degree, mixed with fentanyl seized at the southern border” of the United States.²²⁷ Rather than divert funds from the Department of Health and Human Services’ \$21 million budget for drug control to extensively research xylazine, the U.S. government should pour its attention into the drug that is actually killing Americans: fentanyl.²²⁸ It is time for the U.S. government to break its own cycle of diverting its attention away from a public health crisis and remain focused on its mission to resolve the decades-old opioid epidemic. Instead of creating an entire national infrastructure to combat xylazine, the U.S.

220. OFF. OF THE ASSISTANT SEC’Y FOR PLAN. AND EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., *IMPACT OF DRUG SHORTAGES ON CONSUMER COSTS* (2023).

221. Tracey Forfa, *What We’re Doing to Stop Illicit Xylazine from Getting into the U.S.*, U.S. FOOD & DRUG ADMIN. (July 11, 2023), <https://www.fda.gov/animal-veterinary/news-events/what-were-doing-stop-illicit-xylazine-getting-us> [<https://perma.cc/X657-KC86>].

222. *Id.*

223. *Treasury Targets Large Chinese Network of Illicit Drug Producers*, U.S. DEP’T OF THE TREASURY (Oct. 3, 2023), <https://home.treasury.gov/news/press-releases/jy1779> [<https://perma.cc/DZ74-6ZDH>].

224. *Id.*

225. *Id.*

226. *DEA and DHS Issue Joint Update on Sources of Illicit Xylazine*, U.S. DRUG ENF’T ADMIN. (Sept. 22, 2023), <https://www.dea.gov/stories/2023/2023-09/2023-09-22/dea-and-dhs-issue-joint-update-sources-illicit-xylazine> [<https://perma.cc/E6JP-WNCD>].

227. *Id.*

228. *Federal Drug Control Funding*, THE WHITE HOUSE (2023), https://www.whitehouse.gov/wp-content/uploads/2022/03/ap_20_drug_control_fy2023.pdf [<https://perma.cc/GV2U-DVXR>].

government should rely on the states to implement and enforce their unique regulatory controls over xylazine.

IV. RECOMMENDATIONS OVER THE COMBATING ILLICIT XYLAZINE ACT

Congress should refuse to sign the Combatting Illicit Xylazine Act. The increasing prevalence of xylazine varies across states, and this variability necessarily causes diverse impacts on public health and safety that cannot be adequately addressed by federal legislation. Recognizing the unique needs of each State, Congress should consider alternative approaches. Moreover, amending the Federal Sentencing Guidelines to include xylazine will allow federal agencies to continue combatting illicit xylazine.

A. State Control of Xylazine

Congress should not overstep on U.S. states' individual authority to control xylazine providers. Individual state control provides a more comprehensive solution than blanketly controlling xylazine through the CSA. This argument is not novel, and there is precedent for it. Each state is experiencing the rise of xylazine mixed with fentanyl differently.²²⁹ Individual states have unique economic and public health interests in industries that rely on xylazine.

The practice of states controlling drugs, without federal oversight under the CSA, is not unprecedented. The drug gabapentin, approved by the FDA for use in humans in 1993, is a direct analog to xylazine.²³⁰ Gabapentin is licitly used to control nerve pain and as a muscle relaxer.²³¹ Despite pharmacological differences, gabapentin and xylazine are presently being illicitly used together with opiates.²³² Similar to xylazine, gabapentin has been illicitly used to lengthen the "high" of consuming opiates.²³³ Furthermore, the FDA has concluded that gabapentin, when used alongside opioids, can create serious breathing difficulties.²³⁴ In fact, a 2020 study of ninety-one illicit drug users showed nearly half of the survey participants used gabapentin in combination

229. Papudesi, *supra* note 134.

230. Rama Yasaei et al., *Gabapentin*, NAT'L. LIBR. OF MED. (Dec. 19, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK493228/> [<https://perma.cc/WP4G-7AJS>].

231. *Id.*

232. Alyssa Peckham et al., *Gabapentin Use, Abuse, and the US Opioid Epidemic: The Case for Reclassification as a Controlled Substance and the Need for Pharmacovigilance*, 11 RISK MGMT. HEALTHCARE POL'Y 109, 110 (2018).

