

1 IS THE DEPARTMENT OF JUSTICE ADEQUATELY PROTECTING THE
2 PUBLIC FROM THE IMPACT OF STATE RECREATIONAL MARIJUANA
3 LEGALIZATION?

4 TUESDAY, APRIL 5, 2016

5 U.S. Senate,

6 Caucus on International Narcotics Control,

7 Washington, DC.

8 The Caucus met, pursuant to notice, at 10:01 a.m.,
9 in room SD-226, Dirksen Senate Office Building, Hon.
10 Chuck Grassley, Chairman of the Caucus, presiding.

11 Present: Senators Grassley, Sessions, Feinstein,
12 and Whitehouse.

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1 OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A
2 U.S. SENATOR FROM THE STATE OF IOWA, CHAIRMAN OF THE
3 CAUCUS

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5 Chairman Grassley. Thanks especially to our
6 witnesses because I know you have to work to get ready
7 for this sort of thing. We appreciate that. And all the
8 people in the audience, we welcome you, and thank you for
9 your interest in this issue.

10 In 2013, the Department of Justice decided to all
11 but abandon the enforcement of Federal law relating to
12 the possession, cultivation, and distribution of
13 marijuana in States that were in the process of becoming
14 the only jurisdictions in the world to legalize and
15 regulate all of these activities for recreational use.

16 To provide that decision the veneer of legitimacy,
17 then-Deputy Attorney General James Cole issued a
18 memorandum characterizing its new policy as an exercise
19 of prosecutorial discretion. But this policy does not
20 reflect proper enforcement discretion, any more than the
21 President's Executive action on immigration did the
22 following year. Legitimate enforcement discretion does
23 not tolerate and incentivize ongoing, widespread, and
24 unlawful activity.

25 But a few years later, that is where the

1 Department's policy has led. A number of States now
2 authorize, oversee, and profit from sprawling
3 recreational marijuana enterprises.

4 To flesh out its purported enforcement discretion,
5 the Cole memorandum also described eight Federal
6 priorities that it claimed would guide the Department's
7 efforts. These priorities included preventing the
8 distribution of marijuana to minors and the diversion of
9 marijuana to other States, as well as preventing drugged
10 driving and other health consequences.

11 And the memorandum made clear that its guidance was
12 conditional. It rested on its expectation that States
13 would "implement strong and effective regulatory and
14 enforcement systems" to address the threat recreational
15 legalization "could pose to public safety, public health,
16 and other law enforcement interests."

17 According to the memorandum, these systems had to
18 ensure that Federal priorities were not undermined. In
19 fact, the memorandum went on to warn that "if State
20 enforcement efforts are not sufficiently robust to
21 protect against the harms set forth above, the Federal
22 Government may seek to challenge the regulatory structure
23 itself." So the Department effectively took
24 responsibility to monitor the effect that recreational
25 legalization would have on its enforcement priorities.

1 In addition, a bipartisan consensus developed that the
2 memorandum also required the Department to develop
3 metrics so the Federal Government would know when it
4 needed to step in further.

5 I first raised this issue at a Judiciary Committee
6 hearing soon after the memorandum was issued. Senator
7 Whitehouse, a Democratic member of that Committee as well
8 as this Caucus, echoed my concerns, telling Deputy
9 Attorney General Cole, and I quote, "I think the
10 Department would be well advised to listen to Senator
11 Grassley's advice about trying to establish as clear
12 metrics as you comfortably can, because there can be a
13 lot of unintended consequences from the broad zone of
14 uncertainty that you can create, and that can frankly be
15 quite harmful in and of itself."

16 Even the New York Times agreed. Shortly thereafter,
17 it editorialized that "Senator Charles Grassley, the
18 ranking Republican on the Judiciary Committee, rightly
19 asked how, exactly, the Justice Department would evaluate
20 whether the States were holding up their end of the
21 bargain....If it wants its 'trust but verify' approach to
22 work, it will have to start filling in the details."

23 Almost 3 years later, however, the report that the
24 Government Accountability Office completed at my and
25 Senator Feinstein's request makes clear that the

1 Department has not done so.

2 First, the report found that the Department is not
3 adequately monitoring what is occurring in the States.
4 As the report concluded, officials "have not documented
5 their monitoring process or provided specificity about
6 key aspects of it, including potential limitations of the
7 data they report using."

8 Second, according to the report, the Department has
9 not developed metrics to guide how it will use this data
10 in relation to its policies. According to the GAO,
11 officials "did not identify how they would use the data
12 from these various reports and studies to monitor the
13 effects of marijuana legalization relative to each of the
14 eight marijuana enforcement priorities." The report
15 concluded, "officials also did not state how DOJ would
16 use the information to determine whether the effects of
17 State marijuana legalization necessitated Federal action
18 to challenge a State's regulatory system."

19 Now, this is precisely what I warned about in 2013.

20 The Department's inability to answer these questions for
21 GAO is inexcusable. So today I plan to explore them with
22 our witnesses.

23 Indeed, the public health and safety data that is
24 widely available only underscores the need to fill in
25 these blanks. In Colorado, for example, from 2012 to

1 2014, the number of hospitalizations related to marijuana
2 increased 70 percent, the number of traffic deaths
3 related to marijuana rose 20 percent, and interdiction
4 seizures of Colorado marijuana destined for other States
5 jumped 31 percent. And all these increases took place in
6 just 2 years.

7 I am not suggesting that the Federal Government use
8 its limited resources to go around arresting anyone
9 smoking marijuana. That has never been the Federal role
10 in this area, and it should not be. And today's hearing
11 does not have anything to do with the potential medical
12 use of CBD oil, which I wholly support researching.

13 But our country is in the middle of an epidemic of
14 addiction focused on heroin and prescription opioids.
15 And just last year, the Centers for Disease Control found
16 that people who are addicted to marijuana are three times
17 more likely to be addicted to heroin.

18 So if the Obama administration is serious about
19 addressing this epidemic, it should stop burying its head
20 in the sand about what is happening to its enforcement
21 priorities on recreational marijuana. And it should use
22 what it learns to develop a coherent enforcement approach
23 that protects public health and safety and is consistent
24 with its obligation to take care that our laws are
25 faithfully executed.

1 We will try to make some progress toward those goals
2 today.

3 Now, Senator Feinstein.

4

1 OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S.
2 SENATOR FROM THE STATE OF CALIFORNIA

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4 Senator Feinstein. Thanks very much, Mr. Chairman,
5 and I must say I agree with your comments, and I will
6 probably make the same but in a slightly different way.

7 In June of 2012, Colorado and Washington became the
8 first States to legalize recreational marijuana. In
9 response, as was said, the Justice Department issued the
10 Cole Memo in August of 2013. That memo outlined eight
11 Federal priorities related to marijuana and reserved the
12 right to challenge a State if its enforcement efforts are
13 not sufficient.

14 Following this, Senator Grassley and I asked the GAO
15 to produce a report on the Justice Department's process
16 for monitoring these priorities and evaluating state
17 regulatory practices. So we are here today to discuss
18 this report and how to better shape Federal policies to
19 protect public health and safety going forward,
20 regardless of one's stance on recreational legalization.

21 The report essentially found that the Justice
22 Department has collected very little accurate data and
23 has not documented a process to monitor the effects of
24 marijuana legalization. And this is very concerning. It
25 is an issue that we have repeatedly raised with the

1 Department since 2013.

2 Separately, the Cole Memo does not define what
3 constitutes a "robust regulatory structure" or what would
4 cause the Justice Department to step in. Two big
5 omissions. Consider the following from the Rocky
6 Mountain High Intensity Drug Trafficking Area:

7 In 2014, there were 360 seizures of marijuana from
8 Colorado bound for 36 other States compared to the pre-
9 commercialization annual average of 52. What does that
10 tell you? That marijuana is highly commercialized and
11 that it is being moved in large quantities.

12 When comparing the 2-year average before and after
13 legalization, current marijuana use among 12- to 17-year-
14 olds increased by 20 percent--that is 12- to 17-year-
15 olds-- while the national average decreased by 4 percent.

16 In my book, that is a very big statistic. It tells you
17 a lot.

18 And as the Chairman has said, in 2014, 20 percent of
19 traffic deaths in Colorado were marijuana-related, double
20 what it was 5 years prior. This is something that I have
21 greatly feared, thought would happen, and at least in
22 this State--I do not know about California, but in
23 Colorado, it clearly is happening. So there are many
24 questions.

25 What should trigger Federal enforcement action?

1 Must a specific threshold be met before the Justice
2 Department challenges a State's regulatory structure?
3 Frankly, we do not know because much of the Cole Memo is
4 subjective, creating a gray area that could lead to
5 ineffective regulation.

6 While I understand the need to maintain
7 prosecutorial discretion, this lack of clarity is really
8 a problem.

9 It is also concerning that the little data the
10 Department does collect is unreliable, not aggregated to
11 show overall effects, and not made publicly available in
12 one place. This must change.

