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THE WORK OF THE TASK FORCE TO IMPLEMENT AMENDMENT 64: A CASE STUDY

SAM KAMIN[†]

Colorado's voters passed Amendment 64 in November 2012, legalizing the possession of small amounts of marijuana and requiring the General Assembly to create rules for the regulation and taxation of recreational marijuana sales.¹ Dubbed "The Regulate Marijuana Like Alcohol Act of 2012"² the Amendment was a direct challenge to the federal prohibition of marijuana under the Controlled Substances Act (CSA).³ Despite the passage of Amendment 64 and Washington State Initiative 502⁴ (which covered much of the same ground) federal law continues to treat marijuana the way it treats heroin, not the way it treats alcohol.⁵

This conflict between state and federal law made the implementation of Amendment 64 a complicated puzzle. On the one hand, Colorado Governor John Hickenlooper, a tavern owner who had opposed the Amendment's passage, was obligated to implement the will of the voters.⁶ On the other hand, he had a sincere interest in avoiding a federal crackdown; full implementation of the Amendment could lead to a confrontation over the preemptive power of the CSA. To help him formulate a response, Governor Hickenlooper appointed a 24 member Task Force to make recommendations to the legislature for the passage of appropriate implementation legislation.⁷

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1. Sadie Gurman, *Coloradans Say Yes to Recreational Use of Marijuana*, THE DENVER POST (Nov. 7, 2012), http://www.denverpost.com/breakingnews/ci_21941918/nation-watches-colorados-marijuana-legalization-vote.

2. CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL (2012), <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012>.

3. 21 U.S.C. § 812 (2012).

4. Joel Connelly, *Washington Passes Measure to Legalize, Regulate and Tax Marijuana*, SEATTLE POST-INTELLIGENCER (Nov. 6, 2012), <http://blog.seattlepi.com/seattlepolitics/2012/11/06/initiative-502-passes-to-legalize-regulate-and-tax-marijuana/>; INITIATIVE MEASURE NO. 502 (July 8, 2011), http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

5. See, e.g., 21 U.S.C. § 812 (classifying both heroin (diacetylmorphine) and marijuana (tetrahydrocannabinols) as schedule I controlled substances. Such substances have "no currently accepted medical use in treatment in the United States, a lack of accepted safety for use of the drug or other substance under medical supervision, and a high potential for abuse."). *Id.*

6. *Gov. Hickenlooper Opposes Amendment 64*, COLORADO: THE OFFICIAL STATE WEB PORTAL (Sept. 12, 2012), <http://www.colorado.gov/cs/Satellite?c=Page&childpagemame=GovHickenlooper%2FCBONLayout&cid=1251630730489&pagemame=CBONWrapper>.

7. See *Gov. Hickenlooper Signs Amendment 64 Proclamation, Creates Task Force to Recommend Needed Legislative Actions*, COLORADO: THE OFFICIAL STATE WEB PORTAL (Dec. 10,

I was honored to serve on the Governor's Task Force. My position on this body was unique; the Governor went out of his way to make sure that the various stakeholders were represented on the Task Force.⁸ There were representatives of industry and consumers, labor and employers, public health, law enforcement, local government, state elected officials, regulators, prosecutors and defense attorneys, as well as representatives of the authors and proponents of Amendment 64.⁹ In this group of stakeholders, I was merely an interested observer,¹⁰ one who, as one of my fellow Task Force members kept reminding me, had "no skin in the game." I was thus able to both see the process from an objective viewpoint and bring my expertise to bear on the issues at hand.

The Governor made the Task Force's charge abundantly clear – don't relitigate Amendment 64; figure out how to implement it.¹¹ Although controversy was raised by the appointment to the Task Force of some who had actively worked to oppose Amendment 64,¹² all of the Task Force's members agreed to work to develop consensus regarding the new law's implementation. With a short calendar¹³ and an enormous amount of work to do,¹⁴ I believe we were successful in coming up with common-sense recommendations that largely reflected the consensus of the diverse group of stakeholders assembled. A 166-page report detail-

2012), <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251634887823> (announcing the creation of the Task Force); Exec. Order B 2012-004 (Dec. 10, 2012), *available at* <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22A64TaskForce.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251841374146&ssbinary=true> (the text of the executive order itself).

