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**Before the United States Senate Subcommittee on Criminal Justice
and Counterterrorism**

**Hearing on Decriminalizing Cannabis at the Federal Level:
Necessary Steps to Address Past Harms**

Chairman Booker, Ranking Member Cotton, and Members of the Committee, thank you for the opportunity to appear before you today to address the “Cannabis Administration and Opportunity Act.” By way of background, I spent over forty years in law enforcement including seven years as a police officer, over thirty years as a federal prosecutor in the field, and approximately three as Associate Deputy Attorney General and Director of Law Enforcement Affairs in the U.S. Department of Justice. I also served three terms as president of the National Association of Assistant United States Attorneys, a professional association representing the interests of Assistant United States Attorneys employed by the Department of Justice. I am currently in the private practice of law primarily representing federal law enforcement officers.

I respectfully submit that the legislation currently under consideration—The Cannabis Administration and Opportunity Act—is founded on five myths: that legalizing marijuana will undermine the illegal marijuana trade; that marijuana trafficking (past and present) is a nonviolent business; that the federal approach to enforcement of drug laws has been a failure; that retroactive applications of changes in drug trafficking laws can be done without substantial

costs to the criminal justice system or society at large; and that the criminal justice system is systemically racist.

Myth 1: Legalizing marijuana will undermine the illegal marijuana trade

Two starting facts: Mexican drug cartels are estimated to earn between 19 and 29 billion dollars annually from U.S. drug sales, and some experts estimate that as much as 30% of Mexican drug cartel revenue comes from marijuana. Second, in jurisdictions where marijuana has been legalized, predictably marijuana usage is up. One government-funded study documented a 45 percent increase.

One of the principal goals of legalizing marijuana is to disrupt the illegal market, remove this source of revenue for criminal organizations (Mexican drug cartels and domestic gangs), and redirect that source of revenue into legitimate streams where it can be taxed and where it will create jobs.

The parallel notion that the Mexican drug cartels (or domestic gangs for that matter) will forgo that substantial revenue and shift to legitimate business, however, has proved illusory. Instead, they have taken full advantage of the new more permissive laws in the United States and moved grow (or manufacturing) operations to the United States. By itself, this has resulted in great cost savings for the drug cartels since smuggling marijuana across the border carries a substantial risk of seizure and the potential arrest of couriers. By reducing the risk and thus cost of operations, Mexican cartels can manufacture and distribute marijuana much cheaper than businesses operating legally (which, of course, bear all the costs associated with operating a legitimate business including complying with federal and state labor laws and licensing and tax requirements). By one estimate, five years after legalization in California, although marijuana

was selling in record amounts, legal marijuana made up only 10 to 20 percent of the state's marijuana market.

Moreover, the shift of manufacturing by the drug cartels has come at a great cost within the United States. Law enforcement and national media sources have documented large illegal marijuana crops funded by the drug cartels in northern California. Some of these crops “blend in seamlessly alongside legitimate grows”¹ while others are set up on National Forest lands where they siphon off millions of gallons of water, poison wildlife, contaminate streams and rivers with extremely toxic pesticides (some of which are illegal in the United States), and start forest fires.² The cost of clean-up (not including the damages caused by the forest fires) for the illegal grow sites in the public lands alone is estimated to run between 50 to 100 billion dollars.

As summarized by one article titled “Marijuana wars: Violent Mexican drug cartels turn Northern California into ‘The Wild West’”: “They’re undercutting prices of legalized products offered by permitted farmers who follow the rules and pay taxes. And they’re exploiting workers, robbing and shooting adversaries, poisoning wildlife and poaching water in a state fighting widespread drought and devastating wildfires.”³

At the same time, cartel resources freed up in Mexico have been shifted to the production of heroin, methamphetamine, and fentanyl.

¹ [Mexican drug cartels move in on California's shadow marijuana industry \(usatoday.com\)](https://www.usatoday.com/in-depth/news/nation/2021/12/19/mexican-drug-cartels-move-in-on-californias-shadow-marijuana-industry/8960873002/)
<https://www.usatoday.com/in-depth/news/nation/2021/12/19/mexican-drug-cartels-move-in-on-californias-shadow-marijuana-industry/8960873002/>

² [Mexican Cartels Are Growing Marijuana In California’s National Forests - Bing video](https://www.bing.com/videos/search?q=how+much+of+the+marijuana+trade+is+controlled+by+the+mexican+cartels&docid=608043610043213151&mid=EFFE8C23FFC0AC2A747FEFFE8C23FFC0AC2A747F&view=detail&FORM=VIRE)
<https://www.bing.com/videos/search?q=how+much+of+the+marijuana+trade+is+controlled+by+the+mexican+cartels&docid=608043610043213151&mid=EFFE8C23FFC0AC2A747FEFFE8C23FFC0AC2A747F&view=detail&FORM=VIRE>

³ [Mexican drug cartels move in on California's shadow marijuana industry \(usatoday.com\)](https://www.usatoday.com/in-depth/news/nation/2021/12/19/mexican-drug-cartels-move-in-on-californias-shadow-marijuana-industry/8960873002/)
<https://www.usatoday.com/in-depth/news/nation/2021/12/19/mexican-drug-cartels-move-in-on-californias-shadow-marijuana-industry/8960873002/>

In short, the movement to legalize marijuana has not undermined organized crime, it has allowed criminal organizations to operate more efficiently in marijuana manufacturing and distribution while expanding other components of their illicit drug trade.

