

CONFLICTS BETWEEN STATE AND FEDERAL MARIJUANA LAWS

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRESS FIRST SESSION

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**CONFLICTS BETWEEN STATE AND FEDERAL
MARIJUANA LAWS
TUESDAY, SEPTEMBER 10, 2013**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:45 p.m., in Room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Blumenthal, and Grassley.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. I have mentioned to the witnesses the reason for the delay. It was because I was talking to Senator Grassley, who is going to be joining us shortly. He has been in a very important meeting with the President on the situation in Syria. The President met with the Senate Democrats earlier and now he is meeting with the Senate Republicans. It is a gravely serious matter, as I am sure all of you know, and I mentioned this to Deputy Attorney General Cole earlier also.

Today's hearing also deals with a serious issue, and I trust that members of the public here will act accordingly. I want to note at the outset that the rules of the Senate prohibit outbursts, clapping, or demonstrations of any kind either for or against any position I might take or anybody else might take. That includes blocking the view of people around you.

I am glad to have this hearing room where we can accommodate as many as we possibly can, and we have overflow rooms with a television. But please be mindful of the rules when we conduct these hearings, and, of course, the Capitol Police will be authorized to remove anyone who does not follow these rules.

Now, last November, the people of Colorado and Washington voted to legalize the possession and use of small amounts of marijuana and to regulate how marijuana is produced and distributed in their States. These new laws are just the latest examples of the growing tension between federal and State marijuana laws, and they underscore the persistent uncertainty about how such conflicts are going to be resolved.

Should the Federal Government arrest and prosecute marijuana users in States where they might be in full compliance with State law? Or should the Federal Government take a completely hands-off approach and let drug laws and policy develop on a State-by-State basis? Or is there some middle-ground approach that considers both the national interests and the fundamental principles of federalism, including the rights of voters to decide what is best

for their own individual States? So the Committee is going to hold the first congressional hearing on these issues since the new laws passed in Colorado and Washington, and it presents an important opportunity to hear from some of the people who are directly involved in grappling with these complex questions.

Of course, much of the focus of today's hearing is going to be on what is happening in Colorado and Washington, but the questions and issues we have today are going to have implications for the rest of the country. Marijuana use in this country is nothing new, but the way in which individual States deal with marijuana usage continues to evolve. Some States, like my own State of Vermont, have decided to allow the use of marijuana by patients with debilitating medical conditions. As a result, Vermonters who suffer from diseases like multiple sclerosis, cancer, and AIDS now are able to use medical marijuana to at least treat the symptoms of their conditions. In addition, some States, including Vermont, have simply decriminalized marijuana, imposing civil fines on marijuana users rather than criminal penalties.

To date, and as shown on this map, we have a total of 21 States that have legalized marijuana for medical purposes, and 16 of those States have decriminalized the possession of small amounts of marijuana. But every one of these changes in State marijuana laws has taken place against the same background: the possession of any amount of marijuana is still a criminal penalty under federal law.

Now, the question I have is: What role should the Federal Government play in those States where marijuana use is legal? I think it is important for us to identify the areas in which there is broad agreement and common ground. For example, the Federal Government and those States that have legalized marijuana in some way all agree on the necessity of preventing the distribution of marijuana to minors. Likewise, there is agreement about the need to prevent criminal enterprises from profiting from marijuana sales, the goal of reducing violent crime, and the dangers associated with drugged driving. These are important safety concerns, and I appreciate everybody who is acting to address them, in federal, State, and local law enforcement.

Now, I hope, though that there might be agreement on the fact that we cannot be satisfied with the status quo. We know the black market for illegal marijuana in this country endangers public safety. The black market continues to contribute to violence along the southwest border. It continues to thrive despite the billions of dollars that have already been spent on enforcement efforts at the federal, State, and local levels. It is also clear that the absolute criminalization of personal marijuana use has contributed to our Nation's soaring prison population and has disproportionately affected people of color. And in this context, it is no surprise that States are considering new, calibrated solutions that reach beyond the traditional laws. Anybody, including two of us right here, who has been a prosecutor knows that you cannot begin to prosecute all the laws that are on the books. You do not have the resources. The question is: What resources should we use and where?

I asked the administration last December for its responses to the measures, especially in Colorado and Washington. It took some

time, but I am encouraged by the policy guidance that the Deputy Attorney General recently provided to federal prosecutors. Federal agents and prosecutors have scarce investigative resources. I really do not think they should be devoting them to pursuing low-level users of marijuana who are complying with the laws of their States. As the President said last year, there are bigger fish to fry. And I am glad that the Justice Department plans to commit its limited resources to addressing more significant threats.

I appreciate that Deputy Attorney General Cole, who is no stranger to this Committee, is here to answer questions. But I also look forward to hearing from the witnesses from Colorado and Washington. They see these issues not in the abstract but day by day in their State. I want them to explain the decisions in their States and the implementation of those decisions.

I hope today's hearing will also shine a light on how a series of federal laws poses significant obstacles to effective State implementation and regulation of marijuana, including existing federal laws and regulations in areas such as banking and taxation. We have to have a smarter approach to marijuana policy, and that can only be achieved through close cooperation and mutual respect between the Federal Government and the States.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Whitehouse, did you wish to—

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S.
SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Let me thank the Chairman for holding this important hearing. We have States, as the Chairman's map of the country's quilt of different approaches demonstrated, that have taken very different ways of dealing with marijuana use, particularly for minor, very small amount individual users, and for those for whom it is adjudged to be medically necessary. Rhode Island permits medical marijuana and recently decriminalized the possession of small amounts of marijuana. Our Governor, Governor Chafee, has asked the Drug Enforcement Administration to declassify marijuana as a Schedule II substance, which would allow it to be prescribed.

It strikes me that the areas in which the States are loosening up restrictions on the use of marijuana are virtually entirely also areas in which the need for federal prosecution, and the rationale for the use of scarce law enforcement and prosecutive resources is extremely low. So there does not seem to be an underlying need for conflict between federal prosecution policies and State marijuana policies, and yet I believe that in the past, largely due to uncertain and often inconsistent policies from the Department of Justice, there has been created an artificial conflict. And I think the new memo helps clarify that, and I look forward to this hearing helping to clarify it further. And I thank the Deputy Attorney General, whom I respect very much, for coming here to discuss this issue with us, and I thank the Chairman for holding this important hearing.

Chairman LEAHY. Senator Grassley.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.
SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Mr. Chairman, I would like to give my opening statement.

Chairman LEAHY. Certainly. Go ahead.

Senator GRASSLEY. Thank you. Of course, I thank you very much for holding today's hearing about the conflict between federal and State laws. Since Congress passed the Controlled Substance Act, the cultivation, trafficking, sale, and use of marijuana have been illegal under federal law. Marijuana's continued presence on the statute's list of illegal substances is not based on whim. It is based on what science tells us about this dangerous and addictive drug. There is a process that exists to move drugs on and off that list, but the scientific standard to do that has not yet been met for marijuana.

Marijuana is not only illegal under laws passed by Congress, it is illegal under international law as well. The United States and 180 nations have signed the Single Convention on Narcotic Drugs. This treaty requires the United States to limit the distribution and use of certain drugs, including marijuana, for exclusively scientific and medical use. It is something this country gave its word to do, and it is a commitment that our country and many others have benefited from through improved public health.

Yet in 2012, Colorado and Washington decided to be the first jurisdiction in the world to legalize the cultivation, trafficking, sale, and recreational use of marijuana. These laws flatly contradict our federal law. Moreover, these laws have nothing to do with the controversy about whether marijuana has an appropriate medical use. Some experts fear they will create a big marijuana industry, including a Starbucks of marijuana that will damage public health, and it seems unlikely that we will be able to confine that industry's effect to adults and those within the States of Colorado and Washington. And the response of the Department of Justice is not to sue to strike down the laws or to prosecute illegal drug traffickers, but just to let these States do it.

These policies do not seem to be compatible with the responsibility our Justice Department has to faithfully discharge their duties, and they may be a violation of our treaty obligations.

Prosecutorial discretion is one thing, but giving the green light to an entire industry predicated on breaking federal law is quite another. These policies are another example of this administration ignoring laws that it views as inconvenient or that it does not like. Whether it is immigration laws or Obama deadlines, the list is long, and it hardly needs repeating.

But what is really striking in this case is that the Department of Justice is so quick to challenge State laws when it does not like or want to enforce them. States that change their voting laws to require an ID, well, we will see you in court. States that try to secure their borders when the Federal Government will not, expect a lawsuit. But if some folks want to start an industry dedicated to breaking federal law, well, then the Department's position is to wait and see how it works out.

But we already have a pretty good idea how it works out, and the answer is: Badly.

Take Colorado as an example. Since it has legalized and attempted to regulate medical marijuana, what have we seen? From 2006 to 2011, a 114-percent increase in driving fatalities involving drivers testing positive for marijuana. Comparing 2007 through 2009 with 2010 through 2012, a 37-percent increase in drug-related suspensions and expulsions from Colorado schools, a sharp increase in marijuana exposure to young children, many resulting in trips to poison control centers or hospitals; and in the words of Colorado's Attorney General, the State is becoming "a significant exporter of marijuana to the rest of the country."

The statistics on this point are shocking, but not surprising, given simple economics. From 2005 to 2012, there was a 407-percent increase in Colorado marijuana interdiction and seizures that were destined for other States. In 2012 alone, there were interdictions in Colorado bound for 37 different States. One of those States was my home State of Iowa. In 2010, Colorado was the source State for 10 percent of all marijuana interdictions in Iowa. That number grew to 25 percent in 2011 and to 36 percent in 2012.

Now, this was all before full legalization in Colorado. What do you think this number will be next year? Is the Federal Government prepared to pay for law enforcement costs it is imposing on States like Iowa because it refuses to enforce federal law? In 2012, the proportion of Iowa juveniles entering substance treatment primarily due to marijuana reached its highest point in 20 years. How many more of Iowa's daughters and sons will go into treatment next year because the Department will not enforce federal law? There is no amount of money that can make Iowa whole for that.

I have a letter from the Director of the Iowa Office of Drug Control Policy to the Attorney General that lays out some of these statistics. The Director requested that the Department consider this decision, and I ask that that be included in the record.

Chairman LEAHY. Without objection.

[The letter follows appears as a submission for the record.]

Senator GRASSLEY. Of course, the Department would have known many of these things had it consulted with the folks on the ground before making those decisions. These are people who see the effects of marijuana addiction and abuse every day.

I also have here a letter to the Attorney General from many of the major State and local law enforcement organizations in the United States and likewise ask to put that in the record.

Chairman LEAHY. Without objection.

[The letter follows appears as a submission for the record.]

Senator GRASSLEY. I understand representatives of many of these organizations had asked to be consulted in advance of the Department's decision, and they were told that they would be. However, they wrote, "It is unacceptable that the Department of Justice did not consult our organizations whose members will be directly impacted for meaningful input ahead of this important decision. Our organizations were given notice just 30 minutes before the official announcement was made public and were not given the adequate forum ahead of time to express our concerns with the Department's conclusion on this matter. Simply checking the box by alerting law enforcement officials right before a decision is announced is not enough and certainly does not show an under-

standing of the value of the Federal, State, local, and tribal law enforcement partnerships bring to the Department of Justice and to public safety.”

I will put the rest of my statement in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our first witness is James Cole, as I said, the Deputy Attorney General of the Department of Justice. In that capacity, he helped the Department update marijuana enforcement policies following the recent State-level developments that I discussed earlier. He first joined the Department of Justice in 1979 and served for 13 years in the Criminal Division, later becoming the Deputy Chief of the Division’s Public Integrity Section before entering private practice.

Mr. Cole, it is always good to have you here. Please go ahead, sir.

STATEMENT OF HON. JAMES COLE, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. COLE. Thank you, Chairman Leahy, Ranking Member Grassley, Senator Whitehouse. I am pleased to speak with you about the guidance that the Department recently issued to all United States Attorneys regarding marijuana enforcement efforts. That guidance instructs our prosecutors to continue to enforce federal priorities, such as preventing sales of marijuana by criminal enterprises, preventing violence and the use of firearms in the cultivation and distribution of marijuana, preventing distribution to minors, and preventing the cultivation of marijuana on public lands—priorities that we historically have focused on for many years—and it also notes that we will continue to rely on State and local authorities to effectively enforce their own drug laws as we work together to protect our communities.

As you know, the relevant federal statute, the *Controlled Substances Act of 1970*, among other prohibitions, makes it a federal crime to possess, grow, or distribute marijuana, and to open, rent, or maintain a place of business for any of these purposes.

For many years, all 50 States have enacted uniform drug control laws or similar provisions that mirrored the CSA with respect to their treatment of marijuana and made the possession, cultivation, and distribution of marijuana a State criminal offense. With such overlapping statutory authorities, the Federal Government and the States traditionally worked as partners in the field of drug enforcement. Federal law enforcement historically has targeted sophisticated drug traffickers and organizations, while State and local authorities generally have focused their enforcement efforts, under their State laws, on more localized and lower-level drug activity.

Starting with California in 1996, several States authorized the cultivation, distribution, possession, and use of marijuana for medical purposes under State law. Today, 21 States and the District of Columbia legalize marijuana for medical purposes under State law, including six States that enacted medical marijuana legislation this year.

Throughout this time period, the Department of Justice has continued to work with its State and local partners, but focused its own efforts and resources on priorities that are particularly important to the Federal Government. The priorities that have guided our efforts are as follows:

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

Examples of our efforts have included cases against individuals and organizations who were using the State laws as a pretext to engage in large-scale trafficking of marijuana to other States; enforcement against those who were operating marijuana businesses near schools, parks, and playgrounds; and enforcement against those who were wreaking environmental damage by growing marijuana on our public lands. On the other hand, the Department has not historically devoted our finite resources to prosecuting individuals whose conduct is limited to the possession of marijuana for personal use on private property.

In November 2012, voters in Colorado and Washington State passed ballot initiatives that legalized, under State law, the possession of small amounts of marijuana and made Colorado and Washington the first States to provide for the regulation of marijuana production, processing, and sale for recreational purposes. The Department of Justice has reviewed these ballot initiatives in the context of our enforcement priorities.

On August 29, 2013, the Department notified the Governors of Colorado and Washington that we were not at this time seeking to preempt their States' ballot initiatives. We advised the Governors that we expected their States to implement strong and effective regulatory and enforcement systems to fully protect against the public health and safety harms that are the focus of our marijuana enforcement priorities, and that the Department would continue to investigate and prosecute cases in Washington and in Colorado in which the underlying conduct implicated our federal interests. The Department reserved its right to challenge the State laws at a later time in the event any of the stated harms do materialize—either in spite of a strict regulatory scheme, or because of the lack of one.

That same day, the Department issued a guidance memorandum to all United States Attorneys directing our prosecutors to continue to fully investigate and prosecute marijuana cases that implicate any one of our eight federal enforcement priorities. This memo-

random applies to all of our prosecutors in all 50 States and guides the exercise of prosecutorial discretion against individuals and organizations who violate any of our stated federal interests, no matter where they live or what the laws in their States may permit. Outside of these enforcement priorities, however, the Department will continue to rely on State and local authorities to address marijuana activity through the enforcement of their own drug laws. This updated guidance is consistent with our efforts to maximize our investigative and prosecutorial resources in this time of budget challenges, and with the more general message the Attorney General delivered last month to all federal prosecutors, emphasizing the importance of quality priorities for all cases we bring, with an eye toward promoting public safety, deterrence, and fairness.

Our updated guidance also makes one overarching point clear: the Department of Justice expects that States and local governments that have enacted laws authorizing marijuana-related conduct will implement effective regulatory and enforcement systems to protect federal priorities and the health and safety of every citizen. As the guidance explains, a jurisdiction's regulatory scheme must be tough in practice, not just on paper.

[The prepared statement of Mr. Cole appears as a submission for the record.]

Chairman LEAHY. Thank you. You know, I worry about the extent to which we have some who do not take the position or are unwilling to follow it and may create further problems. For example, the banking industry is not willing to provide services to State-authorized marijuana dispensaries. They fear they may be violating federal money laundering laws. So then the State authorized marijuana dispensaries and they started operating as a cash-only business, with no access to bank accounts or credit card transactions. That is a prescription for problems, tax evasion and so on. And we are hearing that the DEA agents, in what seems to me like a significant step away from reality, are instructing armored car companies to cease providing services to marijuana dispensaries, almost as if they are saying, "Get out of there so we can have some robberies."

Now, I am sure it is not stated that way, but I worry that sometimes a bureaucracy trumps reality, as it has in this case with the DEA.

So what is the Department going to do to address these concerns? What sort of guidance are you giving to States about these banking and tax issues?

Mr. COLE. Chairman Leahy, as far as the banking issue is concerned, we agree it is an issue that we need to deal with. When the Attorney General talked to the Governors of Washington and Colorado, they raised the same issue, and others have raised the same issue.

Obviously, there is a public safety concern when businesses have a lot of cash sitting around. There is a tendency that there are guns associated with that, so it is important to deal with that kind of issue. And we are at the present time talking with FinCEN, and they are talking with and bringing in bank regulators to discuss ways that this could be dealt with in accordance with the laws that we have on the books today.

Chairman LEAHY. You may want to talk with DEA, too.

Mr. COLE. Well, as far as DEA is concerned, Mr. Chairman, I certainly had heard about that. From what I understand, DEA was merely asking questions of the armored car companies at the time as to what their practices are. I think those questions occurred before the guidance memo was put out, and certainly at the present time I do not believe there is any effort to instruct the armored car companies not to do anything at this point.

Chairman LEAHY. The implication is out there, and I would hope that it will get cleared up because I do not want to see a shoot-out somewhere and have innocent people or law enforcement endangered by that. So I think there should be specific guidance to the financial services industry and the Treasury Department.

Now, you have noted that the Department generally does not prosecute individuals for using small amounts of marijuana on private property, which I think is sort of the general attitude of most State prosecutors. They usually have real problems to deal with. You said the Department is targeting sophisticated and large-scale drug traffickers. They rely upon State and local law enforcement to go after lower-level drug activity, although they are usually overwhelmed with things that really affect people.

In the wake of the recent guidance, we have heard some concerns that the Federal Government is abdicating its responsibility for enforcing drug laws in Colorado or Washington State, and that the Department's decision will lead to free-for-all drug activity in those States.

I assume you do not agree with that characterization that the Justice Department is abdicating its responsibility for enforcing federal drug laws in those States.

Mr. COLE. I do not agree with it at all, Mr. Chairman. I think it is quite the contrary. What I think is very clear in our memo is that we are going to aggressively enforce the *Controlled Substance Act* when it implicates any of the eight priorities that are listed there, and I think that is a pretty fulsome list of priorities of important public safety issues that are present and associated with marijuana.

We expect to continue to enforce the CSA in every State, whenever a priority is implicated, whether the State has a State law legalizing marijuana or not. We are not giving immunity. We are not giving a free pass. We are not abdicating our responsibilities. We are dedicating ourselves to enforcing the *Controlled Substances Act* in regard to marijuana when it implicates those federal priorities.

Chairman LEAHY. Are you going to monitor the implementation of the regulatory system in these States?

Mr. COLE. We will certainly be looking at how they go about implementing it, and we hope that they will be doing it in a full and robust way. But largely how we operate is on a case-by-case basis, and when we see somebody who is marketing marijuana in a way that is going to be attractive to minors, we are going to go after them. If we see somebody who is growing and cultivating marijuana so they can export it out of State, we are going to go after them. If they are involved in drug cartels and illegal enterprises, we are going to go after them.

Chairman LEAHY. Now, you stated in your testimony that the Department reserves its right to file a lawsuit challenging the State laws in Colorado and Washington at a later time. The law is clear, of course, that the Federal Government cannot force a State to criminalize a particular type of conduct or activity. So such a lawsuit would have to challenge the State laws focusing on the regulatory framework set up by them but not on the question of telling them what they have to criminalize or not criminalize. Is that correct?

Mr. COLE. That is correct, Chairman Leahy. This was a difficult issue that we had to contend with in deciding whether or not to seek any preemption action here, because it would be a very challenging lawsuit to bring to preempt the State's decriminalization law. We might have an easier time with their regulatory scheme in preemption, but then what you would have is legalized marijuana and no enforcement mechanism within the State to try and regulate it. And that is probably not a good situation to have.

Chairman LEAHY. Kind of an incentive for a black market, isn't it?

Mr. COLE. Very much so, sir, and money going into organized criminal enterprises instead of going into State tax coffers and having the State regulate from a seed-to-sale basis.

Chairman LEAHY. Basically everything the State voted for you would be trying to overturn.

Mr. COLE. We would be trying to overturn that, and yet there would still be decriminalization of marijuana, so it would still exist in the State.

Chairman LEAHY. Thank you.

Senator Grassley.

Senator GRASSLEY. Mr. Cole, I have three questions, but before I do that, I want to take 30 seconds out of my own time to bring an issue up that I think you can help us with.

The DEA is refusing to comply with its legal obligations to provide GAO access to DEA records. Senator Whitehouse and I have a GAO request for a report on drug shortages that is being delayed because of DEA's refusal. I tried to help resolve the issue, but the Justice Department told DEA not to even meet with me and GAO to discuss it. So I think that is unacceptable. I understand that you admitted to the Comptroller General that DEA has a legal obligation to comply. However, the Justice Department and DEA are still withholding records from the GAO. There is no point in wasting time and the taxpayers on litigation with GAO, but that is where this is headed if DEA does not comply.

So as Deputy Attorney General, I hope you can help us, to work with us in Congress to solve this dispute. DEA needs to provide GAO the information it needs to do its work. I do not expect you to respond to that now, but I want you to know how I feel about it, doing my job of oversight, and there is a distinguished Member of the majority that is interested in it as much as I am.

Mr. COLE. Thank you, Senator. I have actually been in contact with the Deputy Administrator at GAO to discuss this once already. We are planning on having another conversation in the next week, I hope, and I am on top of this, Senator.

Senator GRASSLEY. God bless you.

The Cole memorandum suggests that the Department will not seek to enforce the Controlled Substances Act except for certain federal priorities so long as the States that legalize marijuana implement effective regulatory schemes. Those priorities include the diversion of marijuana from Colorado to other States, increased use among minors, and increased fatalities from drugged driving. Yet Colorado has seen a sharp uptick in each of these three priorities over the past few years. Moreover, a recent audit concluded that the Colorado Department of Public Health “does not sufficiently oversee physicians who make medical marijuana recommendations.”

Another recent audit found that the city of Denver did “not have a basic control framework in place” to regulate its medical marijuana program. Denver did not even know how many marijuana businesses were operating in the border.

So my question: Why has the Department decided to trust Colorado to effectively regulate recreational marijuana when it is already struggling to regulate medical marijuana and federal priorities are already being negatively impacted? Before you answer, would the Department establish metrics concerning these priorities that will trigger when it will take action to either challenge these laws or more vigorously enforce federal law?

I want to give you an example. From 2005 to 2012, there was a 407-percent increase in Colorado marijuana interdiction seizures that were destined for other States. How high would that number have to go to trigger a change in policy? I hope this is something that you have thought about.

Mr. COLE. Senator Grassley, we have thought a great deal about these issues. I am certainly aware of the audit that was done in Colorado about the enforcement of their regulatory scheme under medical marijuana, and it was disappointing.

I think along the lines of what I talked to Chairman Leahy about, there are no perfect solutions here. And what we were faced with was a situation where we could not, we thought, be very successful in trying to preempt the decriminalization. So if we just went after their regulatory scheme, instead of just having a bad one, they would have no regulatory scheme.

Our hope is that with this memo and with the engagement with the State, telling them, as we say, trust but verify, that they will have an incentive to actually put in a robust scheme that will, in fact, address a lot of these issues that you have raised and everyone else has raised and that are valid issues in this area. And we are hoping that that kind of effort by the State in enforcing its own State laws will have a better effect than having no effort whatsoever.

So I understand the skepticism that you come to it with. We are looking at it in terms of a trust-but-verify method. We will be following what is going on. We have reserved quite explicitly the right to go in and preempt at a later date if we feel that that is in the public interest. And I think we are at a point now where we are trying to find the best of the imperfect solutions that are before us.

Senator GRASSLEY. Question number two: You heard in my opening statement how the Department did not consult with major State and local law enforcement groups or with former DEA Ad-

ministrators when reaching policy decisions. Did the Department consult with anybody at DEA, HHS, or the State Department about these policies? And if not, why not? And if so, what were their views?

Mr. COLE. Well, we did consult with HHS; we consulted with DEA, ONDCP. We even heard from many of those groups who wrote that letter. The Attorney General and I this morning met with those groups in the Attorney General's conference room for about an hour and a half. We had received a lot of input from them concerning this matter prior to the decision that we made. We stated to them quite clearly today that we should have reached out to them one more time before we made the decision, and we apologized to them for not making that extra effort. We believed that we understood their position, but we have been such good partners with them that we owed them one more conversation and one more opportunity for them to weigh in, and we asked their forgiveness and going forward assured them that we would be giving them that kind of opportunity.

So we did seek out other views in coming to this. We tried to be careful. We tried to be responsible, and we tried to look at all of the avenues of it. And, in fact, much of the input that we got from them and much of what you have been talking about as the concerns that are around this helped us to be able to crystallize and articulate in our eight different areas what it is uniformly throughout the country what we think are the problems that trigger federal enforcement in this area. So we thanked them for that.

Senator GRASSLEY. My last question. In 2010, Colorado was a source State for 10 percent of all marijuana interdiction in Iowa. That number grew to 25 in 2011, 36 percent in 2012. This is all before legalization of recreational use in Colorado was passed. In the words of Colorado Attorney General, the State is becoming "a significant exporter of marijuana to the rest of the country." The Department's decision not to enforce federal law is obviously imposing costs on States outside of Colorado and Washington. These include public health costs and law enforcement costs.

I would normally ask this question. I am going to make a statement. If I am wrong—I doubt if the Federal Government has plans to reimburse the States for these costs. If I am wrong on that, tell me.

My question: What do you plan to do to protect States like Iowa from marijuana diverted from States like Colorado?

Mr. COLE. I think there are two ways that we are hoping to approach this. One is that if the States really do put in the kind of robust system that we are asking them to, where there is control from seed to sale, that it will help really tamp down that kind of export out of Colorado into other States. And, second, and at least as importantly, one of the main priorities we have is the export of marijuana from States that make it legal to any other State, and that will be a federal enforcement priority. If it is being exported from Colorado to Iowa and we find out about it, we will prosecute it.

Senator GRASSLEY. Mr. Chairman, just a short follow-up. In a previous question, the second question I had, you said you con-

sulted with State, HHS, and DEA. Did they agree with the new policy that you have announced?

Mr. COLE. You know, Senator, we had a thorough discussion with them. I do not think it is always appropriate to go into what the internal deliberations are that take place, but we got everybody's views, and we had a thorough discussion and aired it out. And this was a well-thought-through process.

Senator GRASSLEY. Thank you.

Chairman LEAHY. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Mr. Cole, let me just kind of recap what brought us to this point because I do not think we were in a very good place to begin with. I begin with the Ogden memorandum from 2009 which indicated that it would not be a federal enforcement priority to prosecute, and I quote, "individuals whose actions are in clear and unambiguous compliance with existing State laws." And then it gave as an example individuals with cancer or other serious illnesses, as another example, "or those caregivers in clear and unambiguous compliance with existing State law." It then distinguished commercial enterprises that unlawfully market and sell marijuana for profit, and a close reading of the paragraph indicates that the term "unlawfully" refers to State law, because the following sentence talks about operations inconsistent with the terms, conditions, or purposes of those laws, meaning State laws.

So we come out of the Ogden memorandum with protection from federal prosecution for patients, caregivers, and lawful commercial enterprises that are "in clear and unambiguous compliance with State laws." Among other things, that would presumably include dispensaries.

So the next thing that comes out is the U.S. Attorney's letter, which I assume is a Department of Justice product because all of the U.S. Attorney letters that came out were identically phrased, so I do not think this was a unique one to Rhode Island. Now those protected from federal prosecution are limited to seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with State law. There is no longer any mention of caregivers. And further in the paragraph it says that the Department of Justice maintains the authority to enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity, only for purposes of this paragraph, the term "unlawful" has been reversed to now mean federal law and eliminate any shelter of State law.

So there was a dramatic difference, I believe, between the Ogden memo and the U.S. Attorney's letter, and it created immense confusion, which you then sought to clarify somewhat in your June 29, 2011, memo, which said that it will protect individuals with cancer or other serious illnesses, and now caregivers were back. They were out in the U.S. Attorney's letter. They came back in your letter. Caregivers are back in. And then you said, but it would not apply to commercial operations, cultivating, selling or distributing marijuana. You just dropped out the word "unlawful" rather than have to deal with whether that word applied to federal law or State law. And then you added that those who engage in transactions involv-

ing the proceeds of such activity might be prosecuted, so somebody that was paid with money that was earned by one of these folks.

The U.S. Attorney's letter had also singled out landlords and property owners and financiers for prosecution. So as you can imagine, this was a mess.

So I appreciate very much that the August 29th letter straightened out that mess considerably. I do not dispute the sense of the eight different federal priorities, but I just want to—actually there is considerable but imperfect overlap between your eight priorities and the priorities from the original Ogden memo, lo those many years and memos ago.

But let me just be clear. As long as they are not the proper subjects of federal prosecution under the eight 2013 federal interests, a dispensary can do business as long as it is in clear and unambiguous compliance with State law. Correct?

Mr. COLE. I think the proper way to phrase it, Senator Whitehouse, is, as long as they are not violating any of the eight federal priorities in the course of what they are doing, that the Federal Government is not going to prosecute them. And the State law is up to State enforcement.

Senator WHITEHOUSE. Understood.

Mr. COLE. But there also is, just in all fairness, there is a catch-all at the end, and it is not meant to swallow the entire memo, but you cannot anticipate everything that is going to come in the future. So there is an ability, if it is an important enough matter that we had not anticipated, to prosecute another kind of case even if it does not fall within the eight priorities.

Senator WHITEHOUSE. Understood. And those who receive proceeds from a lawful and proper State law enterprise will also not be prosecuted unless they violate one of the eight federal interests?

Mr. COLE. This is something that we are trying to work through with the banking regulators, because the memo really talks about the *Controlled Substances Act*. Now, the prosecution otherwise on the banking end would be with the money-laundering statutes, and those I think are separate matters, but as I have said in answer to Chairman Leahy's questions, ones that we need to deal with. There is a lot of public safety and public interest aspects of that that I think we need to deal with as we go down this road, and we are working on that.

Senator WHITEHOUSE. But you are not intending to put people who are simply getting their bills paid by a proper, lawful State law enterprise from being the subject—it is not your intention that they be the subject of prosecution, in the same way that if you knew it was a criminal cartel and, no matter what your business is, the proceeds of that cartel carry some taint with them, and you can go after individuals—just because they receive money, you can, if nothing else, reclaim the funds as the proceeds of criminal activity. You are not intending to use that unless those eight federal interests are implicated.

Mr. COLE. I think that is part of what we are trying to work through right now in trying to deal with the money-laundering aspect of it. But certainly this memo is meant to guide our enforcement efforts concerning marijuana in regard to the *Controlled Sub-*

stances Act, and it will probably spill over in other ways as we are trying to work through these issues.

Senator WHITEHOUSE. And, similarly, property owners, landlords, and financiers should not fear federal prosecution unless they implicate those eight federal interests.

Mr. COLE. Certainly a lot of that is covered by the *Controlled Substances Act*, so that will be directly within the ambit of the memo. That is correct.

Senator WHITEHOUSE. Okay. Well, I think that helps clarify things.

Senator Grassley raised a number of concerns relating—and I thought from hearing them that all of them fell into the category of either involving children or involving effects in other States or involving a relationship with trafficking organizations. And just to be clear, it is my understanding that in all three of those situations, those are federal interests that would be implicated, and the Federal Government would be willing and able to prosecute in those areas.

Mr. COLE. That is correct.

Senator WHITEHOUSE. Thank you. My time has expired.

Chairman LEAHY. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. Thank you for having this hearing on a subject vitally important my home State of Connecticut. As you know, our law, a new law, currently allows the production and sale and use of marijuana for medicinal purposes in a regulatory regime that I think is fairly straightforward and complete, and certainly indicates the will of our legislature in our State that Connecticut wants to move in the direction of providing legal access to this kind of substance. Essentially it decriminalizes statutes so that anyone found in possession with less than half an ounce of marijuana will be subject to a citation rather than criminal action, and it, I think, mirrors other State laws that contain similar kinds of provisions.

I do not want to speak for the Department of Justice, but my guess is there are very few cases authorized by the Department of Justice that involve simple possession of small amounts of marijuana currently. That has been the ongoing practice for some time, has it not?

Mr. COLE. I think that is correct, and from what we heard from the State and local law enforcement organizations this morning, they say there are very few of those under State law as well.

Senator BLUMENTHAL. Right. So that current practice will not be altered by anything in the memorandum, as I read it.

Mr. COLE. That is correct.

Senator BLUMENTHAL. And in terms of some of the other priorities, my assumption is that the enforcement efforts there on individual prosecution cases would depend to some extent on the amounts of marijuana involved, would they not?

Mr. COLE. That is certainly a factor that is taken into account. It is not the sole factor.

Senator BLUMENTHAL. Would the resulting—and I apologize if this question has been asked—action by the Department of Justice, if there were not enforcement in some of these areas, involve a challenge to the statutory scheme? And how would that be

brought? Or would it involve individual prosecution cases? And how would you make those decisions?

Mr. COLE. Well, we did briefly talk before, in response to Chairman Leahy's question, about what the legal mechanisms would be to challenge the State laws. And, first of all, you start off with the *Controlled Substances Act* has in its body itself a disclaimer of preempting State laws in the area. Because that is explicit in it, you would only have a challenge if there is a conflict that is unreconcilable.

When you have a law that decriminalizes marijuana, it is a very big challenge to challenge that law on a preemption ground because it can co-exist with a federal law that criminalizes it. We can go ahead and enforce our federal law regardless of what the State law says.

We might be in a position and have a better case to try and challenge the regulatory scheme, but that puts you in a difficult position—there are no perfect solutions here—of having the legalization or decriminalization of marijuana and not even a legal structure for the State to try and regulate it. And that is not a very good solution either. None of them are very good in this field, frankly, but that seems to be one that takes you in the wrong direction.

Senator BLUMENTHAL. So the Department of Justice, as I understand your answer, would be very cautious and deliberate about any challenge to a regulatory scheme because the results might do more harm than good.

Mr. COLE. We are going to have to look at all the facts and circumstances that come up. We have certainly put the Governors of Colorado and Washington State on notice that we expect them to have robust systems. We hope that all the other States that have medical marijuana or any other sort of legalized system will view this memo as it should be taken, as telling them they ought to have a robust system to regulate the marijuana usage under their own State laws so that they deal with these eight priorities which we think are important. And then we will make our decisions as we see what kind of public interest issues are raised in the course of this and what the need is for us to take action.

Senator BLUMENTHAL. I understand that the memo deals only with *Controlled Substances Act*, but there are also provisions in the Tax Code that forbid deduction of expenses by some of these enterprises, non-criminal enterprises, dispensaries and others engaged in medicinal marijuana businesses.

