



Advancing Legal Medical Marijuana Therapeutics and Research

To: Department of Justice
From: Americans for Safe Access
Date: February 27, 2015
Re: Application of CJS Medical Marijuana Provision to H.R. 83

Introduction

When President Barack Obama signed the Consolidated and Further Continuing Appropriations Act, 2015 (H.R. 83) into law on December 16, 2014, it went into effect immediately. One of the provisions in the bill, Sec. 538 of Division B, Title V, prohibits the Department of Justice from spending money to prevent states from implementing their own medical marijuana programs. Analysis of the legislative language by Americans for Safe Access (ASA) demonstrates that this spending prohibition forbids the Department from engaging in any conduct that interferes with the fulfillment of these laws. That means the Department can no longer engage in conduct such as investigation of individuals or groups engaged in legal state medical marijuana conduct, nor is it permitted to raid, arrest, prosecute, or incarcerate individuals engaged in legal state medical marijuana conduct. Ultimately, this should result in the Department dropping charges against federal medical marijuana defendants, freeing those currently incarcerated or subject to pre-trial or post-conviction supervision, and any current investigations should be turned over to state and local law enforcement and prosecutors. At the very least, there needs to be a thorough and open accounting demonstrating that no funds have been used, because clearly funds had been intended to be used for the purposes restricted by Sec. 538. In fact, if employees of the Department are using funds to purposes that have been restricted by Sec. 538, these employees may be in violation of the Antideficiency Act. According to the Government Accounting Office, "the Antideficiency Act prohibits federal employees from making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A)."¹

Legislative Meaning - Plain Language and Legislative Intent

The plain language of the Rohrabacher-Farr provision to H.R. 83 states that "*None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of...[list of 32 states and D.C.]..., to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of*

¹ Antideficiency Act, U.S. Government Accounting Office, <http://www.gao.gov/legal/lawresources/antideficiencybackground.html> (last accessed Feb. 26, 2015).

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medical marijuana."² The key word in the provision is "implementing," which is not explicitly defined in the U.S. Code, federal case law, or Black's Law Dictionary. Some may argue that implement only pertains to putting the law into effect, and does not apply to conduct under the law. However, Webster's defines the transitive verb "implement" as to "carry out, accomplish; especially : to give practical effect to and ensure of actual fulfillment by concrete measures."³ Therefore, if actual fulfillment of the state medical marijuana laws is not achieved to due federal law investigations, raids, arrests, prosecution, incarceration, by definition state implementation of these laws is being interfered with, because fulfillment must be *ensured*. It is not possible to accomplish the purpose of the state medical marijuana laws if the parties utilizing the state program (patients, caregivers, physicians, cultivators, providers, landlords, etc.) are being thwarted from engaging in this conduct due to federal interference. Any federal interference from the Department that undermines this fulfillment is prohibited by Sec. 538 of H.R. 83.

Moreover, the legislative intent of the Rohrabacher-Farr provision supports this plain reading interpretation. The floor debate clearly shows that the transitive verb definition of implement is the only possible way to construe "implementing" for the purposes of Sec. 538. Below are excerpts from the floor debate that took place in the U.S House of Representatives on May 29, 2014, in which the cosponsors state the extent and reach of the provision's language. A review of the opponents' statements in the Congressional Record also reveals an acknowledgement of the extent to which the Department of Justice will be limited from interfering with those engaging in medical marijuana conduct within the enumerated states.

Rep. Sam Farr

"This is essentially saying, look, if you are following State law, you are a legal resident doing your business under State law, the Feds just can't come in and bust you and bust the doctors and bust the patient. It is more than half the States. So you don't have to have any opinion about the value of marijuana. This doesn't change any laws. This doesn't affect one law, just lists the States that have already legalized it only for medical purposes, only medical purposes, and says, Federal Government, in those States, in those places, you can't bust people. It seems to me a practical, reasonable amendment in this time and age."⁴

² The list are "Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin". H.R. 83, Sec. 538, 113th Cong. (2014).

³ *Implement*, Merriam-Webster, available at <http://www.merriam-webster.com/dictionary/implement> (last accessed Feb. 26, 2015).

⁴ Representative Farr (CA). "Amendment No. 25 Offered by Mr. Rohrabacher." *Congressional Record* (May 29, 2014) p. H4984, available at <https://american-safe-access.s3.amazonaws.com/Congressional%20Record%20House.pdf>.

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Rep. Dina Titus

“Mr. Chair, for the District of Columbia and 22 States, including Nevada, with laws in place allowing the legal use of some form of marijuana for medical purposes, this commonsense amendment simply ensures that patients do not have to live in fear when following the laws of their States and the recommendations of their doctors. Physicians in those States will not be prosecuted for prescribing the substance, and local businesses will not be shut down for dispensing the same.”⁵

Rep. Barbara Lee

“We should allow for the implementation of the will of the voters to comply with State laws rather than undermining our democracy.

“In States with medical marijuana laws, patients face uncertainty regarding their treatment, and small business owners who have invested millions creating jobs and revenue have no assurances for the future. It is past time for the Justice Department to stop its unwarranted persecution of medical marijuana and put its resources where they are needed.”⁶

Rep. Dana Rohrabacher

“Mr. Chairman, I rise to speak in favor of my amendment, which would prohibit the Department of Justice from using any of the funds appropriated in this bill to prevent States from implementing their own medical marijuana laws...”

“...The State governments have recognized that a doctor has a right to treat his patient any way he sees fit, and so did our Founding Fathers.”⁷

Rep. Thomas Massie

“We need to remove the roadblocks to these potential medical breakthroughs. This amendment would do that. The Federal Government should not countermand State law.”⁸

Rep. Paul Broun

“Also, this is a states' rights, states' power issue, because many States across the country--in fact, my own State of Georgia is considering allowing the medical use

⁵ Representative Titus (NV), *Id.* Note, the number of states with some type of medical marijuana law increased rapidly in the weeks prior to May 29, 2014 floor debate, and some of the Representatives floor comments have varying counts, but it remains clear that the protections expressed in the legislative intent apply to all of the states listed in Sec. 538 of H.R. 83.

⁶ Representative Lee (CA), *Id.*

⁷ Representative Rohrbacher (CA), *Id.* at H4982 and H4985.

⁸ Representative Massie (KY), *Id.* at H4983.

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under the direction of a physician. This is a states' rights, Tenth Amendment issue. We need to reserve the states' powers under the Constitution.”⁹

Rep. Earl Blumenauer

“The problem is that the Federal Government is getting in the way. The Federal Government makes it harder for doctors and researchers to be able to do what I think my friend from Louisiana wants than it is for parents to self-medicate with buying marijuana for a child with violent epilepsy.

“This amendment is important to get the Federal Government out of the way. Let this process work going forward where we can have respect for states' rights and something that makes a huge difference to hundreds of thousands of people around the country now and more in the future.”¹⁰

It is abundantly clear from the legislative intent of the cosponsors and supporters of the Rohrabacher-Farr provision that Sec. 538 is not limited to merely allowing states put medical marijuana laws on their books without federal interference, but that full implementation of state medical marijuana laws *necessitates* that the Department cannot interfere with state-law abiding patients, caregivers, physicians, providers, and other parties necessary to accomplish the purpose of the state medical marijuana program.

Economic Snapshot

In June 2013, ASA issued a report the estimated that more than \$300 million dollars of appropriated funds had been spent by the Department to interfere with the implementing of state medical marijuana laws under the Obama Administration. ¹¹ Given that the Department was previously appropriated money that was originally intended to be spent on interfering with the implementation of state medical marijuana laws, an accounting of how these funds are being currently used in compliance with Sec. 538 should be made available to the public.

Actions the Department Must Take to Comply With H.R. 83

Section 538 prohibits the Department from spending money on activity that interferes with state medical marijuana laws, therefore the Department must either take action or stop acting in a number of areas in order to comply with the spending restriction. The Department must take the following steps to ensure compliance with Sec. 538.

⁹ Representative Broun (GA), *Id* at H4984.

¹⁰ Representative Blumenauer (OR), *Id* at H4984.

¹¹ *What's the Cost?* report, available at <http://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf>.

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End all federal criminal and civil investigations for medical marijuana conduct and related activities that is legal by state law and end all federal raids and arrests regarding state lawful medical marijuana conduct

Medical marijuana conduct that is permitted by state law is not to be investigated unless there is probable cause that state law is being violated. The best agencies to determine if there is probable cause for a state law violation are state and local law enforcement and courts. Therefore, investigations of medical marijuana conduct must be handled by state and local law enforcement. As with investigations, raids and arrests should only be undertaken by state and local law enforcement. Because medical marijuana defendants are denied any opportunity to discuss their state-legal medical marijuana conduct in federal court, the federal court system is inappropriate for handling these cases.

Drop all charges against current federal medical marijuana defendants and end all pre-trial supervision

The statutory language should require judges to grant motions to dismiss for all charges related to legal state medical marijuana conduct unless the prosecutor can prove the conduct in question violated both state and federal law. In fact, Sec. 538 should prohibit prosecutors from responding to such motions to dismiss unless they can prove state law violations. As previously stated, determining violations of state law is a responsibility and duty best left to state prosecutors and judges. If a state prosecutor declines to bring charges against a state medical marijuana patient, caregiver, doctor, or provider of medicine due to lack of evidence, there cannot be a presumed violation of state law. Therefore, there can be no justification under Sec. 538 for federal prosecutors to mount prosecutions against parties when a state prosecutor declines to prosecute due to lack of evidence.

Release prisoners currently incarcerated and end the post-incarceration supervision for lawful state medical marijuana conduct

The passage of Sec. 538 creates grounds for currently incarcerated prisoners to file appeal motions. Unless a violation of state law can be proven, these motions will be granted if judges adhere to the new statutory requirement. As long as parties are incarcerated or under Department supervision for their state legal medical marijuana conduct, the state laws protected by Sec. 538 will be unlawfully interfered with. The specter of federal incarceration is clearly a factor that thwarts the full implementation of state medical marijuana laws.

Conclusion

The Department may no longer spend money on activity that interferes with the implementation of state medical marijuana laws. The plain language and legislative

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intent of Sec. 538 shows that the provision applies to a wide range of activity related that is permitted by state medical marijuana laws. Notably, the Department is not forbidden by Sec. 538 from undertaking action that is consistent with state medical marijuana laws. Therefore, it would be an appropriate use of taxpayer money for the Department to begin the aforementioned required actions even in the absence of motions from defense attorneys.

If inappropriate acts are being taken, employees may be violating the Antideficiency Act, which could make them subject to criminal prosecution. Penalties include up to two years imprisonment, a \$5,000 fine, or both, as well as potential employment discipline, “including, when circumstances warrant, suspension from duty without pay or removal from office.”¹²

We look forward to the Department establishing clear rules and training to ensure that no adverse actions are taken by Department employees.

¹² 31 U.S.C. §§ 1349 and 1350.

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