13 Absent reliable data and a clear process to review
14 it, the Justice Department cannot accurately determine if
15 its marijuana policy sufficiently protects public health
16 or if States have robust regulatory structures.

17 There is nearly universal agreement that accurate
18 data is critical to making informed decisions. And,
19 candidly, we do not have it.

20 This year, as many as nine States may consider
21 recreational marijuana legislation--either
22 decriminalization or legalization. These States must be
23 able to draw upon lessons learned from existing laws.
24 And the Department has been asked to do it, to provide
25 that, but has not. So continued failure to collect

1 accurate data and share it with the public in a way that
2 is understandable is quite simply unacceptable.

3 I was, therefore, pleased that the Department agreed
4 with the report's recommendations that it should document
5 its process to monitor State marijuana legalization and
6 share this with appropriate components.

7 I also want to say that while I am happy that United
8 States Attorney Wagner is here--and I would like to thank
9 him for his work--I am disappointed that the Justice
10 Department chose not to send a witness that is directly
11 responsible for monitoring the effects of legalization or
12 shaping the Department's overall marijuana policy. In my
13 view, it appears the Department is simply trying not to
14 live up to what its responsibility is.

15 So, despite this, I look forward to hearing from
16 each of the witnesses today and learning about how
17 Justice plans to implement the report's recommendations
18 moving forward. And, Mr. Chairman, my suggestion is,
19 if it takes legislation, we should do legislation. But
20 if you have the huge increase in traffic deaths, and you
21 have the huge increase in the 12- to 17-year-olds using
22 marijuana, it seems to me we need to get some accurate
23 data so that these nine States know what they are doing
24 when they consider legalization.

25 Chairman Grassley. We will keep in touch with you

1 on that point.

2 Senator Feinstein. Thank you.

3 Chairman Grassley. I would introduce our panel.

4 Mr. Wagner has served as U.S. Attorney, Eastern
5 District of California, since 2009. He currently serves
6 on the Attorney General's Advisory Committee, and he is a
7 graduate of New York University School of Law and
8 Dartmouth College.

9 The second witness, Jennifer Grover, currently
10 serves as Director of GAO's Homeland Security and Justice
11 team. In that capacity, she led the team that wrote the
12 GAO report that is the focus of this hearing. Ms. Grover
13 has worked at GAO since 1991. She has a master's degree
14 in public policy and administration from the University
15 of Wisconsin and a bachelor's degree in political
16 science.

17 Normally, I would have you start the way I
18 introduced you, but--or should we have Ms. Grover go
19 first?

20 Go ahead, Mr. Wagner. Thank you very much, both of
21 you.

22

1 STATEMENT OF BENJAMIN B. WAGNER, UNITED STATES
2 ATTORNEY, EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO,
3 CALIFORNIA

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5 Mr. Wagner. Thank you. Chairman Grassley, Co-
6 Chairman Feinstein, Senator Whitehouse, on behalf of the
7 United States Department of Justice, I appreciate the
8 opportunity to testify today regarding marijuana
9 enforcement and State marijuana legalization efforts. I
10 am Benjamin Wagner, the U.S. Attorney for the Eastern
11 District of California. I joined the office in 1992, and
12 my first assignment was in the narcotics and violent
13 crime unit, where I served for several years and
14 personally prosecuted drug-trafficking and violent crime
15 cases. I have been with the Eastern District ever since
16 and have been privileged to serve as the U.S. Attorney
17 for the past 6-1/2 years, working alongside dedicated
18 career prosecutors and agents as well as other Federal,
19 State, and local law enforcement partners.

20 In my testimony today, I hope to be able to provide
21 the Caucus with information about the Department's
22 policies regarding marijuana enforcement and my own
23 experience enforcing Federal marijuana laws in a State
24 that recognizes medical marijuana.

25 I will also discuss the recent GAO report regarding

1 State marijuana legalization and the two report
2 recommendations in which the Department has concurred.

3 Although we currently review data from a variety of
4 sources, we agree with the GAO that having a more
5 centralized repository will be helpful in making policy
6 decisions and will inform our investigations and
7 prosecutions.

8 I would like to start by noting that the Federal
9 Government and the States traditionally have worked as
10 partners in the field of drug enforcement and continue to
11 do so. Federal law enforcement historically has targeted
12 large-scale, sophisticated drug traffickers and
13 organizations, while State and local authorities
14 generally have directed their enforcement resources
15 against a broader range of activity, under their State
16 laws, including more localized and lower-level drug
17 activity. Changes in State laws relating to marijuana
18 enforcement have affected this environment in some
19 States, but the Department continues to work with its
20 State and local partners to address the major public
21 safety threats posed by trafficking in narcotics,
22 including marijuana, and to ensure that our efforts are
23 mutually supportive.

24 In August 2013, former Deputy Attorney General James
25 Cole issued guidance to all U.S. Attorneys regarding

1 marijuana enforcement. The Cole Memo directs prosecutors
2 to continue to fully investigate and prosecute marijuana
3 cases in that implicate any of eight enumerated Federal
4 enforcement priorities, including preventing distribution
5 to minors, grows on public lands, funding of organized
6 crime, and other important Federal interests.

7 The Cole Memo has been helpful in focusing how to
8 best utilize our limited resources to pursue cases
9 involving the most serious threats posed by marijuana-
10 related activities. The Cole Memo also articulates the
11 Department's expectation that States which have laws that
12 authorize marijuana production and distribution must
13 implement strong and effective regulatory and enforcement
14 systems to fully protect against the public health and
15 safety harms that are the focus of our marijuana
16 enforcement priorities.

17 In those cases where marijuana-related conduct does
18 not interfere with Federal priorities, we expect our
19 State and local partners to address those cases with the
20 traditional Federal-State approach to drug enforcement.
21 Where such conduct does interfere with Federal
22 priorities, we can and will act.

23 Finally, it is important to remember that marijuana
24 remains illegal under Federal law, and nothing in the
25 Cole Memo alters our enforcement authority. In my

1 district, the Eastern District of California, where we
2 have vast Federal lands, we prosecute a significant
3 number of defendants each year who are arrested while
4 cultivating marijuana on public lands, which is one of
5 the Cole Memo enforcement priorities.

6 In my district, we are also focusing on marijuana
7 enforcement efforts on interstate trafficking. We work
8 closely with DEA and other agencies to identify and
9 prosecute interstate traffickers and to interdict
10 marijuana and drug proceeds.

11 Over the last 2 years, working with the U.S. Postal
12 Inspection Service, we have executed over 100 search
13 warrants on parcels intercepted in the U.S. mail, seizing
14 large amounts of marijuana and cash. And we also assist
15 other jurisdictions in gathering evidence in our district
16 to prosecute interstate marijuana traffickers in those
17 jurisdictions.

18 Just last week, we announced the arrest of a
19 significant interstate marijuana trafficker based in my
20 district. Using the darknet to transact business, he was
21 alleged to have shipped marijuana and also cocaine to
22 locations all over the United States, receiving payment
23 in bitcoin.

24 Two weeks ago, we worked with the U.S. Attorney's
25 Office in the Middle District of Pennsylvania, which

1 indicted four residents of my district for trafficking
2 marijuana from California to Pennsylvania.

3 Turning to the recent GAO report, the Department
4 agrees with the report's recommendations that we document
5 a plan specifying the process for monitoring the effects
6 of marijuana legalization under State law and share the
7 plan with Department components. We appreciate the
8 considerable effort and time GAO spent on this review. I
9 personally met with GAO officials during their review,
10 and I appreciated their thoughtful and collaborative
11 approach.

12 In accordance with the GAO recommendations, the
13 Office of the Deputy Attorney General has directed the
14 development of a publicly accessible web portal to serve
15 as a repository of data. This will help inform the
16 judgments made by the Department as it makes resource and
17 enforcement decisions regarding marijuana-related
18 criminal and civil enforcement actions. We will identify
19 data sources within the Department as well as from other
20 Federal, State, and local agencies, law enforcement, and
21 public health organizations. Although we are in the
22 early stages of development, I can assure you this is a
23 priority for the Department, and we will be happy to keep
24 the Caucus apprised of our progress.

25 Thank you for this opportunity to testify before the

1 Senate Caucus on International Narcotics Control, and I
2 would be pleased to answer any questions.

3 [The prepared statement of Mr. Wagner follows:]

4

1 Chairman Grassley. Thank you, Mr. Wagner.
2 Now, Ms. Grover.

1 STATEMENT OF JENNIFER GROVER, DIRECTOR,
2 HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT
3 ACCOUNTABILITY OFFICE, WASHINGTON, D.C.
4

5 Ms. Grover. Good morning, Chairman Grassley, Co-
6 Chairman Feinstein. I am pleased to be here to discuss
7 the Department of Justice's approach for monitoring the
8 effects of State marijuana laws.