Has the Department of Justice taken a position on changing the Tax Code to make those legitimate businesses eligible to deduct common State expenses?

Mr. COLE. We have not taken a position on changing that legislation. We think that is something that the U.S. Congress should probably in its wisdom take up and debate and determine what the appropriate course of action should be.

Senator BLUMENTHAL. But it would probably be consistent with your memorandum to have those expenses deducted, as long as none of the other priorities are infringed on.

Mr. COLE. Well, our memorandum is really focused on what the federal enforcement will be of the *Controlled Substances Act*. There are obviously other issues that spin off of that that do need to be

dealt with, and I think those are the kinds of things that the Senate and the House can debate and determine if there is an appropriate policy change to be made.

Senator BLUMENTHAL. And, finally, let me ask you about Connecticut. Have there been consultations with Connecticut officials about the implementation of that law?

Mr. COLE. Not that I am aware of right now, but the U.S. Attorney there I am sure has been in touch with them. But I am not positive.

Senator BLUMENTHAL. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator WHITEHOUSE. Mr. Chairman.

Chairman LEAHY. Yes, Senator Whitehouse.

Senator WHITEHOUSE. May I make one point before the Deputy Attorney General is excused?

Chairman LEAHY. Of course.

Senator WHITEHOUSE. You have three former prosecutors here, and so we clearly appreciate the flexibility that it is important for prosecutors to have, and we clearly appreciate the discretion that prosecutors enjoy and that should be protected by the Department. But at the same time, I think the Department would be well advised to listen to Senator Grassley's advice about trying to establish as clear metrics as you comfortably can, because there can be a lot of unintended consequences from the broad zone of uncertainty that you can create, and that can frankly be quite harmful in and of itself.

So I think in this area, and particularly with respect to the regulatory regimes and what you would expect to approve and disapprove, the more you can move toward the kind of metrics that Senator Grassley recommended, I think the better off you would be. I speak only for myself on that, but I think it is—that is my advice, anyway.

Senator BLUMENTHAL. If I may add, Mr. Chairman, I would second what Senator Whitehouse has just said, particularly as Senator Grassley has pointed out some of the banking implications. In Connecticut, my understanding is that some bankers are reluctant currently to be involved with marijuana businesses because they are fearful about violating federal law. And the clearer and more definitive you can make your expressions of prosecutorial policy, I think the more helpful it will be to them insofar as they are aiding legitimate businesses, not criminal enterprises, not businesses selling to minors and others who may violate your priorities. So I would second what Senator Whitehouse has just said.

Thank you.

Chairman LEAHY. Thank you very much. And, Mr. Cole, thank you very much.

Mr. COLE. Thank you, Mr. Chairman.

Chairman LEAHY. We will call up Sheriff Urquhart, who is the King County sheriff; Jack Finlaw, who is the chief legal counsel in the office of Governor Hickenlooper; and Kevin Sabet, who is the co-founder and director of Project SAM.

Sheriff Urquhart is the elected sheriff of King County in Washington State. He is the sheriff of the State's largest metropolitan

county, so I think he is particularly qualified to help us here. Sheriff Urquhart has been in law enforcement for more than 35 years. He has been a patrol officer, field training officer, master police officer, street-level vice and narcotics detective, public information officer, and administrative aide to several sheriffs.

Sheriff, would you go ahead and give your statement? Incidentally, I am advised we may have another Syria meeting, but all statements will be placed in the record in full. You will also be able, when you see the record, to add to things you said. So I would ask you to summarize your statement within the five minutes.

And I hate to say this, Sheriff, because I know you and others have traveled some distance to get here, and I appreciate you being here. Sheriff, go ahead.

**STATEMENT OF HON. JOHN URQUHART, SHERIFF, KING
COUNTY SHERIFF'S OFFICE, SEATTLE, WASHINGTON**

Mr. URQUHART. Thank you, Mr. Chairman, and at the risk of stating the obvious, I am a police officer. Thank you for having me here today. My name is John Urquhart. I am the sheriff of King County, Washington.

Seattle is located in King County, and with almost two million residents, we are the 14th largest county by population in the United States. I have over 1,000 employees in the sheriff's office and a budget exceeding \$160 million.

As sheriff, I am, therefore, the top law enforcement official in the largest jurisdiction in the country that has legalized marijuana.

I have been a police officer for 37 years, and I was elected as King County's sheriff last year. During my career, I have investigated everything from shoplifts to homicides. But I have also spent almost 12 years as a narcotics detective. My experience shows me that the War on Drugs has been a failure. We have not significantly reduced demand over time, but we have incarcerated generations of individuals, the highest incarceration rate in the world.

So the citizens of the State of Washington decided it was time to try something new. And in November 2012, they passed Initiative 502, which legalized recreational amounts of marijuana and at the same time created very strict rules and laws.

I was a strong supporter of Initiative 502 last year, and I remain a strong supporter today. There are several reasons for that support. Most of all, I support 502 because that is what the people want. They voted for legalized marijuana. We, the government, have failed the people, and now they want to try something else. Too often the attitude of the police is, "We are the cops and you are not. Don't tell us how to do our job." That is the wrong attitude, and I refuse to fall into that trap.

While the title of this hearing is conflict between State and federal marijuana laws, I do not see a huge conflict.

The reality is we do have complementary goals and values. We all agree we do not want our children using marijuana. We all agree we do not want impaired drivers. We all agree we do not want to continue enriching criminals. Washington's law honors these values by separating consumers from gangs and diverting the

proceeds from the sale of marijuana toward furthering the goals of public safety.

Is legalizing and regulating the possession and sale of marijuana a better alternative? I think it is, and I am willing to be proven wrong. But the only way we will know, however, is if we are allowed to try.

DOJ's recent decision provides clarity on how we in Washington can continue to collaborate with the Federal Government to enforce our drug laws while at the same time respecting the will of the voters.

It is a great step, but more needs to be done.

I hate to beat a dead horse here, but, for example, we are still limited by not knowing the role of banking institutions as we go forward.

Under federal law, it is illegal for banks to open checking, savings, or credit card accounts for marijuana businesses. The result is that marijuana stores will be operated as cash only, creating two big problems for me as a police officer: Cash-only businesses are prime targets for armed robberies; and cash-only businesses are very difficult to audit, leading to possible tax evasion, wage theft, and diversion of the resources we need to protect public safety.

I am simply asking the Federal Government to allow banks to work with legitimate marijuana businesses who are licensed under this new State law.

In closing, let me make one thing abundantly clear. What we have in Washington State is not the Wild Wild West. And as sheriff, I am committed to continued collaboration with the DEA, FBI, and DOJ for robust enforcement of our respective drug laws. For example, I have detectives right now that are assigned to federal task forces, including a DEA HIDTA Task Force. It has been a great partnership for many years, and that partnership will continue.

Furthermore, the message to my deputies has been very clear: You will enforce our new marijuana laws. You will write somebody a ticket for smoking in public. You will enforce age limits. You will put unlicensed stores out of business. In other words, the King County Sheriff's Office will abide by the standards and laws voted on and adopted by the citizens of the State of Washington and the guidance provided by the Department of Justice on August 29th.

Mr. Chairman, I say to you and the Members of this Committee, I do appreciate the deference the Federal Government has shown to my constituents, and I look forward to continuing that cooperation. Thank you.

[The prepared statement of Mr. Urquhart appears as a submission for the record.]

Chairman LEAHY. Thank you.

I am going to have each of the witnesses testify, and then we will go to questions. But certainly the testimony based on 35 years' experience in law enforcement is extremely helpful.

Mr. Finlaw is the chief legal counsel for the Governor of Colorado, John Hickenlooper. He served as co-chair of the task force that recommended the legislation and rules to implement Colorado's new constitutional provisions legalizing the possession, use, and sale of marijuana in the State. He thus has a unique perspec-

tive of the challenges facing States. They deal with the conflict between State and federal marijuana laws, and I believe prior to your current position, you were chief of staff to the mayor of Denver. Is that correct?

Mr. FINLAW. That is correct.

Chairman Leahy. Thank you. Please go ahead, sir.

STATEMENT OF JACK FINLAW, CHIEF LEGAL COUNSEL, OFFICE OF GOVERNOR JOHN W. HICKENLOOPER, DENVER, COLORADO

Mr. FINLAW. Thank you, Chairman Leahy, Ranking Member Grassley, Members of the Committee. I have been working for the past 10 months with a really large collection of Coloradans—stakeholders, government officials, members of the marijuana industry—to put together what we will affirm to you is a robust and strong enforcement regime.

You know, the voters of Colorado approved what we called Amendment 64 in 2012 by about 55 percent of the vote, even though the Governor, the Attorney General, and State leaders opposed the ballot initiative. But we determined with that sort of clear statement from the people of Colorado, we needed to effectively and efficiently implement the law. We began through a stakeholder process, through a task force, followed by very detailed enabling legislation by the Colorado General Assembly, and now just yesterday, the Colorado Department of Revenue issued 141 pages of regulations to regulate the industry.

Within days of passage of Amendment 64, the Governor, our Attorney General, got on the phone with General Holder and began this conversation about this conflict of federal and State law. And although we just recently, as we have talked about today, received official guidance, we do want to recognize that General Holder, the Justice Department, our U.S. Attorney, was very forthcoming about expressing federal law enforcement's concerns about this new legalization effort, and it really allowed us to focus our efforts to develop a robust regulatory and enforcement regime for marijuana in Colorado.

One of the things we did besides passing bills to regulate the industry, we enhanced tools for law enforcement by passing a new law that gives law enforcement the ability to better address the issues of impaired driving. We now have a law that provides that if a driver's blood contains five nanograms or more of THC, there is a permissible inference that the driver was driving under the influence.

We really appreciate the collaboration we have had with federal officials. We know we have more to do. As has been discussed today, we have audits critical of some of the things we have done in the past to address. I will say that the main reason that we have had failures of regulation of our medical marijuana industry is because we have lacked the resources to hire staff and partner with law enforcement. But we are sending to the voters this fall a marijuana tax measure that will provide the kind of revenue we need to hire staff to also work on public health issues related to marijuana and education and prevention efforts that we are determined to focus on.

The bottom line is we commend the Department of Justice for this guidance that they have issued in the new Cole memo. We think it was, for us, timely clarification because we were in the final weeks of doing our rules, and so we got it in time to make sure that our rules complied with the enforcement priorities outlined in the Cole memo. We actually affirm and embrace those eight priorities, and we look forward to working with the Federal Government. Our Department of Public Safety, our local law enforcement will work with federal law enforcement. We have a great working relationship with our U.S. Attorney, and I think that you will discover that not only will Colorado's regulators and law enforcement want to partner with federal law enforcement, but the industry will as well.

One of the things I have discovered in working on marijuana issues over the last 10 months is how entrepreneurial, how much integrity the folks in our State that have developed these new businesses have. I would compare them to folks that you have all met as you have toured wineries in Napa or gone to distilleries in your State, Mr. Chairman. I know they make some great rye whiskey in Vermont. These are the same types of folks who have established medical marijuana dispensaries, grow operations in Colorado, and they will be partners with us in making sure that minors do not have access to marijuana, that the marijuana does not flow to Iowa or other States.

I think that we look forward to a very successful regulatory regime, and I will echo the sheriff's comments and other comments we have heard today about the banking issue. It is both a law enforcement issue and a regulatory issue, and also the tax issue.

So we look forward to working with our Members of Congress to address those issues.

[The prepared statement of Mr. Finlaw appears as a submission for the record.]

Chairman LEAHY. Well, thank you, Mr. Finlaw.

And, without objection, I will also put in the written testimony of Washington Governor Jay Inslee and Washington Attorney General Bob Ferguson in the record. Their views are also important and relevant.

[The information referred to appears as a submission for the record.]

Chairman LEAHY. Our next witness is Kevin Sabet, who is the co-founder and director of Project SAM, Smart Approaches to Marijuana, and the director of the Drug Policy Institute of the University of Florida. He previously served in the Office of National Drug Control Policy in various capacities. He has written extensively about this topic.

Please go ahead.

STATEMENT OF KEVIN A. SABET, PH.D., DIRECTOR, UNIVERSITY OF FLORIDA DRUG POLICY INSTITUTE, DEPARTMENT OF PSYCHIATRY, DIVISION OF ADDICTION MEDICINE; AND DIRECTOR, PROJECT SAM (SMART APPROACHES TO MARIJUANA), CAMBRIDGE, MASSACHUSETTS

Mr. SABET. Thank you, Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, for pro-

viding me with the opportunity to appear before you today to discuss marijuana policy.

As mentioned, I have studied, researched, and written about drug policy for almost 18 years. I am currently the director and co-founder, with former Congressman Patrick Kennedy, of Project SAM (Smart Approaches to Marijuana).

Because we share the Obama administration's drug control goals of reducing drug abuse and its consequences, I and dozens of prevention, treatment, medical, and scientific groups around the country found the recent guidance by the Department of Justice disturbing on both legal and policy grounds. The guidance, which expressly defers the Department's right to challenge and preempt laws legalizing marijuana, contradicts the *Controlled Substances Act*, both on the policy and legal level, especially policy principles designed to protect public health and safety.

Colorado and Washington have now been given the green light to become the first jurisdictions in the world to allow for the creation of large, for-profit marijuana entities, far surpassing any reforms in Europe.

Now, I think I should mention that the *Controlled Substances Act* is an important tool for public health. In fact, by keeping marijuana illegal, its use is a sixth and a third lower than alcohol and tobacco, respectively, in the United States.

I applaud the way the *Controlled Substances Act* has been used so far by the Federal Government—not to go after low-level users with an addiction problem, but instead to target drug traffickers and producers. This is not about putting marijuana smokers in jail. In fact, analyses have long debunked the myths that our prison cells are full of people whose only crime was smoking marijuana.

Indeed, as a side note, if we were today to let out every single person in the United States for any drug offense, our incarceration rate in the U.S. would be four times its historical high, not five times. Still a massive incarceration problem, regardless of drug offenses.

Now, we do not have to wait for legalization to happen. For several years, many States like Colorado have been operating with a de facto legalization policy under the guise of medicine. In fact, we can get—and anybody who has been to Colorado since 2009 can get—a sense of full legalization. Mass advertising and promotion, using items that are attractive to kids, whether they are “medical marijuana lollipops,” “Ring Pots,” “Pot-Tarts” to mimic Pop Tarts. These are all characteristics of current policies.

The result, as mentioned, has been an increase in drug-related referrals for high school students and more unintentional marijuana poisonings now reaching children as young as five. And the fact that three-quarters of kids in treatment in Colorado today report that their marijuana came from a medical marijuana dispensary.

Now, this is all consistent with the recent National Bureau of Economic Research paper conducted by RAND researchers that found that two distinct features in marijuana policy increases use. Those two features are home cultivation and legal dispensaries. Now, these are found, obviously, in some States that have legalized this under medicine.

Now, this should matter because, despite popular myth, scientists from the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the American Society of Addiction Medicine—and we could go on and on—are universal in stating that marijuana is harmful for young people. Marijuana use, especially among young people, is significantly associated with a reduction in IQ, mental illness, poor learning outcomes, lung damage, and addiction. According to NIH, one out of every six kids who tries marijuana will become addicted, and last year, 400,000 emergency room admissions were applicable for marijuana.

Now, in Colorado, though traffic fatalities have fallen over the last six years, marijuana-related fatalities on the roads have increased.

Now, we already have evidence showing that in some cases, quote-unquote, medical marijuana is going to criminal enterprises and foreign drug-trafficking groups. We know, as Senator Grassley mentioned, about the diversion to other States and interdiction, and we also know, as mentioned, that two very damning State audits released in the last month shows that there has been no, quote-unquote, seed-to-sale nonvertical integration of marijuana policy in States that have allowed this for medical purposes. How on Earth can we think that a task so much more infinitely difficult of full legalization is going to be handled any better?

Now, right now, we are at a precipice. By threatening legal action, the administration can prevent the large-scale commercialization of marijuana. In fact, you all know, after spending decades of fighting Big Tobacco, we are now on the brink of creating Big Marijuana. An executive from Microsoft is teaming up with a former president of Mexico in their assertion that they will mint more millionaires than Microsoft in their creation of the Starbucks of Marijuana. This is what people in public health care about. The issue of a small amount used by an adult in the privacy of their own home is not what the initiatives in Colorado and Washington are about.

So I would just conclude by saying when we can prevent the negative consequences of commercial sale and production of marijuana now, why would we open the floodgates, hope for the best, and try with our limited resources later to patch everything up when things go wrong?

Thank you.

[The prepared statement of Mr. Sabet appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Let me go back to Sheriff Urquhart, because you have heard what Dr. Sabet has said, and others. And I am interested in your insight with 35 years in law enforcement, a significant part of that as a narcotics detective. Your sheriff's department is larger than all our law enforcement in Vermont put together. Those who criticize your State's initiative have asked whether legalizing small amounts of marijuana could result in increased drugged driving or illegal use by minors, cross-border trafficking. You have heard all those concerns. How do you address them from a public safety point of view?

Mr. URQUHART. I think what we need to do is continue doing what we have been doing all along, which is really robust enforcement. This is not going to change a whole lot. The rules that are in place or about to be in place in the State of Washington put a limit on the amount of marijuana that can be produced, and with the idea that they are only going to match demand. They are not going to produce enough so it can be exported to other States.

Now, that is not to say illegal marijuana grows, like I am sure is going on in Colorado, are not going to be exported. But we can go after those, and we will go after those. We do not expect what is grown legally under the new system to be exported.

As far as driving, under this new law we now have a way to go after people that are driving under the influence of marijuana. In the past, it was very, very difficult to get a conviction. Now we have a per se standard of five nanograms per milliliter of blood. Now we have a standard that we can use, just like we use 0.08 for driving under the influence of alcohol. We never had that before.

So one of the things that I am doing is retraining many of my deputies so they can be drug recognition experts, so when they go to the scene of a suspected drugged driver who is under the influence of narcotics, where there is any narcotic or marijuana, they can test that driver to see if they need to arrest that person and take them in for a blood test. It is something brand new.

Chairman LEAHY. I am not even sure we have that standard in my State of Vermont. I recall the frustration as a prosecutor when I was there because we did not have a standard we could use. Alcohol was easy. We had a very strict standard.

So your commitment is to enforce the law as it is in your State. Are there areas where the Federal Government can help you?

Mr. URQUHART. Absolutely. And I think the clarifying letter that came out on August 29th helped immensely. It removed the uncertainty that we had. It knows that they are going to allow the citizens of the State of Washington what they want, and what they want is legalized marijuana. And that is a very big deal, I think. It is going to take the criminal element as best we can out of the sale of marijuana, and that really was brought home to me just two nights ago when I was here in Washington, D.C. My chief of staff here in the front row, Chris Beringer, and I went out to dinner. We went to Old Ebbitt's Grill just two or three blocks from the White House. We are walking back to our hotel. It is about nine o'clock at night, but it is dark. We saw two gentlemen, young gentlemen, college age, walked up to a man standing on the corner, and says, "Hey, can I get some weed around here?"

Now, they certainly did not come up to us, but they did go up—

Chairman LEAHY. I take it you were not in your uniform.

Mr. URQUHART. I was not wearing this outfit, no.

[Laughter.]

Mr. URQUHART. But they did go up to the most sketchy guy on the block—the most sketchy guy on the block—to try and buy weed. That is going to go away in Washington, because they can go into a store—not a Starbucks store. They can go into a free-standing store and buy their marijuana legally. So they know what they are going to get. They know what the price is going to be. They do not have to go to that criminal element on the street cor-

ner at nine o'clock at night and solicit somebody to sell them marijuana. Our 502 is going to eliminate all of that, and that is a huge step forward.

Chairman LEAHY. My time is almost up, but I want to ask Mr. Finlaw a similar question, because I understand that Governor Hickenlooper did not support the constitutional amendment to legalize marijuana in Colorado, but it is very clear from your testimony that you intend to follow the law and make sure it works.

I understand that the lack of access to financial services, and the inability to deduct business expenses, for example, from federal taxes, are cited as hurdles to successful regulation of the marijuana business. Am I correct in that?

Mr. FINLAW. Yes, Chairman Leahy, you are correct. Thank you for raising that issue. You can understand that these businesses that are cash-only, that have dozens of employees, payroll to make; they are dealing with cash, not with credit cards, they are having to find loans from disreputable financial institutions, it is a great challenge. It is a criminal challenge as well as a regulatory challenge. It is criminal, of course, because any business that has that much cash on hand and is having to transport it is ripe for robbery.

It is also a regulatory challenge, because it will be so much easier to audit the books to make sure that the taxes are being paid, make sure that the rules that we put in place are being followed if the folks are doing business with a bank or credit union or other financial institution.

Chairman LEAHY. Thank you. My time is up. I have further questions that I can submit for the record.

Senator Grassley.

Senator GRASSLEY. I have a couple questions for Mr. Finlaw and one for Mr. Sabet. I will start with you, Mr. Finlaw. There has been a sharp uptick in drug-related suspensions and expulsions in Colorado schools in recent years, and in the State's second largest city, Colorado Springs, drug-related referrals for high school students testing positive for marijuana has increased every year between 2007 and 2012.

With legalization for recreational use, the challenges to protect youth will increase, and yet I understand that under certain circumstances the rules in Colorado will allow for marijuana advertising on television and radio. The rules will permit marijuana businesses to maintain Web sites that could be accessible by children, and the rules will permit marijuana-themed magazines to be sold in stores within the reach of children.

My question is: If I am right on those things I just cited, won't all these rules all effectively allow marijuana advertising to children? And then why do you believe that Colorado can successfully protect children from marijuana?

Mr. FINLAW. Senator Grassley, you raise some really important issues that we have been grappling with. Even the constitutional amendment authorizing marijuana has typically said that advertising directly to children can be prohibited. The enabling legislation and the new rules also do the same. So we have tried to develop rules that are narrowly focused on making sure that, whether it is print, television, radio, Web advertising, that it will not be targeted at young people. Cartoon characters and other advertising

that would be particularly appealing to young people are prohibited.

The final rule, which was based upon testimony at our rule-making hearings, provides that if there is to be advertising for marijuana, there has to be documentary evidence that the audience—that no more than 30 percent of the audience is young people. So that advertising will be restricted.

The problem we have had, one of the rules that was adopted in May has already been voided under First Amendment grounds. So we have First Amendment issues to grapple with as we try to restrict advertising.

But the good news is that the voters of Colorado are going to have an opportunity to approve a new tax in November that will give us the resources to develop sort of best practices for education and prevention efforts.

So what we intend to do is counter any ads with very, very strong and effective programming that will be public service programming that will be geared toward young people to let them know that—because we agree with you. We believe that for adolescents, marijuana is a danger, and we intend to educate them.

Senator GRASSLEY. Okay. Also, Mr. Finlaw, you had an interview with NPR in February: “We have very strict controls over who can have access to medical marijuana.”

There was an audit by your State in June concluded by the Colorado Department of Public Health “does not”—let me start over again. But an audit by your State in June concluded that the Colorado Department of Public Health “does not sufficiently oversee physicians who make medical marijuana recommendations.” The audit noted that one physician had recommended marijuana for over 8,400 patients.

Would you still stand by your statement that Colorado has strict control over who can have access to marijuana? And if so, why would you stand by it? And why with these damaging audit findings should the Department of Justice have confidence that Colorado can implement robust regulation of recreational marijuana?

Mr. FINLAW. Thank you. You are right. As a matter of fact, in our conversation with General Holder just a few weeks ago, he raised the same question to us. He asked us about those audits, and he told us we needed to address the issues that are raised in those audits, and we are committed to doing that.

The particular audit you talked about is the regulation over doctors who issue prescriptions. What I meant when I was quoted in February was that we have got really good medical marijuana rules and regulations. What we have not done a good job of is enforcing those because we have lacked the resources.

With the new tax coming, with the advent of legalized marijuana, we will have the resources to hire staff to enhance our oversight of doctors, of those other businesses that are involved in the marijuana world.

Senator GRASSLEY. My time is up. I will submit one question to you and one to Mr. Sabet for answer in writing. Thank you.

[The questions of Senator Grassley appear as submissions for the record.]

Senator WHITEHOUSE [presiding]. Sheriff Urquhart, let me ask you, are you familiar with the eight federal interest areas in the——

Mr. URQUHART. Yes.

Senator WHITEHOUSE. Are you satisfied with those?

Mr. URQUHART. Yes.

Senator WHITEHOUSE. From a law enforcement perspective, you think that they are adequate and appropriate?

Mr. URQUHART. Absolutely, and we will have no problem meeting those at all. Now, some of them do not apply necessarily straight to the sheriff's office, but many of them do. But from what I have seen from the regulatory standpoint that the State is enacting, I think it is going to work out very well. I have no problem with those whatsoever, and I thank the Justice Department for coming forward with those when they did.

Senator WHITEHOUSE. And, presumably, given all your years in law enforcement and your years as a narcotics investigator, you have worked with the Federal Government on federal investigations in the past in various capacities, correct?

Mr. URQUHART. That is correct. And my detectives are doing that currently, yes.

Senator WHITEHOUSE. And are there current activities basically in the same areas that these eight federal interest areas provide for? Or do you see any areas of activity that you are undertaking now that would stop?

Mr. URQUHART. No, not at all. In fact, a week ago, we assisted with serving several federal search warrants and confiscated \$193,000, several guns, heroin, methamphetamine, marijuana, and we do that all the time. And that is not going to change. Our cooperation with the Federal Government is not going to change one iota because of Initiative 502.

Senator WHITEHOUSE. And so by limiting itself to those eight areas of federal interest, you do not see that reducing the federal law enforcement footprint in the State of Washington in any significant respect?

Mr. URQUHART. Absolutely not.

Senator WHITEHOUSE. Very good.

From a public health and safety point of view, Mr. Finlaw, how do you feel about the eight areas of federal interest? Are they adequate from your perspective?

Mr. FINLAW. We also embrace those. The task force that we have put together to implement our new law developed guiding principles, and they were amazingly parallel with the Justice Department's guidance to us. And while this was a formalization of guidance, we really appreciate the fact that throughout this process the Justice Department, particularly through our U.S. Attorney's Office, has been very forthcoming about their general concerns about this new law, and it really allowed us to focus as we developed our legislative and regulatory response.

Senator WHITEHOUSE. And you are the Governor's legal counsel.

Mr. FINLAW. Yes.

Senator WHITEHOUSE. A great job. I used to have that job. You have the responsibility of representing the Governor in the legal negotiations about the enforcement program, the regulatory pro-

gram. Say a word, if you will, about the comments that Senator Blumenthal and I concluded Deputy Attorney General Cole's testimony with about the importance of the Department providing metrics that are as clear as possible so that people know what the rules are that they will be engaging in.

Mr. FINLAW. Well, let me affirm what both you and Senator Blumenthal said. We and I believe that the industry itself in Colorado would really appreciate that sort of guidance. Our Department of Public Safety, our State Patrol, our Bureau of Investigation in Colorado, along with local law enforcement all will appreciate definitive guidance, and I think it will—when the day comes, if there is evidence of an operation that is appealing to young people or exporting marijuana grown in Colorado to other States, an enforcement action that shuts that down would be welcome by us.

Senator WHITEHOUSE. My time has nearly expired but, Dr. Sabet, I assume that your policy disagreement with the choice to decriminalize or make medical marijuana available would drive your answer to all those questions. You are opposed to the metrics. You are opposed to the eight areas of interest. You think that we should just continue along the previous path?

Mr. SABET. Well, not necessarily. I mean, I think the eight provisions are as agreeable as baseball and apple pie. I do not know anybody who would say that those provisions are not helpful. The issue is—which I think you bring up, which is very helpful—how are we going to be monitoring and what are the specific metrics that the Federal Government is going to use to trigger enforcement.

Senator WHITEHOUSE. So prospective metrics are very important?

Mr. SABET. They are extremely important. You know, yesterday there were 4,000 joints publicly passed out in Colorado by the campaign, who used to be in favor of legalization, now is against the tax, and they just launched their campaign by handing out 4,000 joints publicly. At a marijuana festival in Seattle a month or two ago, 50,000 people smoked marijuana publicly. I mean, so if we are talking about actually doing the enforcement at the local level, I just have not seen the evidence so far that we are going to try and rein in these big industries that are going to advertise on the Internet legally. I do not know any kid who watches TV anymore. It is all on social media. Advertisements in these two States will be legal on the Internet for kids.

These are the kinds of things that worry the Academy of Pediatrics and others and myself, and so we will be monitoring this with a very watchful eye.

Senator WHITEHOUSE. Got it. Well, we look forward to working with you on that, and I want to extend through you my personal best wishes to Congressman Kennedy, who was a colleague in my delegation for many years and who I respect very greatly.

Mr. SABET. Thank you.

Senator WHITEHOUSE. Senator Blumenthal.

Senator BLUMENTHAL. I would say the same, if you could pass along my best wishes. And as I understand your position, it is not so much against legalization but the evils and abuses that may be the result. And I wonder if you could say—I know you alluded to it in your testimony—whether, in fact, those evils or abuses have,

in fact, occurred in Colorado and Washington. And what would be your advice to Connecticut?

Mr. SABET. Sure. Well, I have definitely seen them already occurring in these States, and I do not—you know, I understand State officials are in very difficult positions here trying to implement these laws that have been passed by a majority of their voters. But the effects of what we have seen, for example, in a State like Colorado, where less than two percent of people with cards that authorize them to use marijuana medically have cancer, HIV, or any other serious chronic illness, that we have seen them being handed out like candy, that we have seen the mass advertising already, that worries me. What we see with the public use of marijuana in places like Washington, especially in places like Seattle, that worries me.

So, again, I just do not see the evidence of—although it is a difficult task of trying to implement something robust and trying to enforce that, especially in the face of an industry that will be pushing back against every single kind of provision like putting magazines that advertise marijuana just behind the counter so they are—and I know the Governor tried to do that and then dropped that lawsuit when it was challenged. Or, you know, things like in Washington State how you—although packaging will be sterile, you can still have, you know, gummy, candy-shaped, attractive to kids marijuana products. You can still have marijuana products that are edibles, that are actually sometimes a thing that is sending more people to ERs than even joints in terms of an inexperienced marijuana user eating a marijuana brownie that has very concentrated forms of THC in that brownie all at once, that can be a very traumatic experience for some people. So I do not see any of that being regulated, and that is what I worry about.

In terms of the position that SAM and others and myself have put forward, you know, again, I think we are positing that in a country with the First Amendment, in a country that has seen the alcohol and tobacco industries relentlessly target kids—and, by the way, target addicts because these industries do not make money off of casual users. The marijuana industry does not make money off of the person who decides once every 10 years to light up a joint. The industries—alcohol and tobacco are included—make money off of addiction. They make money off of the small amount of users that consume the vast amount of the volume.

What I worry is that inevitably in this country American-style legalization is commercialization, is promotion, no matter the best interests that State officials and regulators and liquor control boards and others try and implement. So that is the worry. It is not about imprisoning people for small amounts. It is not about saddling people with criminal records who get caught with a small amount. It is about this mass commercialization.

Senator BLUMENTHAL. I wonder if the two other witnesses reacting to the points that have just been made about the problems that have arisen under the Colorado and Washington laws would respond.

Mr. FINLAW. You know, I think that we do agree with the concerns that Dr. Sabet has raised with respect to the dangers of products that are designed for young people, and so we have put into

place some significant restrictions on packaging and labeling. The gummy bear story, you are right, it is a problem. And our Department of Public Health, our regulators who are looking over the licensed premises, will be making sure that those types of packages, that type of promotion for young people does not happen in Colorado. It has happened, admittedly, in the past, but we are going to redouble our efforts to make sure that young people do not have encouragement and do not take the fact that it is now legal for adults as a sign that it is good for kids.

Mr. URQUHART. I think there are some urban myths that are floating around out there that Seattle is going to turn into the Starbucks of Marijuana, for example, that 50,000 people were all smoking at Hemp Fest in downtown Seattle a couple of weeks ago, that there is going to be gummy bears infused with marijuana. That is just not going to happen in the State of Washington. Big business is not going to take over the marijuana business, the legal marijuana business in the State of Washington. There is no vertical integration allowed. The processors and the growers of marijuana cannot own retail stores. Only three retail stores can be owned by one owner, for example. No advertising. Security, surveillance systems. Lots and lots of protections in place to make sure marijuana is not sold, marketed to people under the age of 21 or used by people under the age of 21 in any way, shape, or form.

We realize what is going on. We are going to avoid that when it comes to legalizing marijuana for recreational purposes.

Senator BLUMENTHAL. Thank you.

Thank you, Mr. Chairman. My time has expired. Thank you to all of you for being here today.

Senator WHITEHOUSE. Thank you. Well, that brings this hearing to its conclusion. Let me thank Deputy Attorney General Cole and our three witnesses on the second panel for their contributions to our understanding and work on this issue.

For those who wish to add anything to the record of this hearing, the record will be maintained open for one additional week. But other than that, we are adjourned.

[Whereupon, at 4:25 p.m., the Committee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary

On

“Conflicts between State and Federal Marijuana Laws”

Tuesday, September 10, 2013
Hart Senate Office Building, Room 216
2:30 p.m.

Panel I

The Honorable James Cole
Deputy Attorney General
U.S. Department of Justice
Washington, DC

Panel II

The Honorable John Urquhart
Sheriff
King County Sheriff's Office
Seattle, WA

Jack Finlaw
Chief Legal Counsel
Office of Governor John W. Hickenlooper
Denver, CO

Kevin Sabet, Ph.D.
Co-founder and Director, Project SAM
Director, Drug Policy Institute, University of Florida
Cambridge, MA

PREPARED STATEMENT OF RANKING MEMBER CHARLES GRASSLEY

U.S. Senator Chuck Grassley • Iowa

Ranking Member • Senate Judiciary Committee

<http://grassley.senate.gov>



Prepared Statement of Ranking Member Grassley of Iowa
Hearing on "Conflicts between State and Federal Marijuana Laws"
Tuesday, September 10, 2013

Mr. Chairman, thank you for holding today's hearing on the conflict between federal and state laws on marijuana.

Since Congress passed the Controlled Substances Act, the cultivation, trafficking, sale and use of marijuana have been illegal under federal law. Marijuana's continued presence on this statute's list of illegal substances isn't based on a whim. It's based on what science tells us about this dangerous and addictive drug. There's a process that exists to move drugs on and off that list. But the scientific standard to do that hasn't yet been met for marijuana.

Marijuana isn't only illegal under laws passed by Congress. It is illegal under international law as well. The United States and over 180 nations have signed the Single Convention on Narcotic Drugs. This treaty requires the United States to limit the distribution and use of certain drugs, including marijuana, for exclusively scientific and medical use. It's something this country gave its word to do. And it's a commitment that our country and many others have benefitted from through improved public health.

Yet in 2012, Colorado and Washington decided to be the first jurisdictions in the world to legalize the cultivation, trafficking, sale and recreational use of marijuana.

These laws flatly contradict federal law. Moreover, these laws have nothing to do with the controversy about whether marijuana has an appropriate medical use. Some experts fear they will create a Big Marijuana industry, including a "Starbucks of marijuana," that will damage public health. And it seems unlikely that we'll be able to confine that industry's effects to adults, and those within Colorado and Washington.

And the response of the Department of Justice isn't to sue to strike down the laws, or to prosecute illegal drug traffickers, but just to let these states do it.

These policies do not seem to be compatible with the responsibility Justice Department officials have to faithfully discharge their duties. And they may be a violation of our treaty obligations. Prosecutorial discretion is one thing. But giving the green light to an entire industry predicated on breaking federal law is another.

These policies are another example of the Administration ignoring laws that it views as inconvenient, or that it just doesn't like. Immigration law, Obamacare deadlines -- the list is long, and it hardly needs repeating.

But what's really striking in this case is that this Department of Justice is so quick to challenge state laws when it doesn't like or want to enforce them. States that change their voting laws to require an ID? See you in court. States that try to secure their borders when the federal government won't? Expect a lawsuit. But if some folks want to start an industry

dedicated to breaking federal law? Well, then the Department's position is to wait and see how it all works out.

But we already have a good idea how it will work out, and the answer is badly. Take Colorado as an example. Since it legalized and attempted to regulate medical marijuana, what have they seen? From 2006 to 2011, a 114 percent increase in driving fatalities involving drivers testing positive for marijuana. Comparing 2007 through 2009 with 2010 through 2012, a 37 percent increase in drug-related suspensions and expulsions from Colorado schools. A sharp increase in marijuana exposures to young children, many resulting in trips to poison control centers or hospitals. And in the words of Colorado's Attorney General, the state is becoming "a significant exporter of marijuana to the rest of the country."

The statistics on this point are shocking, but not surprising, given simple economics. From 2005 to 2012, there was a 407 percent increase in Colorado marijuana interdiction seizures that were destined for other states. In 2012 alone, there were interdictions in Colorado bound for 37 different states.

One of those states was my home state of Iowa. In 2010, Colorado was the source state for 10% of all marijuana interdicted in Iowa. That number grew to 25% in 2011, and to 36% in 2012. This is all before full legalization in Colorado. What do you think this number will be next year? Is the federal government prepared to pay for the law enforcement costs it is imposing on states like Iowa because it refuses to enforce federal law?

In 2012, the proportion of Iowa juveniles entering substance treatment primarily due to marijuana reached its highest point in 20 years. How many more of Iowa's daughters and sons will go into treatment next

year because the Department won't enforce federal law? There is no amount of money that can make Iowa whole for that.

I have a letter from the Director of the Iowa Office of Drug Control Policy to the Attorney General that lays out some of these statistics. The Director requests that the Department reconsider this decision. I ask that it be included in the record.

Of course, the Department would have known many of these things had it consulted with the folks on the ground before making these decisions. These are people who see the effects of marijuana addiction and abuse every day. I also have here a letter to the Attorney General from many of the major state and local law enforcement organizations in the United States. I ask that it be entered into the record.

I understand representatives of many of these organizations had asked to be consulted in advance of the Department's decision. And they were told that they would be.

However, they wrote, "it is unacceptable that the Department of Justice did not consult our organizations – whose members will be directly impacted – for meaningful input ahead of this important decision. Our organizations were given notice just thirty minutes before the official announcement was made public and were not given the adequate forum ahead of time to express our concerns with the Department's conclusion on this matter. Simply 'checking the box' by alerting law enforcement officials right before a decision is announced is not enough and certainly does not show an understanding of the value the Federal, state, local and tribal law enforcement partnerships bring to the Department of Justice and the public safety discussion."

I agree. The way these law enforcement professionals were treated is quite disturbing.

I also have a letter from all nine of the former heads of the Drug Enforcement Administration that was sent to the Attorney General yesterday. I ask that it be placed in the record as well. These former Administrators were appointed by presidents of both parties. They described themselves as "shocked and dismayed" by the Department's decision. They had also offered to meet with the Attorney General about these issues. But, as they wrote, they "heard nothing" until the Department's announcement that wouldn't challenge these laws. These former officials offer a wealth of knowledge about the law enforcement and public health implications of these decisions. Their treatment by the Department is simply inexplicable.

I am nonetheless grateful that the Deputy Attorney General is here today to explain the Department's decisions. I am hopeful this hearing will be the first step toward reconsidering these misguided policies. Thank you.

PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on “Conflicts Between State and Federal Marijuana Laws”
September 10, 2013**

Last November, the people of Colorado and Washington voted to legalize the possession and use of small amounts of marijuana, and to regulate how marijuana is produced and distributed in their states. These new laws are just the latest examples of the growing tension between Federal and state marijuana laws, and they underscore the persistent uncertainty about how such conflicts will be resolved.

Should the Federal government arrest and prosecute marijuana users in states where they might be in full compliance with state law? Or should the Federal government take a completely hands-off approach and let drug laws and policy develop on a state-by-state basis? Or is there some middle ground approach that considers both the national interests and the fundamental principles of federalism, including the rights of voters to decide what is best for their own individual state? Today this Committee holds the first congressional hearing on these issues since the new laws passed in Colorado and Washington, and it presents an important opportunity to hear from some of the people who are directly involved in grappling with these complex questions.

Although much of the focus of today’s hearing will be on what is happening in Colorado and Washington, the questions and issues we discuss today have implications for the rest of the country. Marijuana use in this country is nothing new, but the way that individual states are dealing with marijuana continues to evolve. Some states, like Vermont, have decided to allow the use of marijuana by patients with debilitating medical conditions. As a result, Vermonters who suffer from diseases like multiple sclerosis, cancer, and AIDS now are able to use medical marijuana to treat their conditions. In addition, some states, including Vermont, have simply decriminalized marijuana, imposing civil fines on marijuana users rather than criminal penalties.

To date, and as shown on this map, a total of 21 states have legalized marijuana for medical purposes, and 16 of those states have also decriminalized the possession of small amounts of marijuana. However, all of these changes in state marijuana laws have taken place against the same backdrop: the possession of *any* amount of marijuana remains a criminal offense under Federal law.

What role, then, should the Federal government play in those states where marijuana use is legal? In order to answer this question, I believe it is important to first identify those areas where there is broad agreement and common ground. For example, the Federal government and those states that have legalized marijuana in some way all agree on the necessity of preventing the distribution of marijuana to minors. Likewise, there is agreement about the need to prevent criminal enterprises from profiting from marijuana sales; the goal of reducing violent crime; and the dangers associated with drugged driving. These are all vitally important public safety concerns. I appreciate all who are acting to address these concerns – particularly those in Federal, state, and local law enforcement who work tirelessly to keep our communities safe.

I hope we can also agree that we must not be satisfied with the status quo. No one can question that the black market for illegal marijuana in this country endangers public safety. The black market contributes to violence along the Southwest border and continues to thrive despite the billions of dollars that have already been spent on enforcement efforts at the Federal, state, and local levels. It is also clear that the absolute criminalization of personal marijuana use has contributed to our Nation's soaring prison population, and has disproportionately affected people of color. In this context, it is no surprise that states are considering new, calibrated solutions that reach beyond the traditional criminal justice system.

Last December, in the wake of the decisions by the voters in Colorado and Washington, I asked the Administration for its response to these measures. Although it took some time, I am encouraged by the policy guidance that the Deputy Attorney General recently provided to Federal prosecutors. I do not believe that Federal agents and prosecutors should be devoting scarce investigative resources to pursuing low-level users of marijuana who are in compliance with state law. As the President said last year, there are bigger fish to fry – and I am glad that the Justice Department plans to commit its limited resources to addressing more significant threats. I appreciate that Deputy Attorney General Cole is here to answer questions regarding the new guidance.

I also look forward to hearing from the witnesses from Colorado and Washington who can both explain the decision in their states legalize personal marijuana use, and the implementation of those decisions. I hope today's hearing will also shine a light on how a series of Federal laws pose significant obstacles to effective state implementation and regulation of marijuana – including existing Federal laws and regulations in areas such as banking and taxation. We must have a smarter approach to marijuana policy and that can only be achieved through close cooperation and mutual respect between the Federal government and the states.

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PREPARED STATEMENT OF HON. JAMES COLE, DEPUTY ATTORNEY GENERAL, U.S.
DEPARTMENT OF JUSTICE, WASHINGTON, DC



Department of Justice

STATEMENT OF
JAMES M. COLE
DEPUTY ATTORNEY GENERAL

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR A HEARING ENTITLED
"CONFLICTS BETWEEN STATE AND FEDERAL MARIJUANA LAWS"

PRESENTED ON
SEPTEMBER 10, 2013

Testimony of James M. Cole
Deputy Attorney General
United States Department of Justice
Before the United States Senate Committee on the Judiciary
September 10, 2013

Good afternoon Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee. I am pleased to speak with you about the guidance that the Department recently issued to all United States Attorneys regarding marijuana enforcement efforts. That guidance instructs our prosecutors to continue to enforce federal priorities, such as preventing sales of marijuana by criminal enterprises, preventing violence and the use of firearms in the cultivation and distribution of marijuana, preventing distribution to minors, and preventing the cultivation of marijuana on public lands – priorities that we historically have focused on for many years – and also notes that we will continue to rely on state and local authorities to effectively enforce their own drug laws as we work together to protect our communities.

I. Introduction

As you know, the relevant federal statute, the Controlled Substances Act of 1970 (CSA), among other prohibitions, makes it a federal crime to possess, grow, or distribute marijuana, and to open, rent, or maintain a place of business for any of these purposes.

For many years, all 50 states have enacted uniform drug control laws or similar provisions that mirrored the CSA with respect to their treatment of marijuana and made the possession, cultivation, and distribution of marijuana a state criminal offense. With such overlapping statutory authorities, the federal government and the states traditionally worked as partners in the field of drug enforcement. Federal law enforcement historically has targeted sophisticated drug traffickers and organizations, while state and local authorities generally have focused their enforcement efforts, under their state laws, on more localized and lower-level drug activity.

Starting with California in 1996, several states have authorized the cultivation, distribution, possession, and use of marijuana for medical purposes, under state law. Today, twenty-one states and the District of Columbia legalize marijuana use for medical purposes under state law, including six states that enacted medical marijuana legislation in 2013.

Throughout this time period, the Department of Justice has continued to work with its state and local partners, but focused its own efforts and resources on priorities that are particularly important to the federal government. The priorities that have guided our efforts are:

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

Examples of our efforts have included cases against individuals and organizations who were using the state laws as a pretext to engage in large-scale trafficking of marijuana to other states; enforcement against those who were operating marijuana businesses near schools, parks, and playgrounds; and enforcement against those who were wreaking environmental damage by growing marijuana on our public lands. On the other hand, the Department has not historically devoted our finite resources to prosecuting individuals whose conduct is limited to possession of marijuana for personal use on private property.

II. The Department's Updated Marijuana Enforcement Guidance

In November 2012, voters in Colorado and Washington State passed ballot initiatives that legalized, under state law, the possession of small amounts of marijuana, and made Colorado and Washington the first states to provide for the regulation of marijuana production, processing, and sale for recreational purposes. The Department of Justice has reviewed these ballot initiatives in the context of our enforcement priorities.

On August 29, 2013, the Department notified the Governors of Colorado and Washington that we were not at this time seeking to preempt their states' ballot initiatives. We advised the Governors that we expected their states to implement strong and effective regulatory and enforcement systems to fully protect against the public health and safety harms that are the focus

of our marijuana enforcement priorities, and that the Department would continue to investigate and prosecute cases in Colorado and Washington in which the underlying conduct implicated our federal interests. The Department reserved its right to challenge the state laws at a later time, in the event any of the stated harms do materialize – either in spite of a strict regulatory scheme, or because of the lack of one.

That same day, the Department issued a guidance memorandum to all United States Attorneys directing our prosecutors to continue to fully investigate and prosecute marijuana cases that implicate any one of our eight federal enforcement priorities. This memorandum applies to our prosecutors in all 50 states and guides the exercise of prosecutorial discretion against individuals and organizations who violate any of our stated federal interests, no matter where they live or what the laws in their states may permit. Outside of these enforcement priorities, however, the Department will continue to rely on state and local authorities to address marijuana activity through enforcement of their own drug laws. This updated guidance is consistent with our efforts to maximize our investigative and prosecutorial resources during this time of budget challenges, and with the more general message the Attorney General delivered last month to all federal prosecutors, emphasizing the importance of quality priorities for all cases we bring, with an eye toward promoting public safety, deterrence, and fairness.

Our updated guidance also makes one overarching point clear: the Department of Justice expects that states and local governments that have enacted laws authorizing marijuana-related conduct will implement effective regulatory and enforcement systems to protect federal priorities and the health and safety of every citizen. As the guidance explains, a jurisdiction's regulatory scheme must be tough in practice, not just on paper. It must include strong enforcement efforts, backed by adequate funding.

We are emphasizing comprehensive regulation and well-funded state enforcement because such a system will complement the continued enforcement of state drug laws by state and local enforcement officials, in a manner that should allay the threat that a state-sanctioned marijuana operation might otherwise pose to federal enforcement interests. Indeed, a robust system may affirmatively address those federal priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain a necessary part of addressing marijuana-related activity.

III. Conclusion

The Department of Justice is committed to enforcing the CSA in all states, and we are grateful for the dedicated work of our Drug Enforcement Administration agents, our federal prosecutors, and our state and local partners in protecting our communities from the dangers of illegal drug trafficking. The Administration also remains committed to minimizing the public health and safety consequences of marijuana use, focusing on prevention, treatment, and support for recovery.

As our updated guidance reflects, we are continuing our practice of targeting conduct that implicates federal priorities and causes harm, regardless of state law. We expect our state and local partners to continue to do so as well. In those jurisdictions that have enacted laws that legalize and seek to regulate marijuana for some purposes, this means that strong and effective regulatory and enforcement systems must address the threat those state laws could pose to public safety, public health, and other law enforcement interests.

I look forward to taking your questions.

PREPARED STATEMENT OF HON. JOHN URQUHART, SHERIFF, KING COUNTY SHERIFF'S
OFFICE, SEATTLE, WASHINGTON

**Testimony of Sheriff John Urquhart
Senate Judiciary Committee
September 10, 2013**

Good afternoon members of the committee, Mr. Chairman. Thank you for having me today. My name is John Urquhart, and I am the Sheriff of King County, WA.

Seattle is located in King County, and with almost 2 million residents, we are the 14th largest county by population in the United States. I have over 1000 employees in the Sheriff's Office and a budget exceeding \$160 million.

As Sheriff, I am therefore the top law enforcement official in the largest jurisdiction in the country that has legalized marijuana.

I have been a police officer for 37 years, and I was elected as King County's Sheriff last year. During my career I've investigated everything from shoplifts to homicides. But I've also spent 12 years as a narcotics detective. My experience shows the War on Drugs has been a failure. We have not significantly reduced demand over time, but we have incarcerated generations of individuals, the highest incarceration rate in the world.

So the citizens of the state of Washington decided it was time to try something new. In November of 2012 they passed Initiative 502, which legalized recreational amounts of marijuana and at the same time created very strict rules and laws.

I was a strong supporter of Initiative 502 last year, and I remain a strong supporter today. There are several reasons for that support. Most of all, I support 502 because that's what the people want. They voted for legalized marijuana. We—the government—have failed the people and now they want to try something else. Too often the attitude of the police is "We're the cops and you're not. Don't tell us how to do our job." That is the wrong attitude and I refuse to fall into that trap.

While the title of this hearing is conflict between state and federal marijuana laws. I don't see a huge conflict.

The reality is we do have complimentary goals and values. We all agree we don't want our children using marijuana. We all agree we don't want impaired drivers. We all agree we don't want to continue enriching criminals. Washington's law honors these values by separating consumers from gangs, and diverting the proceeds from the sale of marijuana toward furthering the goals of public safety.

Is legalizing and regulating the possession and sale of marijuana a better alternative? I think it is, and I'm willing to be proven wrong. But the only way we'll know is if we are allowed to try.

DOJ's recent decision provides clarity on how we in Washington can continue to collaborate with the federal government to enforce our drug laws while at the same time respecting the will of the voters.

It's a great interim step, but more needs to be done.

For example, we are still limited by not knowing the role of banking institutions as we go forward.

Under federal law, it is illegal for banks to open checking, savings, or credit card accounts for marijuana businesses. The result is that marijuana stores will be operated as cash-only businesses, creating two big problems for us: (1) Cash-only businesses are prime targets for armed robberies; and (2) cash-only businesses are very difficult to audit, leading to possible tax evasion, wage theft, and the diversion of resources we need to protect public safety.

I am simply asking that the Federal government allow banks to work with legitimate marijuana businesses who are licensed under state law.

In closing let me make one thing absolutely clear. What we have in Washington State is not the Wild Wild West. And as Sheriff, I am committed to continued collaboration with the DEA, FBI, and DOJ for robust enforcement of our respective drug laws. For example, I have detectives right now assigned to Federal task forces, including a DEA HIDTA Task Force. It's been a great partnership for many years and that partnership will continue.

Furthermore the message to my deputies has been very clear: You *will* enforce our new marijuana laws. You *will* write someone a ticket for smoking in public. You *will* enforce age limits. You will put unlicensed stores out of business. In other words, the King County Sheriff's Office *will* abide by the standards and laws voted on and adopted by the citizens of the state of Washington, and the guidance provided by the Department of Justice on August 29th.

Mr. Chairman, I say to you and the members of this committee, I do appreciate the deference the federal government has shown to my constituents, and I look forward to continuing that cooperation. Thank you.

PREPARED STATEMENT OF JACK FINLAW, CHIEF LEGAL COUNSEL, OFFICE OF
GOVERNOR JOHN W. HICKENLOOPER, DENVER, COLORADO

United States Senate Committee on the Judiciary

Hearing on "Conflicts between State and Federal Marijuana Laws"

September 10, 2013

216 Hart Senate Office Building

Washington, D.C.

Written Statement of Jack Finlaw

Chief Legal Counsel

Office of Colorado Governor John W. Hickenlooper

Thank you Chairman Leahy, Ranking Member Grassley, and Members of the Committee for this opportunity to testify today.

My name is Jack Finlaw and I am Chief Legal Counsel to Colorado's Governor, John Hickenlooper. For the past ten months, I have had the privilege of working with many thoughtful and hardworking colleagues in Colorado state government to implement Colorado's new marijuana laws through the work of a task force, the enactment of enabling legislation and the promulgation of detailed rules for the regulation of this new industry. I have also participated in the ongoing conversation among Colorado and Washington State officials with representatives of the U.S. Department of Justice on the conflicts between state and federal marijuana laws.

Passage of Amendment 64 in November 2012

In 2012 advocates for the legalization of marijuana in Colorado gathered enough signatures to place an amendment to the Colorado constitution on the statewide ballot. Although Governor Hickenlooper, our state's Attorney General John Suthers and other senior state officials opposed its passage, this amendment, which appeared on the ballot as Amendment 64, was approved by 55% of Colorado voters on November 6, 2012 and became law in Colorado on December 10, 2012. Amendment 64 is now codified in the Colorado Constitution as Article XVIII, Section 16.

Thanks to Amendment 64, personal use of marijuana is now permitted under Colorado law for adults 21 years of age or older. For example, adults can possess, use, purchase and transport one ounce or less of marijuana and possess and grow up to six marijuana plants. There are some limits to permitted personal use. Home grows must be in an enclosed, locked space and cannot be conducted openly or publicly, and marijuana from home grows cannot be sold (although up to an ounce can be gifted to

another adult). And furthermore, consumption of marijuana cannot be done openly or publicly or in a manner that endangers others.

Amendment 64 mandates the establishment of a regulatory scheme for the cultivation, harvesting, processing, packaging, display and sale of marijuana. Amendment 64 envisions a state and local licensing scheme requiring that retail stores, infused product manufacturers and grow operations be licensed by the state and local governments. Privacy of purchasers is guaranteed by a provision that prohibits the gathering of the personal information of consumers. Amendment 64 includes very short timelines for its implementation, such as the requirement that the state begin accepting and processing applications for licenses by October 1, 2013 and begin issuing licenses by January 1, 2014.

Amendment 64 permits local governments in Colorado to regulate the time, place, manner and number of marijuana establishments in their communities. And while local governments cannot prohibit home grows or possession and private use of marijuana within their bounds, they can outlaw the operation of retail marijuana cultivation and product manufacturing facilities and retail marijuana stores within their jurisdictions.

Amendment 64 specifically states that nothing in the amendment requires an employer to permit or accommodate the use or possession of marijuana by employees or affects the ability of employers to have policies restricting the use of marijuana by employees. And Amendment 64 is clear that persons and entities that own or control property can prohibit or regulate the possession, use, sale or growing of marijuana on or in that property.

Amendment 64 also authorizes the cultivation, processing and sale of industrial hemp.

Amendment 64 contemplates an excise tax on recreational marijuana but voter approval of Amendment 64 was not effective under Colorado law to authorize the tax. As described below, Colorado voters will have the opportunity to approve both an excise tax and a special sales tax on recreational marijuana in November 2013. Amendment 64 specifically bars an excise tax on medical marijuana.

Implementation of Amendment 64

Within days of the passage of Amendment 64, Governor Hickenlooper and Attorney General Suthers had a telephone meeting with U.S. Attorney General Eric Holder to seek federal guidance on the conflict between Amendment 64 and federal law, specifically the inclusion of marijuana in the Controlled Substances Act. Although Colorado did not receive a formal response to this request for guidance from the U.S. Department of Justice until August 29, 2013, we have appreciated General Holder's and the Justice Department's willingness to engage in frank and candid conversations with the Governor's Office over the past ten months to share federal law enforcement's concerns about the implementation of Amendment 64. Knowing how seriously the Justice Department and Colorado's U.S. Attorney's Office view the issues raised by the legalization of marijuana in Colorado encouraged us to focus our efforts to develop a robust regulatory and enforcement regime for recreational marijuana in Colorado.

Amendment 64 Implementation Task Force

In early December 2012, Governor Hickenlooper established an Amendment 64 implementation task force “to identify the legal, policy, and procedural issues that must be resolved, and to offer suggestions and proposals for legislative, regulatory, and executive actions that need to be taken, for the effective and efficient implementation of Amendment 64.” The task force convened later in December 2012 with representatives from the executive and legislative branches of state government, the Amendment 64 campaign, the medical marijuana industry, marijuana consumers, the criminal defense bar, the Colorado Attorney General’s office, Colorado’s district attorneys, law enforcement, academia, the medical community, employers, employees, and Colorado’s cities and counties. Barbara Brohl, the Executive Director of Colorado’s Department of Revenue, and Jack Finlaw, the Governor’s Chief Legal Counsel, co-chaired the task force.

The task force adopted these guiding principles for its work:

- Promote the health, safety and well-being of Colorado’s youth
- Be responsive to consumer needs and issues
- Propose efficient and effective regulation that is clear and reasonable and not unduly burdensome
- Create sufficient and predictable funding mechanisms to support the regulatory and enforcement scheme
- Create a balanced regulatory scheme that is complementary and clearly defined between state and local licensing authorities
- Establish tools that are clear and practical so that interactions between law enforcement, consumers and licensees are predictable and understandable
- Ensure that Colorado’s streets, schools and communities remain safe
- Take action that is faithful to the text of Amendment 64

Working in five work groups focused on 1) the regulatory framework, 2) local authority and control issues, 3) tax, funding and civil law matters, 4) consumer safety and social issues and 5) criminal law, the task force developed a comprehensive framework for the legislation and regulations needed to implement Amendment 64. The task force delivered its findings and recommendations to Governor Hickenlooper, Attorney General Suthers and the Colorado General Assembly in March 2013.

Amendment 64 Enabling Legislation

In response to the task force report, the Colorado General Assembly formed a special joint committee of members of Colorado’s House and Senate to hold hearings on the task force recommendations and craft them into legislation. This resulted in three bills being drafted by the joint committee – H.B. 13-1317 and S.B. 13-283 put into statute most of the task force recommendations including the framework for regulating retail sales of recreational marijuana; and H.B. 13-1318 referred a ballot question to Colorado voters in November 2013 asking them to approve a 15% excise tax on recreational marijuana and a 10% recreational marijuana sales tax. These three measures were then further revised in committees of

each house and through floor amendments. The final three bills constituting Amendment 64's enabling legislation were adopted by the Colorado General Assembly in early May 2013 and they were signed into law by Governor Hickenlooper on May 28, 2013.

Colorado also enacted legislation to authorize a state income tax deduction for a taxpayer who is prohibited from claiming a federal income tax deduction by Section 280E of the Internal Revenue Code. H.B. 13-1042. Section 280E of the Internal Revenue Code prohibits a business considered to be trafficking substances under the Controlled Substances Act from claiming any tax deductions on their federal tax returns. Section 280E effectively bars legal marijuana businesses operating in Colorado from claiming the types of business expense deductions that other legal businesses can claim. This change in Colorado tax law will allow owners of medical and recreational marijuana businesses to deduct their business expenses from their state income tax returns even though they cannot do so on their federal income tax returns.

Legislation enacted this year also authorized the creation of a program in the Colorado Department of Agriculture to regulate industrial hemp production in the state. S.B. 13-241.

Cognizant that legal access to recreational marijuana could lead to more people driving while impaired, Colorado also enacted legislation giving state and local law enforcement additional tools to prosecute persons driving under the influence of marijuana. H.B. 13-1325. Colorado law now provides that if a driver's blood contained five nanograms or more of delta9-tetrahydrocannabinol (commonly referred to as THC) per milliliter in whole blood, there is a permissible inference that the driver was under the influence of one or more drugs.

Colorado's New Rules Governing Retail Marijuana

Process of Rules Development

Amendment 64 and its enabling legislation directed the Colorado Department of Revenue to promulgate rules governing businesses that cultivate and sell recreational marijuana by July 1, 2013. To comply with this requirement within the short period of time between the adoption of the enabling legislation and constitutional deadline for the promulgation of rules, the Department of Revenue adopted emergency rules on July 1.

Immediately after adopting the emergency rules, the Department of Revenue convened five representative groups, to provide input and substantive suggestions regarding proposed rules governing retail marijuana establishments and medical marijuana businesses in Colorado. Each working group discussed the following diverse set of issues: Licensing, Licensed Premises, Transportation, and Storage; Licensed Entities and Inventory Tracking; Record Keeping, Enforcement and Discipline; Labeling, Packaging, Product Safety & Marketing; and Medical Differentiation. Representatives from law enforcement, the Governor's office, the Colorado Attorney General's office, the Colorado Department of Public Health and Environment, local authorities, medical marijuana industry members, trade industries, child protection advocates, and subject matter experts in the fields of substance abuse, toxicology, pharmacology and marketing participated in the working groups.

The Department of Revenue filed a notice of rulemaking on July 15, 2013. Many written comments from the public were then received. On August 20 and 21, 2013, a rulemaking hearing was held regarding the proposed rules, and members of the public provided oral testimony on the proposed marijuana rules. Written comments on the proposed rules were accepted through the close of business on August 27, 2013, and many additional written comments were submitted after the public hearing. The Department of Revenue issued its permanent rules for the regulation of recreational marijuana on September 9, 2013.

In addition to adopting rules necessary to implement Amendment 64, the Department of Revenue made changes to the state's lengthy medical marijuana rules to harmonize the two sets of rules to provide industry members, law enforcement and other stakeholders a more clear and consistent regulatory scheme in which to operate.

In its statement of basis and purpose for its rules, the Department of Revenue made clear that, during its final rulemaking deliberations, the Department took into consideration the direction provided by the U.S. Department of Justice through the August 29, 2013 letter from U.S. Attorney General Eric Holder to Governors John Hickenlooper of Colorado and Jay Inslee of Washington, and an accompanying memorandum to all United States Attorneys from Deputy Attorney General James Cole. Through this correspondence, the Justice Department has clarified that it will continue to enforce the Controlled Substances Act in Colorado, but that it will not challenge Colorado's ability to regulate the retail marijuana industry in accordance with state law, based upon the expectation that the state and local governments will implement strong and effective regulatory and enforcement systems that address public safety, public health and other law enforcement interests. Some of those federal law enforcement priorities of particular relevance to the rules include preventing the distribution of marijuana to minors, preventing the diversion of marijuana from Colorado to other states, and preventing the exacerbation of adverse public health consequences associated with marijuana use.

In adopting the final rules on September 9, 2013, the Department of Revenue affirmed that "above all these rules accomplish the state of Colorado's guiding principle through this process: to create a robust regulatory and enforcement environment that protects public safety and prevents diversion of retail marijuana to individuals under the age of 21 or to individuals outside the state of Colorado."

Highlights from the Rules

The 141 pages of rules issued yesterday cover the application and licensing process; what activity is permitted and/or required on the licensed premises; rules for retail marijuana stores, retail marijuana cultivation facilities, retail marijuana products manufacturing facilities, and retail marijuana testing facilities including the requirements for marijuana inventory tracking systems; the transport and storage of marijuana; labeling, packaging and product safety requirements; signage and advertising restrictions; and penalties for rules violations.

Television, radio, print and internet advertising of recreational marijuana is prohibited unless the retail marijuana establishment seeking to place an advertisement has reliable evidence that no more than 30% of the audience for the program or web site or the readership of the publication is reasonably

expected to be under the age of 21. The rules also prohibit advertising that specifically targets individuals under the age of 21 or persons located outside of the state of Colorado.

It is important to note too what the rules do not cover. State regulators have no authority to promulgate rules to regulate the home growing of marijuana permitted by Amendment 64 or caregivers who are authorized to serve patients under the state constitutional provisions governing medical marijuana. The burden of ensuring that marijuana produced or managed by these unregulated growers does not supply the in-state or out-of-state black market will rest primarily with law enforcement. The Department of Revenue does intend to create a law enforcement liaison position to work pro-actively with state and local law enforcement with a focus on information-sharing to prevent the diversion of marijuana out of the regulated environment.

Next Steps in Colorado

Production Caps

The rules issued by the Department of Revenue do not include production caps on retail marijuana cultivation facilities. It is difficult to determine what the appropriate rules for production limits should be before regulators have a better understanding of what the in-state market for retail marijuana will be. The Department of Revenue intends in the near future to undertake a market study and develop production caps in response to the study. In the meantime, state regulators are considering imposing temporary production caps to limit the risk that overproduction will supply the black market or find its way into interstate commerce.

Need to Address Product Purity and Testing Issues

To protect public health, Governor Hickenlooper has directed the Colorado Department of Agriculture to promulgate rules to ban harmful and unsafe substances in the cultivation or processing of marijuana. The state's Agriculture Department also has been directed to form a private advisory group to develop good cultivation and handling practices for the marijuana industry. The Colorado Department of Public Health and Environment has been directed to assist in the formation of, and then to work with, a private advisory group that will develop good laboratory practices for the retail marijuana industry. Current Drug Enforcement Agency rules pose a particular challenge for marijuana testing labs because the rules create hurdles to the labs' purchasing the chemical solutions needed to calibrate marijuana testing equipment.

Education and Prevention Efforts

The Office of the Governor, in consultation with state agencies and other stakeholders including industry representatives and members of the public, has established a marijuana educational oversight committee to develop and implement recommendations for the education of all necessary stakeholders on issues related to marijuana use. This committee will develop and distribute educational materials regarding appropriate use of recreational marijuana. The number one goal of this committee is to consult with medical and marketing experts to distill best practices for marijuana prevention messaging

targeted at those age 20 and younger who may be potential marijuana users. We are committed to countering the perception among young people that marijuana is less dangerous to them because it has been made legal for adult use – we are convinced that the drug poses substantial danger for adolescent neurological development.

Funding for Regulation, Enforcement, Health, Public Safety, Education and Prevention

Colorado voters will be asked to approve Proposition AA on November 5, 2013. Proposition AA, if approved, would:

- Impose a 15% state excise tax on the average wholesale price of retail marijuana when the product is first sold or transferred by a retail marijuana cultivation facility, with public school construction receiving the first \$40 million of any tax revenues collected annually
- Impose a 10% state sales tax on retail marijuana and retail marijuana products, in addition to the existing 2.9% state sales tax, to increase funding for the regulation and enforcement of the retail marijuana industry and to fund related health, education, prevention and public safety costs
- Direct 15% of the revenue collected from the 10% state sales tax to cities and counties where retail marijuana sales occur
- Allow the state legislature to increase or decrease the excise and sales taxes on retail marijuana so long as the rate of either tax does not exceed 15%

Governor Hickenlooper strongly supports passage of this marijuana tax measure to ensure the state has the financial resources for a robust regulatory and enforcement regime, for an effective education and prevention program to protect our youth from the harmful effects of marijuana, and for the health and public safety costs associated with the retail marijuana industry.

Our Collaboration with the Federal Government

On August 29, 2013, Deputy Attorney General James Cole issued a memorandum to all United States Attorneys outlining enforcement of the Controlled Substances Act in light of Colorado and Washington State legalizing adult-use marijuana for recreational purposes. We commend the Department of Justice for issuing this important guidance and for providing timely clarification to us as we were finalizing our rules for the regulation of recreational marijuana in our state. This guidance also will be helpful to our local governments as they are in the process of drafting and implementing their recreational marijuana rules and regulations.

I am pleased to affirm that Colorado is completely aligned with the perspectives and guidance contained in the updated Cole memo. We share with the Justice Department a desire for robust enforcement actions against those who will not abide by Colorado's laws and regulations related to the cultivation, sale, transport and use of marijuana. As noted above, our Department of Revenue took the guidance in the new Cole memo into account as it drafted the final rules that it issued yesterday. We are committed to working with federal, state and local law enforcement authorities to see that the eight enforcement priorities outlined in the Cole memo are applied on the ground in Colorado.

Banking Issue

Now that we have the Cole memo from the Department of Justice, we believe that the next federal priority in this field is for the Department of the Treasury and other federal agencies that oversee our nation's financial institutions to address the banking challenges faced by marijuana businesses. This is both a public safety issue – businesses forced to operate as cash-only businesses because they are denied access to the banking system are a magnet for crime and criminal activity – and a regulatory and enforcement issue – it is more difficult to account for and track revenues and audit tax payments of businesses that do not use financial institutions.

Last week U.S. Representatives Ed Perlmutter (CO-07) and Denny Heck (WA-10) sent a letter to federal banking regulators urging them to issue formal guidance to banks, credit unions and other financial service providers that would allow these financial institutions to provide regular banking and financial services to legal, licensed marijuana-related businesses in states with laws allowing marijuana use. As Reps. Perlmutter and Heck note in their letter, “federal banking regulators have the discretion and authority under current law to issue guidance to regulated entities allowing licensed businesses operating in states and localities that have enacted laws relating to adult marijuana use to appropriately access the banking system if certain safeguards are in place and proper diligence is conducted.” We concur.

If federal banking regulators fail to act, we call on Congress to move forward to adopt the Marijuana Businesses Access to Banking Act (HR 2652). This bill, which has bipartisan support, would allow banks, credit unions and other depository institutions the legal clearance to provide banking services to a marijuana-related legitimate business.