233. Yasaei et al., *supra* note 230.

234. *FDA Warns About Serious Breathing Problems with Seizure and Nerve Pain Medicines Gabapentin (Neurontin, Gralise, Horizant) and Pregabalin (Lyrica, Lyrica CR)*, U.S. FOOD & DRUG ADMIN. (Dec. 19, 2019), <https://www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-serious-breathing-problems-seizure-and-nerve-pain-medicines-gabapentin-neurontin> [<https://perma.cc/Q285-JN44>].

with opiates.²³⁵ Despite the similarities of illicit use with xylazine, gabapentin is not controlled under the CSA.²³⁶

Even without a nationwide policy, many states independently label gabapentin as a controlled substance. As of July 2022, seven states label gabapentin as a Schedule V controlled substance.²³⁷ Kentucky was the first state to include gabapentin as a controlled substance.²³⁸ The Kentucky legislature cited an increase in public risk following an increase in illicit and licit use of gabapentin.²³⁹ Other states that have not independently scheduled gabapentin are likely to schedule gabapentin soon. For example, Pennsylvania policymakers are “increasingly interested” in illicit gabapentin use following an increase in gabapentin-related overdoses.²⁴⁰

Analogous to gabapentin, states have begun their own counteroffensive in confiscating illicit xylazine.²⁴¹ In 2018, Florida became the first state to schedule xylazine as a Schedule I drug.²⁴² During 2022 alone, the Florida Highway Patrol confiscated 649 pounds of illicit drugs, including fentanyl, oxycodone, and xylazine.²⁴³ Since 2018, Pennsylvania has experienced a 1,000% increase in fentanyl mixed with xylazine-related overdoses.²⁴⁴ In 2022 alone, xylazine mixed with fentanyl contributed to 644 overdose deaths across thirty-eight Pennsylvania counties.²⁴⁵ Following the exponential increase of xylazine’s prevalence, the Pennsylvania legislature enacted H.R. 1661, which makes

235. Mance E. Buttram & Steven P. Kurtz, *Descriptions of Gabapentin Misuse and Associated Behaviors Among a Sample of Opioid (Mis)users in South Florida*, 53 J. PSYCHOACTIVE DRUGS 47, 50 (2021).

236. Yasaei et al., *supra* note 230.

237. Makaela Premont, *Is Gabapentin a Controlled Substance? In Some States, Yes*, GOODRX HEALTH (July 26, 2022), <https://www.goodrx.com/gabapentin/is-gabapentin-a-controlled-substance> [<https://perma.cc/9FQC-3D4T>] (These States include, Alabama, Kentucky, Michigan, North Dakota, Tennessee, Virginia, West Virginia.).

238. Rachel Smith et al., *A Qualitative Analysis of Gabapentin Misuse and Diversion Among People Who Use Drugs in Appalachian Kentucky*, 32 PSYCH. ADDICTIVE BEHAV. 115 (Feb. 2018).

239. 902 KY. ADMIN. REG. § 55:015 (2023).

240. *RX DRUG SCHEDULING & MONITORING*, PA. DEP’T OF HEALTH (Mar. 2019), https://www.health.pa.gov/topics/Documents/Programs/PDMP/06b_PHMC_Drug%20Scheduling%20Fact%20Sheet.pdf [<https://perma.cc/N9BA-JP48>].

241. Olivia Sugarman & Hridika Shah, *Tracking “Tranq” Laws: The State of Policy Responses to the Growing Xylazine Crisis*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (2023), <https://www.congress.gov/118/meeting/house/116428/documents/HMKP-118-JU00-20230928-SD003.pdf> [<https://perma.cc/JCF7-PXA9>].

242. FLA. STAT. § 893.03 (2023).

243. *Florida Highway Patrol Criminal Interdiction Unit Seized Over \$110,000,000 In Contraband In 2022*, FL. DEP’T OF HIGHWAY SAFETY AND MOTOR VEHICLES (Mar. 27, 2023), <https://www.flhsmv.gov/2023/03/27/florida-highway-patrol-criminal-interdiction-unit-seized-over-110000000-in-contraband-in-2022/> [<https://perma.cc/K7VU-NJ6A>].

244. *Historic Increases in Reported Xylazine-Related Overdose Deaths*, PA. DEP’T OF HEALTH (June 15, 2023), <https://www.health.pa.gov/topics/Documents/HAN/2023-705-6-15-ADV-Xylazine.pdf> [<https://perma.cc/FL2C-DY8P>].

