



Department of Justice

STATEMENT OF
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BEFORE THE
CAUCUS ON INTERNATIONAL NARCOTICS CONTROL
UNITED STATES SENATE

FOR A HEARING ENTITLED
IS THE DEPARTMENT OF JUSTICE ADEQUATELY PROTECTING THE
PUBLIC FROM THE IMPACT OF STATE MARIJUANA
LEGALIZATION?

PRESENTED

APRIL 5, 2016

Statement of Benjamin B. Wagner
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Caucus on International Narcotics Control
United States Senate
April 5, 2016

Chairman Grassley, Co-Chairman Feinstein, and distinguished members of the Senate Caucus on International Narcotics Control, on behalf of Attorney General Loretta Lynch, Deputy Attorney General Sally Yates, and my colleagues at the United States Department of Justice, I appreciate your invitation to testify today regarding marijuana enforcement by the Department of Justice (the Department).

I am the U.S. Attorney for the Eastern District of California. I joined the U.S. Attorney's Office in 1992 as a line prosecutor, and my first assignment was in the narcotics and violent crime unit. I have been with the Eastern District ever since and have been privileged to serve as the U.S. Attorney for the past six and a half years. In my testimony today, I hope to be able to provide the Caucus with information about the Department's policies regarding marijuana enforcement and my own experience enforcing the marijuana laws in a state that recognizes medical marijuana.

The primary means whereby the Department is protecting the public from the impact of state marijuana legalization is through individual enforcement actions. 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. Financial transactions involving proceeds generated by marijuana-related conduct can also form the basis for federal prosecution under money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA). The Department remains committed to enforcing federal laws and regulations.

The federal government and the states traditionally have worked as partners in the field of drug enforcement. Federal law enforcement historically has targeted large-scale, sophisticated drug traffickers and organizations, and those involved in violence, while state and local authorities generally have directed their enforcement resources against a broader range of activity, under their state laws, including more localized and lower-level drug activity. Changes in state laws relating to marijuana enforcement have affected this environment in some states, but the Department continues to work with its state and local partners to address the major threats posed by drug trafficking, including marijuana cultivation and distribution, and to ensure that our efforts are mutually supportive. In my district, for example, the Central Valley High Intensity Drug Trafficking Area (HIDTA), which involves a number of joint federal, state, and local task forces, and our multi-agency Organized Crime Drug Enforcement Task Forces (OCDETF) program, are key components in marijuana enforcement.

On August 29, 2013, former Deputy Attorney General James M. Cole issued guidance to all United States Attorneys regarding marijuana enforcement (Cole Memorandum). The Cole Memorandum notes that the Department will continue to investigate and prosecute cases in which the underlying conduct implicates our federal interests, and it also notes the Department's commitment to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. The Cole Memorandum articulates the Department's expectation that states with laws that authorize marijuana production and distribution must 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. The Department outlined eight federal enforcement priorities in the Cole Memorandum 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.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. 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 Cole Memorandum. In many instances, the conduct of individuals operating outside the scope of state marijuana laws will also interfere with those federal enforcement priorities. In those cases where the conduct does not interfere with federal priorities, we expect our state and local partners to address those cases consistent with the traditional federal-state approach to drug enforcement.

This focus on deploying limited federal law enforcement resources to target the greatest public safety threats relating to the most sophisticated and violent criminal narcotics networks is also reflected in the Smart on Crime initiative, which guides overall federal narcotics enforcement. Indeed, the requirement that we evaluate each potential matter to determine

whether the prosecution will serve a substantial federal interest applies to every case that we bring, consistent with the guidance on Federal Prosecution Priorities issued by former Attorney General Eric Holder on August 12, 2013. Within the scope of this guidance, the Department is vigorously enforcing the CSA. I will mention only a few examples of recent enforcement activity.

In Colorado, during a six week period in the fall of 2015, federal, state, and local law enforcement agencies worked together to identify and dismantle a large number of illicit marijuana cultivation sites across the state, and seize a large amount of marijuana. Located in multiple residences and outbuildings, and on federal land, these marijuana grows were both illegal under federal law and unlicensed by state authorities under Colorado's marijuana regulatory system. In several cases, the marijuana was destined for users outside of Colorado. This enforcement action resulted in over 30 individuals being prosecuted by the U.S. Attorney's Office for the District of Colorado in connection with the cultivation sites, and the discovery and seizure or destruction of nearly 20,000 marijuana plants and over 300 kilograms of dried marijuana. Law enforcement also recovered firearms and cash.