Federal Tax Issue

Section 280E of the Internal Revenue Code prohibits a business considered to be trafficking substances under the Controlled Substances Act from claiming any tax deductions on their federal tax returns. Section 280E effectively bars legal marijuana businesses operating in Colorado from claiming the types of business expense deductions that other legal businesses can claim. Colorado's Amendment 64 Implementation Task Force recommended that this provision of the federal tax code be changed to allow legal marijuana businesses to claim the types of deductions that other legal businesses can claim. It is our understanding that this type of change cannot be made administratively by the Internal Revenue Service but requires amendment to the law. We therefore urge Congress to consider amending Section 280E of the Internal Revenue Code to allow legal, licensed marijuana businesses operating in states and localities that have enacted laws relating to adult marijuana use to claim the types of deductions that other legal businesses can claim on their federal tax returns.

Let me conclude by reiterating that we in Colorado understand that we are doing something new in legalizing recreational marijuana for adults. We are committed to fully implementing and funding a robust regulatory and enforcement regime. We understand the importance of limiting production so that the marijuana produced in Colorado is consumed in our state and is not diverted to other states. We are determined to educate our young people on the dangers posed to them by marijuana and to prevent the distribution of marijuana to those under age 21.

Thank you for the opportunity to speak with you today. I look forward to your questions.

PREPARED STATEMENT OF KEVIN A. SABET, PH.D., DIRECTOR, UNIVERSITY OF FLORIDA DRUG POLICY INSTITUTE, DEPARTMENT OF PSYCHIATRY, DIVISION OF ADDICTION MEDICINE; AND DIRECTOR, PROJECT SAM (SMART APPROACHES TO MARIJUANA), CAMBRIDGE, MASSACHUSETTS

Kevin A. Sabet, Ph.D.

Director, University of Florida Drug Policy Institute,
Department of Psychiatry, Division of Addiction Medicine
Director, Project SAM (Smart Approaches to Marijuana)
Author, *Reefer Sanity: Seven Great Myths About Marijuana*

**Before the United States Senate Judiciary Committee
September 10, 2013**

**Written Testimony
“Conflict Between State and Federal Laws”**

Chairman Leahy, Ranking Member Grassley, distinguished members of the Committee, thank you for providing me with the opportunity to appear before you today to discuss marijuana policy, and more specifically, state laws authorizing the legalization of marijuana.

I have studied, researched, and written about drug policy, drug markets, drug prevention, drug treatment, criminal justice policy, addiction, and public policy analysis for almost 18 years. Most recently, from 2009-2011, I served in the Obama Administration as a senior drug policy advisor. I am currently the co-founder, with former Congressman Patrick J. Kennedy, of Project SAM (Smart Approaches to Marijuana). I am also the author of *Reefer Sanity: Seven Great Myths About Marijuana* (Beaufort).

I am delighted to share with you my perspective, based on evidence and experience, on current marijuana policies in the United States.

Because I share the Obama Administration’s drug control goals of reducing drug abuse and its consequences, as laid out in the President’s *National Drug Control Strategy*, I found the recent guidance by the U.S. Deputy Attorney General (hereafter “Cole 2013”) disturbing on both legal and policy grounds. The guidance, which expressly defers the Department of Justice’s (hereafter “Department”) right to challenge and preempt laws legalizing marijuana, contradicts both the Controlled Substances Act (CSA) and policy principles designed to protect public health and safety.

Colorado and Washington have now been given the green light to become *the first jurisdictions in the world* to allow the retail sales and commercial production of marijuana, far surpassing more relatively modest marijuana policy liberalization measures taken up in countries like the Netherlands or Spain. Though marijuana use was not subject to federal criminal penalties in the United States until the 1930s, its mass commercial production and sales has never taken place here until now. Perhaps the most striking feature of Cole 2013 is that it explicitly omits the creation of large, for-profit entities in its criteria for possible federal action in the future.

The Importance of the CSA

Indeed, besides having an effect of violating the CSA on legal grounds, the Department's guidance flies in the face of the evidence showing that marijuana should remain illegal. The new guidance endangers Americans since it will facilitate the creation of a large industry for marijuana use, production, trafficking, and sale. The CSA is an important tool for promoting public health. By keeping marijuana illegal, its use is lower than the use of our legal drugs. About 52% of Americans regularly drink, 27% use tobacco products, and yet only 8% currently use marijuana, though this number has been rising in recent years (about 25% since 2007) as we have become more accepting of marijuana as a country.¹

I applaud the way the CSA has been so far used by the federal government – not to go after low-level users with an addiction problem, but instead to target drug traffickers and producers. Now, with Cole 2013, we are entering a whole new world where those drug traffickers and producers are getting a “green light” from the federal government to proceed.

International Law

By giving Washington and Colorado the go-ahead to start a massive for-profit, commercial industry for marijuana, the United States will violate its treaty obligations under the United Nations Single Convention on Narcotic Drugs of 1961 and its supplementary treaties, the 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. These treaties make up the global system of drug control to which almost every country in the world has agreed. Already, with respect to laws authorizing both the recreational and medical use of marijuana, the International Narcotics Control Board (INCB), the quasi-judicial, independent body that interprets and enforces international drug laws, has sent several stern messages and warnings to United States officials about how such laws contradict our treaty obligations.²

¹ Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings*, NSDUH Series H-46, HHS Publication No. (SMA) 13-4795. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2013.

² See for example: United Nations Information Services. (2012, November 15). INCB President voices concern about the outcome of recent referenda about non-medical use of cannabis in the United States in a number of states [Press Release]. Retrieved from: http://www.incb.org/documents/Publications/PressRelease/PR2012/press_release_151112.pdf United Nations Information Services. (2013, March 13). INCB President calls on the United States Government to address initiatives aimed at permitting recreational drug use [Press Release]. Retrieved from: http://www.incb.org/documents/Publications/PressRelease/PR2013/press_release140313.pdf United Nations Information Services. (2013, March 15). INCB President expresses grave concern about inadequately regulated medical cannabis schemes which can lead to increased abuse [Press Release]. Retrieved from: http://www.incb.org/documents/Publications/PressRelease/PR2013/press_release150313.pdf

Last week I was invited to speak about legalization to a group of Mexican lawmakers in Mexico City. Universally they asked, “Will people we (the Mexican government) consider criminals – drug traffickers and producers – now be able to flee safely to Colorado and Washington under your new laws?” They also asked me: “How can your government keep telling Mexico to stop producing and trafficking marijuana when your government is now openly approving and facilitating an increase in marijuana demand? Indeed, how can America discuss international law on any subject with authority anymore?” I had no good answers for them, and I worry about what Cole 2013 will mean for our diplomats abroad. Indeed, as the US increasingly cites international law as a reason for enforcing environmental regulations or military intervention, our case for doing so is severely weakened now that we are openly defying and indeed even promoting the violation of international law.

The Consequences of Legalization

In its memo, the Department lists priority areas it will focus on to determine future intervention. The rest of my testimony is dedicated to showing how some of these areas *have already* been violated under existing marijuana laws since in many respects we have already witnessed the effects of the *de facto* legalization of retail marijuana sales under state laws authorizing the use of marijuana for medical purposes:

(1) The distribution of marijuana to minors

Colorado provides an instructive example here. Though they legalized marijuana as medicine in 2000, it was not until about 2009 that marijuana stores were established – about 500 by 2012. The number of cardholders rose from about 1000 in 2006 to 108,000 in 2012.³

Anyone who has been to Colorado since 2009 can get a sense of what full legalization looks like already. Mass advertising, promotion, using items that are attractive to kids – like “medical marijuana lollipops,” “Ring Pots,” “Pot-Tarts” etc. – are all characteristics of current policy.

What has been the result of this *de facto* legalization for kids? For one, drug-related referrals for high school students testing positive for marijuana have increased. During 2007 – 2009 an average of 5.6 students tested positive for marijuana. During 2010 – 2012 the average number of students who tested positive for marijuana increased to 17.3 students per year. In 2007, tests positive for marijuana made up 33 percent of the total drug screenings, by 2012 that number increased to 57 percent. A member of the Colorado Taskforce charged to regulate marijuana who also works for a drug testing

³ Rocky Mountain HIDTA. (August 2013). *The Legalization of Marijuana in Colorado: The Impact, Preliminary Report* (volume 1).

company commented to the press that “A typical kid (is) between 50 and 100 nanograms. Now we’re seeing these up in the over 500, 700, 800, climbing.”⁴

The journal *JAMA Pediatrics* reported that unintentional marijuana poisonings among kids have risen significantly since marijuana as medicine has become available.⁵ Other peer-reviewed papers are finding that medical marijuana is easily diverted to youth. The *Journal of the American Academy of Child and Adolescent Psychiatry* in 2012 surveyed 164 Denver-area teens in treatment, and 121 of them -- or nearly 74 percent -- said they had used someone else's medical marijuana.⁶

This is all consistent with a recent National Bureau for Economic Research paper conducted by some RAND researchers who found that specific dimensions of laws authorizing the use of marijuana for medical purposes, namely home cultivation and legal dispensaries – two features found in Colorado and other states with similar laws – are positively associated with marijuana use and “have important implications for states considering legalization of marijuana.”⁷

(2) The revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels:

Department of Justice officials have publicly said that the sales of marijuana for supposedly “medical” purposes are in some cases going to criminal enterprises and foreign drug trafficking groups.⁸ “It’s very clear to me that there’s outside sources,” said Jeff Sweetin, Special Agent In Charge of the U.S. Drug Enforcement Agency in Colorado, in a news article. “From my investigations, I can tell you what the foreign sources are; they’re foreign cartel sources.” The news story reported that “Sweetin says a large percentage of the pot consumed by medical marijuana patients ‘absolutely’ comes from Mexico.” Sweetin continued, “These are real organized crime groups. There’s a faction that wants you to believe that these are just guys that are listening to their music, they’re driving their van, they’re peaceful guys and they’re moving a couple of ounces a week to people that are not doing any problems. That’s not what’s happening.”

This is also the case in other states, like California, where the U.S. Secret Service and the DEA were involved in “what has amounted to a four-year investigation ... into an organized criminal enterprise involving large-scale marijuana distribution, not only in the Los Angeles area, but throughout the United States. This criminal enterprise hired known

⁴ See Conspire! Drug Testing Results and “Drug Testing Company Sees Spike in Children Using Marijuana” found at <http://denver.cbslocal.com/2013/03/06/drug-testing-company-sees-spike-in-children-using-marijuana/>

⁵ Wang, S.G., Roosevelt, G., & Heard, K. (2013). Pediatric Marijuana Exposures in a Medical Marijuana State. *JAMA Pediatrics*, 167(7), 631.

⁶ Salomonsen-Sautel, S., et al. (2012). Medical Marijuana Use among Adolescents in Substance Abuse Treatment. *American Academy of Child & Adolescent Psychiatry*, 5(7), 5.

⁷ (Pacula, R. et al. 2013). “Assessing the Effects of Medical Marijuana Laws on Marijuana and Alcohol Use: The Devil is in the Details.” NBER Working Paper No. 19302, August 2013, JEL No. I18,K32,K42

⁸ Mexican Gangs Linked To Colorado's Pot: Drug Enforcement Chief Says 'Organized Crime' Here. (2010, January 7). *ABC 7 News, the Denver Channel*. Retrieved from: <http://www.thedenverchannel.com/news/mexican-gangs-linked-to-colorado-s-pot>

gang members as enforcers. This organization was involved in the operation of multiple retail marijuana dispensaries generating massive profits, repeatedly showing their willingness to use violence and intimidation to expand their operations and dissuade competition. To date, there have been 26 documented crimes...”⁹

As a Los Angeles newspaper mentioned in a story about dispensaries and criminal gangs, “Many of the dispensaries and grow houses have ties to organized crime and sell to street dealers as well, detectives said.” The story quoted L.A. County Sheriff’s Detective David Mertens who said, “Most of the dispensaries are getting pot from these indoor grows,” It’s not just the dispensaries they’re growing for. They’re also selling to street dealers.”¹⁰

(3) The diversion of marijuana from states where it is legal under state law in some form to other states:

Once again, this is already happening. And simple economics would dictate that this is hardly surprising. As the price for marijuana plummets in legalization states, we can expect cheap marijuana to be sold in non-legalization states for a handsome profit. As mentioned in a recent law enforcement report¹¹, the El Paso Intelligence Center (EPIC) has established the National Seizure System (NSS) for voluntary reporting interdiction seizures throughout the country. According to this law enforcement report, in 2012, there were 274 Colorado marijuana interdiction seizures destined for other states compared to 54 in 2005. This is a 407 percent increase. Of the 274 seizures in 2012, there were 37 different states destined to receive marijuana from Colorado. The most common destinations were Kansas (37), Missouri (30), Illinois (22) Texas (18), Wisconsin (18), Florida (16) and Nebraska (13). There were some seizures in which the destination state was unknown. In 2012, there were 7,008 pounds of Colorado marijuana seized by interdictions that were destined for other states in the country.

(4) State authorized marijuana activity being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; also violence and the use of firearms in the cultivation and distribution of marijuana

Though most marijuana users do not commit violent crimes, the retail sales of *de facto* legal marijuana has been linked to violence, firearms, illegal activity, and other illegal drugs. A 2008 report from the California Police Chiefs Association documents how “marijuana storefront businesses have allowed criminals to flourish in California” and that “some monetary proceeds from the sale of harvested marijuana derived from plants grown inside houses are being used by organized crime syndicates to fund other legitimate businesses for profit and the laundering of money, and to conduct illegal

⁹ Romero, D. (2013, April 17). Marijuana Shops In WeHo Raided As Gang-Related, Criminal Enterprises, Cops Say. *LA Weekly*. Retrieved from: http://blogs.laweekly.com/informer/2013/04/beverly_hills_marijuana_bust.php

¹⁰ Markus, B.P. (2010, September 3). Pot houses linked to gangs, marijuana dispensaries. *San Gabriel Valley Tribune*. Retrieved from: <http://www.sgvtribune.com/general-news/20100904/pot-houses-linked-to-gangs-marijuana-dispensaries>

¹¹ Rocky Mountain HIDTA. (August 2013). *The Legalization of Marijuana in Colorado: The Impact, Preliminary Report* (volume 1).

business operations like prostitution, extortion, and drug trafficking.”¹² Reports by the California Police Chiefs Association and Colorado law enforcement officials document numerous instances where murder, illegal drug trafficking, robberies, and other crimes take place at or near marijuana storefronts.

(5) An increase in drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use

The adverse consequences of marijuana use take a major toll on America. As the movement to legalize marijuana has gained momentum over the past decade – legalization campaigners have spent tens of millions of dollars on pro-marijuana campaigns that have not only focused on changing state laws but also on creating marijuana producers associations and aiming messages at NASCAR and NFL players and fans – youth perceptions of the harmfulness of marijuana has dropped dramatically. This is troubling because marijuana use has the potential to be very harmful to adolescents, whose brains are developing until age 25.

Marijuana advocates will claim that regulations surrounding legal marijuana will make it harder for youth to access marijuana, since they will have to produce identification to obtain marijuana. However, our experience with another intoxicant that can be deadly on the roads and also inhibit learning outcomes – alcohol – shows us that once a drug is accepted, normalized, and commercialized, youth will have an easier time accessing it than if it was illegal. For example, a study from Columbia University found that alcohol and cigarettes were the most readily accessible substances for youth, with 50% and 44%, respectively, of youth reporting that they could obtain them within a day. Youth were least likely to report that they could get marijuana within a day (31%); 45% report that they would be unable to get marijuana at all.¹³

Marijuana advocates will also claim that we can learn from our tobacco experience – no one has been arrested for tobacco use and yet fewer young people use tobacco compared to marijuana. But this claim completely neglects the social norm and media environment that has emerged in the past two decades against tobacco. Tobacco is looked down upon by many young people precisely because of government and non-governmental efforts to make it so. There is no more a multimillion dollar campaign to legitimize tobacco like there is today for marijuana, and certainly no one is making claims that tobacco is harmless, as advocates routinely do. By contrast, marijuana use is regularly glorified and promoted – and since the defunding of the National Youth Anti-Drug Media Campaign there is virtually no well-financed voice getting the message out to young people that marijuana use is harmful.

¹² White Paper on Marijuana Dispensaries, California Police Chiefs Association, (2009).

¹³ Adapted by CESAR from The National Center on Addiction and Substance Abuse at Columbia University (CASA), National Survey of American Attitudes on Substance Abuse XVII: Teens, 2012. Available online at <http://www.casacolumbia.org/upload/2012/20120822teensurvey.pdf> and CESAR at <http://www.cesar.umd.edu/cesar/cesarfax/vol21/21-43.pdf>

How harmful is marijuana use to adolescents? Despite popular myth and slick ad campaigns by pro-legalization advocates, scientists from the American Medical Association, American Academy of Pediatrics, American Psychological Association, American Society of Addiction Medicine, and other groups are universal in stating that marijuana use is harmful for young people.¹⁴ Marijuana use, especially among young people, is significantly associated with a reduction in IQ¹⁵, mental illness¹⁶, poor learning outcomes¹⁷, lung damage¹⁸, and addiction.¹⁹ According to the National Institutes of Health, one out of every six adolescents who use marijuana will become addicted²⁰, and many more will develop some problems as a result of marijuana use. There are about 400,000 emergency room admissions for marijuana every year – related to acute panic

¹⁴ American Medical Association. (2009). *Report 3 on the Council of Science and Public Health: Use of Cannabis for Medicinal Purposes*; Joffe, E. & Yancy, W.S. (2004). Legalization of Marijuana: Potential impact on youth. *Pediatrics: Official Journal of the American Academy of Pediatrics*, 113(6); American Psychological Association. (2009). *Position Statement on Adolescent Substance Abuse*; California Society of Addiction Medicine. (2009). *Impact of Marijuana on Children and Adolescents*; American Society of Addiction Medicine Statement Retrieved here: <http://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2012/07/30/state-level-proposals-to-legalize-marijuana>.

¹⁵ See Meier, M.H.; Caspi, A.; Ambler, A.; Harrington, H.; Houts, R.; Keefe, R.S.E.; McDonald, K.; Ward, A.; Poulton, R.; and Moffitt, T. Persistent cannabis users show neuropsychological decline from childhood to midlife. *Proceedings of the National Academy of Sciences* 109(40):E2657–E2664, 2012. Also Moffitt, T.E.; Meier, M.H.; Caspi, A.; and Poulton, R. Reply to Rogeberg and Daly: No evidence that socioeconomic status or personality differences confound the association between cannabis use and IQ decline. *Proceeding of the National Academy of Sciences* 110(11):E980–E982, 2013.

¹⁶ See for example: Andréasson S., et al. (1987). Cannabis and Schizophrenia: A longitudinal study of Swedish conscripts. *Lancet*, 2(8574); Moore, T.H., et al. (2007). Cannabis use and risk of psychotic or affective mental health outcomes: a systematic review. *Lancet*, 370(9584); Large M., et al. (2011). Cannabis Use and Earlier Onset of Psychosis: A Systematic Meta-analysis. *Archives of General Psychiatry*, 68(6); Harley, M., et al. (2010). Cannabis use and childhood trauma interact additively to increase risk of psychotic symptoms in adolescences. *Psychological Medicine*, 40(10); Lynch, M.J., et al. (2012). The Cannabis-Psychosis Link. *Psychiatric Times*.

¹⁷ Yucel, M., et al. (2008). Regional brain abnormalities associated with long-term heavy cannabis use. *Archives of General Psychiatry*, 65(6).

¹⁸ See for example: American Lung Association. (2012, November 27). Health Hazards of Smoking Marijuana. Retrieved from: <http://www.lung.org/stop-smoking/about-smoking/health-effects/marijuana-smoke.html>; Tashkin, D.P., et al. (2002). Respiratory and immunologic consequences of smoking marijuana. *Journal of Clinical Pharmacology*, 4(11); Moore, B.A., et al. (2005). Respiratory effects of marijuana and tobacco use in a U.S. sample. *Journal of General Internal Medicine*, 20(1); Tetrault, J.M., et al. (2007). Effects of marijuana smoking on pulmonary structure, function and symptoms. *Thorax*, 62(12); Tan, W.C., et al. (2009). Marijuana and chronic obstructive lung disease.

¹⁹ See for example: Anthony, J.C., Warner, L.A., Kessler, R.C. (1994). Comparative epidemiology of dependence on tobacco, alcohol, controlled substances, and inhalants: Basic findings from the National Comorbidity Survey. *Experiential and Clinical Psychopharmacology*, 2; Budney, A.J., et al. (2008). Comparison of cannabis and tobacco withdrawal: Severity and contributions to relapse. *Journal of Substance Abuse Treatment*, 35(4); Tanda, G., et al. (2003). Cannabinoids: Reward, dependence, and underlying neurochemical mechanisms – A recent preclinical data. *Psychopharmacology*, 169(2).

²⁰ Anthony, J.C., Warner, L.A., Kessler, R.C. (1994). Comparative epidemiology of dependence on tobacco, alcohol, controlled substances, and inhalants: Basic findings from the National Comorbidity Survey. *Experiential and Clinical Psychopharmacology*, 2.

attacks and psychotic episodes²¹ – and marijuana is the most cited drug for teens entering treatment.²²

As for drugged driving, a meta-analysis published in the peer-reviewed *Epidemiological Reviews* looked at nine studies conducted over the past two decades on marijuana and car-crash risk. It concluded, “drivers who test positive for marijuana or self-report using marijuana are more than twice as likely as other drivers to be involved in motor vehicle crashes.”²³ Indeed, we already know marijuana and driving is a growing problem in states with loose marijuana laws. In Colorado, though traffic fatalities fell 16 percent between 2006 and 2011 (consistent with national trends), fatalities involving drivers testing positive for marijuana rose 112 percent.²⁴

Experience Shows That “Regulation” Is Anything But

Finally, two independent reports released within days of each other last month documented how Colorado’s supposedly regulated system is not well regulated at all. In the first of the two audits, the Colorado State Auditor concluded that there were inappropriate recommendations made, a whopping 50% of recommendations were made by only 12 physicians, that the state had not “established a process for caregivers to indicate the significant responsibilities they are assuming for managing the well-being of their patients,” and that the state “cash fund” was out of compliance.²⁵

The second audit²⁶ reviewed the city of Denver’s medical marijuana licensing practices by the Department of Excise and Licenses. It concluded that the city of Denver “does not have a basic control framework in place for effective governance of the... medical marijuana program.” The auditors wrote how the medical marijuana records are “incomplete, inaccurate, inaccessible,” and that many medical marijuana businesses are operating without valid licenses. Moreover, the Department does not even know how

²¹ Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality. (2011). Drug abuse warning network, 2008: National estimates of drug-related emergency department visits. *HHS Publication No. SMA 11-4618*. Rockville, MD.

²² Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality. Treatment Episode Data Set (TEDS): 2000-2010. National Admissions to Substance Abuse Treatment Services. DASIS Series S-61, HHS Publication No. (SMA) 12-4701. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2012

²³ Mu-Chen Li, Joanne E. Brady, Charles J. DiMaggio, Arielle R. Lusardi, Keane Y. Tzong, and Guohua Li. (2011). “Marijuana Use and Motor Vehicle Crashes.” *Epidemiologic Reviews*.

²⁴ Colorado Department of Transportation Drugged Driving Statistics 2006 - 2011, Retrieved <http://www.coloradodot.info/programs/alcohol-and-impaired-driving/druggeddriving/drugged-driving-statistics.html>.

²⁵ Colorado Office of the State Auditor. (June 2013). *Medical Marijuana Regulatory System Part II Performance Audit*. Retrieved from: [http://www.leg.state.co.us/QSA/coauditor1.nsf/All/C9112BFFDE1559CE87257BA5007AE40F/\\$FILE/2194B%20MedMarijPart2%20June%202013.pdf](http://www.leg.state.co.us/QSA/coauditor1.nsf/All/C9112BFFDE1559CE87257BA5007AE40F/$FILE/2194B%20MedMarijPart2%20June%202013.pdf)

²⁶ Office of the Auditor, Audit Services Division, City and County of Denver. (July 2013). *Medical Marijuana Licensing Performance Audit*. Retrieved from: http://www.denvergov.org/Portals/741/documents/Audits%202013/Medical_Marijuana_Licensing_Audit_Report_07-18-13.pdf

many medical marijuana businesses are operating in Denver. In addition, the audit reported that the Department's personnel lacked formal policies and procedures to govern the licensure process. Finally, the auditors concluded that the medical marijuana licensure fee was established arbitrarily and the Department does not know the extent to which the marijuana license fees cover the costs of administering the program.

As for implementing the laws passed in Washington and Colorado, earnest officials have the very difficult task of trying to create a regulatory regime that they consider responsible and safe. However, this has proven to be very difficult already. Even when trying to curb very reasonable things like advertising, or the selling of marijuana periodicals to minors, or the selling of items that would be attractive to children, they have faced obstacles. For example, the multimillion-dollar pro-legalization lobby in Colorado – who financed Amendment 64 with upwards of \$3 million – has already placed a billboard promoting marijuana use along the main boulevard leading to the Denver Sports Authority Field. The marijuana industry also sued Colorado when the state sought to place marijuana publications behind a counter in public retail stores “where persons under twenty-one years of age are present.”²⁷ The state eventually changed the law and now magazines such as *High Times* and *The Daily Doobie* will be sold within reach of children there. We can expect further first amendment challenges to advertising restrictions. Finally, we have also seen the proliferation of marijuana vending machines generating millions of dollars in revenue dispensing “medicine.” As *Bloomberg Businessweek* in May reported: “‘We are in the right place at the right time,’ says Bruce Bedrick, a 44-year-old chiropractor, occasional pot user, and chief executive officer of Medbox, maker of one of the world’s first marijuana vending machines. ‘We are planning to literally dominate the industry.’”²⁸ After spending decades trying to rid America of tobacco vending machines because of the obvious effect on increased access to children, it seems we are about to repeat history with marijuana.

None of this bodes well for the ushering in of an entirely new industry that will allow for the production and sales of marijuana. Why would we assume that an infinitely more difficult task – the full legalization of marijuana — will be better managed than the so-called medicinal use of marijuana?

Conclusion

The CSA explicitly states that the use, possession, trafficking, and sales of marijuana is against federal law. As the Department articulated in a 2011 letter to the city of Oakland, “Congress has determined that marijuana is a controlled substance. Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, *is a violation of federal law regardless of state laws*

²⁷ *Trans-High Corp v Colorado (Denver)*

²⁸ See <http://www.businessweek.com/articles/2013-05-09/medbox-dawn-of-the-marijuana-vending-machine>

*permitting such activities (my emphasis).*²⁹

By deferring its right to challenge state laws in Colorado and Washington, the Department is effectively authorizing state entities to violate federal law. It is approving of state infrastructures to generate revenue from an illegal substance, and, more generally, it is contradicting the Administration's general posture on other issues – immigration, voting rights, civil rights, healthcare, etc. – that states cannot violate federal law at will.

Though the Department listed some “triggers” that might spur federal action, we do not have to wait for these phenomena to occur – they already are at alarming rates. Our experience with state laws authorizing the medicinal use of marijuana tells us that no matter what controls are put on marijuana stores (e.g. no advertising or selling to minors), these regulations are routinely violated, rarely enforced, and the sheer number of marijuana stories tend to overwhelm federal and state resources.

Already, as marijuana laws have become more permissive over the last decade, marijuana use has skyrocketed. In 2007, drug use had dipped to its lowest levels since 2001, but has since been on the rise. Last week the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Administration (SAMHSA) released its annual drug use survey. Although 12-to-17 year old marijuana use for boys and girls combined was relatively unchanged since 2011, the survey revealed a 20% increase in marijuana smoking among girls aged 12-17 since 2007, a 50% increase in the number of daily marijuana smokers among those aged 12 and up, a 12% increase in marijuana use among 18-25 year olds since 2007, and a 25% increase in marijuana use among the general population. The perceived risk of smoking marijuana once a month has fallen almost 30% since 2007. One can only surmise how much legalization will further weaken these numbers. Because it will make these numbers worse, the decision by the Department of Justice will undermine the President's own efforts to boost education outcomes and improve health and healthcare in the United States.

We are at a precipice. By threatening legal action, the Administration can prevent the large-scale commercialization and retail sales of marijuana. Instead, we are about to usher in a new era of marijuana usage. Already, an executive from Microsoft is teaming up with a former Mexican president to try and “mint more marijuana millionaires than Microsoft” in his goal to create a national brand, the “Starbucks of Marijuana.”³⁰ In states that have failed at creating any sort of robust regulatory framework for marijuana as medicine, the effects of retail marijuana sales are already known – mass marketing and increased negative consequences. Authorizing the large scale, commercial production of marijuana will undoubtedly expand its access and availability. When we can prevent negative consequences of the commercial sale and production of marijuana now, why

²⁹ U.S. Department of Justice. (Feb. 11, 2011). Letter from U.S. Attorney Melinda Haag to John Russo, Oakland City Attorney.

³⁰ Ex-Microsoft exec plans 'Starbucks' of marijuana. (2013, May 31). *United Press International*. Retrieved from: http://www.upi.com/Top_News/US/2013/05/31/VIDEO-Ex-Microsoft-exec-plans-Starbucks-of-marijuana/UPI-41161369985400/

would we open the floodgates, hope for the best, and try with limited resources to patch everything up when things go wrong?

QUESTIONS

QUESTIONS SUBMITTED BY SENATOR DIANNE FEINSTEIN FOR JAMES M. COLE

Questions for the Record from Senator Dianne Feinstein

For Deputy Attorney General James M. Cole

Senate Committee on the Judiciary

September 10, 2013

(1)

While I support the compassionate use of marijuana in certain medical situations when prescribed by a physician for a serious illness, I am concerned about individuals taking advantage of California's medical marijuana law.

As one example, on January 24, 2013, the Department of Justice announced that San Diego resident Joshua Hester was sentenced to 100 months in prison for creating two medical marijuana dispensaries and a phony board of directors as a front for a multi-million dollar drug trafficking organization. He pled guilty to charges of conspiracy to distribute over 1,000 kilograms of marijuana.

It is important that the Department of Justice continues to investigate and prosecute owners of medical marijuana dispensaries in California that distribute the drug for illicit, non-medical use.

- Will the Department of Justice continue to pursue individuals in California operating outside of the scope of our state medical marijuana law?
- What language can you point to in your August 29, 2013 memo that will assure me that these prosecutions will continue?

(2)

Due in part to successful enforcement efforts against marijuana cultivation on public lands, marijuana growers in California are moving onto privately-owned agricultural land, particularly in the Central Valley. One tactic is the use of a “deceptive lease,” in which the marijuana grower makes a false statement of his or her intentions for use of the farmland in order to lease the land. This presents serious problems for farmers and landowners in California.

Marijuana cultivation also leads to environmental degradation and increased crime, which affect all of us.

Given the confusion surrounding state and federal marijuana laws, farmers are unsure how to deal with the problem. In a September 10, 2013 letter to Attorney General Holder, I asked that the Department of Justice, in coordination with the Department of Agriculture, conduct a public information campaign to educate farmers in California on the relevant laws and how to deal with marijuana grown on their property.

- Will the Department of Justice commit to conducting a public information campaign to assist farmers and landowners in dealing with the problem of agricultural marijuana grows?

(3)

Your August 29th memorandum lists a number of enforcement priorities for the Justice Department, including the prevention of drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.

I am very concerned about the impact that Colorado and Washington's legalization initiatives will have on drugged driving in these states.

- What metrics will you use to assess when federal enforcement is necessary in the case of drugged driving or other public health consequences in Colorado and Washington?

(4)

Your August 29th memorandum states that the Justice Department will continue to prevent the “diversion of marijuana from states where it is legal under state law in some form to other states.”

It seems that this is already a problem. According to the Colorado High Intensity Drug Trafficking Area (HIDTA), in 2012, there were 274 Colorado marijuana interdiction seizures destined for other states compared to 54 in 2005. This is a 407 percent increase.

- How will you assess when federal enforcement is needed for diversion of marijuana from Colorado and Washington to other states?

(5)

The Monitoring the Future Survey, sponsored by the National Institute on Drug Abuse, demonstrates that marijuana use among minors is increasing. For instance, the most recent report shows that 36% of high school seniors used marijuana in the last 12 months. At the same time, this data suggests a sharp decline in the amount of risk teenagers perceive to be associated with its use.

- With this data in mind, what, if any, changes in marijuana use among minors would need to be observed by the Justice Department to trigger federal intervention pursuant to your latest guidance?
- Has the Justice Department developed, or does it plan to develop, criteria to assist states in “implementing strong and effective regulatory and enforcement systems” that would prevent federal intervention?

(6)

You state in your August 29th memo that, “prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities.” Two sentences later, the memo qualifies this sentence by stating that a “marijuana operation’s large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular enforcement priority.”

- Let’s examine a hypothetical – but realistic – scenario under the Department of Justice’s guidance. Would a large-scale marijuana dispensary that does not distribute to minors, does not fund gangs or criminal enterprises, does not divert marijuana to other states, does not traffic in other drugs, is not involved in violence, and does not use public or federal lands be an enforcement priority if it’s clear that it is selling its drugs to those who have no legitimate medical purpose to consume marijuana?

QUESTIONS SUBMITTED BY SENATOR CHARLES GRASSLEY FOR JAMES M. COLE

Senate Committee on the Judiciary

“Conflicts between State and Federal Marijuana Laws”

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

James Cole, Deputy Attorney General

1. Will the Department of Justice establish specific, quantifiable metrics by which it will evaluate how the state laws legalizing and regulating the cultivation, trafficking and/or recreational use of marijuana are affecting each of the areas of federal enforcement priority identified in the August 29, 2013 Cole Memorandum? If so, will it make those metrics public? If it will not establish metrics, how will it know whether its stated policy of “trust but verify” is a success or failure?
2. Although the Department of Justice has decided to defer any legal challenge to these state laws at this time, is it the Department’s position that the laws legalizing recreational use of marijuana in Colorado and Washington are preempted by federal law? Why or why not?
3. What is the Department of Justice’s position as to whether the policy announced in the August 29, 2013 Cole Memorandum violates the United States’ treaty obligations, including the Single Convention on Narcotic Drugs, which requires the United States to limit exclusively to medical and scientific purposes the use and possession of certain drugs, including marijuana, or otherwise violates international law? What is the basis for its position? Did the Department consult with the State Department in advance of announcing its policy? If so, what was the State Department’s position?

QUESTIONS SUBMITTED BY SENATOR PATRICK LEAHY FOR JAMES M. COLE

**Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
on “Conflicts Between State and Federal Marijuana Laws”
September 10, 2013**

Questions for Deputy Attorney General James Cole

Question 1:

You testified that the Department of Justice is consulting with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding the lack of access to financial services for marijuana businesses operating in accordance with state law.

What, if any, other federal government agencies is the Department of Justice consulting with on this issue?

Does the Department of Justice intend to issue guidance to states, banks, federal regulators, and law enforcement regarding the provision of financial services to marijuana businesses operating in accordance with state law?

Question 2:

As I noted at the hearing, the media has reported that Drug Enforcement Administration (DEA) agents instructed armored car companies to cease providing services to marijuana dispensaries, leaving no professional protection for what has largely become an all-cash business. You testified that you believe the DEA merely asked these armored car companies questions, and that this questioning occurred prior to issuance of your August 29 memorandum to United States Attorneys.

What, if any, guidance has been provided to the DEA regarding the use of armored car services, banking services, or any other financial services by marijuana-related businesses operating in accordance with state law? If guidance has not been provided to the DEA, does the Department of Justice intend to provide it in light of these media reports?

Question 3:

Several states, including Vermont, have enacted laws permitting the cultivation under state permit or license of industrial hemp – that is, cannabis with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. The Controlled Substances Act currently does not distinguish between industrial hemp and marijuana.

Does the guidance for enforcement of federal marijuana laws outlined in your August 29 memorandum also apply to state laws regarding the cultivation and processing of industrial hemp?

Does the Department of Justice intend to prosecute those who cultivate or process industrial hemp in compliance with state law if none of the Department's eight enforcement priorities (as outlined in your August 29 memorandum) is implicated?

QUESTIONS SUBMITTED BY SENATOR AL FRANKEN FOR JAMES M. COLE

Senate Judiciary Committee Hearing
“Conflicts between State and Federal Marijuana Laws”
Questions for the Record Submitted by Senator Al Franken for
the Honorable John Urquhart, Sheriff, King County, WA

Question 1: Some studies indicate that enforcement of marijuana possession laws have a racially disparate impact. For example, a recent report found that African Americans are 3.73 times more likely to be arrested for marijuana possession than are whites, even though African Americans and whites use marijuana at similar rates. See “The War on Marijuana in Black and White,” American Civil Liberties Union at 9 (June 2013). The report says that this disparity increased significantly between 2001 and 2010, and it concludes that “[t]he war on marijuana has largely been a war on people of color.” *Id.* at 9.

- What are your thoughts on the racially disparate impact of marijuana possession laws?
- What advice do you have for lawmakers who are concerned about these data?
- What advice do you have for law enforcement leaders who want to enforce the laws in a racially neutral manner?

Question 2: I want to thank the King County Sheriff’s Office for its endorsement of the Justice & Mental Health Collaboration Act (JMCA), which will extend federal support for mental health courts, crisis intervention teams, and veterans treatment courts. I believe that it makes sense to provide non-violent offenders with access to rigorous treatment and supervision programs in appropriate cases, and I know that our law enforcement officers face difficult challenges when they are asked to fill public health roles – such as responding to mental health crises in the community and overseeing the jails, where many people with mental illnesses are living.

- Could you please explain how JMCA would help your office and your community?

QUESTIONS SUBMITTED BY SENATOR CHARLES GRASSLEY FOR JOHN URQUHART

Senate Committee on the Judiciary

“Conflicts between State and Federal Marijuana Laws”

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

John Urquhart, Sheriff, King County, Washington

1. You suggested that your support for Washington’s Initiative 502, which legalized recreational amounts of marijuana, is in part linked to high incarceration rates. What do the two have to do with each other? To what extent are simple possessors of the amounts of marijuana legalized by Initiative 502, who do not have any other criminal history or conduct, incarcerated in Washington? Do you support the legalization of any other drugs that are illegal under federal law?
2. You testified that you will instruct your officers to enforce the law under Initiative 502, including writing tickets for smoking marijuana in public. However, according to press reports, during Seattle’s three-day Hempfest in August 2013, many attendees openly smoked and sold marijuana in public and on public property. Attendees also were given snack foods by police officers with stickers that read: “We thought you might be hungry.” Are these press reports accurate? How many tickets for smoking marijuana in public were issued by Seattle police to those attending Hempfest?

QUESTIONS SUBMITTED BY SENATOR CHARLES GRASSLEY FOR JACK FINLAW

Senate Committee on the Judiciary

“Conflicts between State and Federal Marijuana Laws”

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

Jack Finlaw, Chief Legal Counsel

to Colorado Governor John Hickenlooper

1. In 2010, Colorado was the source state for 10% of all marijuana interdicted in Iowa. That number grew to 25% in 2011, and to 36% in 2012. This is all before legalization of recreational use there. In the words of your Attorney General, the state is becoming “a significant exporter of marijuana to the rest of the country.” Does Colorado have any specific, concrete steps it either has taken or plans to take in the wake of its legalization of marijuana that would protect states like Iowa from receiving diverted marijuana from Colorado?
2. You testified that part of the solution to the problems of increased use of marijuana among youth in Colorado and the state’s lack of enforcement of its medical marijuana laws lies in the receipt of increased revenues from taxing marijuana. Is it your position that the legalization and taxation of marijuana will result in a net financial gain for your state? If so, what is the basis for that conclusion, given the public health, safety, and other social costs that will likely result from the legalization of marijuana?

QUESTIONS SUBMITTED BY SENATOR CHARLES GRASSLEY FOR KEVIN SABET

Senate Committee on the Judiciary

“Conflicts between State and Federal Marijuana Laws”

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

Kevin A. Sabet, Ph.D.

1. Do you oppose the legalization of marijuana or are you merely concerned about some of its effects? Does opposing the legalization of marijuana mean that you support prison sentences for low-level users of marijuana who have not been involved in any other criminal activity? Is that something that is actually occurring either at the federal or state level?
2. In states that legalize the recreational use of marijuana, do you expect that the number of individuals that have contact with the criminal justice system as a result of marijuana use will rise or fall? Why?
3. In states that legalize and tax the recreational use of marijuana, do you expect governments to realize a net financial gain? Why or why not? What do studies tell us about whether governments realize a net financial gain from the availability of alcohol and tobacco, given the public health, safety, and other social costs that result from these legal drugs?

ANSWERS

RESPONSES OF JAMES M. COLE TO QUESTIONS SUBMITTED BY SENATORS LEAHY,
GRASSLEY, AND FEINSTEIN



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 18 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Deputy Attorney General James M. Cole before the Committee on September 10, 2013, at a hearing entitled "Conflicts between State and Federal Marijuana Laws." We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Kadzik".

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

**Questions for the Record
Deputy Attorney General James M. Cole
U.S. Department of Justice**

**Committee on the Judiciary
United States Senate**

**“Conflicts between State and Federal Marijuana Laws”
September 10, 2013**

Questions Posed by Senator Leahy

1. You testified that the Department of Justice is consulting with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding the lack of access to financial services for marijuana businesses operating in accordance with state law.

What, if any, other federal government agencies is the Department of Justice consulting with on this issue?

Does the Department of Justice intend to issue guidance to states, banks, federal regulators, and law enforcement regarding the provision of financial services to marijuana businesses operating in accordance with state law?

Response:

The Department of Justice and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) worked closely in considering policy options and developing guidance on these issues. On February 14, 2014, the Department of Justice issued guidance [Attachment A] to all U.S. Attorneys regarding marijuana and related financial crimes. FinCEN also issued guidance on February 14, 2014 [Attachment B], regarding Bank Secrecy Act (BSA) expectations for financial institutions seeking to provide services to marijuana-related businesses.

2. As I noted at the hearing, the media has reported that Drug Enforcement Administration (DEA) agents instructed armored car companies to cease providing services to marijuana dispensaries, leaving no professional protection for what has largely become an all-cash business. You testified that you believe the DEA merely asked these armored car companies questions, and that this questioning occurred prior to issuance of your August 29 memorandum to United States Attorneys.

What, if any, guidance has been provided to the DEA regarding the use of armored car services, banking services, or any other financial services by marijuana-related businesses operating in accordance with state law? If guidance has not been provided to the DEA, does the Department of Justice intend to provide it in light of these media reports?

Response:

The memorandum I issued on August 29, 2013 [Attachment C, "August 29 memorandum"], provided guidance to all Department attorneys and law enforcement agents, including Special Agents of the Drug Enforcement Administration (DEA), regarding enforcement priorities under the Controlled Substances Act (CSA). The provision of financial services to marijuana businesses implicates a number of other federal criminal statutes in addition to the CSA, including the money laundering statutes (18 U.S.C. §§ 1956, 1957, 1960) and the Bank Secrecy Act. To address these issues, I issued a memorandum on February 14, 2014 [Attachment A], which provides guidance to all Department attorneys and law enforcement agents regarding marijuana-related financial crimes.

3. Several states, including Vermont, have enacted laws permitting the cultivation under state permit or license of industrial hemp – that is, cannabis with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. The Controlled Substances Act currently does not distinguish between industrial hemp and marijuana.

(A) Does the guidance for enforcement of federal marijuana laws outlined in your August 29 memorandum also apply to state laws regarding the cultivation and processing of industrial hemp?

Response:

The cultivation of marijuana for industrial purposes is governed by the CSA and permitted pursuant to the registration requirements found in Title 21, United States Code, Section 823. In addition, the Agricultural Act of 2014, Pub.L. 113-79, permits institutions of higher education and State departments of agriculture to grow or cultivate "industrial hemp," as defined in the statute, for purposes of research conducted under an agricultural pilot program or other agricultural or academic research. These are lawful activities when conducted in compliance with federal and state law, and accordingly, do not implicate the guidance of the August 29 memorandum.

Maintaining an effective system of registration for manufacturers of controlled substances is an important federal interest. Accordingly, the Department of Justice, through the DEA and consistent with the mandates of Section 823 of the CSA, will continue to work to facilitate federal registration by individuals and entities within states permitting the cultivation of marijuana for industrial purposes who are seeking to engage in such lawful activity. To the extent marijuana is cultivated, either for consumption or for industrial or other purposes, in violation of federal law, the guidance of the August 29 memorandum would apply to the use of investigative and prosecutorial resources to enforce the relevant provisions of the CSA.

(B) Does the Department of Justice intend to prosecute those who cultivate or process industrial hemp in compliance with state law if none of the Department's eight enforcement priorities (as outlined in your August 29 memorandum) is implicated?

Response:

Please see the response to Question 3(A), above.

Questions Posed by Ranking Member Grassley

4. Will the Department of Justice establish specific, quantifiable metrics by which it will evaluate how the state laws legalizing and regulating the cultivation, trafficking and/or recreational use of marijuana are affecting each of the areas of federal enforcement priority identified in the August 29, 2013 Cole Memorandum? If so, will it make those metrics public? If it will not establish metrics, how will it know whether its stated policy of “trust but verify” is a success or failure?

Response:

The Department’s focus is on applying its limited investigative and prosecutorial resources to enforcing the CSA in a manner that addresses the most significant threats to public safety, as discussed in the August 29 memorandum. As noted in the August 29 memorandum, the Department’s guidance rests on the expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. To the extent conduct in any state implicates the eight enforcement priorities, the Department will enforce the CSA consistent with the August 29 memorandum. The Department will consider data of all forms – federal surveys on drug usage, state and local research, and, of course, feedback from the community and from federal, state, and local law enforcement – on the degree to which state systems protect federal enforcement priorities and the public. We are also working with the Office of National Drug Control Policy and other partner agencies to identify other mechanisms by which to evaluate such data.

5. Although the Department of Justice has decided to defer any legal challenge to these state laws at this time, is it the Department’s position that the laws legalizing recreational use of marijuana in Colorado and Washington are preempted by federal law? Why or why not?

Response:

Preemption analysis is statute-specific and presents a question of whether state laws conflict with the federal statutory regime. For example, the analysis of state laws altering or eliminating punishments for marijuana-related activity could differ substantially from that of state laws establishing a regulatory regime or framework for sanctioning or facilitating activity that remains in violation of federal law. With regard to these particular laws in Colorado and Washington, and without reaching the ultimate question of preemption, the Department has determined that, at this time, we can continue to enforce the CSA pursuant to our traditional federal enforcement priorities. We expect our state partners will enforce their state laws in a manner that prevents harm to federal interests and the public. If the state systems implemented in Colorado and Washington do not protect those priorities, the Department is prepared to bring federal cases to protect them.

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

Response:

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

Questions Posed by Senator Feinstein

7. While I support the compassionate use of marijuana in certain medical situations when prescribed by a physician for a serious illness, I am concerned about individuals taking advantage of California's medical marijuana law.

As one example, on January 24, 2013, the Department of Justice announced that San Diego resident Joshua Hester was sentenced to 100 months in prison for creating two medical marijuana dispensaries and a phony board of directors as a front for a multi-million dollar drug trafficking organization. He pled guilty to charges of conspiracy to distribute over 1,000 kilograms of marijuana.

It is important that the Department of Justice continues to investigate and prosecute owners of medical marijuana dispensaries in California that distribute the drug for illicit, non-medical use.

- (A) Will the Department of Justice continue to pursue individuals in California operating outside of the scope of our state medical marijuana law?

Response:

We share your concerns about the dangers to public health and safety posed by large-scale drug traffickers. The Department has directed its prosecutors and agents to continue to investigate and prosecute marijuana cases on a case-by-case basis, and the primary question in all cases will be whether the conduct at issue implicates one or more of the federal enforcement priorities set forth in the August 29 memorandum. In many cases, the conduct of individuals operating outside the scope of state marijuana laws will also harm those federal enforcement priorities. In those cases where the conduct does not harm federal priorities, we expect our state and local partners to address those cases consistent with the traditional federal-state approach to drug enforcement.

- (B) What language can you point to in your August 29, 2013 memo that will assure me that these prosecutions will continue?

Response:

The August 29 memorandum sets forth the Department's eight priorities that will continue to guide enforcement of the CSA against marijuana-related conduct. Individuals in California whose conduct implicates any one of our traditional eight enforcement federal priorities – such as defendants like Mr. Hester, who operated a criminal enterprise and fraudulently attempted to conceal his ownership interest and the income he earned from the dispensaries through a sham board of directors – will continue to be targets of federal enforcement.

8. Due in part to successful enforcement efforts against marijuana cultivation on public lands, marijuana growers in California are moving onto privately-owned agricultural land, particularly in the Central Valley. One tactic is the use of a "deceptive lease," in which the marijuana grower makes a false statement of his or her intentions for use of the farmland in order to lease the land. This presents serious problems for farmers and landowners in California.

Marijuana cultivation also leads to environmental degradation and increased crime, which affect all of us.

Given the confusion surrounding state and federal marijuana laws, farmers are unsure how to deal with the problem. In a September 10, 2013 letter to Attorney General Holder, I asked that the Department of Justice, in coordination with the Department of Agriculture, conduct a public information campaign to educate farmers in California on the relevant laws and how to deal with marijuana grown on their property.

Will the Department of Justice commit to conducting a public information campaign to assist farmers and landowners in dealing with the problem of agricultural marijuana grows?

Response:

The public health, safety and environmental harms that flow from marijuana cultivation are of great concern, and the United States Attorneys have been active in prosecuting cases involving firearms and interstate trafficking that originate with agricultural land grows. These cases are, and will continue to be, enforcement priorities, as are cases involving illegal marijuana cultivation on public lands. The Department, consistent with the August 29 memorandum, will continue to enforce prohibitions on marijuana cultivation that threaten public health, safety or environmental harms.

In our December 12, 2013, response to your September 10, 2013, letter we noted that the Department of Justice will coordinate with the Department of Agriculture in an effort to develop appropriate materials addressing these issues. We appreciate your letter dated January 29, 2014, in which you provided valuable input regarding the information you suggest be included in any materials from the Departments of Justice and Agriculture for landowners and farmers faced with illegal marijuana grows on their land. We are working with the Department of Agriculture to develop useful information for those impacted throughout the country, including farmers and landowners in California's Central Valley.

- 9. Your August 29th memorandum lists a number of enforcement priorities for the Justice Department, including the prevention of drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.**

I am very concerned about the impact that Colorado and Washington's legalization initiatives will have on drugged driving in these states.

What metrics will you use to assess when federal enforcement is necessary in the case of drugged driving or other public health consequences in Colorado and Washington?

Response:

Please see the response to Question 4, above.

10. Your August 29th memorandum states that the Justice Department will continue to prevent the “diversion of marijuana from states where it is legal under state law in some form to other states.”

It seems that this is already a problem. According to the Colorado High Intensity Drug Trafficking Area (HIDTA), in 2012, there were 274 Colorado marijuana interdiction seizures destined for other states compared to 54 in 2005. This is a 407 percent increase.

How will you assess when federal enforcement is needed for diversion of marijuana from Colorado and Washington to other states?

Response:

The August 29 memorandum identified interstate trafficking of marijuana from states such as Colorado and Washington to other states as a federal enforcement priority. Accordingly, U.S. Attorneys’ Offices will prosecute cases involving the diversion of marijuana from such states in accordance with their prosecutions guidelines, as with any other case under the CSA.

11. The Monitoring the Future Survey, sponsored by the National Institute on Drug Abuse, demonstrates that marijuana use among minors is increasing. For instance, the most recent report shows that 36% of high school seniors used marijuana in the last 12 months. At the same time, this data suggests a sharp decline in the amount of risk teenagers perceive to be associated with its use.

(A) With this data in mind, what, if any, changes in marijuana use among minors would need to be observed by the Justice Department to trigger federal intervention pursuant to your latest guidance?

Response:

As set forth in our August 29 memorandum, the Department expects that jurisdictions that have enacted laws legalizing marijuana in some form will also establish strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, and to protect against the harms that we have identified. Specifically, these harms include the dangers that marijuana availability and use could pose to minors. Preventing the distribution of marijuana to minors is one of the Department’s eight enforcement priorities. If state enforcement efforts are not sufficiently robust to protect against this harm and/or the other harms that we have identified, then the Department may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions focused on those harms. In making these determinations, if it appears from reliable information that the absence of strong and effective regulatory and enforcement systems is contributing to an increase in marijuana use among minors in a particular jurisdiction, the Department will consider this data as well as all other available information and evidence.

- (B) Has the Justice Department developed, or does it plan to develop, criteria to assist states in “implementing strong and effective regulatory and enforcement systems” that would prevent federal intervention?**

Response:

We have not developed specific criteria for state regulations. Rather, the August 29 memorandum identifies eight specific federal priorities that we expect jurisdictions that enact marijuana laws to affirmatively address through stringent regulatory and enforcement systems. We expect that Colorado and Washington will continue to work to implement strong and effective systems that address the harms we have identified.

12. You state in your August 29th memo that, “prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities.” Two sentences later, the memo qualifies this sentence by stating that a “marijuana operation’s large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular enforcement priority.”

Let’s examine a hypothetical – but realistic – scenario under the Department of Justice’s guidance. Would a large-scale marijuana dispensary that does not distribute to minors, does not fund gangs or criminal enterprises, does not divert marijuana to other states, does not traffic in other drugs, is not involved in violence, and does not use public or federal lands be an enforcement priority if it’s clear that it is selling its drugs to those who have no legitimate medical purpose to consume marijuana?

Response:

It is difficult to respond to such a hypothetical. As set forth in the August 29 memorandum, the Department’s eight enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement. For example, even if there was a lack of evidence that a large-scale marijuana dispensary was distributing marijuana to minors, the dispensary could be conducting business near a place or area associated with minors, or marketing its products in a manner designed to appeal to minors, or having its products diverted, directly or indirectly, to minors. These are the type of facts that would inform whether investigation and prosecution would be warranted under the first priority. Similarly, there are additional facts that may inform whether the conduct of a large-scale marijuana enterprise is implicating other federal enforcement priorities. Furthermore, as stated in the August 29 memorandum, a marijuana operation’s large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority.

Attachments

Attachment A



U.S. Department of Justice

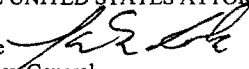
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

February 14, 2014

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Related Financial Crimes

On August 29, 2013, the Department issued guidance (August 29 guidance) to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). The August 29 guidance reiterated the Department's commitment to enforcing the CSA consistent with Congress' determination that marijuana is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. In furtherance of that commitment, the August 29 guidance instructed Department attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against marijuana-related conduct:

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

Under the August 29 guidance, whether marijuana-related conduct implicates one or more of these enforcement priorities should be the primary question in considering prosecution

Memorandum for All United States Attorneys
 Subject: Guidance Regarding Marijuana Related Financial Crimes

Page 2

under the CSA. Although the August 29 guidance was issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide. The guidance, however, did not specifically address what, if any, impact it would have on certain financial crimes for which marijuana-related conduct is a predicate.

The provisions of the money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a “specified unlawful activity,” including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds “derived from” marijuana-related conduct can also serve as a predicate for prosecution under 18 U.S.C. § 1960. Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. *See, e.g.*, 31 U.S.C. § 5318(g). Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.

As noted in the August 29 guidance, the Department is committed to using its limited investigative and prosecutorial resources to address the most significant marijuana-related cases in an effective and consistent way. Investigations and prosecutions of the offenses enumerated above based upon marijuana-related activity should be subject to the same consideration and prioritization. Therefore, in determining whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance and reiterated above.¹ For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers’ activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers

¹ The Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) is issuing concurrent guidance to clarify BSA expectations for financial institutions seeking to provide services to marijuana-related businesses. The FinCEN guidance addresses the filing of Suspicious Activity Reports (SAR) with respect to marijuana-related businesses, and in particular the importance of considering the eight federal enforcement priorities mentioned above, as well as state law. As discussed in FinCEN’s guidance, a financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the federal enforcement priorities or violate state law, would file a “Marijuana Limited” SAR, which would include streamlined information. Conversely, a financial institution filing a SAR on a marijuana-related business it reasonably believes, based on its customer due diligence, implicates one of the federal priorities or violates state law, would be label the SAR “Marijuana Priority,” and the content of the SAR would include comprehensive details in accordance with existing regulations and guidance.

Memorandum for All United States Attorneys
 Subject: Guidance Regarding Marijuana Related Financial Crimes

Page 3

services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.

The August 29 guidance rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities. Consequently, financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal enforcement priorities.² In addition, because financial institutions are in a position to facilitate transactions by marijuana-related businesses that could implicate one or more of the priority factors, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors. Moreover, as the Department's and FinCEN's guidance are designed to complement each other, it is essential that financial institutions adhere to FinCEN's guidance.³ Prosecutors should continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct of a person or entity threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

² For example, financial institutions should recognize that a marijuana-related business operating in a state that has not legalized marijuana would likely result in the proceeds going to a criminal organization.

³ Under FinCEN's guidance, for instance, a marijuana-related business that is not appropriately licensed or is operating in violation of state law presents red flags that would justify the filing of a Marijuana Priority SAR.

Attachment B



Department of the Treasury Financial Crimes Enforcement Network

Guidance

FIN-2014-G001

Issued: February 14, 2014

Subject: BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network (“FinCEN”) is issuing guidance to clarify Bank Secrecy Act (“BSA”) expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice (“DOJ”) concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act (“CSA”) makes it illegal under federal law to manufacture, distribute, or dispense marijuana.¹ Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum (the “Cole Memo”) to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.² The Cole Memo guidance applies to all of DOJ’s federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates Congress’s determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most

¹ Controlled Substances Act, 21 U.S.C. § 801, *et seq.*

² James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, the Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the “Cole Memo priorities”):³

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

Concurrently with this FinCEN guidance, Deputy Attorney General Cole is issuing supplemental guidance directing that prosecutors also consider these enforcement priorities with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA.⁴

Providing Financial Services to Marijuana-Related Businesses

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of

³ The Cole Memo notes that these enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA.

⁴ James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014).

products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement's priorities. A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports ("SARs") as described below.

Filing Suspicious Activity Reports on Marijuana-Related Businesses

The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.⁵ Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds.

One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a SAR that facilitates law enforcement's access to information pertinent to a priority.

"Marijuana Limited" SAR Filings

A financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a "Marijuana Limited" SAR. The content of this

⁵ See, e.g., 31 CFR § 1020.320. Financial institutions shall file with FinCEN, to the extent and in the manner required, a report of any suspicious transaction relevant to a possible violation of law or regulation. A financial institution may also file with FinCEN a SAR with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations.

SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term “MARIJUANA LIMITED” in the narrative section.

A financial institution should follow FinCEN’s existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a “Marijuana Limited” SAR.⁶ The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a “Marijuana Priority” SAR.

“Marijuana Priority” SAR Filings

A financial institution filing a SAR on a marijuana-related business that it reasonably believes, based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law should file a “Marijuana Priority” SAR. The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. Financial institutions should use the term “MARIJUANA PRIORITY” in the narrative section to help law enforcement distinguish these SARs.⁷

“Marijuana Termination” SAR Filings

If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it should

⁶ Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (Question #16), available at: http://fincen.gov/whatsnew/html/sar_faqs.html (providing guidance on the filing timeframe for submitting a continuing activity report).

⁷ FinCEN recognizes that a financial institution filing a SAR on a marijuana-related business may not always be well-positioned to determine whether the business implicates one of the Cole Memo priorities or violates state law, and thus which terms would be most appropriate to include (i.e., “Marijuana Limited” or “Marijuana Priority”). For example, a financial institution could be providing services to another domestic financial institution that, in turn, provides financial services to a marijuana-related business. Similarly, a financial institution could be providing services to a non-financial customer that provides goods or services to a marijuana-related business (e.g., a commercial landlord that leases property to a marijuana-related business). In such circumstances where services are being provided indirectly, the financial institution may file SARs based on existing regulations and guidance without distinguishing between “Marijuana Limited” and “Marijuana Priority.” Whether the financial institution decides to provide indirect services to a marijuana-related business is a risk-based decision that depends on a number of factors specific to that institution and the relevant circumstances. In making this decision, the institution should consider the Cole Memo priorities, to the extent applicable.

file a SAR and note in the narrative the basis for the termination. Financial institutions should use the term “MARIJUANA TERMINATION” in the narrative section. To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity. See *Section 314(b) Fact Sheet* for more information.⁸

Red Flags to Distinguish Priority SARs

The following red flags indicate that a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law. These red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list. It is thus important to view any red flag(s) in the context of other indicators and facts, such as the financial institution’s knowledge about the underlying parties obtained through its customer due diligence. Further, the presence of any of these red flags in a given transaction or business arrangement may indicate a need for additional due diligence, which could include seeking information from other involved financial institutions under Section 314(b). These red flags are based primarily upon schemes and typologies described in SARs or identified by our law enforcement and regulatory partners, and may be updated in future guidance.

- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
 - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
 - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
 - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
 - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
 - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.

⁸ Information Sharing Between Financial Institutions: Section 314(b) Fact Sheet, *available at*: http://fincen.gov/statutes_regs/patriot/pdf/314bfactsheet.pdf.

- Deposits apparently structured to avoid Currency Transaction Report (“CTR”) requirements.
 - Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
 - Deposits by third parties with no apparent connection to the account holder.
 - Excessive commingling of funds with the personal account of the business’s owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
 - Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
 - Financial statements provided by the business to the financial institution are inconsistent with actual account activity.
 - A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.
- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
 - The business is unable to demonstrate the legitimate source of significant outside investments.
 - A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a “consulting,” “holding,” or “management” company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
 - Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
 - The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
 - A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- A marijuana-related business's proximity to a school is not compliant with state law.
- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

Currency Transaction Reports and Form 8300's

Financial institutions and other persons subject to FinCEN's regulations must report currency transactions in connection with marijuana-related businesses the same as they would in any other context, consistent with existing regulations and with the same thresholds that apply. For example, banks and money services businesses would need to file CTRs on the receipt or withdrawal by any person of more than \$10,000 in cash per day. Similarly, any person or entity engaged in a non-financial trade or business would need to report transactions in which they receive more than \$10,000 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business). A business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8), and therefore, is not eligible for consideration for an exemption with respect to a bank's CTR obligations under 31 C.F.R. § 1020.315(b)(6).

* * * * *

FinCEN's enforcement priorities in connection with this guidance will focus on matters of systemic or significant failures, and not isolated lapses in technical compliance. Financial institutions with questions about this guidance are encouraged to contact FinCEN's Resource Center at (800) 767-2825, where industry questions can be addressed and monitored for the purpose of providing any necessary additional guidance.

Attachment C

**U.S. Department of Justice**

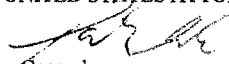
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

Memorandum for All United States Attorneys
Subject: Guidance Regarding Marijuana Enforcement

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- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.¹

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

¹ These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

Memorandum for All United States Attorneys
Subject: Guidance Regarding Marijuana Enforcement

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As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Ronald T. Hosko
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

RESPONSES OF JOHN URQUHART TO QUESTIONS SUBMITTED BY SENATOR FRANKEN



KING COUNTY SHERIFF'S OFFICE
516 Third Avenue, W-116
Seattle, WA 98104

John Urquhart
Sheriff

Senate Judiciary Committee Hearing
"Conflicts between State and Federal Marijuana Laws"
Questions for the Record Submitted by Senator Al Franken for
the Honorable John Urquhart, Sheriff, King County, WA

Question 1: Some studies indicate that enforcement of marijuana possession laws have a racially disparate impact. For example, a recent report found that African Americans are 3.73 times more likely to be arrested for marijuana possession than are whites, even though African Americans and whites use marijuana at similar rates. See "The War on Marijuana in Black and White," American Civil Liberties Union at 9 (June 2013). The report says that this disparity increased significantly between 2001 and 2010, and it concludes that "[t]he war on marijuana has largely been a war on people of color." *Id.* at 9.

- What are your thoughts on the racially disparate impact of marijuana possession laws?

John Urquhart – *I agree with reports stating that marijuana enforcement laws have historically been enforced against African Americans in a disparate manner. Police departments focus their limited resources where they feel they can best serve the community. This often means that if we are getting calls about drug dealing, or speeding, or loitering, we will try to respond to the community's concerns and fix the problems by enforcing the laws available to us.*

The issue of marijuana enforcement is not just enforced in a racially disparate manner, but an economically disparate manner. People with lower incomes are more likely to publicly use drugs or engage in drug dealing, than those of higher incomes. Those with higher incomes are using in their own homes, or dorm rooms, etc. Therefore, lower income usage of marijuana becomes a more visible problem to the rest of the community, making the police more likely to receive complaints, and thus direct their resources to address it.

- What advice do you have for lawmakers who are concerned about these data?

John Urquhart – *The problems associated with drug use do not start at the time of arrest, but in the family unit. The determination is influenced by whether a child is receiving adequate early learning education, whether a student is learning in a safe and fulfilling environment, or whether an adult can become gainfully employed. I would encourage our lawmakers to implement policy that gives the greatest number of people the best opportunity to succeed, so they are less likely to turn to drug use, ultimately harming their own lives and those of their loved ones.*

- What advice do you have for law enforcement leaders who want to enforce the laws in a racially neutral manner?

John Urquhart – *I don't know that I have any advice for law enforcement leaders other than to be aware of their own biases, and to ask their police officers to do the same. We as police officers have a duty to enforce the law. When we identify laws that are having a net detrimental impact on society in their enforcement, I also consider it our duty to alert lawmakers to that fact. That's why I was so vocal about my support of I-502. In that case, the citizens of Washington were the policy makers, and I made it clear from my experience as a narcotics detective, that the old system of enforcement was not working, and we needed to try something new.*

Question 2: I want to thank the King County Sheriff's Office for its endorsement of the Justice & Mental Health Collaboration Act (JMHA), which will extend federal support for mental health courts, crisis intervention teams, and veterans treatment courts. I believe that it makes sense to provide non-violent offenders with access to rigorous treatment and supervision programs in appropriate cases, and I know that our law enforcement officers face difficult challenges when they are asked to fill public health roles – such as responding to mental health crises in the community and overseeing the jails, where many people with mental illnesses are living.

- Could you please explain how JMHA would help your office and your community?

John Urquhart – *The JMHA is critical for supporting the safety net of some of our community's most vulnerable residents. My deputies see the impacts every day of defunding our mental health care system in King County and Washington State. The King County Jail has become the largest de facto mental health hospital in the entire state due to budget costs. Corrections and court costs are skyrocketing as cases are delayed as defendants are put on long waiting lists for assessments and treatment. And in the community, when law enforcement encounters people suffering from mental illness, it ends in tragedy. Earlier support may have prevented such an encounter. I stand firmly behind the goals of the JMHA and urge its passage.*

RESPONSES OF JOHN URQUHART TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY



Senate Committee on the Judiciary

"Conflicts between State and Federal Marijuana Laws"

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

John Urquhart, Sheriff, King County, Washington

1. You suggested that your support for Washington's Initiative 502, which legalized recreational amounts of marijuana, is in part linked to high incarceration rates. What do the two have to do with each other? To what extent are simple possessors of the amounts of marijuana legalized by Initiative 502, who do not have any other criminal history or conduct, incarcerated in Washington? Do you support the legalization of any other drugs that are illegal under federal law?

John Urquhart – *I do not support the legalization of any other drugs that are illegal under federal law. I am not aware of any data available to answer your question to what extent possessors of marijuana are incarcerated in Washington. But I know that a criminal conviction can have just as detrimental effect to a person's future as being incarcerated. A criminal conviction has the potential to follow someone around for life. Students convicted of drug offenses, including marijuana, have their federal financial aid eligibility negatively impacted. Criminal convictions may be required on job or housing applications. And of course, criminal convictions can lead to incarceration that negatively impacts an individual's ability to become a productive member of society in the future. The citizens of Washington State have made it clear that they do not want those who possess small amounts of marijuana to be convicted or incarcerated, and I will abide by their wishes.*

2. You testified that you will instruct your officers to enforce the law under Initiative 502, including writing tickets for smoking marijuana in public. However, according to press reports, during Seattle's three-day Hempfest in August 2013, many attendees openly smoked and sold marijuana in public and on public property. Attendees also were given snack foods by police officers with stickers that read: "We thought you might be hungry." Are these press reports accurate? How many tickets for smoking marijuana in public were issued by Seattle police to those attending Hempfest?

John Urquhart -- *The King County Sheriff's Office and the Seattle Police Department are two separate entities, therefore I do not have figures regarding the number of tickets that SPD issued to attendees of Hempfest. I am aware of press reports describing the outreach efforts of SPD to educate citizens on changes to laws that may have an impact on them, and have been given no reason to question their veracity.*

The Sheriff's Office presence in the city of Seattle is primarily in the form of our Metro and Sound Transit Police. I have instructed my deputies that they will enforce the law under Initiative 502, which includes writing tickets for smoking marijuana in public, and I expect that law to be enforced. The law also prohibits street deals for marijuana. In November of 2013, my deputies and SPD conducted an undercover investigation in downtown Seattle that resulted in the arrest of 30 drug dealers and gang members for selling crack cocaine, powder cocaine, pills, and marijuana.

RESPONSES OF JACK FINLAW TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Senate Committee on the Judiciary

“Conflicts between State and Federal Marijuana Laws”

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

Jack Finlaw, Chief Legal Counsel

to Colorado Governor John Hickenlooper

1. In 2010, Colorado was the source state for 10% of all marijuana interdicted in Iowa. That number grew to 25% in 2011, and to 36% in 2012. This is all before legalization of recreational use there. In the words of your Attorney General, the state is becoming “a significant exporter of marijuana to the rest of the country.” Does Colorado have any specific, concrete steps it either has taken or plans to take in the wake of its legalization of marijuana that would protect states like Iowa from receiving diverted marijuana from Colorado?

Response: Colorado is committed to preventing the diversion of marijuana grown in Colorado to states where marijuana is still illegal under state law. In response to the citizen-initiated state constitutional amendment legalizing marijuana in Colorado, which was approved by voters in November 2012, the Governor and the Colorado General Assembly enacted enabling legislation in May 2013 that established a robust regulatory and enforcement regime for the oversight of the production and distribution of recreational marijuana. In September 2013, the Colorado Department of Revenue issued rules for the recreational marijuana industry that address licensing and residency requirements, inventory and tracking requirements for grow, product manufacturing and retail operations, and other rules constraining the production and distribution of marijuana in our state. The state also will be undertaking a market study in the months ahead to better understand the Colorado market for recreational marijuana and to guide the setting of marijuana production caps to be sure that there is a balance between in-state supply and demand. Our goal is to have permanent rules on production caps in place by mid-2014.

2. You testified that part of the solution to the problems of increased use of marijuana among youth in Colorado and the state’s lack of enforcement of its medical marijuana laws lies in the receipt of increased revenues from taxing marijuana. Is it your position that the legalization and taxation of marijuana will result in a net financial gain for your

state? If so, what is the basis for that conclusion, given the public health, safety, and other social costs that will likely result from the legalization of marijuana?

Response: The newly established Marijuana Enforcement Division in the Colorado Department of Revenue will regulate the cultivation, processing and sale of both medical and recreational marijuana, and it is hiring staff to enforce the new laws and regulations. The Marijuana Enforcement Division will also hire a liaison to federal, state and local law enforcement so that suspected criminal violations can be investigated in a timely manner. A key to successful regulation and enforcement is funding. The current funding structure for the regulatory system is not adequate and requires funds to be diverted from other state priorities such as education and health care. In November 2013, Colorado voters will be asked to approve a new special 10% sales tax on recreational marijuana, the proceeds of which will be used to fund the work of the Marijuana Enforcement Division and state and local law enforcement as well as marijuana-related costs for health care and education and prevention efforts. Passage of the special marijuana sales tax is a critical condition precedent to our ability to keep marijuana grown in Colorado from flowing into interstate commerce. Without revenue from the special marijuana sales tax, educational efforts aimed at preventing the use of marijuana by children and youth may not be funded.

RESPONSES OF KEVIN SABET TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Senate Committee on the Judiciary

“Conflicts between State and Federal Marijuana Laws”

September 10, 2013

Questions for the Record from Ranking Member Charles E. Grassley

Kevin A. Sabet, Ph.D.

1. Do you oppose the legalization of marijuana or are you merely concerned about some of its effects? Does opposing the legalization of marijuana mean that you support prison sentences for low-level users of marijuana who have not been involved in any other criminal activity? Is that something that is actually occurring either at the federal or state level?

I, and my organization, Project SAM, unambiguously oppose the legalization of marijuana. We oppose marijuana precisely because we are very concerned with the consequences of such a policy. We know legalization would dramatically lower the price of the drug, commercialize the substance, and thereby increasing its use. That we oppose legalization does not mean we support prison time for low-level users who have not been involved in any other criminal activity. We think that low-level users should be assessed for a health problem and dealt with accordingly. It is important to note, however, that low-level marijuana users do not constitute our state or federal prisoners. In fact, research has found that less than 0.3% of state prisoners are there for smoking marijuana.

2. In states that legalize the recreational use of marijuana, do you expect that the number of individuals that have contact with the criminal justice system as a result of marijuana use will rise or fall? Why?

An ironic and unintended consequences of legalization could very well be an *increase* in the number of people having contact with the criminal justice system. Legalization would mean more use, and thus more violations of marijuana-related regulations, more public intoxication violations, and an increased probability of drivers high on marijuana on the roads. To examine this argument in greater detail, we can see how another intoxicating, but legal, drug, alcohol, fares in the criminal justice system. Last year there were 2.7 million arrests for alcohol-related violations, *not* including violent crime. These 2.7 million arrests came from public drunkenness, the violation of liquor laws (like drinking-age limits), and driving while intoxicated. In contrast, arrests for marijuana violations stand at *less than one-third* of alcohol arrests. Indeed, our experience with alcohol indicates that laws and regulations around legal marijuana could result in *much higher costs* to the criminal justice system, in addition to increasing healthcare costs. This is a rarely discussed paradox.

Additionally, if alcohol and marijuana are used together, this compounds our problems. While it isn't a clear-cut case, the majority of studies investigating whether alcohol and marijuana are substitutes or complements suggest that the two drugs are used in a complementary way. This is consistent with the literature on tobacco and marijuana, which suggests that they too are complements, not substitutes.

Today in the United States there are about 15 million marijuana users compared to 129 million alcohol users and 70 million users of tobacco. The legalization of marijuana will result in a huge expansion in the number of its users. And with this increase, comes an increase in its potential harms.

3. In states that legalize and tax the recreational use of marijuana, do you expect governments to realize a net financial gain? Why or why not? What do studies tell us about whether governments realize a net financial gain from the availability of alcohol and tobacco, given the public health, safety, and other social costs that result from these legal drugs?

States that legalize marijuana can expect a net *loss* for their budgets. Our legal drugs – alcohol and tobacco – bring in about \$40 billion of state and federal tax revenue each year. However, to society, they cost us more than \$400 billion in lost social costs due to lost productivity for employers, school dropouts and truancy, healthcare costs, and, yes, criminal justice costs. We can expect the harms of marijuana to go up as we increase use through legalization – costs related to driving while high, coming to work high on marijuana, healthcare costs due to the ever-increasing panic attacks and anxiety issues related to today's high potency marijuana, and other social and healthcare costs.

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

LETTER TO ATTORNEY GENERAL ERIC HOLDER FROM STEVEN F. LUKAN, DIRECTOR,
IOWA GOVERNOR'S OFFICE OF DRUG CONTROL POLICY



STATE OF IOWA

TERRY E. BRANSTAD
GOVERNOR
KIM REYNOLDS
LT. GOVERNOR

OFFICE OF DRUG CONTROL POLICY
STEVEN F. LUKAN, DIRECTOR

U.S. Department of Justice
Attorney General Eric Holder
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Cc: U.S. Senator Charles Grassley
135 Hart Senate Office Building
Washington, DC 20510

31 August 2013

To the Department of Justice and the Honorable Members of the Senate Judiciary Committee,

As the Drug Policy Coordinator of Iowa, I am concerned by the recent U.S. Department of Justice directive to defer enforcement of federal law in states that have chosen to relax marijuana laws in conflict with the federal Controlled Substances Act (CSA).

Deprioritizing the prosecution of large-scale marijuana distribution and sales in certain states threatens to deprioritize the health and safety of Iowans and other Americans.

According to the Iowa Department of Public Safety, 36% of the marijuana seized in Iowa drug interdiction stops in 2012 originated in Colorado. Clearly allowing large scale marijuana sale and cultivation in one state has negative impacts on others.

Marijuana is a serious drug and needs to be treated as such. In Iowa, over 60% of our youth who are in drug treatment programs cite marijuana as their primary drug of choice. I believe it is a drug that holds great harm for our youth population, depriving them of the opportunity to achieve their full potential in life.

The new Department of Justice directive sends further mixed messages to Iowa youth that experimenting with Marijuana is OK.

As already shown, I believe this policy will make more illegal marijuana more accessible to more people, including children, in our state. We know that when children experiment with marijuana they are far more likely to go on to use drugs like heroin or prescription pain killers.

Reducing drug use and its consequences in America takes strong law enforcement, effective prevention and access to quality treatment. I urge the Department of Justice to reconsider the weakening of federal anti-drug law and fully enforce the federal CSA.

Respectfully,

A handwritten signature in dark ink, appearing to read "Steven F. Lukan". The signature is fluid and cursive, with the first name "Steven" and last name "Lukan" being the most legible parts.

Steven F. Lukan-Director Iowa Governor's Office of Drug Control Policy

LETTER TO ATTORNEY GENERAL ERIC HOLDER FROM NATIONAL LAW ENFORCEMENT ORGANIZATIONS IN HENNEPIN COUNTY, MINNESOTA; HUGHES COUNTY, SOUTH DAKOTA; ASSOCIATION OF STATE CRIMINAL INVESTIGATIVE AGENCIES; INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE; POLICE EXECUTIVE RESEARCH FORUM; AND NATIONAL NARCOTIC ASSOCIATIONS' COALITION



August 30, 2013

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
Washington, DC 20530

Dear Attorney General Holder,

On behalf of the undersigned national law enforcement organizations, we write to express our extreme disappointment that the U.S. Department of Justice does not intend to challenge policies in Colorado or Washington that legalize the sale and recreational use of marijuana in contravention of Federal law. Further, the Department reiterated its intent to enforce the Federal Controlled Substances Act (CSA) in eight priority areas, however, these will be extremely difficult for Federal, state, local and tribal law enforcement agencies to enforce in practice given the recently approved referendums. As law enforcement officials, we are charged with enforcing the law and keeping our neighborhoods and communities safe—a task that becomes infinitely harder for our front-line men and women given the Department's position.

The decision by the Department ignores the connections between marijuana use and violent crime, the potential trafficking problems that could be created across state and local boundaries as a result of legalization, and the potential economic and social costs that could be incurred. Communities have been crippled by drug abuse and addiction, stifling economic productivity. Specifically, marijuana's harmful effects can include episodes of depression, suicidal thoughts, attention deficit issues, and marijuana has also been documented as a gateway to other drugs of abuse.

Marijuana use has had devastating effects in our communities with over 8,000 drugged driving deaths a year, many of which involved marijuana use. Data from Colorado demonstrate the consequences of relaxed marijuana policies that lead to increased use: fatalities involving drivers testing positive for marijuana increased 114 percent between 2006 and 2011. Youth admissions into emergency rooms for marijuana-related incidents have also increased in Colorado. From 2005-2008, the national average for ER admissions for marijuana-related incidents was 18 percent, while in Colorado it was 25 percent. From 2009-2011, the national

average increased to 19.6 percent, while in Colorado it rose to 28 percent. Additionally, the Department of Health and Human Services issued a report showing that for drug-related emergency room visits among youth aged 12-17 the leading drug involved in the incident was marijuana. In addition, officials have documented major increases in exports of marijuana from Colorado to other states between 2010 and 2012.

As with many other drugs, marijuana can also be directly tied to violent crime. As recently as May of 2013, the Office of National Drug Control Policy (ONDCP) released a report showing that marijuana is the most common drug found in the systems of individuals arrested for criminal activity. The ONDCP study found that eighty percent of the adult males arrested for crimes in Sacramento, California, last year tested positive for at least one illegal drug. Marijuana was the most commonly detected drug, found in fifty-four percent of those arrested. Similar results were found in other major cities such as Chicago, Atlanta and New York.

The conclusion that can be drawn from these facts is that relaxed marijuana policies lead to clear and foreseeable negative consequences for communities and families.

Furthermore, it is unacceptable that the Department of Justice did not consult our organizations – whose members will be directly impacted – for meaningful input ahead of this important decision. Our organizations were given notice just thirty minutes before the official announcement was made public and were not given the adequate forum ahead of time to express our concerns with the Department’s conclusion on this matter. Simply “checking the box” by alerting law enforcement officials right before a decision is announced is not enough and certainly does not show an understanding of the value the Federal, state, local and tribal law enforcement partnerships bring to the Department of Justice and the public safety discussion.

Marijuana is illegal under Federal law and should remain that way. While we certainly understand that discretion plays a role in decisions to prosecute individual cases, the failure of the Department of Justice to challenge state policies that clearly contradict Federal law is both unacceptable and unprecedented. **The failure of the Federal government to act in this matter is an open invitation to other states to legalize marijuana in defiance of federal law.**

We strongly encourage you to consider all the potential implications of the Department’s decision not to enforce Federal law on marijuana sale and use in Colorado and Washington. The decision will undoubtedly have grave unintended consequences, including a reversal of the declining crime rates that we as law enforcement practitioners have spent more than a decade maintaining. Our number one goal is to protect the public and ensure its safety. The Department’s decision undermines law enforcement’s efforts to carry out this responsibility and will not aid in maintaining public safety.

Sincerely,



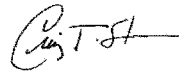
Richard W. Stanek
President, Major County Sheriffs' Association
Sheriff, Hennepin County (MN)



Michael H. Leidholt
President, National Sheriffs' Association
Sheriff, Hughes County (SD)



Robert McConnell
Executive Director, Association of State Criminal
Investigative Agencies



Craig T. Steckler
President, International Association of
Chiefs of Police



Charles H. Ramsey
President, Major Cities Chiefs Police Association
President, Police Executive Research Forum



Bob Bushman
President, National Narcotic
Associations' Coalition

Cc: Deputy Attorney General James Cole

LETTER TO ATTORNEY GENERAL ERIC HOLDER FROM THE FORMER ADMINISTRATORS
OF THE DRUG ENFORCEMENT ADMINISTRATION (1973–2007)

**Letter from the Former Administrators of the Drug Enforcement Administration
1973–2007**

September 9, 2013

The Honorable Attorney General Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Attorney General Holder:

We are shocked and dismayed with your decision to allow the states of Colorado and Washington to legalize the production and sale of marijuana for "recreational" use – this is in direct conflict with federal law and our international treaty obligations. We expressed our concern to you about state level efforts to legalize marijuana in August 2010 when California ballot initiative, Proposition 19 was being considered. On Oct 13, 2010 you responded, "let me state clearly that the Department of Justice strongly opposes Proposition 19. If passed, this legislation will greatly complicate federal drug enforcement efforts to the detriment of our citizens. Regardless of the passage of this or similar legislation, the Department of Justice will remain fully committed to enforcing the Controlled Substances Act (CSA) in all states. We will vigorously enforce the CSA against those individuals and organizations that possess, manufacture or distribute marijuana for recreational use, even if such activities are permitted under state law."

Federal laws and our international treaty obligations have not changed.

In fact, in January 2013, a Federal Appeals Court in Washington, DC affirmed that DEA's placing marijuana in Schedule I (an illegal status) of the CSA was entirely appropriate. How can you now allow two states to legalize marijuana in direct conflict with law enacted by Congress, particularly when the state laws frustrate the purpose of federal law? How can our country's law enforcement agencies expect to disrupt the most significant international cartels which deal in marijuana, cocaine and heroin? They are poly-drug organizations. What about the Asset Forfeiture Provisions, Title 881 (c) and (f) which provide that assets derived from, traceable to, and intended to be used for a violation of the CSA, shall be subject for forfeiture under civil law? The United States promoted and signed a treaty – the 1961 Single Convention on Drugs – to adopt measures that will ensure that cultivation, manufacture, possession, offering for sale on any terms whatsoever shall be punishable offenses. The treaty is specific with respect to marijuana and disallows trade in marijuana among private parties. The President of the International Narcotic Control Board has already called on the United States to enforce the law and treaty in all of its territories.

You took an oath of office, as each of us did, to support and defend the Constitution of the United States. Article VI of the Constitution, the Supremacy Clause, states that the laws enacted by Congress shall be the supreme law of the land. Great harm will be done in Colorado and Washington and throughout the country with the legalization of marijuana. There will be an increase of marijuana used by minors, since adults in these states will be able to purchase marijuana legally, without fear of arrest, and they will give it or sell it to minors. Gangs and cartels will take advantage of the disregard for marijuana enforcement in Colorado and Washington and they will expand their poly-drug operations in those states. Diversion of "medical marijuana" from


The Honorable Attorney General Eric Holder
 September 9, 2013
 Page Two

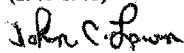
Colorado has already been documented in 23 other states. When marijuana will be fully legal to buy, diversion of the drug will explode. Highway crashes and fatalities will increase. Research has documented that marijuana use doubles the risk of a motor vehicle crash. School attendance and performance, as well as workplace productivity and safety, will all be negatively affected by your decision, and so will the effectiveness of drug law enforcement efforts.

In our letter to you from September 7, 2012, almost one year ago, we outlined our concerns regarding the state-based legalization of marijuana. We offered to meet with you on this matter. We heard nothing from you until your announcement on August 29, 2013, that the Department of Justice would not challenge state law that legalizes "recreational" use of marijuana and would not enforce federal laws against the large-scale commercial cultivation and distribution in those states. We have also reviewed the guidelines provided on that date to all US Attorneys, from Deputy Attorney General Cole. These guidelines only intensify our concerns.


We urge you to live up to the oath of office you took when you were sworn in as the Attorney General of the United States and to reconsider the unwise path you have chosen, a path that will inevitably have significant adverse consequences for our Nation, our youth and the safety and health of our citizens.


Sincerely,



 John Bartels
 (1973-1975)



 Jack Lawn
 (1985-1990)


 Donnie Marshall
 (2000-2001)


 Peter Bensinger
 (1976-1981)


 Robert Bonner
 (1990-1993)


 Asa Hutchinson
 (2001-2003)


 Francis Mullen
 (1981-1985)


 Tom Constantine
 (1994-1999)


 Karen Tandy
 (2003-2007)

The above individuals served as Administrators of the United States Drug Enforcement Administration, from 1973 to 2007 under both Democratic and Republican Administrations.

LETTER TO SENATOR LEAHY FROM DENNIS J. GALLAGHER, CITY AUDITOR, DENVER,
COLORADO*City and County of Denver*201 West Colfax Avenue, Dept. 705 • Denver, Colorado 80202 • 720-913-5000 •
Fax 720-913-5253 • www.denvergov.org/auditor

Auditor

RECEIVED SEP 16 2013

September 5, 2013

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
437 Russell Senate Building
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Businesses which can only operate on a cash basis are not only a magnet for crime and criminal activity - a serious threat to public safety - but are virtually unaccountable from a regulatory or taxation standpoint. As the Auditor for the City and County of Denver I am aware, first-hand, of this serious problem for that is exactly the situation we face in Denver and throughout Colorado. We have businesses growing, producing and selling marijuana and marijuana products for medical purposes and soon businesses that will also grow, produce and sell what is termed 'recreational' or 'retail' marijuana for non-medical reasons to individuals over the age of 21. Because these duly licensed businesses cannot establish a banking relationship, they are forced to do all their financial transactions on a cash basis. In Denver, those transactions have amounted to millions of dollars annually for medical marijuana alone. Those amounts are likely to increase exponentially next year when non-medical retail sales begin.

Something must be done to alleviate this situation; something must be done to allow duly licensed businesses in Denver (and the rest of the State of Colorado) to establish banking relationships and eliminate this dangerous and unaccountable cash process.

I understand that you will be conducting hearings soon related to marijuana issues and I am hopeful that a solution to this problem might be found as a result. A model for possible legislation might be a bill introduced in the House of Representatives by Representative Ed Perlmutter from the 7th District Colorado. H.R.2652 Marijuana Businesses Access to Banking would directly address the problem. Similar legislation introduced in the Senate might expedite the process and improve the chances of solving this problem sooner, rather than later. As a Shakespeare scholar, the words of Macbeth come to mind: "If 'twere done, then 'twere well it were done quickly."

To promote open, accountable, efficient, and effective government by performing impartial reviews and other audit services that provide objective and useful information to improve decision making by management and the people.

We will monitor and report on recommendations and progress towards their implementation.

Page 2

I appreciate that Attorney General Eric Holder has informed Colorado Governor John Hickenlooper as well as Governor Jay Inslee of Washington State that the Department of Justice will allow the states to create a regime that will regulate and implement ballot initiatives that legalized, at the state level, the use of marijuana by adults. However, while that is helpful, it does not directly address the banking problem.

A memo from the Justice Department to the U.S Attorney in Colorado (and Washington state), related to this, states in part: "The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice."

The very regulatory framework the memo espouses is negated by the inability of transactions to be tracked and money accounted for because of the inability of businesses to operate in anyway other than cash. As Denver's Auditor I find this contradiction troubling.

It is critical that federal agencies including Justice, the Federal Deposit Insurance Corporation and the Comptroller of the Currency move expeditiously to revise appropriate regulations and allow both federally-chartered as well as state-chartered financial institutions to enter into banking relationships with duly licensed and regulated marijuana businesses and to be able to enter into such relationships without fear of negative consequences by federal action.

This is not about the efficacy of the Controlled Substance Act or the War on Drugs; it is about facing the reality of our current situation and creating a level of accountability where today it is virtually non-existent.

I urge you to act as quickly as possible to give us at the state and local level the ability to effectively license, regulate and ensure an acceptable level of accountability in this business that is not going away.

Sincerely,


Dennis J. Gallagher,
City Auditor

cc: John Hickenlooper, Governor
Michael Bennett, Senator
Mark Udall, Senator
Diana DeGette, Congresswoman
Ed Perlmutter, Congressman
Michael Hancock, Mayor
Charlie Brown, City Councilman

AMERICANS FOR SAFE ACCESS, “THREE AREAS OF INQUIRY FOR ‘CONFLICTS BETWEEN
STATE AND FEDERAL MARIJUANA LAWS’”



Three Areas of Inquiry for “Conflicts between State and Federal Marijuana Laws”

U.S. Senate Judiciary Committee
Hon. Patrick Leahy (D-VT), Chair
Full Committee
DATE: September 10, 2013
TIME: 02:30 PM
ROOM: Hart 216

I. Clarification on Department of Justice Policies and U.S. Attorney Actions: The Obama Administration's policy toward state medical marijuana laws has been incoherent and inconsistent. On the one hand, the October 19, 2009 memorandum, “Investigations and Prosecutions in States: Authorizing the Medical Use of Marijuana,” (the “Ogden memo”) and the August 29, 2013 memorandum “Guidance Regarding Marijuana Enforcement,” (the “2013 Cole memo”), have created a perception of tolerance for states to implement their medical marijuana laws. On the other hand, the Obama Administration has spent more money than both of the two previous administrations combined interfering with state medical marijuana laws, including such tactics as paramilitary raids on medical marijuana patients and providers, asset forfeiture proceedings against landlords, and letters to state and local government officials threatening criminal prosecution for implementing state law.

Background:

When California passed Proposition 215 in 1996 to authorize the use of marijuana for medicinal purposes, it ushered in an era of conflict between state and federal law concerning marijuana. The federal reaction was not to try to resolve this conflict through the courts or legislation but rather to criminally and civilly prosecute individuals protected by state law: qualified patients and their providers (those who cultivate, process, and sell medical marijuana). As more states passed medical marijuana laws during the Bush Administration, the federal crackdown escalated significantly, with over 200 medical marijuana dispensaries raided between 2001 and the end of 2008.¹

The rhetoric of the Obama White House on state medical marijuana laws has been more conciliatory than previous administrations. The supportive words Obama spoke on the 2008 campaign trail towards medical marijuana were followed by affirming comments from Administration spokespersons and then seemingly formalized by the Department of Justice (referred to herein as “the Department” or “DOJ”) in October 2009 via [a memo issued to several U.S. Attorneys](#) by then-Deputy Attorney General David Ogden (the “Ogden memo”) that stated:

¹ ASA maintains a database of known medical marijuana raids, available upon request.

Headquarters

1600 Clay Street, Suite 300, Oakland CA 94612
PHONE: 510.251.1856

National Office

1808 Vernon St. NW, Suite 100, Washington DC 20009
PHONE: 202.857.4272 FAX: 202.857.4273

General Information

WEB: www.AmericansForSafeAccess.org
TOLL FREE: 1.888.939.4367

*"As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."*²

With this legal guidance, patient advocates, community members, and officials spent thousands of hours drafting compassionate legislation and strict regulations in at least eleven states. But when legislators and other state and local officials came close to passing or implementing these laws, they received nearly identical threatening letters from U.S. Attorneys, containing language such as this:³

"The Washington legislative proposals will create a licensing scheme that permits large-scale marijuana cultivation and distribution. This would authorize conduct contrary to federal law and thus, would undermine the federal government's efforts to regulate possession, manufacturing, and trafficking of controlled substances. Accordingly, the Department could consider civil and criminal legal remedies regarding those who set up marijuana growing facilities and dispensaries, as they will be doing so in violation of federal law. Others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law. In addition, state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the [Controlled Substances Act]. Potential actions the Department could consider include injunctive actions to prevent cultivation and distribution of marijuana and other associated violations of the CSA; civil fines; criminal prosecution; and the forfeiture of any property used to facilitate a violation of the CSA."

-excerpt from letter to former Washington Governor Christine Gregoire from U.S. Attorney Durkan and Michael Ormsby, April 14, 2009

"If the City of Eureka were to proceed, this office would consider injunctive actions, civil fines, criminal prosecution, and the forfeiture of any property used to facilitate a violation of [federal law]."

-excerpt from letter to Eureka City Council from U.S. Attorney Melinda Haag on August 15, 2011.

The impact of threats made by U.S. Attorneys against public officials was the suspension or derailment of medical marijuana laws in the states of Arizona, California, Delaware, Hawaii, Montana, Rhode Island, and Washington, as well as municipalities across California. The letters were followed by an intense campaign of raids, threats to landlords, and asset forfeiture lawsuits. Since these actions contradicted the 2009 Ogden memo, the Department issued a memorandum on June 29, 2011 from Deputy Attorney General James Cole to authorize the raids and threat letters *after* the fact of their occurrence.⁴ To date, not a single state or local government official has been indicted or prosecuted for attempting to implement a medical marijuana law, which raises the question of whether or not there is a

² Memorandum from Deputy Attorney General David Ogden to Selected U.S. Attorneys, "Investigations and Prosecutions in States: Authorizing the Medical Use of Marijuana," Oct. 19, 2009, (the "Ogden memo").

³ Copies of U.S. Attorney threat letters to state and local officials can be found at http://safeaccessnow.org/downloads/DOJ_Threat_Letters.pdf

⁴ Memorandum from Deputy Attorney General James Cole to U.S. Attorneys, "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," June 29, 2011, (the "2011 Cole memo").

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legal basis or seriousness of intent behind these threat letters. Regardless, the result has not been a resolution of the state-federal conflict but an exacerbation.

In addition to attempts at intimidating local officials, the U.S. Attorneys from California announced a campaign to undermine the state's production and distribution system, using raids, criminal prosecutions and asset forfeiture against state-compliant medical marijuana operations. As part of this ongoing campaign, U.S. Attorneys are currently threatening landlords of medical marijuana businesses with criminal and civil action if they do not evict their tenants.⁵ U.S. Attorneys in California have also begun forfeiture proceedings against a handful of property owners.

Taken together, this attack on the medical cannabis community is unprecedented in its scope, undermining state laws and coercing local lawmakers. In less than four and a half years into President Obama's command, the federal crackdown on state medical marijuana programs has generated more raids than under eight years of President Bush. According to ASA's calculations, the Department's war on medical marijuana eclipsed **\$500 million** dollars, with over **\$300 million** being spent during the Obama Administration. Based on ASA's estimates, the Drug Enforcement Administration ("DEA") has spent approximately 4% of its budget in 2011 and 2012 on the medical marijuana crackdown.⁶ These costly raids, the investigations that lead up to them, and the prosecutions and imprisonment that follow them have strained the limited resources of the Department and ripped families apart to fight a fruitless war that 70-85% of Americans have opposed for well over a decade.

When asked on June 7, 2012 by the House Judiciary Committee to explain the Administration's escalating enforcement activity, Attorney General Eric Holder testified:

"We limit our enforcement efforts... to those acting out of conformity with state law."⁷

In the second memo by Deputy Attorney General Cole, issued on Thursday, August 28 2013, the Department seems to return to the spirit of the 2009 Ogden memo:

"As explained above, however, both the existence of a strong and effective state regulatory system and an operation's compliance with such a system may allay the threat that an operation's size poses to federal enforcement interests."⁸

Yet, following the issuance of this memo, U.S. Attorney for Western Washington Jenny Durkan said in a statement that this new guidance changed nothing about her so-far aggressive response to medical marijuana in her state:

⁵ Partially redacted to medical marijuana dispensary landlord sent by Melinda Haag, U.S. Attorney for Northern California, September 28, 2011, available at http://americansforsafeaccess.org/downloads/US_Attorney_Landlord_Letter.pdf.

⁶ Numbers are based upon the calculations in ASA's June 2013 report, *What's the Cost?*, plus the calculated average of \$180,000 per day spent since the report was issued. Report available at <http://americansforsafeaccess.org/downloads/WhatsTheCost.pdf>. Cost estimates available at: <http://www.americansforsafeaccess.org/whatsthecostreportestimates>.

⁷ *Oversight of the United States Department of Justice: Before the H. Comm. on the Judiciary*, 112th Congress (2012) (statement by Eric Holder, U.S. Attorney General).

⁸ Memorandum from Deputy Attorney General David Ogden to U.S. Attorneys, "Guidance Regarding Marijuana Enforcement," Aug. 29, 2013, (the "2013 Cole memo").

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"[C]ontinued operation and proliferation of unregulated, for-profit entities outside of the state's regulatory and licensing scheme is not tenable and violates both state and federal law."⁹

Similarly, the Office of the Northern District of California U.S. Attorney responded:

"At this time the U.S. Attorney is not releasing any public statements. The office is evaluating the new guidelines and for the most part it appears that the cases that have been brought in this district are already in compliance with the guidelines. Therefore, we do not expect a significant change."¹⁰

The gulf between the rhetoric and the actions of the Obama Administration's policy towards state medical marijuana laws is striking. Absent further concrete action, it seems likely that there will still be hostilities initiated by the Department against states with medical marijuana laws.

Questions:

1. Is the Department aware of the series of letters sent by U.S. Attorneys to elected officials between February 1, 2011 and May 16, 2011 designed to block the passage of state medical marijuana laws?
2. Is the sentiment in these threat letters still the opinion of the Department?
3. Given that U.S. Attorneys continued to block states from implementing medical marijuana legislation and regulation following the 2009 Odgen memo by sending threat letters to public officials, do you anticipate U.S. Attorneys to continue to do so?
4. If not, what will the Department of Justice do to communicate with policy makers threatened in this series of letters that they are free to pass laws that comply with the new DOJ policy?
5. Can you explain the constitutional basis for the Department to take legal action against state and local officials for passing or implementing their own marijuana laws? If such a basis can be articulated, will there be Departmental oversight to make sure that U.S. Attorneys are applying the CSA in a consistent fashion from state to state?
6. It has been estimated that the Department of Justice has now spent over half a billion dollars cracking down on medical marijuana patients and providers in states that have authorized medical use since 1996, and that more than \$300 million has been spent by the current administration. Can the Department accurately account for how much it has spent investigating and prosecuting medical marijuana conduct in these states? If not, how can the Department explain whether or not it is using resources against these parties in a manner consistent with prosecutorial guidelines provided by the Department?

⁹ *Prosecutor: Wash. medical pot system 'not tenable'*, San Francisco Chronicle, Aug 29, 2013, available at <http://www.sfgate.com/news/article/Prosecutor-Wash-medical-pot-system-not-tenable-4771750.php>

¹⁰ *US Attorney Melinda Haag to Continue Crackdown Despite White House Directive*, East Bay Express, Aug. 30, 2013, available at, <http://www.eastbayexpress.com/LegalizationNation/archives/2013/08/30/us-attorney-melinda-haag-to-continue-crackdown-despite-white-house-directive>.

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7. In jurisdictions where local public officials received threat letters and have been intimidated into not implementing their own laws, how does the Department justify U.S. Attorneys prosecuting current and future cases for conduct outside of the strict guidelines of the 2013 Cole memo? If the Department is sincere about not prosecuting conduct that is supposedly permissible by the new guidelines, will states such as California and Washington be allowed a period of time to bring their current laws into compliance with the Department guidelines?
8. How does the new Cole memo impact current federal cases such as the asset forfeiture proceedings on properties leased to regulated medical marijuana dispensaries in Northern California?
9. U.S. Attorneys shut down over 300 dispensaries in Colorado and over 200 in California which were following state law, citing 1,000 foot proximity to schools as a reason, despite the fact that states have the right to set these proximities for all other matters. Why does the 2013 Cole memo continue to include this as a basis for enforcement?
10. During the 2011 raid of the Oaksterdam facility in Oakland, California, the Department failed to coordinate in advance with local law enforcement, and as a result, local law enforcement were unable to rapidly respond to a mass shooting at a college campus that occurred nearby at the same time. More generally, by preventing medical marijuana businesses from being able to use bank and credit services, the Department forces these business to operate using cash, while simultaneously threatening armed guard services from providing service to these business, which makes potentially makes them targets of criminals. What steps does the Department take with respect to local public safety when enforcing the CSA in states that have authorized medical marijuana conduct?
11. The August 2013 Cole memo cites eight areas of enforcement priority. It appears federal banking and money laundering statutes could still be enforced against those who act in accordance with a state marijuana law that meets the new guidelines. Will the Department prosecute or send threat letters to banks or businesses that engage in medical marijuana conduct permitted in such states?
12. The memo seems to state that U.S. Attorneys will not go after businesses that are following state laws that meet the eight guidelines, yet in federal courts, juries are not allowed to see any evidence of a defendant's compliance with state medical marijuana laws. If U.S. Attorneys are now to be arbiters of state laws as well as federal law, why are defendants denied the right to present evidence of compliance with state law?
13. Although the 2013 Cole memo states that size alone will not be a determinative factor in whether or not to investigate or prosecute a marijuana business, what assurances can states and providers have that the Department will not go after such businesses in light of the fact that Department is still prosecuting the Harborside case?
14. Would the Department use resources to oppose Congressional legislation that allows states to fully implement their own medical marijuana laws?
15. Given that U.S. Attorneys currently have broad discretionary power to carry out or ignore the guidance offered in the 2013 Cole memo, what in your opinion would be the necessary Congressional action that would need to take place in order to make sure that U.S. Attorneys do not ignore the guidance?

Requests:

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1. Have the Department instruct U.S. Attorneys to send retraction letters to legislative offices that received threat letters.
2. Have the Department instruct banking institutions that they will not be prosecuted for doing business with state-sanctioned medical marijuana businesses.
3. Provide communication between U.S. Attorneys and the DEA as it relates to medical marijuana enforcement starting January 2009.

II. Clarification on Department of Justice Compassionate Release and Mandatory Minimum Sentencing Guidelines as they relate to medical marijuana prisoners and defendants: In August 2013, the Department of Justice announced plans to expand its Compassionate Release program and ease rules concerning mandatory minimum sentences, yet it unclear if these reforms will allow for the release of any federal prisoners convicted of federal marijuana crimes who were acting in accordance with their state's medical marijuana laws.

Background

On August 12, 2013, Attorney General Eric Holder gave a speech to the American Bar Association in which he outlined reforms to the Department's policies on mandatory minimum sentencing and compassionate release. While the Attorney General never spoke directly about the state-federal conflict on medical marijuana, a number of his statements gave rise to questions about how the new sentencing and compassionate release guidelines pertain to those federal marijuana prisoners who were acting in accordance with their state laws, as well as those who are currently being prosecuted or under investigation. For example, when discussing the Department's limited financial resources, he said:

*"This means that federal prosecutors cannot – and should not – bring every case or charge every defendant who stands accused of violating federal law. Some issues are best handled at the state or local level."*¹¹

While the August 2013 memo from Deputy Attorney General Cole James Cole seems to set forth the guidelines on prosecuting marijuana violations, the memo does not resolve the state-federal conflict in a meaningful way because multiple U.S. Attorneys in medical marijuana states have announced they will continue efforts to shut down the state-approved programs in their states.

Mandatory Minimums

Federal medical marijuana defendants often receive harsh mandatory minimum sentences when they are convicted in federal court. Very few federal medical marijuana defendants take their cases to trial because they are not allowed to enter into evidence anything about their conduct being in compliance with state medical marijuana law, and prosecutors typically bring charges with long mandatory sentences to pressure defendants into accepting plea deals. Most take the deals to limit their sentences.

¹¹ Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates, Aug. 12, 2013, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>

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The announced reforms on mandatory minimum sentences are encouraging rhetoric, but unfortunately do not appear to bring relief to those federal marijuana prisoners who were acting in accordance with their states' laws. This is because the Attorney General limited the eligibility to "low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels."¹² Considering that many state-complaint medical marijuana providers are charged with amounts that are well above so-called "personal use" amounts, it would appear that these providers would be excluded from eligibility, even if the state permits conduct that is above what the Department deems as "low level." Moreover, because the Department has systematically prevented providers from being able to use secure financial services, such as credit and armored guards, they have senselessly forced providers to become cash-only companies who have little choice but to arm themselves, leading to enhanced sentencing upon conviction. The situation is even worse for providers when taking into account the 2013 Cole memo, which calls for federal prosecution for "the use of firearms in the cultivation and distribution of marijuana."¹³

Unless the Department explicitly expands the rules concerning mandatory minimums to those who were acting in conformity with their state's medical marijuana laws, they are unlikely to receive sentences that deviate from the mandatory minimums.

Compassionate Release

There are at least two dozen federal marijuana prisoners who were acting in accordance with their state's medical marijuana laws, many serving lengthy mandatory minimum sentences.¹⁴ While Attorney General Holder's speech to the American Bar Association called for an expansion of eligibility for compassionate release, these patients and providers do not appear eligible to be released any sooner, as the expansion is limited to elderly (age 65 or older) who have served more 50-75% of their sentence (depending on their health), are terminally ill, or are confined to bed or wheelchair at least 50% of their waking hours.¹⁵

One federal medical marijuana prisoner with a serious medical condition who should be considered is Jerry Duval. At age 54, Mr. Duval began serving a 10-year mandatory minimum sentence for conduct allowed under the Michigan medical marijuana law. A dual kidney and pancreas transplant recipient, Mr. Duval also suffers from glaucoma and neuropathy. The Bureau of Prisons estimates that the average cost to incarcerate a patient at a Federal Medical Center is \$51,430 annually.¹⁶ However, in the case of Mr. Duval, it is likely double that amount, as the cost for his kidney and pancreas medicines alone is over \$100,000 per year.¹⁷ As a result, U.S. taxpayers will spend over \$1.2 million to imprison Mr. Duval for acting in accordance with Michigan law. Because of Mr. Duval's age, he will be ineligible to

¹² Id.

¹³ The 2013 Cole memo.

¹⁴ A listing of currently incarcerated federal marijuana prisoners can be found at <http://www.safeaccessnow.org/article.php?id=624>.

¹⁵ Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), Federal Bureau of Prisons, Aug. 12, 2013, available at http://www.bop.gov/policy/progstat/5050_049.pdf.

¹⁶ Federal Prison System, Cost Per Capita, Fiscal Year 2012, Federal Bureau of Prisons, available at http://www.bop.gov/foia/fy12_per_capita_costs.pdf.

¹⁷ Letter for compassionate release from Gerald Lee Duval, Jr. to Warden J. Grondolsky, FMC Devens, May 28, 2013, available at http://safeaccessnow.org/downloads/Compassionate_Release_Request_Duval.pdf.

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obtain compassionate release through the elderly criteria, and because he is ambulatory without a terminal diagnosis, he is too healthy to meet the other criteria, in spite of his severe medical condition. Without an expansion of the compassionate release program, Mr. Duval will likely serve his full mandatory minimum sentence.

One federal medical marijuana prisoner who may have been eligible under the new compassionate release rules was Richard Flor. At age 67, Mr. Flor was given a 5-year mandatory minimum sentence for conduct permitted under Montana's medical marijuana law. Mr. Flor, who suffered from dementia, diabetes, hepatitis C, and osteoporosis, was incarcerated in a non-medical facility where a fall further injured his ribs and vertebrae. While at the awaiting transfer to a medical facility, Mr. Flor suffered two heart attacks experienced renal failure and kidney failure, and died shortly after. While the severity of Mr. Flor's conditions would have made him eligible for compassionate release, the new release criteria excludes "inmates who were age 60 or older at the time they were sentenced," for certain crimes, such as violations of the Controlled Substances Act.¹⁸

For the aforementioned reasons, it appears that the Department's revisions to mandatory minimums and compassionate release will not apply to any federal marijuana prisoners who acted in accordance with state law, regardless of their age or medical condition.

Questions:

1. During Attorney General Eric Holder's August 12, 2013 speech to the American Bar Association concerning mandatory minimums and compassionate release, he said, "certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences." In light of the new Department prosecutorial guidelines, large-scale state-compliant medical marijuana providers are no longer to be considered enforcement priorities. Will the Department order the expansion of compassionate release to alleged "large-scale" federal inmates who were acting in accordance with their state's medical marijuana law?
2. Given that it costs significantly more to imprison a seriously ill person, does the Department consider it a good use of resources to impose a mandatory 10-year sentence on a seriously ill kidney transplant recipient who was acting in accordance with his state's medical marijuana law?

Request:

1. Revise compassionate release and mandatory minimums to include federal offenders who were in compliance with the medical marijuana laws of their states.

III. Inquiry about the Scheduling of Marijuana: Under the Controlled Substances Act, the U.S. Attorney General has the ability to initiate the rescheduling of substances, including the classification of marijuana as a Schedule I substance.

¹⁸ Federal Bureau of Prisons, Program Statement, Categorization of Offenses, March 16, 2009, available at http://www.bop.gov/policy/progstat/5050_049.pdf.

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Background:

According to the federal Controlled Substance Act (CSA), items placed in Schedule I, such as marijuana, have “no currently accepted medical use in treatment in the United States.” Yet, 20 states and the District of Columbia have authorized marijuana as a therapeutic treatment option that physicians can recommend to their patients. The over one million medical marijuana patients who have received recommendations from their physicians to treat their conditions is a manifestation of the fact that marijuana has true accepted use in the medical community. These doctors are not recommending the medical use of marijuana without any scientific basis. To date, there have been over 300 scientific studies on marijuana’s therapeutic value.¹⁹ In fact, one of President Obama’s original choices for US Surgeon General, Dr. Sanjay Gupta, a former opponent of medical marijuana, recently issued a public apology in which he said he now believes there is great medicinal value to marijuana.

Many have sought to reclassify marijuana under the CSA through the petition process, but thus far, none of these efforts have been successful. One such attempt has been undertaken by Americans for Safe Access, resulting in the case of *ASA vs. DEA*. The petition charges that the DEA position on marijuana’s accepted medical use has been “arbitrary and capricious as a matter of law, as it conflicts with the language and legislative history of the CSA.”²⁰ More recently, the governors of the states of Washington, Rhode Island and Vermont filed their own rescheduling petition, while Governor Hickenlooper of Colorado filed a separate rescheduling petition on behalf of his state.

Regardless of the specific merits of each of these rescheduling efforts, the CSA authorizes the Attorney General to reschedule any substance through an internal review process. This process is described in detail in 21 USC § 811. The Attorney General “may by rule” transfer a drug or other substance between schedules if he finds that such drug or other substance has a potential for abuse, and may then make a decision under the rules subsection (b) of Section 812 as to the schedule in which such substance is to be placed. The criteria for how to evaluate a substance’s placement is in section (c) of Section 811.

Among the eight listed criteria is § 811(c)(3), which includes a review of the “state of current scientific knowledge regarding the drug or other substance.” The Department’s current evaluation process is a five-prong test; however, the Department has employed narrow reasoning that makes it impossible for marijuana to be rescheduled. The test requires that there be large-scale FDA studies (Phase 2 and 3 trials) affirming the medical efficacy of a substance. Yet the Department systematically works to block any and all attempts at Phase 2 and 3 trials through its rules concerning the National Institute on Drug Abuse’s (“NIDA”) monopoly on the marijuana available for such studies. The Department has even rejected a 2007 DEA administrative law ruling that found the licensing of more production of marijuana for research is in the public interest.²¹

¹⁹ A database of over 300 scientific studies on the medical value of marijuana with brief descriptions of each study can be found at <http://www.cannabis-med.org/studies/study.php>.

²⁰ Petition for Review of a final order of the Drug Enforcement Administration, *Americans for Safe Access vs. Drug Enforcement Administration*, available at http://safeaccessnow.org/downloads/ASA_v_DEA_Reply_Brief.pdf

²¹ In the Matter of Lyle Craker-Opinion and Recommended Ruling. DEA Administrative Law Judge Mary Ellen Bittner, February 12, 2007. https://www.aclu.org/files/images/asset_upload_file116_28341.pdf.

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Moreover, the federal government's own National Cancer Institute ("NCI") has a Physician Data Query ("PDQ") on the medical value of marijuana. The PDQ acknowledges that "that physicians caring for cancer patients in the United States who recommend medicinal *Cannabis* predominantly do so for symptom management."²² The original version of the PDQ contained passages affirming the tumor-fighting properties of marijuana, though the NCI removed that information from its website shortly after it was posted. Emails between the parties involved obtained via the Freedom of Information Act make clear the information was removed for political rather than scientific reasons.²³

U.S. Attorney for Western Washington, Jenny Durkin, recently said that her state's medical marijuana program was "untenable." If there is anything untenable about medical marijuana in the United States, it is its placement as Schedule I substance with "no accepted medical use." Maintaining the placement of marijuana in Schedule I undermines the scientific integrity of the entire CSA.

Questions:

1. The Controlled Substances Act grants the Attorney General the authority to reschedule marijuana or any substance if certain determinations are made. Given the growing body of evidence that demonstrates marijuana has at least some medical value, including the National Cancer Institute's Physician Data Query, marijuana's placement in Schedule I is increasingly suspect. What steps is the Department taking with respect to examining marijuana's placement in the schedule under the authority granted by 21 USC § 811?
2. More specifically, 21 USC § 811(c)(3) calls for a review of "the state of current scientific knowledge regarding the drug or other substance." How does the Department evaluate the scientific knowledge concerning marijuana, and:
 - a. What studies have been reviewed?
 - b. Does the Department examine scientific knowledge that has been gained from studies conducted outside of approval by the National Institute on Drug Abuse?
 - c. What is the Department's current opinion of the current scientific knowledge?
 - d. Will the Department direct the DEA to eliminate rules that inhibit research into the medicinal value of marijuana so that more studies can be conducted using marijuana grown from state-approved sources?

Request:

1. Provide resources for a comprehensive Department review of the current scientific knowledge, including studies about the medical benefit of marijuana and not merely those confined by NIDA's mission to explore substance abuse and addiction.

²² National Cancer Institute, Physician Data Query, Cannabis and Cannabinoids, last updated August 2, 2013, available at, <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/healthprofessional/page2>

²³ Freedom of Information Act Request, National Cancer Institute's Cannabis and Cannabinoids PDQ, available at: <https://www.muckrock.com/foi/united-states-of-america-10/national-cancer-institute-cannabis-and-cannabinoids-pdq-502/>

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TAMAR TODD, SENIOR STAFF ATTORNEY, DRUG POLICY ALLIANCE, OFFICE OF LEGAL AFFAIRS, STATEMENT

**“Conflicts Between State and Federal Marijuana Laws”
Senate Judiciary Committee Hearing**

September 2013

Testimony of Tamar Todd, Senior Staff Attorney, Drug Policy Alliance, Office of Legal Affairs

The Drug Policy Alliance (DPA) is the nation’s leading organization working to promote alternatives to punitive drug laws. DPA advocates for new drug policies that are grounded in science, compassion, health and human rights, and we applaud Chairman Leahy for arranging this hearing to address the important issue of marijuana regulation.

On behalf of DPA, I submit the following testimony on the intersection between state and federal marijuana policy. I assisted in the drafting of Amendment 64 in Colorado and have helped craft numerous marijuana legalization and regulatory proposals in other states. I have also drafted legislation, helped litigate cases involving cutting-edge legal issues regarding medical marijuana in courts around the country, and have testified in various state legislatures on the issues of medical marijuana, marijuana legalization and regulation, and the intersection of state and federal law. In addition, I advised the government of Uruguay on its proposal to legalize the production and distribution of marijuana.

I will focus my remarks on five key points:

First, nothing—not federal law, nor federal or state constitutions—prevents a state from removing all state law penalties with respect to conduct involving marijuana, or requires that a state punish marijuana offenses in any particular way, or at all. Indeed, states are free to repeal state law penalties if they so choose. Many states wish to follow in Colorado’s and Washington’s footsteps by repealing state criminal penalties and putting responsible regulatory controls in place. Responsible state control of marijuana, however, is made vastly more difficult with the cloud of federal enforcement of federal law obstructing the state’s ability to regulate. Though the Department of Justice (DOJ), under the leadership of Attorney General Eric Holder, has recently taken important steps to disperse this cloud by issuing the “Cole memo,” uncertainty remains and additional steps must be taken to remove this cloud completely.

Second, both state and federal interests are best promoted when state level marijuana programs are allowed to be implemented as intended absent federal threats and other interference (as distinguished from federal consultation, cooperation, and collaboration).



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Third, despite the extensive efforts of states to regulate marijuana responsibly, these states have had their hands tied by federal tax policies that restrict business owners from deducting business expenses and by banking policies that prevent businesses from utilizing banking institutions.

Fourth, it is possible to craft policies that address concerns over advertising, marketing, and the creation of large-scale commercial operations, as well as metrics that assess whether the eight enforcement priorities recently outlined by the DOJ are being met by states that have undertaken to regulate marijuana.

Fifth, allowing states to experiment with regulating marijuana is an opportunity to develop outcome measures of success that include lower rates of incarceration and violence that can be applied to other aspects of drug policy beyond marijuana prohibition.

1. The States are Free to Change State Law

As was confirmed by the recent guidance issued by the DOJ, it is perfectly legal, and contemplated by our federalist constitutional structure, for states to explore a different marijuana policy than the one currently in place, or than the one set out by federal law. Indeed, there is nothing in the United States Constitution that requires a state to criminalize *anything* under state law. If a state chooses to lessen or remove its penalties for marijuana possession, or to legalize marijuana under state law, or to legalize it just for patients, it is free to do so.

The Constitution establishes a system of dual sovereignty whereby the federal government creates and enforces federal law in the areas expressly granted to it by the Constitution, and the state governments create and enforce state law. Under the Commerce Clause, the federal government may enact federal laws to criminalize the possession, cultivation, and sale of marijuana within the United States, even if those activities are legal under state law. The federal government does this through the Controlled Substances Act (CSA). The CSA, however, contains an anti-preemption provision by which Congress explicitly left the states with wide discretion to legislate independently in the area of drug control and policy. Federal preemption of state drug laws is accordingly limited to the narrow set of circumstances where there is a *positive* conflict between state and federal law so that the two cannot consistently stand together. In other words, preemption only occurs when a person is unable to abide by both state and federal law simultaneously—a situation not presented by dual regulation of marijuana under both state and federal law.

Moreover, the Supreme Court has clearly established that under the Tenth Amendment the federal government may not compel state law enforcement agents to enforce federal laws or issue directives requiring states to address particular problems.

Thus, states have the authority under the Constitution and the CSA to design their own drug policies—even if those policies do not track federal law or policy. States do not

have to march in lockstep with the federal government, and, indeed, a number of states have already chosen not to do so by reducing criminal penalties for minor marijuana offenses, enacting medical marijuana laws and programs, and, most recently, by legalizing, taxing, and regulating marijuana like alcohol.

Seventeen states¹ have enacted various forms of marijuana decriminalization, reducing or eliminating penalties for minor marijuana offenders. Many of these states have replaced criminal sanctions with the imposition of civil, fine-only penalties² or no penalty at all;³ others have reduced marijuana possession from a felony to a misdemeanor.⁴

Twenty states⁵ and the District of Columbia currently provide legal protection under state law for seriously ill patients whose doctors recommend the medical use of marijuana. While these state programs differ from each other in significant ways, most have tightly controlled programs regulated by the state department of public health. Nineteen of these states and the District of Columbia issue identification cards to patients who provide their doctors' recommendations to a state or county agency.⁶ Moreover, fourteen of these states and the District of Columbia have state regulated and licensed centers that produce and dispense medical marijuana to patients.⁷

Last year the people of Washington and Colorado voted (by decisive margins) to end the criminalization of marijuana in those states and to regulate its production and distribution like they do alcohol and tobacco instead. Other states are sure to follow in 2014 and beyond through legislative measures and ballot initiatives

It is important that the federal government recognize the authority of these states, and others in the future, to regulate marijuana as they choose and to meet such authority with cooperation, rather than threats of federal enforcement of federal law, or, worse, conduct aimed at undermining responsible state marijuana regulation.

2. Allowing States to Regulate Marijuana Without Interference Advances Both State and Federal Interests

Despite state variances in drug laws and penalties, there are a number of common goals associated with state-level marijuana reform, including:

¹ Alaska, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont, and Washington.

² Alaska, California, Colorado, Maine, Massachusetts, Nebraska, New York, Vermont, Rhode Island, and Ohio.

³ Colorado and Washington.

⁴ Nevada, North Carolina, Minnesota, Mississippi, and Oregon.

⁵ Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont.

⁶ Washington does not have an identification card program.

⁷ Arizona, Colorado, Connecticut, Delaware, Illinois, Oregon, New Mexico, Nevada, Rhode Island, Maine, Massachusetts, New Hampshire, New Jersey, the District of Columbia, and Vermont all have licensed centers to produce and distribute marijuana. California has collectives and cooperatives for patients who grow and dispense together but they are not licensed by the state.

- Further reducing law enforcement, court, and correctional resources spent on marijuana law enforcement;⁸
- Reducing violent crime associated with the illicit market for marijuana by replacing the illicit market with a legal, regulated, and tightly-controlled market;
- Reducing access by minors who can buy marijuana easily from the illicit market, where they are not asked to show identification;⁹
- Raising revenue and earmarking funds for enforcement, treatment, and education.¹⁰

These state-level goals dovetail with the eight federal guidelines outlined recently by the DOJ. Moreover, as noted above, the states that have repealed state law marijuana penalties have also, generally, adopted systems to control and regulate marijuana. Allowing states the freedom to implement these systems of control with minimal federal interference advances both state and federal interests. The consequence of the federal government seeking to prevent regulation or enforcing federal law against state law compliant actors will be states removing state law penalties without regulation or control.

Colorado and Washington are illustrative of how state-level marijuana reform and responsible regulation can actually advance federal drug control interests. Indeed, these two states did not choose to repeal all state marijuana laws. Instead, they took much more modest steps—steps that advanced, not hindered, the core federal interests outlined by the DOJ guidelines and found in the CSA.

These states still aim to control marijuana, restrict youth access, and protect communities—but they chose to do so in a manner that also conserves state law enforcement resources rather than pursuing the expensive, failed approaches of the past.

⁸ The Obama Administration has spent nearly \$300 million dollars on the enforcement efforts in medical marijuana states. In 2011 and 2012, the DEA spent 4% of their budget on medical cannabis according to a 2013 report by Americans for Safe Access, *What is the Cost*. Furthermore, it is estimated that the legalization of marijuana in Washington will provide annual state and county law-enforcement savings of approximately \$22 million according to an analysis by the Office of Financial Management.

⁹ Marijuana prohibition has done nothing to reduce youth access. The national *Monitoring the Future* survey found that marijuana use, which has been rising among teens for the past two years, continued to rise in 2010 in all prevalence periods for all grades surveyed. In fact, teen marijuana use has risen back to the record level set in 1979. Nearly a third of U.S. high school seniors have used marijuana in the past year (as compared to only one in five who have used illegal drugs other than marijuana), and four out of five say that it is either “fairly easy” or “very easy” to obtain. See *Monitoring the Future, Overview of Key Findings, 2010*, available at <http://monitoringthefuture.org/pubs/monographs/mtf-overview2010.pdf>.

¹⁰ The November 2012 initiative passed in Washington establishes a “dedicated marijuana fund” for all revenue received by the Washington State Liquor Control Board, and explicitly earmarks any surplus from this new revenue for health care (55%), drug abuse treatment and education (25%), marijuana-related research at University of Washington and Washington State University (1%), and with most of the remainder going to the state general fund. A March 2012 analysis by the state Office of Financial Management estimated annual revenues above \$560 million for the first full year, rising thereafter.

Further, in response to the federal government's newly announced policy of "trust and verify," these states, and others that will follow, stand prepared to demonstrate that the federal interests in safety and health are advanced by these new state paradigms.

Congress can and should take steps to ensure that these state laws, and those that follow, are fully and properly implemented so that comprehensive marijuana regulation, consistent with the newly-issued federal guidelines, can take place in the states. This includes providing additional guidance as necessary to assure state legislators, employees, and residents that their efforts to advance public safety and health by responsibly regulating marijuana will not be undermined by federal government threats or conduct. By using the carrot of not interfering, the federal government can force states to regulate marijuana and cooperate on federal interests, perhaps even assisting with them. Congress should also remove federal criminal penalties for marijuana possession, or, at the very least, remove federal criminal penalties for persons and business entities in compliance with their state laws.

Critical federal legislation has already been introduced in the U.S. House of Representatives that recognizes the ability of the state to regulate marijuana and the importance of federal support and noninterference in advancing both state and federal interests:

- *H.R. 499 – Ending Federal Marijuana Prohibition Act of 2013*: This bipartisan legislation, introduced by Rep. Jared Polis (D-CO), decriminalizes marijuana at the federal level, leaving individual states free to either prohibit or tax and regulate it according to their own policies. The federal government would still prosecute people for transporting marijuana from states where it is legal to states where it is illegal. The bill would require marijuana producers to purchase permits, similar to those obtained by commercial alcohol producers, to offset the cost of establishing and maintaining a federal regulatory system. It would also transfer jurisdiction of marijuana regulation from the Drug Enforcement Administration to a newly-renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms, and Explosives.
- *H.R. 689 – States' Medical Marijuana Patient Protection Act of 2013*: Introduced by Rep. Earl Blumenauer (D-OR), this bipartisan bill would reschedule marijuana below Schedule II, recognizing the plant's accepted medical use. The issue of regulating medical marijuana would be returned to the states, ensuring that neither the CSA nor the Federal Food, Drug, and Cosmetic Act would restrict individuals or entities operating in compliance with state or local laws. The legislation would also require that access to marijuana for medical research be expanded and overseen by a government agency not focused on investigating the addictive properties of substances.
- *H.R. 784 – The States' Medical Marijuana Property Rights Protection Act*: Introduced by Rep. Barbara Lee (D-CA), this legislation would prevent the Department of Justice from initiating civil asset forfeiture proceedings against

property owners of state-sanctioned medical marijuana businesses based solely on marijuana-related activity. The bill does not legalize marijuana or restrict the broader use of civil asset forfeiture, but protects the rights of landlords who lease to permitted dispensaries that are compliant with state law.

- *H.R. 1523 – Respect State Marijuana Laws Act of 2013*: This bipartisan bill, introduced by Rep. Dana Rohrabacher (R-CA), provides a resolution to the conflict between state and federal marijuana laws by exempting individuals operating in compliance with state law from the CSA.

3. Removing Tax Policy and Banking Barriers

In addition to the steps outlined above, Congress should also remove barriers in banking and tax law that make it difficult for marijuana-related business entities permitted by state law to operate safely and responsibly, without having to resort to gray-market, cash-only operations that invite danger and graft. Fortunately, work is already being done on this front as well. The following legislation has been introduced in the U.S. House of Representatives to protect compliant actors, ensure access to banking institutions, and permit tax deductions:

- *H.R. 2440 – Small Business Tax Equity Act of 2013*: This bipartisan legislation, introduced by Rep. Earl Blumenauer (D-OR), would provide standard tax benefits for legal marijuana businesses in states that have passed laws to allow the medical or non-medical use of marijuana. This bill amends the Internal Revenue Code to allow businesses operating in compliance with state law to take business-related deductions associated with the sale of marijuana—just like any other legal business.
- *H.R. 2652 – Marijuana Business Access to Banking Act of 2013*: Introduced by Rep. Ed Perlmutter (D-CO) and Denny Heck (R-WA), this bipartisan bill would resolve conflicts between state and federal banking laws to extend Federal banking protections to marijuana-related businesses. The bill explicitly prevents Federal banking regulators from prohibiting, penalizing, or otherwise discouraging banks from providing financial services to marijuana-related businesses. The bill also stipulates that the banks cannot be held liable under Federal law for providing financial services to a marijuana-related business.

4. Addressing Concerns and Measuring Outcomes

Two common concerns raised during the Senate hearing were how to restrict advertising and prevent commercialization of the marijuana industry, and how to design metrics to assess whether states regulating marijuana are meeting the eight enforcement priorities outlined by the DOJ.

Advertising and Marketing

Given the fact that the heaviest consumers of a substance make up the largest market share, the concern over the marijuana industry marketing to heavy users is real. However, heavy users already buy marijuana illegally off the streets, and legalization and regulation gives policymakers the ability to place restrictions on where, when, and if marijuana can be sold and advertised, and to whom (subject, of course, to First Amendment protections). A variety of policies, from taxation to marketing restrictions, have led to historically low tobacco use rates for both youth and adults—without the need for mass incarceration. Colorado and Washington have already developed restrictions on the marijuana trade designed to protect public health and safety. To the extent Congress is interested in the issue, members should support efforts to regulate marijuana nationally. Indeed, prohibition is the absence of control.

Measuring Outcomes

Key to the DOJ's "trust and verify" protocol is the development of metrics and outcome measures to determine whether state programs are advancing federal interests of health and safety or whether further changes are needed. Measuring the instances of marijuana-related driving under the influence charges, auto accidents, youth use, diversion, market-related violence, and cartel involvement are all important aspects of responsible state-level regulation of marijuana. Fortunately, these types of metrics for other regulated commodities already exist, as do researchers with experience assessing such outcomes. The Alcohol Research Group (ARG) has been studying similar outcomes in relation to alcohol use. Funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA), ARG administers the National Alcohol Survey to assess the country's drinking patterns, and conducts public health, substance dependence, and economic research on alcohol use, community outcomes, and economic and taxation issues.

In developing metrics for marijuana use, a newly-formed institute at Humboldt State University, the Institute for Interdisciplinary Marijuana Research (HIIMR), could be of assistance. The Institute is comprised of researchers from across many disciplines, including public health, agriculture, public policy, medicine, and economics, and its purpose is to study many of the interrelated aspects of marijuana use and policy.

And, ultimately, broader metrics need to be developed to measure the success or failure of federal drug policy, in addition to state drug policy.

5. Beyond Marijuana: Rethinking the War on Drugs

The public overwhelmingly regards the war on drugs as a failed endeavor. Increasingly, individuals, families, communities, government agencies, chambers of commerce, religious leaders, elected officials, and others consider marijuana policy reform to be an important first step in developing a new paradigm for drug control.

The costs of the war on drugs are substantial. Individual liberties and constitutional safeguards have been unquestionably weakened, and, in some cases, ignored altogether. Millions of persons have been incarcerated under our drug laws—particularly young persons of color—and millions more live with the crippling stigma of a drug conviction on their records. Tens of thousands have died from unnecessary disease and overdose exacerbated by punitive drug policies, and much of the population has woefully inadequate access to quality drug treatment. The *status quo* is untenable. State regulation of marijuana is a harbinger of the type of change that is needed. The idea that we should measure the effectiveness and value of a policy based on evidence and an objective assessment of its outcomes is a crucial first step and must be applied to all drug policies, including current federal policies, not just state policies that legalize marijuana. Congress has an important role to play in helping our country develop drug laws and policies, beginning with marijuana, that promote safety and health.

GOVERNOR JAY INSLEE AND ATTORNEY GENERAL BOB FERGUSON, WASHINGTON
STATE, STATEMENT

**Written Testimony of Washington Governor Jay Inslee and
Washington Attorney General Bob Ferguson**

Senate Judiciary Committee Hearing on
Conflicts Between State and Federal Marijuana Laws
September 10, 2013

Thank you Chairman Leahy, Ranking Member Grassley, and members of the Senate Judiciary Committee for holding a hearing on this important topic and for allowing us to submit written testimony. We write to update the Committee on developments in our state, to thank President Obama and Attorney General Holder for clarifying federal enforcement priorities, and to highlight for the Committee areas where we could benefit from further federal guidance or potential changes in federal law.

Since the voters of Washington approved Initiative 502 last November, authorizing the creation of a highly regulated market for marijuana, we have been working diligently to respect the will of the voters and implement the measure. Washington's Liquor Control Board has spent months developing detailed rules and regulations to implement Initiative 502, through an extensive process of public testimony and deliberation, and will soon adopt final rules and begin issuing licenses to qualified marijuana producers, processors, and retailers.

In light of our voters' choice and the extensive work we have done to implement that choice, we welcomed the recent announcement from the Department of Justice that it will not act to challenge our state's law. We appreciate the leadership that President Obama and Attorney General Holder have shown in carefully considering this issue and ultimately concluding that the federal government should allow Washington and Colorado to implement our states' laws and serve as the laboratories of democracy on this issue (in Justice Brandeis's famous words), while continuing to enforce federal law in the areas of highest priority for the federal government.

We look forward to working with the Department of Justice and other federal agencies to ensure that our state's effort complies with and advances federal priorities. Specifically, Deputy Attorney General James Cole listed eight enforcement priorities in his recent memorandum to United States Attorneys. Initiative 502 and the proposed rules to implement it developed by the Liquor Control Board address each of these issues in important ways. We address each of the priority areas in turn:

- (1) "Preventing the distribution of marijuana to minors;"
 - Initiative 502 allows marijuana sales only to adults age 21 and older. RCW 69.50.354.
 - No retailer, processor, or grower can be located within 1,000 feet of a school, park, playground, recreation center, child care center, transit center, video arcade, or library. RCW 69.50.331(8); proposed WAC 314-55-010 (definitions).

- The Liquor Control Board's proposed rules restrict advertising that could reach minors. RCW 69.50.345(9)(b); proposed WAC 314-55-155.
 - No one under 21 can enter a licensed marijuana retailer, obtain a license under Initiative 502, or be an employee of a licensee. RCW 69.50.357(2); RCW 69.50.331(1)(a); proposed WAC 314-55-015(2).
 - The Board's proposed rules require specific child resistant packaging for marijuana and marijuana-infused products in solid or liquid forms. Proposed WAC 314-55-105.
 - Marijuana possession by those under 21 remains illegal under state law. RCW 69.50.4013.
- (2) "Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;"
- The Liquor Control Board's proposed rules require criminal background checks of any person or member of any business entity (and their spouses and financiers) seeking a license to sell, grow, or process marijuana. Licenses can be denied or revoked for criminal violations. Proposed WAC 314-55-020; 314-55-035; 314-55-040.
 - To obtain a license, business entities must be formed under the laws of the state of Washington, and all individual members of business entities must have resided in the State for at least three months before applying for a license. RCW 60.50.331(1)(b) and (c); proposed WAC 314-55-020(7).
 - The Liquor Control Board will inspect licensed premises and their books to ensure that they are not acting as covers for other activities. Proposed WAC 314-55-087.
- (3) "Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;"
- Initiative 502 and the Liquor Control Board's proposed rules require careful tracking of marijuana by producers, processors, and retailers. All licensees must track marijuana "from seed to sale" using a software system specified by the Board, and must notify the Board in advance of all shipments and waste disposal. Proposed WAC 314-55-083(4); 314-55-085; 314-55-097.
 - The Board also capped the total amount of marijuana that may be grown statewide and the total number of retail stores, attempting to limit the marijuana supply to only what will be demanded in Washington. Proposed WAC 314-55-075(6); 314-55-081.
 - Limits are placed on the amount of marijuana that each licensee may have on hand. Proposed WAC 314-55-075(9); 314-55-077(7); 314-55-079(7).
 - Purchase and possession of marijuana by individuals is limited to specified quantities. RCW 69.50.360(3); 69.50.4013(3).
 - Internet sales and delivery are prohibited. Proposed WAC 314-55-079(3).
 - Marijuana packaging must have labels warning that: "This product is unlawful outside of Washington state." Proposed WAC 314-55-105(13)(f).

- (4) “Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;”
- The Liquor Control Board will not license any location where law enforcement access is limited. This includes personal residences. Proposed WAC 314-55-015(5).
 - All licensees must maintain surveillance systems with continuous recording twenty-four hours a day, subject to inspection by the Board. Proposed WAC 314-55-083(3).
 - The Board will inspect licensed premises and their books to ensure that they are not acting as covers for other activities. Proposed WAC 314-55-087.
- (5) “Preventing violence and the use of firearms in the cultivation and distribution of marijuana;”
- In addition to the required background checks mentioned above, the Liquor Control Board’s proposed rules require licensed producers, retailers, and processors to have detailed plans for security and transportation of their products, and all licensees must have alarm and surveillance systems. Proposed WAC 314-55-083.
- (6) “Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;”
- Impaired driving is illegal under state law, and Initiative 502 set a new “per se” blood THC limit for a conviction of driving under the influence of marijuana. RCW 46.20.308.
 - Any marijuana advertisement must disclose the drug’s potential health consequences and contain a warning not to operate a vehicle under the influence. Marijuana packaging must have labeling that discloses potential health risks, a warning not to operate a vehicle, and include accompanying material with other health warnings and information. Proposed WAC 314-55-155; 314-55-105.
 - Licensed producers of marijuana must submit representative samples of their product to a licensed testing laboratory for inspection and testing to assure compliance with standards set by the LCB. If a representative sample fails to meet those standards, the entire lot from which it was taken must be destroyed. RCW 69.50.348; *see* proposed WAC 314-55-102 (quality assurance testing standards).
 - Limits are placed on the amount of active ingredient in a single serving of an infused product and the number of servings in any single unit of a product for sale. Proposed WAC 314-55-095.
- (7) “Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and”
- Outdoor production of marijuana is tightly regulated under the proposed rules and can only take place behind fences at least 8 feet tall and with security and surveillance systems. Proposed WAC 314-55-075.

(8) “Preventing marijuana possession or use on federal property.”

-The LCB will not approve any marijuana license for a location on federal lands.
Proposed WAC 314-55-015(6).

As you can see, we have taken many steps to address the federal government’s enforcement priorities, and we are confident that we can partner with the federal government in enforcing the law as to those who act outside the bounds of both Initiative 502 and federal law.

At the same time, certain aspects of federal law are making it difficult for entrepreneurs seeking to enter the regulated marijuana market and comply with Initiative 502. Most importantly, business owners attempting to comply with Initiative 502 are having great difficulty accessing banking services, because federal law can impose regulatory and criminal penalties on banks that accept money they know to be proceeds from drug sales, even if those sales are legal under state law.

This situation unfortunately undermines federal priorities, because it means that legitimate business owners acting in full compliance with state law may still need to operate on an all-cash basis. This will make it more difficult for the State to audit their books, track their income, and differentiate those acting within the law from those possibly using proceeds from regulated marijuana sales to fund illegal activities. We are additionally concerned that by operating on an all-cash basis, licensees may become a target for theft and burglary, thereby creating additional public safety challenges. We encourage the Department of Justice to provide federal banking regulators further guidance in this area. We would also ask you to consider legislation such as H.R.2652—the Marijuana Businesses Access to Banking Act of 2013, which would allow banks to accept deposits from legitimate marijuana businesses acting in compliance with state law.

We would like to again thank President Obama and Attorney General Holder for their leadership, and for allowing us to move forward with implementation of Initiative 502 in Washington state, in accordance with the will of our voters.

