

## Clearing The Smoke Around The Farr-Rohrabacher Amendment

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The Farr-Rohrabacher Amendment to the 2015 Omnibus Appropriations Bill, which was signed into law on Dec. 16, 2014, was widely hailed as a significant victory for advocates of medical marijuana.[1] While the amendment is a positive step toward giving marijuana industry participants comfort, several factors limit its reach.

The amendment, which repeatedly had been offered for debate in the House since 2003, restricts the U.S. Department of Justice from using its funds in connection with certain activities related to medical marijuana. The amendment states:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of 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, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.



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While media outlets have made largely unsubstantiated claims that the amendment prohibits the DOJ from prosecuting medical marijuana businesses and patients in medical marijuana states, many legal analysts believe that the effect of the amendment actually might be quite limited.[2]

What is the exact meaning of the amendment's language that DOJ funds cannot be used to "prevent [medical marijuana states] from implementing their own State laws...?" Does it merely prevent the DOJ from enforcing federal drug laws against states or state officials and employees for enacting marijuana legislation and building a regulatory regime? Or does the amendment prohibit the DOJ from prosecuting medical marijuana patients and businesses? The amendment's legislative history and a recent court decision in Washington suggest the amendment might be a broader shield than its plain text suggests.

## **Appropriations Riders: A Limited Tool**

Appropriations riders long have been a controversial method for Congress to control executive action. Members often attach legislation that likely would not pass as a standalone law as amendments to spending bills. The stakes are high in spending bills — vetoing or postponing government appropriations bills can mean the delay of funding for government programs and appropriations bills must be accepted or rejected in their entirety. Because courts are aware that such amendments do not go through the same considered process as regular laws, they construe appropriations measures narrowly and attempt to avoid interpretations that would amend or repeal substantive statutes.[3] As Cass Sunstein writes:

This principle [of statutory interpretation] is designed in part to promote responsible lawmaking by ensuring that casual, ill-considered, or interest-driven measures do not overcome ordinary statutes. The narrow construction of appropriations measures promotes the primacy of ordinary lawmaking, in which the constellation of interests is quite different and the likelihood of deliberation higher.[4]

If the amendment is read to only apply to DOJ actions against states, it would not conflict with the Controlled Substances Act as much if the amendment were read to limit the department's enforcement authority against individuals and entities involved in the medical marijuana business. Had Congress intended to explicitly prohibit enforcement actions against individuals involved in medical marijuana, it could have used specific language of the type seen in an appropriations rider concerning enforcement of the Federal Water Pollution Control Act:

None of the funds appropriated under this heading shall be made available for the enforcement of permit limits or compliance schedules for combined sewer overflows or sanitary sewer overflows under section 402 of the Federal Water Pollution Control Act, as amended: Provided further, That none of the funds appropriated under this heading may be used to implement or enforce section 404 of the Federal Water Pollution Control Act, as amended ...[5]

That the Farr-Rohrabacher Amendment does not mention the CSA easily could be interpreted by a court to mean that Congress intended to keep the CSA entirely intact.

Additionally, appropriations riders are effective only for one year. Accordingly, unless the amendment is passed in future spending bills, the potential for prosecution remains.

### **Judicial Interpretation of the Farr-Rohrabacher Amendment: The Kettle Falls Five Case**

A recent decision by the U.S. District Court for the Eastern District of Washington provides the first judicial interpretation of the Farr-Rohrabacher Amendment. Although ultimately allowing the DOJ to proceed against several marijuana growers, the decision strongly suggests that both the district court and government believe the amendment prohibits the department from using its fiscal year 2015 funds to prosecute growers and distributors of medical marijuana whose conduct is in compliance with state law.[6]

In February 2013, federal prosecutors in Washington charged five individuals with violating the Controlled Substances Act by growing large quantities of marijuana plants. The defendants, referred to as the “Kettle Falls Five,” claim to have been growing the marijuana for personal medical use in compliance with state law. Federal prosecutors argue that the amount of marijuana being grown on the defendants’ premises exceeded that necessary for personal medical purposes and claim that the group

was using state law as a shield to hide a black market marijuana cultivation and distribution operation.

Shortly after the Farr-Rohrabacher Amendment became law, the defendants filed a motion to dismiss, arguing that the amendment precluded the DOJ from further prosecuting the matter. The defendants pointed to legislative history to support their argument that the amendment's prohibition should be liberally interpreted to apply to any and all DOJ enforcement activities in medical marijuana states.[7] Specifically, they pointed to the statement of one of the amendment's co-sponsors, Rep. Sam Farr, D-Calif., who said:

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. ... 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.[8]

Similarly, Rep. Dana Titus, D-Nev., said:

[T]his 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. ..."[9]

In its response to the motion to dismiss, the government argued that the amendment shouldn't apply to the Kettle Falls Five because they were operating illegally under Washington law, which limited permissible plant quantities to 15 per patient and capped the total number of plants allowed at 45 (the law has since been amended to be more restrictive). The Kettle Falls Five were growing 74 plants.

Ultimately, the court accepted the government's argument and denied the motion to dismiss. It held that "this rider does not disallow federal use of funds to prosecute persons who are not in compliance with their state medical marijuana laws because such prosecution does not interfere with sanctioned conduct and otherwise remains illegal under federal law."