245. *Id.*

possession of xylazine a felony punishable by up to five years' imprisonment.²⁴⁶ Many states, such as Ohio²⁴⁷ and West Virginia,²⁴⁸ are also following Florida's and Pennsylvania's lead in enacting their own drug policies to control xylazine.²⁴⁹ As shown, many states are combating illicit xylazine in their own way. Allowing each state to control xylazine individually will reduce the economic impacts on domestic xylazine production, reduce the risk of international importation of illicit xylazine, and allow the U.S. government to focus on combating illicit fentanyl.

With a direct comparison between xylazine and gabapentin, the U.S. government has a clear path to follow. Many states are implementing laws and regulations to control xylazine of their own accord. Without blanket federal control of xylazine under the CSA, the states have independently allocated their own resources toward combating illicit xylazine while simultaneously preserving their individual state veterinary economies. For example, in a 2023 report, Texas attributed at least four overdose deaths to xylazine mixed with fentanyl.²⁵⁰ However, as of 2015, Texas's 840,000 horses generated almost \$6 billion in state revenue and supported 52,000 jobs.²⁵¹ Balancing a multi-billion-dollar industry and drug policy is a complex and highly individualized task. If the U.S. government passed the Combating Xylazine Act, the effect on Texas's and every other state's veterinary industry could be detrimental.²⁵² Furthermore, the risks associated with importing drugs from other countries, some of which have already proven to be contributors to America's ongoing opioid epidemic, are too high to blindly accept. By allowing the states to control xylazine individually, the U.S. government should turn its focus and mountain of resources toward the overarching issue: fentanyl.

B. Federal Sentencing Guidelines

In response to the rising need for federal action against xylazine, an alternative approach to changing national policy would be to update the Federal Sentencing Guidelines. Doing so circumvents the need to designate xylazine as a controlled substance under the CSA and allows federal agencies to punish

246. David Wenner, "Tranq dope" Update: Pa. Takes Another Step in Fight Against xylazine, PENN LIVE PATRIOT-NEWS (Oct. 6, 2023, 7:52 AM), <https://www.pennlive.com/health/2023/10/tranq-dope-update-pa-takes-another-step-in-fight-against-xylazine.html> [https://perma.cc/2LJ3-L7QU].

247. OHIO REV. CODE § 4729:9-1-03(B)(15) (2024).

248. W. VA. CODE § 60A-2-210 (2023).

249. Sugarman & Shah, *supra* note 241 (These states include Delaware, Illinois, Indiana, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Tennessee, Vermont, and West Virginia.).

250. *Health Advisory: Xylazine in Illicit Drugs Increases Overdose Risks*, TEX. DEP'T. OF STATE HEALTH SERVS. (Mar. 21, 2023), <https://www.dshs.texas.gov/news-alerts/health-advisory-xylazine-illicit-drugs-increases-overdose-risks> [https://perma.cc/D9X7-598U].

251. Heird, *supra* note 18, at 99.

252. Tolan, *supra* note 17.

illicit xylazine use. By changing the sentencing guidelines, the U.S. government would be able to make possession of xylazine a sentencing enhancement without having to make xylazine a controlled drug under the CSA.²⁵³ This approach preserves domestic xylazine manufacturing while also combatting the increasing prevalence of xylazine.

The Federal Sentencing Guidelines list base offense levels for each type of crime.²⁵⁴ Higher levels are determined based on the severity of the crime.²⁵⁵ Following the base level, the Federal Sentencing Guidelines apply “specific offense characteristics.”²⁵⁶ Specific offense characteristics are factors that vary among different offenses but can increase or decrease the base offense level and, subsequently, change the length of sentence an offender receives.²⁵⁷ Other factors included in the Federal Sentencing Guidelines are “adjustments” and the offender’s criminal history.²⁵⁸ Adjustment factors can apply to any offense and, like specific offense characteristics, can raise or lower the offense level.²⁵⁹ The offender’s criminal history is more crucial in determining the base level.²⁶⁰ The sentence length increases depending on the number of prior criminal offenses the offender has been charged with.²⁶¹ After determining all relevant factors in the Federal Sentencing Guidelines, the advisory guidelines point towards a minimum to maximum sentencing length in months.²⁶² For example, if someone with no criminal history is charged with possession of less than ten grams of heroin, the base offense level is twelve.²⁶³ Following the Federal Sentencing Guidelines’ Sentencing Table, the individual’s prescribed sentencing length would be ten to sixteen months.²⁶⁴ However, if the charged individual imported the illicit substances through the use of an aircraft, the offense level would automatically increase from twelve to twenty-six, resulting in a prescribed sentencing length of sixty-three to seventy-eight months.²⁶⁵

253. 28 U.S.C. § 994(p) (2000).

254. *Overview of the Federal Sentencing Guidelines*, U.S. SENT’G COMM’N (2021), https://www.uscc.gov/sites/default/files/pdf/about/overview/2022_Guidelines-Basics-Trifold.pdf [<https://perma.cc/NL8E-WZFM>].

255. *Id.* (For example, a trespassing crime has a base offense level of 4, whereas a kidnapping crime has a base offense level of 32.).

256. U.S. SENT’G GUIDELINES MANUAL § 1A1.4(f) (U.S. SENT’G COMM’N 2021).

257. *Id.*

258. *Annotated 2021 Chapter 1*, U.S. SENT’G COMM’N, www.uscc.gov/guidelines/2021-guidelines-manual/annotated-2021-chapter-1#1a1 [<https://perma.cc/74DE-4TQB>] (last visited Oct. 20, 2023).

259. *Id.* (Examples of adjustment factors include victim-related adjustments, the offender’s role in the offense, and obstruction of justice.).

260. *Id.*

261. *Id.* (For example, if a first-time offender is charged with a crime that carries an offense level of six, the advisory guideline would prescribe a 0-6 month sentence. If the offender has four prior criminal acts, that same offense level of six now carries a two-to-eight-month sentence.).

262. U.S. SENT’G GUIDELINES MANUAL § 1A1.3 (U.S. SENT’G COMM’N 2021).

263. *See id.* § 2D1.1(c).

264. *See id.* § 5A.

265. *See id.* § 2D1.1(b)(3); *see id.* § 5A.

Under this alternative solution, possession of xylazine should fall within Part D(1)(1) as a specific offense characteristic.²⁶⁶ Part D(1) of the Federal Sentencing Guidelines encompasses the unlawful manufacturing, importing, exporting, trafficking, or possession of drugs.²⁶⁷ In doing so, possession of xylazine would increase the offense level by two.²⁶⁸ Increasing the offense level by two mirrors many other specific offense characteristics within Part 2D(1)(1).²⁶⁹ For example, Part 2D.1.1(b)(6) increases an offense level by two if the defendant is convicted of importing methamphetamine or methamphetamine precursors into the U.S.²⁷⁰ This specific offense characteristic is directly comparable with the illicit xylazine that is being imported from China. Applying this change would increase a possession of eight to ten grams of fentanyl from a level sixteen offense with a suggested sentence of twenty-one to twenty-seven months, to a level eighteen offense with a suggested sentence of twenty-seven to thirty-three months.²⁷¹ Making these changes to the Federal Sentencing Guidelines would allow the U.S. government to have a hand in punishing possession of xylazine while preserving the licit use of xylazine. Furthermore, without having to expend the additional funds required to incorporate xylazine into the CSA, the U.S. government could continue to focus on combating fentanyl.

CONCLUSION

The increasing presence of xylazine in illicit opioids like fentanyl is a growing concern for public health. Without preapproved reversal drugs to combat the effects of xylazine, there could be an increase in the overall opioid-related overdose death rates. The foundational issue with xylazine remains that this threat to human health is unresearched, and too little information is known about this drug's effects on the human body. However, the known problem is fentanyl. Blanketly controlling xylazine under the CSA will take the U.S. government's attention away from battling fentanyl and have a disastrous impact on the veterinary economy.

This note examined what is currently known about xylazine, how it is affecting U.S. citizens today, and what can be done to combat this spreading problem. Understanding the impact that controlled substances have on particular industries is imperative to objectively consider what should be done about xylazine. This note argued that there is too little known about how xylazine contributes to the already increasing opioid-related overdose death rates to run headfirst into adopting legislation that impacts a multi-billion-dollar domestic

266. *See id.* § 2D1.1.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* § 2D1.1(b)(6).

271. *Id.* § 2D1.1; *id.* § 5A.

industry. To adequately research xylazine, the U.S. government would be turning its attention away from the real threat, fentanyl. Allowing states to criminalize xylazine possession provides the necessary flexibility to make the greatest impact on that individual state's public health. Doing so enables states whose populations rely on the veterinary industry and are not experiencing a xylazine-related public health crisis to protect their state economies and protect their population's welfare. Congress should throw out the "Combating Illicit Xylazine Act" and remain focused on fentanyl.