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March 2, 2016

Honorable Loretta E. Lynch
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Lynch:

In November 2014 the voters of Alaska enacted Measure #2 establishing a framework for the lawful cultivation and sale of marijuana and marijuana products under a regulated process supervised by the newly formed Alaska Marijuana Control Board and local governments.

I did not support Measure #2 in my personal capacity and still have serious public health related reservations over marijuana legalization, even in a regulated environment. However, as an elected servant of Alaska's people I am equally committed to playing a constructive role in the implementation of my constituents' will. If the cultivation, manufacture and use of marijuana and marijuana products is to be lawful in Alaska it must be undertaken consistent with the regulatory scheme, and proactive efforts should be taken to reconcile inconsistent federal laws with more permissive state laws.

The so-called Cole memorandum dated August 29, 2014 represents a step forward in addressing some but not all of the federal-state conflict issues. Today, I write with respect to an area of potential conflict which may be more difficult to resolve than those specifically addressed in the Cole memorandum. That is the question of whether those law abiding Alaskans who consume marijuana in a manner consistent with state laws, and not inconsistent with the Department's enforcement priorities as articulated in the Cole Memorandum, must surrender their Second Amendment right to acquire, possess and use firearms as a consequence.

The Bureau of Alcohol, Tobacco, Firearms and Explosives appears to take this position. In a September 21, 2011 "Open Letter" to Federal Firearms Licensees signed by Arthur Herbert, Assistant Director, Enforcement Programs and Services considered the question of whether Federal Firearms Licensees could lawfully sell firearms to individuals who possessed medical marijuana cards issued under state laws. The letter concludes that 18 USC 922(g)(3) does prohibit those lawfully using marijuana under state laws from shipping, transporting, receiving or possessing firearms or ammunition because marijuana remains a controlled substance under federal law. Therefore, Federal Firearms Licensees cannot lawfully sell firearms or ammunition to those who consume marijuana when expressly permitted under state law.

The Open Letter goes even further to suggest that Federal Firearms Licensees could be subject to federal criminal liability under 18 USC 922(d)(3) if they transfer a firearm to a person "having reasonable cause to believe" that such person is an unlawful user of marijuana as determined solely be federal law. It then suggests that if the Federal Firearms Licensee knows that the prospective purchaser has a medical marijuana card the transaction cannot be consummated even if the individual states on ATF Form 4473 that he does not use marijuana. ATF Form 4473, which is completed by those purchasing firearms expressly asks the prospective purchaser whether he or she "uses marijuana" and if the prospective purchaser answers "YES" the firearms transaction cannot be consummated.

The Cole memorandum would seem to suggest that the mere use of marijuana in accordance with state law is not of great moment from a federal law enforcement perspective. However if that user wishes to hunt it appears that he may not because it is unlawful for him to possess a firearm. In my judgment the disqualification of an entire class of marijuana users acting consistent with state law from possessing any firearm merits a review of federal legal policy. Without such a review I fear that otherwise law abiding citizens will choose to answer the marijuana use question on Form 4473 "NO" either they believe their use is fully lawful or because they believe marijuana use consistent with state law should not subject them to a firearms disability. In either case they would potentially be exposed to criminal liability for false statements.

It is my judgment that denying Americans the personal Second Amendment right to possess firearms as articulated by the Supreme Court in Heller for mere use of marijuana pursuant to state law is arbitrarily overbroad and should be narrowed. Whether this requires legislation or can be accomplished through the exercise of prosecutorial discretion, by expansion of the Cole memorandum, is the question presented by this letter.

I would appreciate the Department's views on whether it is appropriate to revisit the application of 18 USC 922(g)(3) in light of state law changes related to both medical and recreational use of marijuana to allow those who use consistent with state law to purchase and possess firearms.

Nathan Bergerbest, my Deputy Chief of Staff in Washington, is staffing this matter for me. He may be reached at (202) 224-2839 if your staff has any questions.

Respectfully,

Lisa Murkowski
United States Senator