

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1660

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 22 1982

The National Organization for the Reform of Marijuana Laws (NORML), Petitioner, **GEORGE A. FISHER**
CLERK

v.

U.S. Drug Enforcement Administration (DEA)
and U.S. Department of Health and Human
Services (DHHS), Respondents.

MEMORANDUM OF FEDERAL RESPONDENTS IN
RESPONSE TO NORML'S EMERGENCY MOTION
TO COMPEL COMPLIANCE WITH THIS COURT'S
PRIOR ORDERS

By emergency motion filed on April 12, 1982, NORML, for the second time, has requested this Court to enjoin federal respondents' ongoing court ordered review of NORML's petition for the rescheduling of synthetic tetrahydrocannabinol (THC) under the Controlled Substances Act (CSA), 21 U.S.C. § 801, et. seq; order federal respondents to hold a hearing, within sixty days, on the rescheduling of the remaining substances in NORML's petition, marijuana cigarettes; issue a declaratory judgment that the Drug Enforcement Administration (DEA) and the Department of Health and Human Services (DHHS) have not complied with this Court's prior order of October 16, 1980, and opinion in NORML v. DEA, 559 F.2d 735 (D.C. Cir.

criteria of both Schedules I and II of the CSA. For sound reasons that are described in detail in the DHHS 1982 Federal Register notice, DHHS' recommendation is that this drug, THC, nevertheless should remain in Schedule I until a new drug application, pursuant to the Federal Food, Drug, and Cosmetic Act, is approved. In making the final determination of the appropriate schedule for THC, DEA will not be precluded from rescheduling THC.

Finally, NORML has failed to exhaust its administrative remedies on THC rescheduling. McKart v. United States, 395 U.S. 185, 194 (1969). The comment period on the proposed findings and recommendation on THC is ongoing. NORML's dissatisfaction with DHHS' tentative conclusions should be expressed in the form of comments on the proposal submitted to DHHS' administrative docket on THC, and not, for the first time, in pleadings filed in Court.

c. DEA Was Not Required To Determine Limitations Of The Psychotropic Convention On The Domestic Scheduling Of THC Before Referring The Matter To DHHS

NORML now asserts, for the first time, that DEA should have received testimony and comments over a year ago on the limitations, if any, that the Psychotropic Convention imposes on the domestic scheduling of THC. DEA should have gone through this procedure, according to NORML, before referring the matter to DHHS for a scientific and medical evaluation.

NORML claims that DEA's failure to do so constitutes a violation of the Court's orders. NORML's Motion at pp. 18-21.

A plain reading of the Court's October 16, 1980, order, however, buttressed by NORML's own actions shortly following the issuance of that order, demonstrate that NORML's assertion is without merit. The Court's October 16, 1980, order directed DEA to refer the matter to DHHS for a scientific and medical reevaluation in light of new scientific evidence on THC. No mention was made in that order of any prior hearings or determinations by DEA of the international treaty issue, and all parties at the time, including NORML, viewed the scientific and medical update as the focus of the remand order. Indeed, that remand order had hardly issued before NORML contacted the Secretary of DHHS by letter, requesting a meeting to discuss the procedures that DHHS would follow in response to the Court's order. Appendix B to current NORML Motion. Such a meeting was held with DHHS representatives, and no mention was made by NORML at that meeting, or at any time thereafter until the current motion, of the need to hold up proceedings under the remand for a prior determination by DEA.

NORML's references to prior decisions of this Court in NORML v. Ingersoll, 497 F.2d 854 (D.C. Cir. 1974), and NORML v. DEA, supra, are misdirected. Those decisions interpret language in section 201(d) of the CSA, 21 U.S.C. § 881(d),

relating to a different treaty, the Single Convention on Narcotic Drugs, the treaty which covers marijuana. Subsequent to those court decisions, Congress passed the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, which amended section 201(d) by adding different procedures regarding the Convention on Psychotropic Substances (Psychotropic Convention), the treaty which covers THC.^{7/} Accordingly, this Court's directives as to marijuana in those prior decisions are not directly applicable here to the treatment of THC in a subsequent treaty and separate implementing legislation.

DHHS recognizes there are international treaty ramifications under the Psychotropic Convention regarding the domestic scheduling of THC. In the proposed medical and scientific evaluation recently published in the Federal Register for public comment, FDA noted, "FDA is considering with the other interested agencies of government involved in international scheduling whether rescheduling of THC to [CSA] Schedule II could be accomplished without international rescheduling." 47 F.R. 10082 (1982). These other government agencies include DEA, the Department of State, and other

^{7/} Under those amendments, former section 201(d) became section 201(d)(1) and the new language appeared in section 201(d)(2)-(5). Sections 201(d)(1) and 201(d)(2)-(5) are mutually exclusive.

constituents of DHHS. The issue is still unresolved because the international law is ambiguous. Contrary to NORML's assertions, domestic rescheduling of THC may be permissible, without international rescheduling, thus obviating the need for a hearing on this issue.^{8/}

Moreover, NORML's avowed cause^{9/} is aided, not prejudiced, by the procedures being followed. It is prudent for DHHS to provide a complete scientific and medical evaluation on THC at this time, because even if the ultimate

^{8/} It is true, as NORML points out, that THC is listed in Schedule I of the Psychotropic Convention, and that Article 7 of that convention restricts use of Schedule I substances to "scientific and very limited medical purposes . . .," thereby suggesting that only CSA Schedule I would be appropriate. However, the official Commentary on the Psychotropic Convention, in discussing this restriction, points out that,

[I]t cannot have been the intention of the 1971 Conference to prohibit or unduly impede any medically justified therapeutic use of substances in Schedule I.... It may sometimes be held in such a case to be advisable to permit such use . . ., and consequently not to transfer the substances in question from Schedule I to another Schedule.

Commentary on the Convention on Psychotropic Substances (United Nations 1976), p. 138.

^{9/} NORML's alleged goals include increasing the availability of marijuana derivatives for therapeutic purposes. It is hard to reconcile this with NORML's present attempt to delay the availability of THC until the more difficult marijuana issue is also resolved.

DHHS recommendation is found to be inconsistent with current treaty obligations, the United States could petition for international rescheduling. See NORML v. Ingersoll, supra, 497 F.2d at 658. Indeed, DHHS is now considering whether to request the Secretary of State to petition for international rescheduling of THC, pursuant to 21 U.S.C. § 811(d) (5).^{10/}

For these reasons, the respondents are in full compliance with all prior orders of this Court regarding the consideration of international treaty issues.

d. The Time Schedule Used By DHHS Is Not Unreasonable

Finally, NORML alleges that respondents have failed to review the marijuana plant materials quickly enough and, thus, have violated provisions of the Administrative Procedure Act, 5 U.S.C. §§ 555(b) and 706(1), and of the CSA, 21 U.S.C. § 811(b). NORML's Motion at 22.

NORML's petition was referred to DHHS by DEA in April of 1981. Since that time, DHHS convened an advisory committee meeting on one of the substances, THC. In March 1982,

^{10/} The procedures now being followed by federal respondents are the exact opposite of the procedure, overturned by this Court in NORML v. Ingersoll, supra, of holding out treaty restrictions as mooted the need for a full scientific and medical evaluation.