Myth 2. Drug Trafficking is a nonviolent business

Promoters of sentencing reform like to call drug trafficking crimes “nonviolent drug offenses.” This euphemism masks two realities: drug trafficking is inherently violent, and it is extremely harmful to our nation.

The drug trafficking business is inherently and necessarily violent from top to bottom. Street level traffickers deal with a clientele desperate to obtain their product, whether it is heroin, methamphetamine, crack cocaine, or marijuana. Traffickers unwilling or unable to use whatever violence is necessary to protect their product and the large sums of money generated from the sale of that product, quickly find themselves out of business or worse.

Those further up the distribution chain (that is, those dealing with quantities of illicit drugs worth hundreds of thousands, and even millions of dollars or the cash proceeds from the sale of those drugs) have an even greater need and incentive to engage in violence to protect their interests.

Protecting the product and cash proceeds is only one aspect of the use of violence in the drug trafficking business. Threats of violence and violence are a necessary part of intimidating rivals and informants and witnesses to avoid detection and prosecution. And their violent acts are by design not pretty: they range from beheadings to drive-by shootings which often result in the death or maiming of innocent bystanders, including, all too often, children.

Last, the Fifth Circuit Court of Appeals aptly summarized the nature of the harm done by drug traffickers as follows:

Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image—others who create others still, across our land and down our generations, sparing not even the unborn.⁴

Myth 3. The federal approach to enforcing drug laws has been a failure

From 1961 to 1985 the violent crime rate tripled. As is often the case with violent crime, minority communities bore the brunt of these increases. As is also often the case, this increase in violent crime was driven in a very large part by drug trafficking. With the urging of the Black Caucus, Congress responded to the increase in violent crime by passing drug trafficking and firearm laws carrying mandatory minimum penalties. In 1991 Congress passed additional legislation sponsored by then Senator Joe Biden enhancing state and local law enforcement, federal criminal penalties, and funding for additional prisons.

Local, state, and federal law enforcement officers began using the federal drug and firearm statutes to target the worst offenders. As federal prison populations grew, violent crime rates began to drop and declined steadily. By 2014, violent crime rates, which had peaked in 1991, had been cut in half. To put this in perspective there were:

- 17,000 fewer murders,
- 54,000 fewer robberies,
- 517,000 fewer rapes, and
- 646,000 fewer aggravated assaults.

At that point, the federal prison population had grown from 40,330 in 1985 to 219,298 when it peaked in 2013.

⁴ *Terrebonne v. Butler*, 820 F.2d 156, 157-58 (5th Cir. 1987).

At about this time three things occurred: (1) President Obama began aggressively using his clemency powers releasing federally convicted drug traffickers including kingpins, firearm offenders, and repeat offenders with as many as six prior felony drug convictions; (2) a series of amendments reducing penalties for federal drug offenses were made retroactive resulting in the early release of approximately 70,535 federally convicted drug traffickers; and (3) the administration handcuffed federal prosecutors preventing them from using many of the tools Congress provided and resulting in a 25% reduction in prosecutions.

Federal prison populations began to drop and predictably violent crime began to rise. In 2015 and 2016 together,

- murders increased by 20%,
- rapes increased by 10%,
- robberies increased by 1.9%, and
- aggravated assaults increased by 8.6%.

In 2017, Attorney General Sessions reversed many of the Obama administration policies and violent crime rates turned around and began declining. This trend continued for three years largely because federal prosecutions again focused aggressively on drug trafficking, firearm, and other violent crime offenses.

The current administration reinstated the Obama administration's prosecutorial policies and as a result of these policy changes and some intervening reforms to the criminal justice system, the federal prison population has continued to decline. As of 21 June 2022 the federal prison population stood at 157,814. Meanwhile, violent crime rates have again dramatically begun to rise. In 2020, the United States experienced the largest single-year increase in murder on record, rising by a shocking 25 percent. According to data published by the FBI, in 2020 the

homicide rate reached almost the same point as it was in 1997.⁵ Aggravated assaults increased in 56 of the 66 largest American cities. These increases wiped away much of the hard-earned progress made between 1991 and 2014.

Although the FBI has not yet published statistics for 2021, media sources relying on data from major cities have reported that the upward trend in murders and violent crime has continued unabated.