9 The primary message of my testimony this morning is
10 that the Department should document its monitoring
11 approach, including how it will use the data that it is
12 considering to evaluate the effects of State marijuana
13 legalization relative to the Federal enforcement
14 priorities to better ensure that monitoring is being
15 carried out as intended by the Department.

16 We have already talked this morning about how in
17 2012 Colorado and Washington passed ballot initiatives
18 that legalized marijuana for recreational use. And in
19 turn, the Department, which is responsible for enforcing
20 the Controlled Substances Act, updated its marijuana
21 enforcement guidance.

22 In that guidance, the Department emphasized that
23 States permitting marijuana use must also implement
24 strong and effective regulatory and enforcement systems
25 to make sure that the Federal enforcement priorities are

1 protected.

2 The Department went on to note that if the State
3 enforcement efforts did not adequately protect the
4 priorities that had been outlined in the guidance, the
5 Federal Government may challenge the State regulatory
6 structures in addition to conducting this specific
7 enforcement action.

8 But to be able to follow through on this enforcement
9 approach, the Department must have and effectively
10 implement mechanisms of its own for effectively
11 monitoring threats against those priorities. DOJ told us
12 that they have two main approaches.

13 The first approach is through their ongoing law
14 enforcement activity. In the States, the U.S. Attorneys
15 told us that they monitor and prosecute cases that
16 involve the enforcement priorities. They also consult
17 with their partners in State and local law enforcement to
18 address concerns about the effects of marijuana
19 legalization.

20 And the second approach is through coordination and
21 data monitoring. Department officials told us that they
22 collaborate with and assess information from DOJ
23 components and other Federal agencies. For example, they
24 reported using data sources such as the DEA's National
25 Drug Threat Assessments and the U.S. Attorney's case

1 management system and by participating in meetings with
2 other Federal officials to discuss the effects of State
3 marijuana legalization.

4 We acknowledge that Department officials have
5 reached out to coordinate with State and Federal
6 officials. However, we found that the Department had not
7 prepared a formal written plan, nor did DOJ share any
8 details about how it planned to monitor the effects of
9 State legalization of marijuana.

10 For example, Department officials did not specify
11 the range of data they would consider nor how the data
12 would be used to evaluate the effects of State marijuana
13 legalization relative to the enforcement priorities.

14 At the time, Department officials told us that they
15 did not see a benefit in preparing a formal written plan.

16 We are pleased that they have decided to document their
17 approach as we believe that it will have several good
18 effects.

19 Because GAO has found that a specific written plan
20 generally provides assurances that activities actually
21 occur as intended, we recommended that the Department
22 should go ahead and prepare this type of plan and that it
23 should include, first of all, the data that they will be
24 using and potential limitations of the data so that the
25 Department can be assured that the data that they are

1 using is complete, accurate, reliable, and appropriate
2 for the purpose that they are intending to use it; and,
3 second, how that data and other information sources will
4 be used for monitoring. DOJ also concurred with this
5 recommendation.

6 We also noted that having this type of a formal
7 written plan provides a way for the Department to retain
8 and communicate organizational knowledge. Thus, sharing
9 a written plan with the appropriate DOJ components could
10 improve the overall effort.

11 For example, the Department cited reliance on the
12 U.S. Attorneys' case management system, known as LIONS,
13 that we subsequently learned was likely limited in its
14 use for identifying marijuana-related enforcement cases.

15 By sharing its monitoring plan, the Department will be
16 better able to ensure that it is using data in the most
17 appropriate way, and the Department has concurred with
18 this recommendation.

19 Should the Department make the changes we have
20 recommended, it will be better positioned to ensure the
21 protection of Federal enforcement priorities and overall
22 public health and safety.

23 Thank you for the opportunity to testify, and I look
24 forward to your questions.

25 [The prepared statement of Ms. Grover follows:]

1 Chairman Grassley. Senator Feinstein, you said you
2 had to go at 11:00. Do you want to go first?

3 Senator Feinstein. That is very kind of you.

4 Chairman Grassley. Go ahead.

5 Senator Feinstein. Thank you very much.

6 Ms. Grover, let me just say I agree with everything
7 you said, and I thank you for that. The eight priority
8 enforcement areas of the Cole Memo that are on page 11 of
9 the memo, let me quickly run through them. Each one
10 begins with one word, and it is "preventing" the
11 distribution of marijuana to minors. Big problem,
12 obviously, from just that one number of the increased
13 percent from age 12 to 17 that are now using marijuana.

14 Preventing revenue from the sale of marijuana from
15 going to criminal enterprises and cartels.

16 Preventing the diversion of marijuana from States
17 where it is illegal under State law in some form to other
18 States.

19 Preventing State-authorized marijuana activity from
20 being used as a cover for the trafficking of other drugs.

21 Preventing violence and the use of firearms in the
22 cultivation and distribution of marijuana. Big problem
23 in California.

24 Preventing drugged driving and the exacerbation of
25 other public health consequences associated with

1 marijuana use.

2 Preventing the growth of marijuana on public lands.

3 And, finally, preventing marijuana possession or use
4 on Federal property.

5 Mr. Wagner, will the Department use these eight
6 priorities and carry them out?

7 Mr. Wagner. Oh, absolutely. We--

8 Senator Feinstein. Could you turn on your mic?

9 Mr. Wagner. Sorry. Absolutely we will, and I know
10 in my office and in talking to my fellow U.S. Attorneys
11 across the country, we very much look to those priorities
12 in making enforcement decisions, not only who to
13 prosecute but in our discussions with the DEA, with our
14 State and local law enforcement, which is a constant
15 discussion between U.S. Attorneys and our State and local
16 law enforcement partners. We talk about those
17 priorities, about targeting our enforcement to those
18 priorities, and so that is very much in our minds
19 constantly when we focus on marijuana enforcement.

20 Senator Feinstein. And will you do the required
21 data collection and make the report available to the
22 public in at least one place?

23 Mr. Wagner. Our plan is to collect data from a
24 number of sources, and to the extent it is publicly
25 available data--obviously some internal law enforcement

1 data, some of it will be, I think, inward-looking law
2 enforcement data. But we plan on capturing public data
3 from a number of different sources, putting it in a
4 central repository that will be--a web portal that is
5 available to the public, yes.

6 Senator Feinstein. Well, as you know, our State may
7 very well move to legalize, and that is 40-plus million
8 people. And with the increase that is here in the use of
9 marijuana from 12- to 17-year-olds having escalated
10 dramatically in the States that have legalized marijuana,
11 it raises a huge concern as to driving statistics, which
12 are reflected also in Colorado's numbers, which are
13 accidents caused by marijuana use.

14 What is your view of what we might be able to do to
15 see that the accurate information is provided and that
16 Justice is willing to carry out its responsibility?

17 Mr. Wagner. Well, we are going to capture data from
18 as many different reliable sources as we can. One of the
19 things that we have learned in the course of this is that
20 some States have more reliable data than others. I think
21 as Ms. Grover indicated, we have to be careful that we
22 are relying on data that is reliable. Some States do not
23 have effective baseline data, so if they do not have
24 data, sort of "before data," then the "after data" is of
25 questionable reliability. But we want to reach out and

1 collect data from our Federal agencies, from State public
2 health organizations, from the ONDCP, and collect that
3 all in a central place so that we can have a better idea
4 of trends as they are happening.

5 Senator Feinstein. Thank you.

6 Thank you, Mr. Chairman.

7 Chairman Grassley. Thank you.

8 We are going to put some charts up here to show the
9 direction of some of the harm that has come from this
10 legalization. So I would ask you to refer to that. It
11 is the Rocky Mountain High Intensity Drug Trafficking
12 Area report, September 2015. Here you can see the number
13 of marijuana-related hospitalizations in Colorado, and it
14 has dramatically increased, including an increase of 70
15 percent between 2012 and 2014.

16 The Cole Memorandum specifically states,
17 "Jurisdictions that have implemented systems that provide
18 for regulation of marijuana activity must provide the
19 necessary resources and demonstrate the willingness to
20 enforce their laws and regulations in a manner that
21 ensures they do not undermine Federal enforcement
22 priorities."

23 So question: Preventing adverse public health
24 consequences associated with marijuana use is a Federal
25 enforcement priority under this Cole Memo. So I hope you

1 would agree that this chart reflects this priority is
2 being undermined. Do you see it that way? If not, why
3 not? And if so, why hasn't the Department of Justice
4 taken action to challenge the State law?

5 Mr. Wagner. I would agree that that data is
6 alarming, and I will start off by saying that the U.S.
7 Attorneys' offices are acutely aware of the data and
8 reports that are put out by the HIDTAs. I know that my
9 colleague in the District of Colorado is in touch
10 constantly with the Rocky Mountain HIDTA. I know in my
11 own district, the Central Valley HIDTA also collects
12 data, and we are very in tune with the Central Valley
13 HIDTA. In fact, the HIDTAs, as you know, Senator, are
14 joint Federal-State-local law enforcement. A lot of our
15 marijuana prosecutions arise out of cases brought by the
16 HIDTA. I personally served as the vice chair and then as
17 the chair of the HIDTA. It is a rotating chair system,
18 so we are very closely connected with them and with their
19 data.

20 To answer your question about this information and
21 its use, certainly it is very alarming, and it is data
22 that we, as the Department, will take into account when
23 we look at what sort of enforcement actions to take. I
24 think it is important to realize that enforcement
25 decisions are going to be informed by data and more data

1 is good, but they are not going to be dictated by data in
2 the sense that enforcement decisions invariably look at a
3 range of factors, look at the local environment, look at
4 local law enforcement, their views, look at the prospects
5 for success, look at what the likely result is of an
6 enforcement action, and look at a range of factors,
7 including, importantly, the sort of data that you are
8 referring to.

9 Chairman Grassley. Well, since you say yes, but
10 obviously it is not enough yet to warrant challenging the
11 law--of course, this is why having metrics is very
12 important. So a follow-up question: How high would this
13 graph have to go here to have the Department of Justice
14 intervene to challenge State law? Would it be 15,000
15 hospitalizations? Or you can pick anything out of the
16 clear blue sky, 20,000?

17 Mr. Wagner. Well, I do not think I can give you a
18 number on that, and that is because the decision, as I
19 mentioned, would not be solely based on the data. So
20 with any enforcement decision, whether it is to bring a
21 prosecution or to bring a civil case, you look at a range
22 of factors, and that would certainly be true in Colorado.

23 So one of the factors in Colorado, for example, is
24 that it may be possible as a legal matter to challenge
25 the regulatory regime that is in effect, but not to

1 overturn the decriminalization of marijuana in that
2 State. So if we brought an action which essentially took
3 out the regulatory system for recreational marijuana but
4 left in place decriminalization, you may well have a
5 situation which is worth than the status quo.

6 Another similar factor is under Section 538 of the
7 omnibus bill, the way the Department reads that language,
8 it prevents us from bringing actions which would prevent
9 a State from implementing its own medical marijuana
10 system. So if we were to, for example, challenge the
11 State regulatory system for recreational marijuana but
12 were prohibited from challenging the medical marijuana
13 side, again, it may leave a more chaotic situation than
14 we have now. So that is all by way of simply indicating
15 that the decision whether or not to challenge a given
16 regulatory regime is going to be informed by data but not
17 dictated by data.

18 Chairman Grassley. Let us go on to another
19 statistic we have. You can see in the next one that the
20 number of marijuana-related emergency room visits in
21 Colorado per year has increased more than 83 percent
22 between 2012 and 2014. In 2014, it reached over 18,000
23 visits. So the question is similar: Doesn't this chart
24 also reflect the same Federal enforcement priority being
25 undermined? Again, if not, why not? And if so, why

1 hasn't the Department of Justice taken action to
2 challenge the State law?

3 Mr. Wagner. I think my answer would be largely the
4 same, which is it is alarming data, and we would
5 certainly--it is certainly something that we are
6 concerned about and are keeping an eye on, and it will
7 certainly inform a range of enforcement decisions, not
8 only whether to bring a civil case but what sort of
9 resources to dedicate toward prosecutions in that area.
10 So, certainly, it is valuable data and alarming. But I
11 do not think it would necessarily by itself trigger any
12 particular enforcement action.

13 Chairman Grassley. Okay. I have a similar follow-
14 up, but I think I will get the same answer you gave
15 before. But I think then I would make a statement, that
16 this is why the metrics are so important.

17 And then my last question will be in regard to the
18 next statistic we have: traffic deaths. Finally,
19 preventing drugged driving is another enforcement
20 priority under this Cole Memorandum. Again, we see the
21 number of traffic deaths related to marijuana in
22 California increasing 20 percent the last few years, from
23 78 to 94 deaths. So doesn't this chart reflect this
24 Federal enforcement priority being undermined? And I
25 assume that the--the question is the same. You will

1 probably give me the same answer, right?

2 Mr. Wagner. I think I would. I share your concern
3 over the data. It is certainly alarming, and it is
4 something we want to keep an eye on. And that is one of
5 the reasons why we are embracing the recommendations of
6 the GAO report so that we can more accurately factor that
7 in.

8 Chairman Grassley. I will stop with this: Does the
9 Department plan to develop metrics as part of its
10 response to the GAO report? And if not, why not?

11 Mr. Wagner. We are certainly going to, as we look
12 at the data, we are going to develop, I think, a plan for
13 which data we are going to be looking at. It is not
14 likely that the Department is going to be publishing to
15 the States a description of when we are going to take
16 action in a particular case. I think that is not
17 helpful, and, again, when we look at enforcement, we are
18 going to want to look at a range of factors. We are
19 going to look at local law enforcement.

20 The analogy that I frequently use, in California I
21 have been asked a lot by municipalities and counties that
22 are considering their own ordinances: What if we enact
23 this? Is this going to pass muster with you? Are you
24 going to sue us? What if we pass this kind of a system?
25 Is that going to be adequate?

1 And I invariably tell them you do not expect the
2 State troopers to tell you in advance how many miles over
3 the speed limit you can go before they are going to stop
4 you. And my approach really is dictated by that. As a
5 prosecutor, you want to maintain maximum flexibility to
6 enforce Federal law, and this data is obviously very
7 important in making those decisions. But we are not
8 going to say in advance that if you do X, we will do Y.
9 We want to keep our ability to act in every case
10 depending on the circumstances.

11 Chairman Grassley. It seems to me, before I call on
12 Senator Whitehouse--and this will not be a question. It
13 seems to me when you talk about a range of factors, it is
14 a far cry from the metrics that we need when the Cole
15 Memorandum says you are going to take action.

16 Senator Whitehouse?

17 Senator Whitehouse. Thank you, Chairman.

18 Mr. Wagner, back in my U.S. Attorney days, it was
19 kind of an article of faith within the Department of
20 Justice that it was the Department's policy to articulate
21 on enforcement a single national standard for whatever,
22 and that conditions on the ground in different States
23 were not sufficient or not significant enough to justify
24 any kind of explicit change or separation of certain
25 States out from the prevailing national standard.

1 I assume that that impetus remains very alive and
2 well within the Department of Justice today?

3 Mr. Wagner. I think it does. Obviously, U.S.
4 Attorneys jealously guard their prerogative to exercise
5 their prosecutorial discretion. Different States are
6 very different. In my 6-1/2 years as U.S. Attorney and
7 serving on quite a number of committees, including the
8 U.S. Attorneys Marijuana Working Group, I have really
9 come to appreciate the very different situations that
10 U.S. Attorneys find themselves in around the country.

11 Senator Whitehouse. I both remember and well
12 understand the significance, as does Senator Sessions,
13 who had the same privilege, of being able to make one's
14 own prosecutive decisions within the national guidelines
15 that the Department of Justice maintained and did its
16 best often to enforce against individual U.S. Attorneys.

17 My concern here is that now that operating principle
18 of the Department bumps up against a principle that has a
19 long tradition in our country, which is of some degree of
20 deference to States rights to decisions that have been
21 made by sovereign States in their sovereign capacity and
22 what sort of deference is due there. And it strikes me
23 that you are in a bit of a pickle because, on the one
24 hand, you would like to have a national standard; on the
25 other hand, the national standard that would gratify the

1 Attorney General of Nebraska, who is here, might be very
2 different from that which would be appreciated by the
3 Attorney General and the government of Colorado.

4 So I guess my question to you is: Is there a point
5 at which the clear policy choice differences that States
6 have made should create some policy differentiation
7 within the Department just as a matter of respect for
8 local authorities? If not, it seems to me that what ends
9 up happening is you have to, in Cole Memos and other
10 things like that, try to morph this peculiar national
11 policy in a way that covers both, which the spread is
12 covered by prosecutorial discretion, but when that spread
13 is covered by prosecutorial discretion, we end up with
14 the predicament you just elucidated, which is that your
15 State partners, trying to proceed in good faith, cannot
16 get a straight answer from the Department about where the
17 real operating lines are. And I think that is a flaw.
18 It may be that it is a less important flaw than departing
19 from the principle of national homogeneity, but I would
20 really urge you to reflect on that, because I think that
21 the principle of a single national standard has driven
22 you to a place where you are not being as helpful as you
23 could be to local officials who want clarity about how
24 this is going to play out in their States, and waving the
25 Cole Memorandum at them frankly is not a very helpful

1 answer.

2 Mr. Wagner. So I think your observations about the
3 tension between sort of our duty to enforce the law
4 impartially nationwide and the variability in State
5 responses to this issue in light of the sort of
6 traditional Federal-State relationship, particularly in
7 drug trafficking, are spot on, and that is a tension
8 which we wrestle with every day.

9 On the other hand, I do not think that the Cole Memo
10 is as much a sort of departure from prior practice than
11 some people have assumed. Traditionally, as I indicated
12 in my opening statement, we do focus on the more
13 aggravated cases, and that is true across the board in
14 the narcotics world. And in that respect, the Cole Memo
15 is an effort to articulate what the more aggravated cases
16 are that we would focus on.

17 So we have discussions all the time with State and
18 local drug prosecutors about what kinds of cases are you
19 interested in prosecuting and what can we prosecute, and
20 that is true in methamphetamine and heroin and--

21 Senator Whitehouse. I guess my point here, though,
22 is that if the Cole Memo reflects a retreat by the
23 Department to this aggravate cases standard, which is
24 applicable without too much conflict in the legalized
25 marijuana States, then in States that have not legalized

1 marijuana or in places where there is exclusive Federal
2 jurisdiction on military bases and reservations and so
3 forth, then you have also retreated to aggravated as your
4 standard there, and now what happened to the enforcement
5 that people expected at something below the aggravated
6 standard. And it looks to me like you are solving that
7 problem with prosecutorial discretion and kind of letting
8 that sort itself out, which may be the best solution for
9 a while, but I think ultimately a little bit more rigor,
10 a little bit more candor about how you work your way
11 through that for your local law enforcement partners, it
12 would be a useful outcome. I do not want to fault the
13 Department for where you are now. I understand why you
14 got there, and I see the predicament. But I do think
15 there is a little bit more of a partnership that is
16 possible if you could be a little bit--if the Department
17 could be a little bit clearer about where this
18 enforcement was, because there is a gap. It is a gap
19 that is filled with prosecutorial discretion, and by
20 definition, prosecutorial discretion is not a helpful--it
21 is a black box and not helpful for our partners who want
22 to know what you are going to do and when you are going
23 to do it, because that informs the relationship they have
24 with you.

25 Mr. Wagner. Just to flesh out that very thought,

1 within California itself, so in California we have had a-
2 -medical marijuana has been legal, but until new
3 legislation that was passed in January, there was no
4 centralized regulatory system for that. So it was quite
5 chaotic in California, and different counties and
6 different cities took different approaches to it. Some
7 banned it outright. Some invited in marijuana producers.

8 And so even within my own district--I cover 34
9 counties--different sheriffs, different police chiefs
10 felt differently about the issue. And that changed over
11 time. The California Supreme Court in 2013, around the
12 same time as the Cole Memo, made clear that local
13 authorities could enact their own restrictions on medical
14 marijuana, and many of them did so and then began
15 enforcing it themselves so they did not need our help as
16 much.

17 So it has been a bit of a moving target, and because
18 of that, I think there has been a considerable amount of
19 deference within the Department paid to U.S. Attorneys to
20 collaborate with their State and local law enforcement
21 and to take their views into account in the exercise of
22 their discretion, and we do that really daily.

23 Senator Whitehouse. Thank you, Mr. Wagner.

24 My time has expired. Thank you, Chairman.

25 Chairman Grassley. Thank you.

1 Senator Sessions?

2 Senator Sessions. Mr. Wagner, the issue is bigger
3 than the technical matter we are discussing today. In my
4 opinion, this is a huge, huge issue. I was United States
5 Attorney when President Reagan was elected in the early
6 1980s. Half the high school seniors in America had used
7 an illegal drug. Over 12 to 15 years, it went to less
8 than half that, less than 25 percent. Would you say that
9 was an advantage, a health advantage to young people in
10 America, that drug use declined?

11 Mr. Wagner. I will stipulate that certainly less
12 drug use is better.

13 Senator Sessions. All right. What about marijuana
14 legalization in Colorado? Did you take a public position
15 on that?

16 Mr. Wagner. I do not take public positions on
17 political issues. I think generally that is a bad policy
18 for U.S. Attorneys. We try to maintain our role as the
19 enforcers of law, not--

20 Senator Sessions. I have been there, and I know the
21 tension on that. But in the past, U.S. Attorneys and the
22 drug czar have opposed it. Does President Obama oppose
23 States' adopting legalization of marijuana?

24 Mr. Wagner. I do not know exactly what positions he
25 has taken with respect to Colorado and Washington.

1 Senator Sessions. Well, that is a terrible comment,
2 that the United States Attorney that works for the
3 President of the United States does not know whether he
4 opposes or favors legalization of marijuana. He
5 certainly has said some things that indicate he thinks it
6 is a very little problem. But these data show that it
7 is. So you have got this huge increase in marijuana-
8 related emergency room visits. This is as obvious as
9 night following day. You make more marijuana more
10 available, you basically say it is not very dangerous,
11 and that the young people have a right to participate
12 with it, and others, older people do, too, and you are
13 going to have more problems. Would you not agree?

14 Mr. Wagner. I certainly think that increases in
15 marijuana use are bad for public health. I totally agree
16 with that. And I think there has been an increase
17 recently, certainly out in Sacramento, my district. Our
18 focus is on the opioid and heroin increase, which has
19 been quite an unfortunate upturn in overdose prescription
20 pills. I know in the Sacramento area just in the last 10
21 days, we have had 9 people die from fentanyl overdoses,
22 and that is something which we are--

23 Senator Sessions. Fentanyl and heroin or just
24 fentanyl alone?

25 Mr. Wagner. No, not heroin. They are apparently

1 prescription drugs that had been laced with fentanyl, and
2 that is something that we have been spending sort of 24/7
3 the last 2 weeks.

4 Senator Sessions. That is a huge issue, but just
5 from my experience in dealing with this, we need to set a
6 nationwide--we need a nationwide understanding about the
7 problem. This is very real.

8 Are you aware that the American Medical Association
9 just last year issued a report that hammered this idea
10 that marijuana is not dangerous? And they were
11 particularly concerned about the mental impacts it has on
12 young people. Are you familiar with that?

13 Mr. Wagner. I am.

14 Senator Sessions. Do you have any doubt about that?

15 Mr. Wagner. I do not have any doubt about that,
16 Senator.

17 Senator Sessions. Did the drug czar of the United
18 States of America make any opinion, express any opinion
19 to Colorado about the possible dangerous impacts of
20 marijuana legalization in Colorado?

21 Mr. Wagner. I know the drug czar has been quite
22 articulate about some of the dangers associated with
23 marijuana. In fact, Mr. Botticelli, just before he
24 became drug czar, came out to California with us and
25 participated in some marijuana enforcement operations,

1 where we went up into the North State, flew over some
2 very large marijuana grows in the course of our
3 operation. So I know he has been quite committed to
4 supporting us, and, in fact, he supported an expansion of
5 the HIDTA to do more enforcement in our district on
6 marijuana.

7 Senator Sessions. Well, what I want to say to you
8 and those who might be listening is it is far more
9 important than just the details of whether Federal
10 prosecutors start prosecuting marijuana cases in
11 Colorado. Colorado was one of the leading States that
12 started the movement to suggest that marijuana is not
13 dangerous. And we are going to find it, in my opinion,
14 ripple throughout the entire American citizenry, and we
15 are going to see more marijuana use, and it is not going
16 to be good. We are going to see more other drug use,
17 illegal drug use also, which is damaging.

18 I mean, we need grownups in charge in Washington to
19 say marijuana is not the kind of thing that ought to be
20 legalized, it ought not to be minimized, that it is, in
21 fact, a very real danger. You can see the accidents,
22 traffic deaths related to marijuana jump 20 percent.
23 These are the kind of things that we are going to see
24 throughout the country, and we will see cocaine and
25 heroin increase more than it would have, I think, had we

1 not talked about it.

2 Well, is there any sense that Colorado might
3 reevaluate what they have done?

4 Mr. Wagner. I know that there is a lot of
5 discussion back and forth between the U.S. Attorney's
6 Office and the State authorities in Colorado about issues
7 that we are seeing, issues that we are concerned about.
8 And I understand that the State authorities have been
9 receptive to our concerns. I do not know the details of
10 what they are doing about them, but citing some of the
11 data that Senator Grassley presented earlier, we are
12 concerned about that data, and we are talking about to
13 Colorado about it. I know the same is true in
14 California.

15 Senator Sessions. Well, I hope you will speak out.

16 I mean, you are able as a citizen of Colorado to say you
17 think this is dangerous, I have worked with it every day,
18 I see the danger and damage it does. And I think the
19 President needs to speak out. I think one of his great
20 failures, it has been obvious to me, is lax treatment and
21 comments on marijuana. It has been obvious. It reverses
22 20 years almost of hostility to drugs, begun really when
23 Nancy Reagan started the Just Say No program. I made
24 that mention when she passed away. It was a great
25 accomplishment. We moved this country from 50 percent of

1 high school seniors using a drug, marijuana or other
2 drug, to less than half that. Lives were saved. Young
3 people's futures were saved. And if we go back into this
4 path, we are going to regret it. And you have got to
5 have leadership from the top. And I think the drug czar
6 and the DEA leadership understand this. But I am not
7 sure the President does. I am not sure the message is
8 getting down to the prosecutors.