8. See Exec. Order B 2012-004 at § III (describing the various points of view to be represented on the task force).

9. *Id.*

10. I have been researching and writing about the decriminalization of marijuana, federal law and preemption issues for several years. See Sam Kamin and Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013); Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012); Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 87 DENV. U. L. REV. 977 (2012); Sam Kamin, *The Challenges of Marijuana Law Reform*, THE IMPACT OF THE DECRIMINALIZATION AND LEGALIZATION OF MARIJUANA (2011).

11. Exec. Order B 2012-004, *supra* note 8, at § II ("Task Force members are charged with finding practical and pragmatic solutions to the challenges of implementing Amendment 64 while at all times respecting the diverse perspectives that each member will bring to the work of the task force. The Task Force shall respect the will of the voters of Colorado and shall not engage in a debate of the merits of marijuana legalization or Amendment 64.")

12. Bryce Crawford, *Amendment 64 Task Force Continues to Draw Heat*, COLORADO SPRINGS INDEPENDENT (Jan. 30, 2013), <http://www.csindy.com/IndyBlog/archives/2013/01/30/amendment-64-task-force-continues-to-draw-heat>.

13. The text of Amendment 64 set out a very rapid path to implementation. The Department of Revenue was directed to put regulations in place no later than July 1, 2013 and to begin taking applications for recreational marijuana licenses no later than October 1, 2013. *Supra* note 3, at §§ 5(a), 5(f). This required the General Assembly to enact appropriate legislation during its Spring 2013 session.

14. See Exec. Order B 2012-004, *supra* note 8, at § II (setting forth a non-exhaustive list of the issues for the Task Force to consider).

ing our recommendations was released to the public on March 13, 2013.¹⁵

This success was particularly noteworthy given the regulatory complication posed by the continuing federal prohibition of marijuana. This prohibition – coupled with the Amendment’s commands to the legislature and governor – required the Task Force to navigate between two diametrically opposed policy extremes. On one hand was full implementation of Amendment 64. That is, it would have been relatively straightforward for the Task Force to determine what policy changes the Amendment called for in existing law and to make recommendations to the legislature for effecting those changes. That is, we could have determined how authority was to be shared between the state and local governments, which department should have oversight of the new retail marijuana industry, and so forth. While reasonable minds could certainly disagree on these topics, our task would simply be to determine the will of the 55% of Coloradans who approved Amendment 64.

But we had a second charge as well. While attempting to craft recommendations true to the spirit and text of the Amendment, we also endeavored to create a regulatory regime that, even if it were not viewed as compliant with federal law, would at least not be so intolerable to federal law enforcement officials that they would take action to block its implementation. That is, we recognized that nothing we could do would make marijuana sales within our state lawful in the eyes of the federal government – the CSA would continue to prohibit the manufacture and sale of marijuana, whether in Colorado or elsewhere. Rather, our goal was to create a regulatory regime that would have a better chance of forestalling federal intervention. To add just one more level of difficulty, the federal silence in the face of the passage of Amendment 64 and Initiative 502 meant that we were working largely in the dark with regard to the federal government’s interests. While we knew that we had to take federal concerns into account, the federal government was mum about exactly what their concerns were in this area.

This tension played itself out on the Task Force in a number of ways. For example, the question of so-called “marijuana tourism” was one that occupied a great deal of the Task Force’s time and media attention.¹⁶ At issue was whether out-of-state residents (or those who could

15. JACK FINLAW ET AL., TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64 (Mar. 13, 2013), <http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf>.