In the State of Washington, where federal prosecutors have been prosecuting a number of persons involved in the hazardous extraction of hash oil from marijuana using butane gas, two men were sentenced to prison in October 2015 in two separate cases relating to hash oil production. In one of those cases, the defendant operated a company that made edible products, although the company was not licensed under state law. The hash oil extraction operation in that case resulted in an explosion in a residential neighborhood, although fortunately there were no injuries. He was sentenced to six years in prison.

Nationally, the Drug Enforcement Administration (DEA) and other agencies are also attacking the problem of interstate marijuana trafficking. In Fiscal Year 2014, U.S. Postal Inspectors from five divisions seized more than 10,000 pounds of marijuana from the U.S. mail. In Fiscal Year 2015, U.S. Postal Inspectors nationwide seized over 34,000 pounds of marijuana.

In my own district, where we have vast federal lands under the management of the National Forest Service, the Bureau of Land Management, and the National Park Service, we prosecute a significant number of defendants each year who are arrested while cultivating marijuana on public lands. Last year we charged at least 25 defendants with felony offenses relating to marijuana cultivation on public lands. In February of this year, we took a guilty plea from a Fresno high school teacher's aide who was arrested at a marijuana cultivation site while in possession of a firearm. Although the cultivation operation was on private land, he transported the marijuana across federal lands.

In the Eastern District of California, we are also focusing our marijuana enforcement efforts on interstate trafficking. We work closely with DEA and other agencies to identify and prosecute interstate traffickers, and to interdict marijuana and drug proceeds. Over the last two years, working with the U.S. Postal Inspection Service, we have executed over 100 search warrants on parcels intercepted in the U.S. mail, seizing large amounts of marijuana and cash.

In a separate case, just last week on March 29th, we announced the arrest of a significant interstate marijuana trafficker based in my district. Using the darknet to transact business, he was alleged to have shipped marijuana and cocaine to locations all over the United States, receiving payment in bitcoin. That case was investigated primarily by U.S. Immigration and Customs Enforcement, Homeland Security Investigations, and IRS-Criminal Investigations.

We also assist other jurisdictions in gathering evidence in our district to prosecute interstate marijuana traffickers in those jurisdictions. Two weeks ago, for example, the U.S. Attorney's Office for the Middle District of Pennsylvania indicted four residents of my district, including a deputy sheriff, for trafficking marijuana from California to Pennsylvania.

Changes in local approaches to marijuana enforcement have impacted the environment not only in some states, but also in some communities in Indian Country. On October 28, 2014, the Department issued a policy statement to all United States Attorneys regarding the legality of marijuana in Indian Country (October 28th policy statement). Indian Country includes numerous reservations and tribal lands with diverse sovereign governments, many of which traverse state borders and federal districts. In some states there is exclusive federal jurisdiction in Indian Country, while in other states local law enforcement agencies have primary jurisdiction over criminal law issues. Given this fact, the Department recognizes that effective federal law enforcement in Indian Country, including marijuana enforcement, requires consultation with our tribal partners in the districts and flexibility to confront the particular public safety issues that can exist on any single reservation. As the October 28th policy statement indicates, tribal governments and their local United States Attorneys will consult on a government-to-government basis as issues arise to determine an appropriate local enforcement response in line with the priorities laid out in the Cole Memorandum and taking into account local circumstances. Marijuana remains illegal under federal law, and nothing in the Cole Memorandum or the October 28th policy statement alters the authority or jurisdiction of the United States to enforce federal law in Indian country or elsewhere.

In the Eastern District of California, pursuant to the October 28th policy statement, we have had consultations with several tribes who were interested in exploring commercial marijuana cultivation operations in Indian Country. In those consultations, we have made clear that we will take enforcement action if marijuana-related conduct in Indian Country implicates federal interests as set forth in the Cole Memorandum. Last July, for example, I learned that large marijuana cultivation operations had been started at two locations in Indian Country

located in Modoc County in my district. Our investigation indicated that these operations were not in compliance with state and local law, and the information we received from the tribes did not satisfy our concern that the vast quantities of marijuana contemplated by these operations was intended for export to other states. My office obtained search warrants that were executed by federal agents with the Bureau of Indian Affairs and DEA at the two locations, resulting in the seizure and destruction of over 12,000 marijuana plants and 100 pounds of processed marijuana. That investigation is ongoing.

