THE STATE of ALASKA
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Honorable Anna MacKinnon
Alaska State Senate
Alaska Capitol, Room 516
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Dear Senator MacKinnon:

Article 12 Section 5 of the Alaska Constitution reads:

> All public officers, before entering upon the duties of their office, shall take and subscribe to the following oath or affirmation "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United Sates and the Constitution of the State of Alaska and that I will faithfully discharge my duties as ... to the best of my ability."

The question presented is: Would it be a violation of a legislator's oath to participate in committee or voting on legislation relating to Ballot Measure #2, An Act to Tax and Regulate the Production, Sale, and Use of Marijuana, given the Supremacy Clause of the United States Constitution? The answer to this question is, no.

The Supremacy Clause is found in Article Six Clause 2 of the U.S. Constitution. This clause establishes the principle that the federal constitution and federal statutes are the "supreme law of the land." The practical effect of this constitutional provision is that all state judges must follow federal law when there is an irreconcilable conflict between federal and state law. For example, in *Cooper v. Aaron,* 358 U.S. 1 (1958), the Supreme Court rejected the validity of Arkansas' laws attempting to stop desegregation of that state's schools. The Supreme Court relied on the Supremacy Clause in holding that their decision in *Brown v. Board of Education* could not be nullified by state statues. In other words, the Supremacy Clause relates to the validity of state laws rather than being a tool to create liability for elected officers from conducting hearings, debating, speaking for, or voting on legislation that may be in conflict with the federal law.

Further, the Supremacy Clause does not require a state to have a state statutory scheme consistent with federal law. For example, because the Federal Controlled Substance Act prohibits the possession of marijuana, a state is not required to have a similar provision of law prohibiting possession of marijuana. Marijuana under federal law is scheduled as a Schedule I controlled substance, the most serious substance, while Alaska schedules

marijuana as a schedule VIA controlled substance, the least serious of the controlled substances. These differences are not violations of the Supremacy Clause.

A hypothetical may be of assistance. If the federal government enacted a law that prohibited the sale of soft drinks in containers of more than 24 ounces, the Supremacy Clause would not be implicated if the state had no law on container size. On the other hand, if the state had a law that said soft drinks can only be sold in containers of 25 ounces or more the Supremacy Clause would cause the state law to be struck down. However, the Supremacy Clause would not have prohibited the legislature from passing the soft drink legislation.

As to the interplay between federal and state law, the United States Attorney General has provided guidance. See attached August 29, 2013 memorandum commonly referred to as the "Cole Memo." The "Cole Memo" provides guidance to federal prosecutors concerning federal enforcement efforts in those states that have legalized marijuana. According to the memo, federal enforcement efforts will be focused on the following priorities:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal entities, gangs or cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law to other states;
4. Preventing state-authorized marijuana activity from being used as a pretext for illegal activity (trafficking, etc.);
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing the exacerbation of adverse public health consequences and crimes (e.g., drugged driving);
7. Preventing the growing of marijuana on public lands (public safety and environmental dangers); and
8. Preventing marijuana use or possession on federal property.

As to state regulatory efforts, the memo specifically provides the following guidance:

> In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. . . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state

> enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecution, focused on those harms.

In other words, it is the position of the United States' Attorney that if a state has an initiative that requires regulation of marijuana, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activities." Although it cannot be guaranteed, the "Cole Memo" makes it clear that the Supremacy Clause will not be used to try to stop a legislative body from regulating marijuana use and distribution.

The next sentence in the Cole Memo suggests that the federal government might choose to use the Supremacy Clause "[i]f state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement action, including criminal prosecution, focused on these harms." The memo does not mention the use of the Supremacy Clause against the initiative, but without sufficient regulation by the legislature the federal government may choose to use federal law to "bring individual enforcement action, including criminal prosecution…" Again, one can never guarantee what the federal government will do in the future, but this language means that if the legislature does not act with a sufficiently robust regulating scheme it is possible that federal criminal cases could be brought against users and distributors of marijuana.

In conclusion, the State of Alaska and the United States of America are separate sovereigns. The legislative body of each government may adopt laws. When the laws of a state are irreconcilably in conflict with a law of a federal government, the federal law becomes "the supreme law of the land." Hence, it is not a violation of a legislator's oath to engage in speech and debate on legislation even if a court ultimately finds that a federal law supersedes a state law and declares the state law unconstitutional.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL

By: Richard Svobodny
Deputy Attorney General

Enclosure: "Cole Memo"

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

cc: Lanny A. Breuer
Assistant Attorney General, Criminal Division

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