Myth 4. Retroactive applications of changes in the law do no harm

The Supreme Court and lower federal courts have often emphasized the importance of finality in the criminal justice system. In one case the court observed that

the principle of finality is “essential to the operation of our criminal justice system.” Not only would reopened proceedings tax the system of justice with the potential for countless hearings with each new change to a procedural rule, but subsequent hearings could suffer from “lost evidence, faulty memory, and missing witnesses,” to all parties’ detriment. . . . “No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.”⁶

And the costs are significant. “Without finality, the criminal law is deprived of much of its deterrent effect.”⁷ Retroactive changes also consume the limited judicial and prosecutorial resources that are vital to addressing current crime. Perhaps worst of all, retroactive changes create instability and turmoil inevitably undermining the public confidence in the criminal justice system.

The legislation under consideration would also undermine another related component of the criminal justice system. With well over ninety percent of federal convictions resulting from

⁵ [CDE :: Crime \(cloud.gov\)](https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend)
<https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend>

⁶ *Wall v. Kiser*, 21 F.4th 266, 276 (4th Cir. 2021)(cleaned up)(collecting Supreme Court cases).

⁷ *Teague v. Lane*, 489 U.S. 288, 309 (1989).

guilty pleas, the plea process and plea agreements have become “central to the administration of the criminal justice system.”⁸ The current legislative proposal would release defendants based exclusively on the offense of conviction without regard to charges that may have been dismissed as part of a plea agreement. Thus, in cases where other charges (even much more serious charges) have been dismissed as part of a plea agreement, the defendant benefits unjustly from this windfall, and society is deprived of the benefit of the agreement.

One final thought on retroactivity and expungement of marijuana trafficking convictions. Individuals who elected to engage in this activity did not do so to promote some social cause that we have now come to realize was good and right. The essence of what they did was to blatantly disregard the laws of our nation for personal enrichment and in doing so engaged in, perpetuated, and promoted violent international organized criminal activity. Congress should not absolve them by releasing them from prison or expunging their well deserve criminal convictions.

Myth 5: The criminal justice system is systemically racist

The suggestion that the criminal justice system is systemically racist—a suggestion on which the Bill is in large part premised—is both unfounded and perhaps the most destructive myth of all.

In her October 2019 testimony before the United States Senate Judiciary Committee, Heather Mac Donald, the Thomas W. Smith fellow at the Manhattan Institute for Policy Research, made the following remarks on the subject:

The most dangerous misconception about our criminal justice system is that it is pervaded by racial bias. For decades, criminologists have tried to find evidence proving that the overrepresentation of blacks in prison is due to systemic racial inequity. That effort has always come up short. In fact, racial differences in offending account for the disproportionate representation of blacks in prison. A 1994 Justice Department survey of felony cases from the country’s 75 largest urban areas found that blacks

⁸ *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

actually had a lower chance of prosecution following a felony than whites. Following conviction, blacks were more likely to be sentenced to prison, however, due to their more extensive criminal histories and the gravity of their current offense.

The drug war was not a war on blacks. It was the Congressional Black Caucus that demanded a federal response to the 1980's crack epidemic, including more severe penalties for crack trafficking.

Drug trafficking (whether marijuana or any other substance) is not committed by any group that mirrors the nation's demographics in terms of age, race, or gender, and prosecutions cannot be expected to parallel those demographics.

Young and middle-aged minority males are convicted and incarcerated at a higher rate than their relative numbers in the general population. That said, although all three categories—age, race, and gender—are disproportionately represented in prisons, there is no evidence that there is any bias in any of those categories in the enactment or enforcement by legislative, executive, or judicial authorities. Drug trafficking is an inherently violent, harmful, and serious criminal activity, and those who engage in it should be held responsible regardless of age, race, or gender.

Moreover, and perhaps more importantly, the neighborhoods and communities in which many minorities live are disproportionately victimized by the devastating effects of drug crime, through addiction, gun violence, property crime, and open-air drug markets. These conditions have attracted federal efforts to prosecute large-scale drug trafficking and to relieve the destruction it caused.

One final note. At the beginning of my remarks on this subject, I observed that unfounded allegations that the criminal system is systemically racist are destructive. There are over 800,000 state and local law enforcement officers, 130,000 federal law enforcement officers, tens of thousands of state and federal prosecutors who work shoulder to shoulder with those

officers as well as thousands of state and federal judges who closely scrutinize the work of those officials. With only extraordinarily rare exceptions, those public servants are faithful to and consider sacred their oaths to see that the laws of our nation are enforced fairly and without regard to race, gender, age, or any other inappropriate or insidious factors. Any time the leaders of our country make comments suggesting otherwise—comments which as I have said find no basis in fact—they not only demean and demoralize those dedicated public servants, but they undermine the public confidence in the best criminal justice system in the world and they foster division at a time when our nation desperately needs leaders who do the opposite.

Thank you again for the opportunity to appear before you. I welcome any questions that you might have.