In addition to investigating and prosecuting cases that implicate federal interests, the Department also has supported action to strengthen the ability of federal law enforcement to address to particular public safety threats associated with marijuana-related conduct. In 2014, for example, the Department recommended to the U.S. Sentencing Commission that it increase penalties under the Federal Sentencing Guidelines for marijuana cultivation on state or federal land, or while trespassing on tribal or private land, to account for the unique public safety hazards and environmental harms caused by such conduct. The Sentencing Commission amended the applicable sentencing guideline to impose a two-level increase on defendants who served as an organizer, leader, or manager of such conduct. The amendment became effective November 1, 2014. United States Sentencing Commission, Guidelines Manual, Supplement to Appendix C, Amendment No. 783 (Nov. 2015). In the current guideline amendment cycle, the Department has proposed an amendment to the guidelines that would enhance penalties for hash oil manufacturing resulting in serious bodily injury and property damage.

The recent report by the Government Accountability Office (GAO) entitled, *State Marijuana Legalization: DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, recommended that the Department document a plan specifying its process for monitoring the effects of marijuana legalization under state law, and share the plan with Department components. The Department has concurred with the GAO recommendations. I personally met with GAO officials during their review, and I appreciated their thoughtful and collaborative approach.

In accordance with the GAO recommendations, the Office of the Deputy Attorney General has asked the Executive Office for United States Attorneys (EOUSA), working with the Attorney General's Advisory Committee and the Narcotics and Dangerous Drug Section of the Criminal Division, to develop a repository of data and assessments of state marijuana legalization efforts, particularly focusing on data and assessments that may provide information relevant to the Department's stated federal enforcement priorities. This repository providing data concerning the effects of state marijuana legalization will help inform the judgments made by the Department as it makes resource and enforcement decisions with regard to marijuana and related criminal and civil enforcement actions.

In identifying and compiling this data, the Department will identify sources of information from within the Department, specifically including the DEA, ODCETF, the United States Attorneys' Offices, and the Office of Justice Programs, as well as from other federal sources, including the Office of National Drug Control Policy and the Department of Health and Human Services, and from state and local law enforcement and public health organizations.

Recognizing that, due to the evolving nature of this issue, new and additional sources of data will arise over time, the Department will seek to maintain and update this repository regularly so that the information contained therein is comprehensive and timely. Additionally, the Department will seek to publish on a publicly-accessible Department website such information that is available to the public.

The Department will use this information as part of its continuing process of considering all sources of information to make decisions on how best to utilize limited investigative and prosecutorial resources in individual criminal and civil enforcement actions as well as to continue to assess whether states that have legalized recreational marijuana are effectively protecting federal enforcement priorities.

In the invitation letter for this hearing, the Caucus inquired about the process and related metrics through which the Department may determine, as set forth in the Cole Memorandum, that state enforcement efforts are not sufficiently robust to protect federal priorities, such that the Department may consider a challenge to the state regulatory structure itself, in addition to continuing to bring individual enforcement actions. Any such determination would rely on a broad assessment, including an analysis of the data described above, assuming there is sufficient data from which to draw reliable conclusions. Of course, the decision to initiate a major lawsuit, while informed by quantitative data, is not based on data analysis alone.

As indicated in the GAO report, which focused primarily on the state systems in Colorado and Washington, state laws relating to marijuana regulation and enforcement vary widely, both in their design and implementation. Any decision to initiate legal action would depend on a legal and practical assessment of the particular provisions of the state system at issue, and would be informed by the views and experiences of various stakeholders, including our state and local law enforcement partners. The judgment of the relevant U.S. Attorney(s) would also be an important factor. Finally, any deliberation regarding potential litigation would necessarily include an assessment of the consequences of the litigation, in terms of likely outcomes, and whether a successful result in the litigation would lead to a material improvement in terms of the actual impact on federal interests.

It should be noted, however, that due to the action of Congress in passing section 538 of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2217, (Dec. 16, 2014), extended by Pub. L. 114-53, § 103, 129 Stat. 502 (2015), the

Department is currently barred from taking any action to prevent 32 states and the District of Columbia from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. It is the Department's view that while section 538 does not prevent federal prosecutors from bringing federal prosecutions to enforce the Controlled Substances Act consistent with the Cole Memorandum, by its terms it does prohibit the Department from initiating civil litigation intended to prevent one of the 32 states identified in the statute, or the District of Columbia, from implementing its own medical marijuana laws. I note, however, that the Department has not had occasion to consider whether there may be constitutional limitations to such a prohibition.

Thank you for this opportunity to testify before the Senate Caucus on International Narcotics Control. I would be pleased to answer any questions you may have.