16. See, e.g., Associated Press, *Colorado Marijuana Regulators Sign Off on Pot Tourism*, FOX NEWS (Feb. 19, 2013), <http://www.foxnews.com/politics/2013/02/19/marijuana-regulators-ok-pot-tourism-idea-in-colo/>; Ana Campoy, *Colorado Opens Door to Marijuana Tourism*, THE WALL STREET JOURNAL (Feb. 20, 2013), <http://online.wsj.com/article/SB10001424127887323864304578316521035888206.html>; *Pot Tourism in Colorado? Marijuana Regulators OK Idea*, 9NEWS.COM (Feb. 19, 2013), <http://www.9news.com/news/article/318005/188/Pot-tourism-in-CO-Marijuana-regulators-OK-idea>.

not show a valid Colorado ID) would be permitted to purchase marijuana from one of the planned retail marijuana stores. Under the text of the amendment the answer to this question was relatively straightforward: the amendment spoke about customers exclusively in terms of those over the age of 21.¹⁷ Both the Amendment's text and the Blue Book¹⁸ analysis of the Amendment seemed to envision that the only requirement for purchasing retail marijuana would be a valid id showing that the bearer was of legal age. Furthermore, as Amendment 64 legalized possession of up to one ounce of marijuana – and since this repeal of the state's criminal prohibition clearly applied to all those within our borders, whether residents or not – forbidding sales to out-of-state residents would create a bizarre gray market. As those out-of-staters would be authorized to possess but not to procure marijuana, a market would inevitably arise whereby residents authorized to purchase marijuana would then resell it to out-of-staters who were not. This seemed to us to be counter to the core principle of Amendment 64 – taking marijuana use and sale out of the shadows and into a regulated, and taxed, market.

But giving a voice to the will of the voters could not be our only priority. We were aware that recommending a rule that permitted non-Coloradans to purchase marijuana within our state could have externalities well beyond our borders. For example, those from states where marijuana was not legal might be tempted to travel to Colorado and purchase large amounts of marijuana for illegal resale back home. There was also concern that those who had traveled to Colorado to purchase marijuana for use in-state might either intentionally or accidentally carry their leftovers back home when their stay in our state was completed. Either of these means of diversion would be embarrassing for the state, would raise the ire of neighboring governors, and might lead the federal government to conclude that Colorado was not adequately regulating the industry.

In the end, we struck a compromise. We permitted sales to out-of-state residents, but recommended that the legislature adopt “reasonable” limits on the amount of marijuana that could be sold to an out-of-stater.¹⁹

17. See, e.g., CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, *supra* note 3, at 2b (“‘CONSUMER’ MEANS A PERSON TWENTY-ONE YEARS OF AGE OR OLDER WHO PURCHASES MARIJUANA OR MARIJUANA PRODUCTS FOR PERSONAL USE BY PERSONS TWENTY-ONE YEARS OF AGE OR OLDER, BUT NOT FOR RESALE TO OTHERS.”)

18. The Blue Book is the official election guide supplied to all voters. See *Ballot & Blue Book*, COLORADO: THE OFFICIAL STATE WEB PORTAL (2013), <http://www.colorado.gov/cs/Satellite/CGA-LegislativeCouncil/CLC/1200536134742> (“The purpose of the ballot information booklet is to provide voters with the text, title, and a fair and impartial analysis of each initiated or referred constitutional amendment, law, or question on the ballot. The analysis must include a summary of the measure, the major arguments both for and against the measure, and a brief fiscal assessment of the measure. The analysis may also include any other information that will help voters understand the purpose and effect of a measure.”).

19. See FINLAW ET AL., *supra* note 15, at 49.

We argued that such reasonable limits – whether 1/8 or 1/4 ounce – would make the accumulation of a saleable amount of marijuana significantly more difficult. We also recommended that the legislature adopt other measures – point of sale information, restrictions on sales near the border, warnings at the state borders and airports, etc. – to help ensure that marijuana purchased in Colorado is consumed wholly within the state.

This is but one example. Time and again, we attempted to make recommendations to the legislature that would implement Amendment 64 without raising federal ire. Given the fact that Colorado and Washington are trying to do what has never been done – regulating and taxing the sale of recreational marijuana, I believe that our work can stand as an example to other states – as well as the federal government – as they inevitably lift their marijuana prohibitions in the years to come.