9 Mr. Chairman, thank you for hosting this. You have
10 been very astute on this issue for many, many years. You
11 have led this Committee, this Drug Caucus, for many, many
12 years. We made tremendous progress. Just I cannot tell
13 you how concerning it is for me emotionally and
14 personally to see the possibility that we would reverse
15 the progress that we have made and let it slip away from
16 us. Lives will be impacted, families will be broken up,
17 children will be damaged because of the difficulties
18 their parents have, and people may be psychologically
19 impacted the rest of their lives with marijuana. And if
20 they go on to more serious drugs, which tends to happen--
21 you can deny it if you want to, but it tends to happen--
22 there will be even greater deaths per year.

23 Mr. Wagner. I can assure you that we are very--I am
24 a citizen of California, and certainly out there, we are
25 very aggressively prosecuting narcotics cases. I had a

1 press conference last week in a interstate narcotics
2 trafficking case. We prosecuted almost 90 people on a
3 marijuana case that was in my office last year, and one
4 of my Assistant U.S. Attorneys in February received the
5 National Prosecutor of the Year Award from the HIDTA
6 National Association at their national conference here in
7 Washington for her work in marijuana prosecutions.

8 So we are very committed to doing those cases, and
9 we will continue to do that.

10 Senator Sessions. Thank you. I would just comment
11 that, as I was talking to somebody who is experienced in
12 this recently, it was the prevention movement that really
13 was so positive, and it led to this decline, the creating
14 of knowledge that this drug is dangerous, you cannot play
15 with it, it is not funny, it is not something to laugh
16 about, and trying to send that message with clarity that
17 good people do not smoke marijuana. And the result of
18 that is to give that away and make it socially acceptable
19 creates the demand, increased demand that results in
20 people being addicted or impacted adversely.

21 I just hope that we can get our thoughts together on
22 it. I believe the Department of Justice needs to be
23 clearer and I believe the President really needs to
24 reassert some leadership on this. I think it is really
25 serious.

1 Chairman Grassley. Ms. Grover, I just have one
2 question for this panel, and it is for you, and then I
3 will call the second panel.

4 The Department now apparently concurs with the GAO's
5 recommendations after officials first told your agency
6 that they did not see the benefit to DOJ's documenting
7 its monitoring of State marijuana legalization. Can you
8 provide us with a status update on what you know about
9 DOJ's implementation of the recommendations? For
10 instance, when would you expect them to be fully
11 implemented?

12 Ms. Grover. They sent a note late on Friday with an
13 update on their progress in that regard that they are
14 committed to creating a monitoring plan and that they
15 have asked the Executive Office of the U.S. Attorneys,
16 the Attorney General Advisory Committee, and the Criminal
17 Division within the Department to work with them to
18 develop the data that they need to have.

19 I think they are just starting, and I expect it will
20 be quite a while. This is a big job for the Department,
21 but it is critically important because good, solid
22 metrics, as you mentioned, as Senator Sessions mentioned,
23 is really the underpinning of all of the decisions that
24 will need to be made going forward.

25 Chairman Grassley. Okay. Go ahead.

1 Mr. Wagner. I think I can elaborate on that.

2 Chairman Grassley. Please go ahead.

3 Mr. Wagner. Exactly as Ms. Grover indicated, we are
4 moving to collect the data. I have personally
5 participated in a number of meetings and conference calls
6 about this, including yesterday, last week, and prior to
7 that, involving the Criminal Division, EOUSA, as Ms.
8 Grover indicated, DEA, people from the OCDETF program.
9 So there are a lot of people mobilized within the
10 Department to make this happen.

11 As she indicated, this is a heavy lift. All of the
12 people who are going to work on this have to make space
13 on their plates to do this. But we are identifying the
14 data that we need, the people that are going to make it
15 happen, and we are committed to making it happen as soon
16 as we can. But I agree with Ms. Grover. It is going to
17 take us some months to make it a reality.

18 Chairman Grassley. Thanks to both of you. I will
19 call the second panel now.

20 Mr. Wagner. Thank you, Senator.

21 Chairman Grassley. Thank you.

1 Chairman Grassley. While the other panel is coming,
2 I am going to introduce them.

3 Doug Peterson was elected Nebraska's 32nd Attorney
4 General in 2014. In this capacity, Mr. Peterson
5 represents the State of Nebraska in all litigation
6 matters. Nebraska is one of two States that sued
7 Colorado in 201 as a result of the diversion of marijuana
8 across the border into Nebraska. He received his
9 bachelor's degree from the University of Nebraska and his
10 law degree from Pepperdine University School of Law.

11 Our second witness and final witness is Dr. Kathryn
12 Wells. Dr. Wells has served as the medical director and
13 team leader of the Denver Health Medical Clinic at the
14 Denver Family Crisis Center. I think you have been in
15 that position since 2003. Dr. Wells is a graduate of
16 Carroll College, Helena, Montana, and Creighton
17 University School of Medicine. She is certified in both
18 general pediatrics and child abuse pediatrics.

19 I will call on the Attorney General first.

1 STATEMENT OF DOUGLAS J. PETERSON, ATTORNEY
2 GENERAL OF THE STATE OF NEBRASKA, LINCOLN, NEBRASKA
3

4 Mr. Peterson. Good morning, Chairman Grassley. I
5 want to thank you. It is an honor to testify before you
6 today, and I appreciate your attention to this critically
7 important issue of the growing State-sponsored marijuana
8 industry and how it violates Federal law. Frankly, it is
9 amazing to me that this one memo issued by the Department
10 of Justice in August of 2013 has resulted in a marijuana
11 industry that has become completely untethered from the
12 anchor of the Controlled Substances Act.

13 Media reports indicate that the marijuana industry
14 has earned over \$5.4 billion in 2015, and although I
15 agree with the GAO's basic conclusion that the Department
16 of Justice has failed to sufficiently document its
17 monitoring efforts, the magnitude of the Cole Memo on the
18 marijuana industry is so much more significant than
19 simple issues of paperwork.

20 The Cole Memo identifies eight enforcement
21 priorities for Federal prosecutors. For the sake of
22 time, I want to only address the first three, that being
23 distribution to minors, revenue sales by gangs, and
24 diversion to other States.

25 As to minors, in the last year I have had the

1 opportunity to speak to several Nebraska high schools,
2 particularly in western Nebraska. In fact, I will be
3 there tomorrow morning speaking to another school. I
4 have learned from school administrators that students
5 have taken a much more accepting and less guarded
6 attitude towards marijuana. School administrators
7 frequently hear students say, "If it is legal in
8 Colorado, it cannot be that bad."

9 However, the free market factors in Colorado have
10 caused marijuana potency levels to have reached
11 unprecedented heights, posing serious health threats.
12 The marijuana of the 1960s, 1970s, 1980s, and 1990s had
13 THC values around 5 percent. Currently, the free market
14 out of Colorado has potency in the 15- to 20-percent THC
15 level, with premium values over 25 percent THC. Also,
16 the edible cannabis products put in such things as Pixy
17 Stix, lollipops, power drinks, and gummy bears obviously
18 are targeted towards young people with serious levels of
19 THC. Law enforcement officers throughout the State of
20 Nebraska have reported seizing these type of edibles from
21 several minors in the State.

22 As to gangs, these extraordinarily high potency
23 levels have increased interest by drug traffickers by
24 violent gangs in the Omaha region. The Omaha Police
25 Department reports to me--and this I think would also be

1 true for your community of Council Bluffs--that prior to
2 2009, the primary source of marijuana in the metro area
3 was Mexico, and the value of that product was typically
4 about \$1,000 a pound.

5 In 2009, once Colorado passed its medical marijuana-
6 -or not passed, but after the Ogden Memo and it became
7 much more commercial, the marijuana being produced in
8 Colorado was soon being transported into Omaha and
9 becoming the marijuana of choice. The price of marijuana
10 shot up to \$3,500 to \$4,200 a pound, and that tells you
11 how significant this potency issue really is. It also
12 with that type of value brought in the gang activity.
13 The Omaha Police Department reports that since 2014, now
14 they typically see Colorado as the predominant supplier
15 of marijuana to the community, and also the new twist is
16 that the Internet and social media are more frequently
17 used to sell to Omaha from Colorado using the Postal
18 Service, UPS, and FedEx. Most importantly, the Omaha
19 Police Department reports that with the high potency,
20 high demand for the Colorado marijuana, they are seeing
21 more frequent violent and firearms related to the
22 marijuana trade.

23 Finally, on diversion, the diversion of marijuana
24 into Nebraska has been fierce. For example, just mid-
25 January to the end of February of this year, in Lancaster

1 County, which is an eastern county in Nebraska--it is
2 where Lincoln is located--there were three significant
3 stops.

4 One stop along Interstate 80 was for--they found
5 over 1,500 pounds of marijuana. It is believed that that
6 marijuana was brought from Oregon. That has a street
7 value of approximately \$6.5 million.

8 There was another stop where 515 pounds--now, this
9 is just one county within 40 days--where 515 pounds were
10 seized. This marijuana was sourced to northern
11 California.

12 And another 100-pound stop which was believed to
13 come from Colorado. So over 2,000 pounds in 40 days with
14 a value of over \$6 million.

15 It is obvious that the diversion is rampant. I
16 think the HIDTA report, the Rocky Mountain report,
17 certainly indicates that several States are receiving the
18 Colorado marijuana. It could be Colorado, Washington,
19 Oregon, or California. There is no question this
20 industry is growing.

21 In conclusion, the irony of all of this--the harm to
22 minors, the revenue generated by gang activity,
23 widespread diversion among the States--were all clearly
24 identified by this body back in 1970 in the passing of
25 the Controlled Substances Act. The social harms and the

1 importance of the Controlled Substances Act was confirmed
2 by the Supreme Court in 2005 in the case of Gonzales v.
3 Raich related to California medical marijuana. In spite
4 of the powerful wisdom of both this body and the U.S.
5 Supreme Court, the marijuana industry has been allowed to
6 take the Cole Memo and has ignited a marijuana market
7 that has spread like wildfire beyond the Colorado
8 borders.

9 In conclusion, to the Caucus question, "Is the
10 Department of Justice Adequately Protecting the Public
11 from the Impact of State Recreational Marijuana
12 Legalization?" the short answer is no.

13 The solution is far more involved than the
14 recommendation of the GAO. As Nebraska's Attorney
15 General, my greatest concern is that the high-profit
16 industry is being allowed to market without restraint an
17 extremely potent drug that continues to get stronger.
18 The target market is our youth who stand most to be
19 seriously harmed, and much like the tobacco industry and
20 Joe Camel, it is very clear that this industry is
21 targeting those young people.

22 As elected officials, this is on our watch. None of
23 us want to look back 10, 20 years from now and say we
24 could have done more. It will be far too late. The
25 industry is running far too hard.

1 The wisdom found in the Controlled Substances Act is
2 amplified as marijuana has become so much stronger.
3 Protecting against these serious public health risks was
4 and is at the heart of the Controlled Substances Act.
5 This body cannot let the Controlled Substances Act be
6 completely circumvented by one agency and one memo and an
7 industry that has absolutely no concern for our public
8 health or our youth.

9 Thank you.

10 [The prepared statement of Mr. Peterson follows:]

1 Chairman Grassley. Thank you, General Peterson.
2 Now, Dr. Wells, please.

1 STATEMENT OF KATHRYN WELLS, M.D., MEDICAL
2 DIRECTOR, DENVER HEALTH CLINIC AT THE FAMILY CRISIS
3 CENTER, DENVER, COLORADO

4
5 Dr. Wells. Good morning, Chairman Grassley. Thank
6 you so much for providing me the opportunity to appear
7 before you today to discuss my perspective of the impact
8 legalization of recreational marijuana has had on
9 Colorado's children and the child welfare system. As a
10 child abuse pediatrician and someone who has observed and
11 studied the impact of substance abuse on children and
12 child maltreatment for almost 20 years, I am hoping that
13 my experiences related to marijuana legalization in
14 Colorado might help inform your decisions. In Colorado,
15 we have come to understand that these are extremely
16 complex issues that seem to generate more questions than
17 answers.

18 Most of my comments can be viewed through the
19 Department of Justice's marijuana enforcement priority of
20 preventing the distribution of marijuana to minors.
21 Regardless of one's overall position on marijuana
22 legalization, I trust most would accept this priority.
23 Unfortunately, child health and welfare in Colorado has
24 been endangered for many reasons but largely because of
25 the skyrocketing access to marijuana edible products.

1 Marijuana-infused products such as candy, brownies,
2 and cookies are all inherently appealing to children.
3 Because of this appeal, better regulations around edibles
4 is essential to prevent child ingestion. A systematic
5 literature review of unintentional marijuana exposures in
6 children undertaken by Colorado's Retail Marijuana Public
7 Health Advisory Committee found substantial evidence that
8 more unintentional marijuana exposures of children occur
9 in States with increased legal access to marijuana.

10 According to data compiled by the Rocky Mountain
11 Poison and Drug Center, the number of marijuana-related
12 exposures in children ages 0 to 5 increased from an
13 average of four per year during the pre-commercialization
14 years of 2006 to 2008 to 13 per year during post-
15 commercialization between 2009 and 2012, a 225-percent
16 increase, to an average of 31 per year following
17 legalization in 2013 and 2014, a subsequent 138-percent
18 increase. In this same time period between 2013 and
19 2014, the average percentage of all marijuana-related
20 exposures occurring in children ages 0 to 5 in Colorado
21 was 17.71 percent, far exceeding the national average of
22 5.95 percent.

23 Because of the increased potency of these exposures,
24 children are often requiring more medical interventions
25 when they do present after an ingestion. According to

1 Colorado Hospital Association data, the rates of
2 hospitalizations and emergency department visits in
3 children up to 9 years of age due to possible marijuana
4 exposures increased more than five-fold between pre-
5 commercialization and post-commercialization.

6 In addition to the clear health concerns, child
7 ingestions prompt reports to child welfare and law
8 enforcement, posing additional challenges to systems that
9 then attempt to determine the source and nature of the
10 exposure, whether it was intentional or accidental, and
11 the potential for future risk.

12 Beyond access to edibles, Colorado has experienced
13 several other challenges related to the impact of the
14 legalization of marijuana on children that we are trying
15 to understand more completely but are clearly hindered by
16 the lack of data. For example, home cultivation of
17 marijuana, including home grows and processing of
18 edibles, has raised concerns related to children. While
19 we now have restricted the ability to legally extract THC
20 utilizing butane due to the risk of explosions, other
21 risks continue to exist, such as those from improper
22 ventilation, exposure to pesticide, and unrestricted
23 access to marijuana.

24 Marijuana legalization has also had a sizable impact
25 on our schools. The Denver Post examined marijuana store

1 locations and found 25 marijuana stores closer than 1,000
2 feet to at least one nearby school. And using data
3 compiled by PBS in Colorado, there are signs that more
4 students are using marijuana, creating an increasing
5 problem for teachers, counselors, and other school
6 personnel.

7 Another challenge is the ability to determine if
8 someone is impaired while operating a vehicle or
9 parenting, whether the use is recreational or medicinal.

10 Impairment is an important issue in determining if a
11 caregiver is safe to care for a child, a decision that
12 challenges child welfare workers daily.

13 A final topic I wish to touch on briefly is
14 marijuana use during pregnancy and breastfeeding. The
15 legalization of recreational marijuana has underscored
16 the need to better understand the impact of exposure on
17 the unborn fetus as well as the breastfeeding infant to
18 different forms of marijuana. The potential for adverse
19 outcomes in exposed offspring of marijuana-using mothers
20 prompted Colorado's Retail Marijuana Public Health
21 Advisory Committee to review the available literature on
22 physical, developmental, and mental health outcomes of
23 marijuana exposure during pregnancy and breastfeeding.

24 While it is important to note that this literature
25 is based on smoked marijuana alone as well as much lower

1 potency THC than is being used currently, the Committee
2 found moderate evidence that maternal use of marijuana
3 during pregnancy is associated with negative impacts on
4 exposed offspring, including cognitive function, IQ, and
5 attention. Importantly, these effects may not appear
6 until adolescence.

7 The Committee also reviewed the very limited
8 research related to breastfeeding and marijuana and found
9 that biological evidence shows that THC is present in the
10 breast milk of women who use marijuana and that infants
11 who drink breast milk containing THC absorb and
12 metabolize the drug. The issue of prenatal exposure to
13 marijuana has been especially challenging because in
14 Colorado, an infant born positive for a Schedule I drug
15 or a Schedule II drug not being used by the mother as
16 prescribed is defined as child abuse. Therefore, an
17 infant is born positive for THC in Colorado meets the
18 health care provider's mandate to report the case to
19 child welfare and can be used as evidence of child abuse
20 in civil court.

21 Due to the many challenges faced by Colorado's
22 child-serving professionals, the Colorado School of
23 Public Health has undertaken a health impact assessment.

24 This effort was largely initiated due to perceived
25 inconsistencies in how marijuana use and exposures were

1 operationalized in child welfare in an effort to define
2 greater consistency and develop evidence-based and
3 informed recommendations. This challenging work
4 continues specifically related to mandatory reporting,
5 child welfare screening and assessment, and the
6 management of open child welfare cases where marijuana is
7 a factor.

8 In conclusion, I urge the Federal Government and
9 other States contemplating similar legal changes
10 involving the legalization of recreational marijuana to
11 take the time to consider the impact such changes will
12 have on the health and well-being of our youngest
13 citizens. We desperately need better and more accurate
14 research and data, funding support, and laws that allow
15 research needed to inform these critical policies and
16 regulations that clearly impact the health, welfare, and
17 safety of our most vulnerable but our critical resource--
18 our children.

19 Thank you very much for your time.

20 [The prepared statement of Dr. Wells follows:]

1 Chairman Grassley. Thank you both very much.

2 I have got a couple questions for General Peterson
3 and then a question for you, Dr. Wells.

4 My first question you have already answered with a
5 lot of specifics, but let me ask the question anyway, and
6 it will give you a chance for maybe some additional
7 information or conclusions that you can have an
8 opportunity to present.

9 We all know that one of the Federal priorities
10 outlined in the Cole Memo is preventing the diversion of
11 marijuana from States where it is legal under State law
12 to other States. So the question I was going to ask that
13 you have already answered but gives you a chance to
14 expand: What does the available information tell us
15 about how readily marijuana from Colorado is being
16 diverted to other States? And, specifically, what has
17 been the experience of Nebraska law enforcement officials
18 in this regard?

19 Mr. Peterson. You know, Senator, it has been very,
20 very difficult. It used to be initially thought that
21 western Nebraska was taking the impact, being so close to
22 Colorado. And now it is across the State, and I am sure
23 in your State of Iowa it is moving that direction. It is
24 a very significant strain to the financial abilities of
25 several of these county law enforcement agencies. They

1 make a lot of stops along I-80 and some of the other off-
2 roads.

3 The other problem is they are seeing it in the high
4 schools. They see the young people bringing the drugs
5 in.

6 There is an example of a fairly small county,
7 population 2,000, in western Nebraska, just to give you a
8 snapshot. In 2011, they had three felony charges with
9 regards to marijuana, and that was most likely medical
10 marijuana out of Colorado. After 2014--or after the
11 passage in 2013, in 2014 they had, I believe, 33
12 citations. For a county of 2,000, having to prosecute 33
13 felony marijuana cases is a significant impact
14 financially. They do not have the resources. They
15 barely have the resources in a lot of these counties just
16 to get by with their burdens. And when we add to this
17 the traffic of marijuana that is coming through, not only
18 passing through the counties but also within the
19 residents and the young people in the counties, it has
20 put quite a burden on them.

21 Chairman Grassley. My next question is about
22 Article II, Section 3 of the Constitution requiring the
23 Executive to take care that laws are faithfully executed.

24 Of course, this duty is also subject to the exercise of
25 legitimate enforcement discretion due to limited

1 resources as only one example.

2 Do you believe the Department of Justice enforcement
3 policy laid out in the Cole Memorandum is consistent with
4 the Take Care Clause? Why or why not?

5 Mr. Peterson. Senator, what amazes me about the
6 Cole Memo of 2013, it was a green light to the industry
7 to take off, and the industry has certainly taken off,
8 and with certainly an attitude that they do not have to
9 worry about the Department of Justice.

10 Hearing the testimony today, it is a little bit like
11 a whack-a-mole type of analysis by the Department of
12 Justice. By issuing the Cole Memo, they opened the
13 valve, and this water is flooding into Nebraska. And
14 then their answer to opening the valve is, "Hey, we have
15 got really big buckets, and we will come and help you
16 out."

17 In fact, on two of those cases that I mentioned, the
18 1,500 and the 500, the U.S. Attorney's Office is becoming
19 involved. But that makes no sense to open up the valve
20 and then say they are going to show up with the big
21 buckets to help you out.

22 Our position is that they need to stop it in
23 Colorado. And it makes no sense to say, "Well, we will
24 use this discretion as set forth in the Cole Memo" when
25 we know--and the biggest concern I have is we know that

1 our young people in Nebraska--and I appreciate the
2 comments by Dr. Wells. We know our young people are
3 getting the drugs. And the Feds cannot stop that because
4 it is not large enough to them, but yet I can tell you
5 story after story of young people who have had the
6 ability either through a sibling or someone else going to
7 Colorado, high school students gathering up their money
8 and sending a buyer into Colorado and bringing the
9 edibles back or bringing the product back, and it is a
10 very, very strong product.

11 So this Department of Justice perspective just does
12 not make sense to me. It does not seem to be good uses
13 of resources because they have opened up this big
14 industry, and the industry, the free market has relished
15 it.

16 One thing I would also comment, Senator, is I do not
17 think the Department of Justice fully understood how the
18 free market works. When you tell an industry that you
19 have a green light to go forward, what is that industry
20 going to do? They are going to try to make the best
21 product possible. And by doing that, now we have these
22 potency levels, 20, 25 percent, in these different edible
23 products. We have a real public health concern. I think
24 they assumed that this was going to be the old days, 5
25 percent marijuana, and it is not going to be a big deal.

1 The fact of the matter is it is a serious public health
2 issue which was addressed back in 1970 under the
3 Controlled Substances Act, recognized by the Supreme
4 Court in the Raich case and its interstate commerce
5 impact. And now if they do not do something very
6 quickly, I do not think we will ever be able to get this
7 back in the bag. And that is why I think, frankly, this
8 body with its Controlled Substances Act is being ignored.

9 And I think with the separation of powers, I believe
10 this body needs to step up and say, "You know what? We
11 meant it. We meant what we said in the Controlled
12 Substances Act, and it is truer now than ever before."

13 I appreciate Senator Sessions' comments on that.
14 This memo has created great havoc, and I cannot believe
15 the industry has been allowed to run so freely, make so
16 much profit, and at the cost of public health and
17 particularly our young people.

18 Chairman Grassley. Thank you, General.

19 Now, Dr. Wells, another one of the Cole Memorandum
20 Federal enforcement priorities is preventing minors and
21 children from contact with marijuana. Now, you have
22 noted that edible products pose a risk to children in
23 Colorado, but data on what is happening is limited. So
24 could you walk us--I have two questions. Let me state
25 both of them. Can you walk us through what information

1 exists on how the presence of edibles has impacted the
2 Federal priority of protecting children in Colorado? And
3 then going forward, given the very complex issue we have
4 here, what sources of information would you advise the
5 Department of Justice to look into in order to monitor
6 what is happening more than what they are now?

7 Dr. Wells. Thank you, Chairman Grassley. I think
8 that the best information that we have is things like the
9 Colorado hospital data, and so if there is an ICD-9 code
10 that someone has come in and they tested positive, almost
11 always it is assumed that it is an ingestion of an
12 edible. Sometimes it is because there is actual evidence
13 of an edible exposure. Sometimes it is based on how the
14 child may have gotten into something.

15 The Poison Center data is somewhat limited, so what
16 that means is if I am a physician and I am in the
17 emergency department, I see a dangerous exposure or
18 ingestion of some kind, I may call Poison Center to get
19 some advice. Quite frankly, those numbers are going to
20 start to decline, and we have seen that, because people
21 are getting more comfortable because we are seeing this
22 more frequently. So if I am comfortable treating a child
23 that has been exposed, I am not necessarily going to call
24 Poison Center.

25 Those are really the two best sources. In child

1 welfare data, there is no way to pull out data about
2 referrals that come in regarding an exposure or an
3 ingestion from marijuana, and that is very frustrating
4 and challenging to those of us that are making policy.

5 I think that anything that could help us gather
6 better data, we certainly learn from what other States
7 are doing and other folks' experiences as well, so it is
8 like in medicine we talk about a case study being
9 somewhat helpful, but then something that really is much
10 more broad in its interpretation or understanding of what
11 the actual data is is very, very helpful. So, first of
12 all, the Federal Government, I think anything that can
13 draw data down from not just our Colorado experience but
14 other folks that are experiencing these same issues would
15 be very helpful in determining policy.

16 Additionally, when we try to address these issues
17 and questions and try to develop policies and regulations
18 around these issues, frankly, the huge amount of money
19 that comes in from the marijuana industry and the
20 influence that has on those conversations takes a
21 conversation that really from a health perspective seems
22 to be a very simple and basic conversation and, frankly,
23 makes it a very political one and one that has a
24 significant interference in making reasonable policies.

25 Chairman Grassley. Well, thanks to both of you. I

1 appreciate your participation and your preparation for
2 today's meeting and the work that you respectively do.

3 We had four of all the members of the Caucus here.
4 I do not know to what extent there will be questions in
5 writing, but if they would--and I should have told the
6 first panel this as well. We will have the record open
7 for a few days to take written questions, and if you get
8 some, please answer them. Outside of that, I say thank
9 you and the meeting is adjourned.

10 [Whereupon, at 11:25 a.m., the Caucus was
11 adjourned.]

I N D E X

	<u>PAGE</u>
<u>STATEMENT OF:</u>	
THE HONORABLE CHARLES E. GRASSLEY A United States Senator from the State of Iowa	2
THE HONORABLE DIANNE FEINSTEIN A United States Senator from the State of California	8
A Panel Consisting of:	
Benjamin B. Wagner United States Attorney Eastern District of California Sacramento, California	13
Jennifer Grover, Director Homeland Security and Justice U.S. Government Accountability Office, Washington, D.C.	20
A Panel Consisting of:	
Douglas J. Peterson Attorney General of the State of Nebraska Lincoln, Nebraska	49
Kathryn Wells, M.D. Medical Director Denver Health Clinic at the Family Crisis Center Denver, Colorado	56