We appreciate the Committee’s interest in this issue, the opportunity to update you on our State’s progress implementing Initiative 502, and the chance to highlight areas where we could use additional federal assistance to ensure that we best achieve our shared goals of keeping drugs out of the hands of children, preventing drug money from fueling criminal gangs, and preventing the violence that can be associated with the illegal drug trade.

LETTER TO SENATOR LEAHY FROM MARK A.R. KLEIMAN, PROFESSOR OF PUBLIC
POLICY, UCLA LUSKIN SCHOOL OF PUBLIC AFFAIRS, LOS ANGELES, CALIFORNIA

September 10, 2013

The Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

Thank you for the invitation to submit a statement of my views on conflicts between state and federal marijuana laws.

By way of introduction, I am a Professor of Public Policy at the UCLA Luskin School of Public Affairs. With Jonathan Caulkins, Angela Hawken, and Beau Kilmer, I wrote a book last year called *Marijuana Legalization* published by Oxford University Press. Kilmer and I jointly edit the *Journal of Drug Policy Analysis*.

In addition to my academic work, I provide advice on crime control and drug policy to governments in the United States and abroad through BOTEK Analysis Corporation. BOTEK has been advising the Washington State Liquor Control Board on the implementation of a regulated market for cannabis.

The opinions here expressed are entirely my responsibility, and should not be taken to reflect the views of UCLA, of the State of Washington, or of my co-authors.

The Nature of the Conflict and the Case for Accommodation

The combination of the Controlled Substances Act and state-level legalization creates a conflict: the states are licensing individuals and firms to commit federal felonies. The question is how the federal government should deal with that conflict. Neither of the obvious answers to that question – simple acquiescence nor a complete crackdown – is either workable or consistent with the requirements of the CSA itself.

It is undisputed that the states could repeal their marijuana laws entirely – as New York State did with alcohol in 1923 – leaving the federal government with an impossible task: 4000 DEA agents can't replace 500,000 state and local police.

It's clearly more desirable, in terms of controlling drug abuse – which, after all, is the purpose of the CSA – for the states to tax and regulate than for them to declare a free-for-all. To make those taxes and regulations effective, the states will have to maintain or even increase enforcement against the

remaining illicit market. It has proven impossible to eliminate cannabis use and sales entirely, because arresting a grower or dealer creates a market niche for another grower or dealer. It should not be impossible, once a state allows a reliable competing state-licensed source of supply, to drive most of the purely illicit market out of business, just as the legal alcohol industry has largely eliminated moonshining.

Therefore it makes sense for the federal government to work with the states – as the CSA requires – rather than against them, even when the states decide to regulate and tax cannabis rather than continuing to prohibit it. That does not change the illegal status of the activity under federal law. But it does hold out hope of preventing these two local experiments from becoming national problems.

Indeed, the federal government could easily destroy the licensed, taxed, and regulated systems Colorado and Washington are now putting into place. But that would not mean that no one in those states would produce, sell, or consume marijuana: it would merely leave production and sale in the hands of unlicensed, untaxed, and unregulated illicit and quasi-medical producers and distributors. Would that really be a better result than is likely to emerge if the state-level experiments are allowed to run their course?

On the other hand, simple deference to the states seems equally unwise. The CSA remains the law of the land, and other states have a right to expect the federal government to ensure that decisions made in Washington and Colorado do not lead to a national flood of cheap, high-potency cannabis.

The DoJ announcement of August 29 seems to me a serious and well-considered effort to deal with a situation without any easy solutions.

Alternative Approaches: Sec. 873 Contractual Agreements and Waivers

Still, the uncertainties and ambiguities created by the conflict of laws represent undeniable problems. In a recently published paper, “Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization,” (*Journal of Drug Policy Analysis*. Volume 6, Issue 1, August 2013) I attempt to lay out two alternatives.

One, which could have been done – or could still be done – within the confines of the current law, would be for the federal government and the legalizing states to enter into “contractual agreements” as provided for in Section 873 of the CSA. That section gives the Attorney General the power to make such agreements “notwithstanding any other provision of law.” In the negotiations leading up to such agreements, the Justice Department could and should require specific, verifiable commitments from Colorado and Washington with respect both to the controls to be placed on the state-legal markets and

the efforts to be undertaken with respect to the frankly illicit markets. In my view, the risks of interstate smuggling from purely illegal activity, and from the unregulated and unregistered production for personal use allowed under the Colorado law and under Washington's medical marijuana law, are more substantial than the risks of diversion from licensed producers.

A second alternative – requiring new legislation – would be to create a formal “waiver” process under which states would be allowed to experiment with taxed and regulated cannabis production and distribution, as states were allowed to experiment with alternative forms of income support under AFDC waivers. The waiver process could be made as strict as Congress desired. With a waiver in place, state-legal activity would become legal under federal law as well, a substantial improvement, for state regulators and industry participants alike, over simply being a low enforcement priority. That promise would provide a substantial incentive for states seeking waivers, or wanting to hold on to waivers, once granted, to do their utmost to prevent sales out of state. That would also create an incentive for the newly-legal industries to self-police and to support enforcement efforts against rogue licensees and entirely illicit traffickers, since the threat of having a waiver withdrawn as the result of misbehavior by a few bad actors or the state's failure to rein in the illicit market would be a potent one.

The goals established, either under contractual agreements or under waivers, would have to be realistic. Even under existing laws, we have notably failed to prevent the distribution of cannabis to minors, just as age restrictions have not prevented a major alcohol-abuse problem among people under 21. A rule that required states to promise that no cannabis from licensed sellers ever find its way into the hands of minors would be a demand for the Moon. However setting reasonable goals and requiring sensible policies about, for example, labeling, marketing, and child-resistant or child-aversive packaging, could produce reasonable results.

Commercialization is Not the Only Option

The voters in Colorado and Washington State have created “alcohol-like” cannabis industries: competing for-profit firms acting under state regulation. There is reason to doubt that such a system is anywhere close to the ideal one. Whether the drug involved is cannabis or alcohol, commercial vendors have interests directly opposed to the public interest, because their most reliable and lucrative customers are precisely the minority of cannabis users or drinkers who have lost control over their consumption. The public interest is in allowing adult access to intoxicants for those who will use them moderately and responsibly. The commercial interest is in maximizing revenues and profit, which means creating and serving a market of people with substance abuse problems. The ability of regulators to rein in market excesses is limited by the Supreme Court's “commercial free speech” jurisprudence. In what seems (to a

non-lawyer) a complete absurdity, the Court has held that Congress or a state legislature may ban an activity entirely, but may not allow it while banning its promotion.

There are at least two alternatives to commercial availability, short of complete prohibition. One would be to create a state monopoly on retail sales, as used to be the policy toward alcohol in many states. The other would be to allow production and sale on a strictly not-for-profit basis, exemplified by the Spanish “cannabis clubs” where users band together to hire people to produce cannabis for them, on the model of a consumer-owned organic farm. Neither of those approaches is simple or without its own problems, but either would dampen what will otherwise be the enthusiastic efforts of state-licensed cannabis vendors to create bad habits. A “state-store” system could both limit its own marketing and require its suppliers to limit theirs as a contractual matter. (There is no guarantee that a state monopoly system would avoid relentless promotion; consider the excesses of the state lottery system, But the federal government could insist on such restraint as the price of a waiver.)

While the Controlled Substances Act in its current form remains in place, the “state-store” system is not an option, because no state can instruct its officials to violate the federal law, as selling cannabis clearly does. (Regulating the behavior of private parties, even when that behavior violates the federal law, does not create the same problem.) Production and sales activity under a waiver of the kind proposed would be legal, rather than merely tolerated, eliminating the legal problem. Thus a “waivers” approach could allow a state monopoly on sales.

In creating authority for cannabis policy waivers, the Congress could even require either state-monopoly sales or an entirely not-for-profit industry. Or it could choose to give the Executive Branch, and the states, more leeway. But without new legislation the Federal response will necessarily continue to be purely reactive, and without substantial legislative input. Surely it would be better for the Congress to take an active role, lest the country wind up stuck with the commercial-sales model simply because that was the choice of the first two states to attempt cannabis regulation.

Discouraging Marketing

Even under the prosecutorial-discretion approach adopted by the Justice Department, there are opportunities for discouraging marketing activity which the memo issued last month does not fully exploit. A retailer needs a modest sign on the outside of the building and a website listing what it has to sell. There is no need to tolerate anything more than that: billboards, flyers, newspaper/television/radio advertising, “social marketing.” The Justice Department could, and I submit should, add marketing efforts to the list of eight categories of activity that will attract enforcement and prosecution. That

would do more to prevent increased drug abuse and increased use by minors than any single other step the Federal government could take.

Both in Washington State and in Colorado, there are two major categories of risk: the risk of increased drug abuse and its consequences within the state, and the risk of exports to other states worsening drug abuse problems there. In each case price is a key consideration. If prices in the licit market are so much higher than illicit prices that they help keep the black market in business, it will frustrate the goal the voters had in mind. But there is no good reason to allow licit-market prices to fall much below current illicit-market or medical-market prices. (In Colorado especially, some of the reported medical-market prices are already at dangerously low levels, and they are likely to fall – even taking taxation into account – when producers are able to enjoy the efficiencies that go with open rather than covert production.) For a non-habituated user, cannabis intoxication is already available at a price of less than a dollar per hour. Paraphrasing an old ad for a premium Scotch, “If the price bothers you, you’re taking too much.” It should be an explicit goal of state and federal policy to prevent any further decrease in price. Both Washington and Colorado use *ad valorem* taxes, which will fall along with market prices. A better approach would be a specific excise based on the quantity of THC, and rising as market prices fall.

The Financial-Services Issue

Federal responsibility does not begin and end with the Department of Justice. Treasury Department (and Federal Reserve Board) regulations, and the guidance provided to financial institutions by their regulators and inspectors from the Fed, the Comptroller’s office, the Federal Deposit Insurance Corporation, and the National Credit Union Administration currently mean that in practice the entire state-legal medical marijuana industry, and the new state-legal commercial cannabis industries in Washington and Colorado, have to operate almost entirely in cash – without being able either to accept credit cards or to have checking accounts – unless they conceal their identity from their financial institutions by calling themselves “flower shops” or “natural products suppliers” or “herbalists” or some such, or maintaining what are in fact business accounts under personal names. Even those prepared to engage in such subreption face the constant risk of having their accounts terminated.

Once Washington and Colorado have their commercial systems up and running, those regulatory practices, if not changed, will mean hundreds of millions of dollars per year in cash transactions, with attendant risks of robbery. That risk to public safety seems to me unnecessary and unaccompanied by any good result. I would suggest that the Committee, having asked the Justice Department what it plans to do and gotten the August 29 memo as an answer, now ask the Treasury Department whether it plans to offer new guidance to the bank regulators, or whether it believes that

new legislation is needed. This matter deserves, I submit, more attention than it has received heretofore.

The States as Laboratories

Now, as to the longer term:

I have been a long-time skeptic about proposals for cannabis legalization. But the changes in public opinion, and in market behavior, over the past decade now make me doubt that there is a operationally and politically sustainable version of cannabis prohibition still available. It seems to me that the burden of the argument now falls on those who wish to retain the legal *status quo*. What specific policies would they put in place, and what resources would they be willing to provide, that could realistically be expected to shrink what is now a \$30 billion-per-year illicit market? If they have no more idea than I do how to accomplish that, then it is time to ask whether whatever benefits we get from continued cannabis prohibition in the form of reduced drug abuse are really large enough to justify offering criminal organizations such a huge economic prize.

The answer to that question depends in part on whether the states and the federal government can design and implement effective systems of taxation and regulation to replace the cannabis provisions of the CSA and of the corresponding state laws. Right now, no one knows. The Colorado and Washington experiments will provide substantial help in finding some answers. (Since those data will not collect themselves federal and philanthropic research-funding agencies should be ready to take advantage of the opportunity to learn from experience.) That – along with the sheer impossibility of enforcing federal law without state and local help – seems to me the best argument for accommodating to the Washington and Colorado initiatives rather than merely clamping down hard.

Very truly yours,

Mark A.R. Kleiman

LETTER TO SENATOR LEAHY FROM HON. DANA ROHRABACHER, 49TH DISTRICT,
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House of Representatives

September 10, 2013

Committees:
FOREIGN AFFAIRS
Chairman, Subcommittee on
Europe, Eurasia, and Emerging Threats
Subcommittee on Asia and the Pacific
SCIENCE, SPACE, AND TECHNOLOGY
(VICE CHAIRMAN)
Subcommittee on Space
Subcommittee on EnvironmentThe Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy,

I want to thank you for the courage you've shown by your recent decision to hold a hearing on the issue of the disparity between state and federal marijuana laws. As you are well aware, the gradual change in public opinion in recent years has resulted in numerous states taking steps to legalize marijuana to some degree. As public opinion and state laws continue to change and more states are expected to take action in coming years, it is only appropriate that the people's representatives understand this issue and develop a sensible approach to dealing with the inconsistency between state and federal law.

In my own state of California, marijuana was legalized for medicinal purposes in 1996. Since that time, numerous California residents have been prosecuted for violating federal law even though they were in compliance with state law. To solve not only California's problem, but the problem of every state that has taken steps to loosen its prohibition against marijuana, I recently introduced H.R. 1523, the "Respect State Marijuana Laws Act of 2013," which would legalize marijuana at the federal level to the extent it is legal at the state level. In other words, my proposal would prevent the federal government from continuing to prosecute residents who are acting in accordance with their state's marijuana laws.

It is my hope that you are able to explore some of these challenges during your hearing and identify some potential solutions. I believe my legislation is the most comprehensive and pragmatic solution that has been offered thus far. Therefore, it is my hope that you will take a close look at it and ultimately consider supporting it or a similar approach in the Senate.

Thank you again for your leadership on this issue and please let me know if I can be of any assistance moving forward. I look forward to working with you as we confront the challenges posed by this state-federal dichotomy.

Sincerely,

Dana Rohrabacher
Member of Congress

LETTER TO SENATOR LEAHY FROM WE CAN DO BETTER COALITION: SUE RUSCHE, NATIONAL FAMILIES IN ACTION; A. THOMAS McLELLAN, TREATMENT RESEARCH INSTITUTE; KEVIN SABET, PROJECT SAM (SMART APPROACHES TO MARIJUANA)

We Can Do Better

Helping Policy Makers Make Informed Decisions about Marijuana

September 5, 2013

The Honorable Patrick Leahy
Chairman, Judiciary Committee
United States Senate
437 Russell Senate Building
Washington, DC 20510

Dear Senator Leahy:

Several national organizations are forming a coalition, *We Can Do Better*,¹ to educate the public about the impact of marijuana legalization on the nation's children. Others are signing on to this letter as well.

Just last week, the journal *Neuropharmacology* published an [article](#)² in which researchers reviewed 120 marijuana studies published in the scientific literature. They warn:

Most of the debates and ensuing policies regarding cannabis were done without consideration of its impact on one of the most vulnerable populations, namely teens, or without consideration of scientific data. . .

"Addiction is a serious concern, but it is not nearly the only significant harm. Like alcohol, marijuana-related car accidents, missed school, poor attention, and loss of interest in healthy activities are just some of the realistic and prevalent concerns associated with marijuana use among teens," says A. Thomas McLellan, former Deputy Director of the Obama Administration's Office of National Drug Control Policy and founder and CEO of the Treatment Research Institute, which is a member of the coalition.



Since 1996, some 21 states and the District of Columbia have legalized marijuana for medical use. This gave rise to a quasi-legal marijuana industry. With Colorado and Washington fully legalizing marijuana last November, the industry is becoming a full-fledged, commercial industry. It is already selling a variety of marijuana products, including edibles, such as the marijuana-infused chocolate chip cookies pictured here, marijuana [concentrates](#) with levels of THC so high users are [overdosing](#), and marijuana infused [E-cigarettes](#), or E-joints. The industry is attracting [investment groups](#). It is advertising and marketing products to increase consumption in order to increase profits. Lessons learned from the alcohol and tobacco industries suggest that a marijuana industry will target children, adolescents, and young adults, whose developing brains make them more vulnerable to becoming addicted—and lifetime customers. The number of [edibles](#) designed to appeal to children make industry intentions clear, as the examples below show.

The last thing the United States needs is a third commercial industry that, like tobacco and alcohol, is likely to expose children heavily to marketing marijuana. There must be room for a sensible, evidence-based middle course between "drug wars" and outright legalization that risks

putting another addictive drug into the hands and minds of our children. To this end, we offer several recommendations we hope Congress will consider to protect children, and the nation, from the disaster that is currently unfolding.



Recommendation 1. Enforce federal law.

States that have legalized medical marijuana violate both the federal Food and Drug Act of 1906 (and some 200 subsequent laws) and the federal Controlled Substances Act of 1970. The promise of medical use lies in marijuana's individual constituents, not the whole drug.³ In the 1980s, FDA approved two drugs, Marinol® and Cesamet®, for the treatment of chemotherapy-induced nausea. Both are synthesized THC made with pure chemicals to guarantee safety. Physicians may prescribe (rather than "recommend") these drugs and they are sold in pharmacies (rather than "dispensaries"). Sativex, a mouth spray containing THC and CBD, two ingredients extracted from research-grade marijuana, is in Phase III FDA trials. It may soon be available to treat spasticity due to multiple sclerosis and perhaps cancer and neuropathic pain. Other medicines are likely to be tested under FDA protocols as scientists isolate additional marijuana constituents. Let FDA continue to regulate the cannabis-based drugs available in the marketplace.

Recommendation 2. Commission a study from the Institute of Medicine.

We recommend that Congress commission the Institute of Medicine to study and propose options for a new marijuana policy based on scientific research. Leaving it up to the states to make 50 different versions of marijuana policy, based on little if any evidence, seems unwise. Let science guide policy.

Recommendation 3. Make low-level marijuana possession a civil rather than criminal offense.

By fully legalizing marijuana, Colorado and Washington have opened the door to a burgeoning commercial marijuana industry. This action violates the federal Controlled Substances Act and several international treaties to which the United States is signatory. The Justice Department's announcement⁴ that it will not challenge these laws sets the stage for more states to legalize commercial marijuana and for the industry to explode. One of the biggest risk factors for drug use is availability. With hundreds, perhaps thousands, of marijuana stores opening for business, a stunning rise in adolescent marijuana use and problems is inevitable. Proponents of full legalization have convinced Americans that we have only two choices regarding marijuana policy: either lock offenders up or legalize the drug. But there is a middle road between these two stark choices. Make low-level marijuana possession a civil offense that is tied to health assessments and treatment or social services for those in need as Project SAM proposes.

Recommendation 4. Study legalization's impact in Colorado and Washington. Call a halt to further state legalization until actual outcomes in these two states are determined through research.

Several critical questions need to be answered before the nation embraces marijuana legalization and endangers its children. These states present two "laboratories" in which to find answers. Will legalization and the commercialization of marijuana:

1. Increase use and intoxication?
2. Increase harmful use and addiction?
3. Increase the number of people who need treatment?
4. Increase school drop-out rates?
5. Increase auto crash injuries and fatalities?
6. Increase ER admissions?
7. Increase mental illness?
8. Increase overdoses among very young children who accidentally consume marijuana edibles?
9. Increase overdoses and deaths from vaporizing marijuana concentrates (dabbing)?
10. Increase negative effects (if any) of second-hand marijuana smoke?

Provide additional funding to federal agencies that survey these areas to enable them to oversample Colorado and Washington and release findings from these two states promptly. Just one example is the National Survey on Drug Use and Health, which provides data about substance use, substance use disorders, mental health disorders, and treatment for people aged 12 and older. However, to provide data at the state level, two years of findings must be combined and the survey is released annually two years after the current year. This means the earliest we will know from this survey whether marijuana use and health problems increase in these two states will be in 2017, three years after legalization begins in January, 2014.

Recommendation 5. Strengthen the Department of Justice enforcement priorities by setting minimum national regulatory standards to protect children with which Colorado and Washington must comply.

Create an advisory body drawn from children's rights organizations, the alcohol and tobacco control communities, and the prevention and public health communities to recommend the standards. National Families in Action's 12 Provisions, attached, can provide a base on which to

build the standards. Use federal enforcement powers provided by the Controlled Substances Act to shut down businesses that do not comply with the standards.

Recommendation 6. Educate the nation about how marijuana harms children.

We recommend that Congress charge the Surgeon General with compiling a report to the nation on the harms marijuana poses to children, adolescents, and young adults. Let the Surgeon General educate Americans about how marijuana harms children.

In closing, we ask you to protect the nation's children from legal, commercial marijuana. Thank you for considering our recommendations.

Very truly yours,

 A. Thomas McLellan 

We Can Do Better:

Sue Rusche, National Families in Action
A. Thomas McLellan, Treatment Research Institute
Kevin Sabet, Project SAM (Smart Approaches to Marijuana)

cc: The Honorable Dianne Feinstein, D-California
The Honorable Chuck Schumer, D-New York
The Honorable Dick Durbin, D-Illinois
The Honorable Sheldon Whitehouse, D-Rhode Island,
The Honorable Amy Klobuchar, D-Minnesota
The Honorable Al Franken, D-Minnesota
The Honorable Christopher A. Coons, D-Delaware
The Honorable Richard Blumenthal, D-Connecticut
The Honorable Mazie Hirono, D-Hawaii
The Honorable Chuck Grassley, Ranking Member, R-Iowa
The Honorable Orrin G. Hatch, R-Utah
The Honorable Jeff Sessions, R-Alabama
The Honorable Lindsey Graham, R-South Carolina
The Honorable John Cornyn, R-Texas
The Honorable Michael S. Lee, R-Utah
The Honorable Ted Cruz, R-Texas
The Honorable Jeff Flake, R-Arizona

Others signing on to this letter:

CeDAR (Center for education Dependency Addiction and Rehabilitation), University of Colorado Hospital, Aurora, CO

The Council on Alcohol and Drugs, Atlanta, GA, Chuck Wade, Executive Director and CEO

Greenville Family Partnership, Greenville, SC, Carol Reeves, Director/CEO

Gwinnett United in Drug Education (GUIDE), Ari Russell, Executive Director, Lawrenceville, GA

Hawaii Legislature: Representative Marcus R. Oshiro, State Representative, District 46

The Hills Treatment Center, Los Angeles, CA, Howard C. Samuels, Psy D., Founder and CEO

*Illinois TASC, Inc., Chicago, IL, Pamela F. Rodriguez, President
Institute for Behavioral Health, Rockville, MD, Robert L. DuPont, M.D., Founding President*

Learn to Grow, Atlanta, GA, Vincent Vandiegriff, Executive Director

NAADAC: The Association for Addiction Professionals, Alexandria, VA

National Association of Drug Court Professionals, Alexandria, VA

Phoenix House, New York, NY

References

¹ National Families in Action, Project SAM, Treatment Research Institute, and others.

² Yasmin L. Hurd, Michael Michaelides, Michael L. Miller, Didier Jutras-Aswad. Trajectory of adolescent cannabis use on addiction vulnerability. *Neuropharmacology*, 2013; DOI: [10.1016/j.neuropharm.2013.07.028](https://doi.org/10.1016/j.neuropharm.2013.07.028)

³ Alison Mack and Janet Joy for the Institute of Medicine, *Marijuana as Medicine? The Science Behind the Controversy*, National Academy Press, Washington D.C., 2001.

⁴ James M. Cole, Deputy Attorney General, *Memorandum for All United State Attorneys*, "Guidance Regarding Marijuana Enforcement," August 29, 2013.

HON. ED PERLMUTTER, 7TH DISTRICT, COLORADO, STATEMENT

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Congress of the United States
House of Representatives

COMMITTEES:
FINANCIAL SERVICES
CAPITAL MARKETS AND
GOVERNMENT-SPONSORED ENTERPRISES (CSBEs)
MONEY, POLICY AND TRADE
OVERSIGHT AND INVESTIGATIONS

Testimony for the Record

Senate Committee on the Judiciary

"Conflicts between State and Federal Marijuana Laws"

September 10, 2013

Congressman Ed Perlmutter (CO-7)

I commend Chairman Leahy and Ranking Member Grassley for holding today's hearing. It is an important step forward in highlighting and resolving existing conflicts between federal and state marijuana laws.

The Department of Justice, including Attorney General Eric Holder and Deputy Attorney General James Cole, should be commended for clarifying the Obama Administration's position regarding the enforcement of the Controlled Substances Act (CSA).

Voters in my home state of Colorado and my congressional district supported Amendment 64 last year, which allows for the adult use of marijuana. The Colorado Department of Revenue is now tasked with implementing regulations that appropriately tax and regulate the possession of marijuana.

However, many conflicts still exist between federal and state law, raising practical and constitutional matters since marijuana is listed as a "Schedule I" substance on the CSA.

The updated Cole memo alludes to the fact that state and local governments can only have an effective regulatory regime in place if such transactions are operating under a tightly regulated market in which revenues are tracked and accounted for.

As you are aware, because marijuana remains illegal as a substance covered under the CSA, financial institutions who provide banking services to licensed marijuana businesses are subject to criminal prosecution under several covered banking statutes such as "aiding and abetting" a federal crime and money laundering.

As a senior member of the House Financial Services Committee, I've been actively working on a solution to the transactional banking problem currently preventing full implementation of Amendment 64 in Colorado.

Attached is a recent letter Rep. Denny Heck (WA-10) and I sent to the federal banking regulators seeking guidance to regulated entities allowing licensed businesses operating in states and localities that enacted laws relating to adult marijuana use. We are anxiously awaiting a response from the federal banking regulators.

In addition, Rep. Heck and I are sponsors of H.R. 2652, the Marijuana Businesses Access to Banking Act of 2013. I hope the House of Representatives will take up the legislation soon. It is important Senate companion legislation be introduced in short order.

Thank you again for holding this hearing, and I appreciate the opportunity to submit the attached letter for the record.

A handwritten signature in black ink, appearing to read "Ed Perlmutter". The signature is stylized with a large, looped "E" and a cursive "P".

Ed Perlmutter
Member of Congress

LETTER TO TREASURY SECRETARY LEW, CHAIRMAN BERNANKE, CHAIRMAN
GRUENBERG, COMPTROLLER CURRY, DIRECTOR CORDAY, AND CHAIRMAN MATZ FROM
HON. ED PERLMUTTER, 7TH DISTRICT, COLORADO, AND HON. DENNY HECK, 10TH
DISTRICT, WASHINGTON STATE

Congress of the United States
Washington, DC 20515

September 3, 2013

The Honorable Jacob J. Lew
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Ben S. Bernanke
Chairman
Federal Reserve Board of Governors
20th Street and Constitution Ave, N.W.
Washington, DC 20551

The Honorable Martin J. Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

The Honorable Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, S.W.
Washington, D.C. 20219

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

The Honorable Debbie Matz
Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Dear Secretary Lew, Chairman Bernanke, Chairman Gruenberg, Comptroller Curry, Director
Cordray and Chairman Matz:

On August 29, 2013, the Assistant Deputy Attorney General, James Cole issued a memorandum to all United States Attorneys outlining enforcement of the Controlled Substances Act (CSA) in light of recent state ballot initiatives legalizing adult-use marijuana for recreational purposes. We commend the Department of Justice for promulgating this important guidance and for providing clarification to state and local governments who are in the process of implementing strict rules and regulations assuring an effective regulatory regime.

However, the updated Cole memo focuses mainly on prosecutorial discretion and expenditure of federal resources to enforce the CSA. More importantly, the Department's guidance rests on the expectation that jurisdictions who have authorized "marijuana-related conduct will implement strong and effective regulatory and enforcement systems" to protect public safety and public health¹.

The memo alludes to the fact that state and local governments can only have an effective regulatory regime in place if such transactions are operating under "a tightly regulated market in which revenues are tracked and accounted for²."

As you are aware, because marijuana remains illegal as a substance covered under the CSA, financial institutions who provide banking services to licensed marijuana businesses are subject to criminal

¹ Cole, James M. U.S. Department of Justice. Office of the Deputy Attorney General. "Guidance Regarding Marijuana Enforcement." August 29, 2013. Page 2

² Cole Page 3

prosecution under several covered banking statutes such as "aiding and abetting" a federal crime and money laundering.

The conflict between federal and state law restricts licensed and regulated businesses from accessing the banking system. There is strong evidence banks and credit unions are eliminating certain cash intensive business accounts and prohibiting others from opening accounts thus forcing small businesses to operate cash-only operations. This places our communities at serious risk by increasing the likelihood of crime.

State and local governments identified the inherent conflict between federal and state laws with respect to banking as a major hurdle in implementing effective rules and regulations³. Allowing licensed and regulated businesses to access the banking system will decrease the risks associated with operating a cash-only business and increase public safety.

Therefore, we strongly encourage the federal banking regulators to issue a memorandum providing guidance to regulated banks, credit unions and other financial services providers eliminating any further uncertainty and ensuring state and local governments have access to an effective and safe regulatory regime in place.

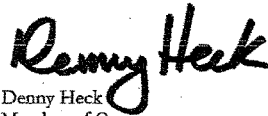
Similar to the Cole memo released by the Department of Justice, we believe federal banking regulators have the discretion and authority under current law to issue guidance to regulated entities allowing licensed businesses operating in states and localities that have enacted laws relating to adult-marijuana use, to appropriately access the banking system if certain safeguards are in place and proper diligence is conducted.

We look forward to working with you on this important issue and hope such guidance is forthcoming shortly.

Sincerely,



Ed Perlmutter
Member of Congress



Denny Heck
Member of Congress

cc: Conference of State Bank Supervisors
The Honorable Jeb Hensarling
The Honorable Maxine Waters
The Honorable Shelley Moore-Capito
The Honorable Gregory Meeks

³ Task Force Report on the Implementation of Amendment 64, State of Colorado, March 13, 2013, Page 98

LETTER TO SENATOR LEAHY FROM LORI AUGUSTYNYIAK, PREVENTION WORKS! VT



September 12, 2013

Dear Senator Leahy and Senate Judiciary Committee Members:

Prevention Works! VT (PW!VT) is a network of 28 community based coalitions in the state of Vermont that are working with thousands of health care providers, educators, law enforcement, youth, community volunteers and others to prevent substance abuse and support health and wellness in their local communities. PW!VT is also the lead organization of the Vermont affiliate of SAM, Smart Approaches to Marijuana.

The Vermont prevention community is greatly concerned about the recent response by the Department of Justice to states that legalize marijuana use. While we are concerned that laws legalizing cannabis use are in conflict with federal law and international treaties, we are most troubled by the harms associated with liberalized cannabis laws, especially among young people.

The costs of marijuana use nationally already includes 400,000 emergency room visits a year, increased incidence of mental illness, car crashes, and learning problems for kids. These costs will only increase as legalization creates easier access, reduces perception of harm and creates avenues for businesses to heavily promote and provide cheap marijuana in a permissive environment.

We know that on the heels of legalized marijuana follows commercialization of this new commodity. Already, talk of creating the "Starbucks" equivalent of marijuana and pop-star promotion of the drug has begun. Big Tobacco representatives seem to have interest in supporting a marijuana industry if it is legal. As shown by Altria's (the parent company of Philip Morris) purchase of the web domain names altriacannabis.com and altriamaijuana.com. A commercial marijuana industry will certainly act just as the tobacco industry behaves, with the same or more freedom to market products to kids and the community, if careful consideration is not given by policy makers now.

(Please see the following link to "As marijuana goes legit, investors rush in" from USA Today. <http://www.usatoday.com/story/money/business/2013/04/07/medical-marijuana-industry-growing-billion-dollar-business/2018759/>)

We also know that when a substance is legal, powerful business interests have an incentive to encourage use by keeping prices low. Heavier use, in turn, means heavier social costs. Alcohol taxes, on the other hand — kept outrageously low by a powerful lobby — generate revenue amounting to less than a tenth of these costs.

Tobacco companies lied to America for more than a century about the dangers of smoking. They deliberately targeted kids. They had doctors promote cigarettes as medicine. And today, after decades of lawsuits and strategies to prevent tobacco use, we continue to pay a high price. Tobacco use costs our country at least \$200 billion annually — which is about 10 times the amount of money our state and federal governments collect from today's taxes on cigarettes and other tobacco products.

If our experience with alcohol and tobacco provides any lessons for drug policy, it is this: **We have little reason to believe that the benefits of drug legalization would outweigh its costs.**

What about the kids? A recent review of research found that the permanent IQ loss associated with childhood lead exposure is similar to the permanent IQ loss associated with childhood marijuana exposure. Shouldn't our response to protect children from marijuana exposure be as serious as our response to protect them from lead exposure?

Research clearly tells us that by allowing states to violate the current federal marijuana laws we reduce the perception of harm of using which in turn increases the number of young people trying and using marijuana.

This is evidenced by two independent, peer-reviewed studies looking at medical marijuana states in the 2000s that concluded: **States with medical marijuana programs had an increase in marijuana use not seen in other states**¹ In those states where marijuana has been equated with medicine, the perception of harm relating to that drug has been drastically reduced, social norms to reinforce "no use" messages have been undermined and youth use and addiction has increased.

And to make matters worse, it is estimated that about 1 in 6 people who start using marijuana young (in their teens or earlier) will become dependent on it. To demonstrate, a study of over 300 fraternal and identical twin pairs found that the twin who had used marijuana before the age of 17 had elevated rates of other drug use and drug problems later on, compared with their twin who did not use before age 17.²

We plan to hold officials accountable according to the 8 points DOJ laid out in their decision. In addition, we ask the Senate Judiciary Committee to consider the following recommendations as you further consider the federal response to states that liberalize marijuana laws:

1. Science-based drug education and prevention strategies need to become a top national priority. Community coalitions that engage multiple community sectors must be supported and expanded to meet the ever growing need for prevention information, education and services.

2. We would like to see the committee recommend that a surveillance methodology be established to monitor the public health consequences of marijuana legalization in Colorado and Washington and report findings, to help both federal and state governments make more informed decisions regarding this issue.
3. Be knowledgeable of how corporate interests plan to capitalize on this new industry and recommend protective measures to minimize the harm created by these interests (i.e. marketing to youth, advertising in public places, locations of marijuana-related businesses and effective, research-based efforts)

We agree that the country's drug policy must be reconsidered, however responsible drug policy must focus on effective research based efforts to both prevent and treat drug use. . These are highly complex problems, and it is short sighted and too simplistic to say that the only alternative to current policy is legalization. I thank you for your consideration of our concerns. I am happy to provide you with additional information or discuss this issue further with you.

Most Sincerely,

Lori Augustyniak for Prevention Works! VT
and
Black River Area Community Coalition
Brattleboro Area Prevention Coalition
The Burlington Partnership for a Healthy Community
CY - Connecting Youth
Franklin County Caring Communities
Winooski Coalition for a Safe and Peaceful Community

¹ Substance Abuse and Mental Health Services Administration (SAMHSA), State Estimates from the 2008- 2009 National Surveys on Drug Use and Health, 2011

² <http://www.drugabuse.gov/publications/marijuana-abuse/marijuana-addictive>

Prevention Works! VT is a statewide coalition of community prevention coalitions.

Our mission is to create and lead advocates to work collaboratively on policy, practice and attitudes that promote prevention, health and wellness with one voice.

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