Although the Kettle Falls Five case would be a better test case of the Farr-Rohrabacher Amendment's reach if the defendants had been in unambiguous compliance with state law, both the government and court indicated that they interpreted the amendment to prohibit the DOJ from prosecuting a wide swath of marijuana-related activity as long as that activity is legal under state law. The court stated,

"this Court acknowledges the plain language of the rider prevents the Department of Justice from using its 2015 fiscal year funds in a manner that interferes with certain conduct sanctioned by state medical marijuana laws. ..."

Critically, the government's brief implicitly accepts the argument that Congress intended to defund federal prosecutions of doctors, patients and dispensaries operating in compliance with state law. The government observed that the legislative history demonstrates an intent to "prevent[] prosecutions of physicians who prescribe medical marijuana and prosecutions of patients who are prescribed medical marijuana in states where such actions are legal, as well as owners of licensed medical marijuana dispensaries." The government's brief is particularly noteworthy because rather than arguing simply that the Kettle Falls Five were in violation of the Controlled Substances Act, it instead acknowledged the amendment's limiting

impact on prosecutions where the defendants are in full compliance with state law.

### **Analyzing the Impact of the Farr-Rohrabacher Amendment**

While the Farr-Rohrabacher Amendment may not provide the comfort that businesses in the medical marijuana industry have been waiting for, it is another item in a growing list of encouraging developments for those seeking decriminalization of marijuana. As the Cole Memorandum expressed in 2013, the DOJ will focus its marijuana enforcement efforts on conduct that implicates at least of one of eight enforcement priorities, such as distribution to minors, violence prevention and “state-authorized marijuana activity ... being used as a cover or pretext for ... other illegal activity.”<sup>[10]</sup> The DOJ’s prosecution of the Kettle Falls Five arguably fits within these limited enforcement priorities given the government’s contention that the collective garden was in fact a pretext for an illegal distribution organization.

The general message from the federal government appears to be that businesses that comply with state regulations religiously won’t be targets. But, until there is a more clear and permanent expression of congressional intent to protect medical marijuana businesses from prosecution, the risk remains. Although there are many growers and sellers of medical marijuana, this unstable climate largely has prevented the participation of ancillary service providers, most notably the financial services industry.

Similar to previous government guidance, the Farr-Rohrabacher Amendment provides an opening for those businesses and investors that can ensure that their activities comply with state laws. The difficulty lies in establishing procedures and protocols that can give businesses, investors and, ultimately, the government assurance that a business is compliant with state law. As state laws develop further, legal and industry professionals will become more adept at creating compliance programs, thus, opening the door for more widespread involvement in the medical marijuana industry.

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[1] See, e.g., Bill Piper, A Decade of Hard Work Turns into Historic Marijuana Victory in Congress, Huffington

Post (Dec. 15, 2014), available at [http://www.huffingtonpost.com/bill-piper/a-decade-of-hard-work-tur\\_b\\_6328446.html](http://www.huffingtonpost.com/bill-piper/a-decade-of-hard-work-tur_b_6328446.html) (“This is a huge victory — one that has taken 13 years to win. For the first time, Congress is cutting off funding to federal medical marijuana raids and saying no one should be arrested for complying with their state’s medical marijuana law.”); Jonah Bennett, Spending Bill Will Fully Protect Medical Marijuana From The Feds, *The Daily Caller* (Dec. 10, 2014), available at <http://dailycaller.com/2014/12/10/spending-bill-will-fully-protect-medical-marijuana-from-the-feds/>.

[2] See, e.g., Jeremy Daw, Federal Cannabis Spending Bill Widely Misunderstood, *The Leaf Online* (Dec. 10, 2014), available at <http://theleafonline.com/c/politics/2014/12/federal-cannabis-spending-bill-misunderstood/>; Jacob Sullum, Would The Rohrabacher-Farr Amendment Actually Stop Medical Marijuana Raids?, *Forbes* (June 3, 2014), available at <http://www.forbes.com/sites/jacobsullum/2014/06/03/would-the-rohrabacher-farr-amendment-actually-stop-medical-marijuana-raids/>.

[3] *TVA v. Hill*, 437 US 153, 190 (1978). (The doctrine disfavoring repeals by implication “applies with full vigor when ... the subsequent legislation is an appropriations measure. ...” This, perhaps, is an understatement, since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are “acts of Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs.)

[4] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 458 (1989).

[5] Title III of the FY 1996 Department of Veterans Affairs, Housing and Urban Development, and Independent Agencies bill reported by the House Appropriations Committee (H.R. 2099), 54.

[6] *United States v. Firestack-Harvey, et al.*, No. 13-CR-0024-TOR1 (E.D. Wash., Feb. 12, 2015).

[7] Additionally, Reps. Sam Farr, D-Calif., and Dana Rohrabacher, R-Calif., recently urged the DOJ to cease its ongoing prosecution of a dispensary in Oakland, arguing in an open letter that the department's prosecution is “in conflict with the limitation on DOJ resources” contained in the amendment. [http://www.harborsidehealthcenter.com/pdf/Harborside\\_Statement.pdf](http://www.harborsidehealthcenter.com/pdf/Harborside_Statement.pdf)

[8] 113 CONG. REC. H4984 (2014), available at <https://www.congress.gov/amendment/113th-congress/house-amendment/748/text>.

[9] *Id.*

[10] James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. Similarly, guidance from FINCEN in 2014 suggests, but does not promise, that banks that deal with only compliant medical marijuana businesses and conduct thorough due diligence and reporting would be safe from prosecution. FIN-2014-G001, *BSA Expectations Regarding Marijuana Related Businesses* (Feb. 14, 2014), available at [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf).