

HEMP INDUSTRIES ASSOCIATION v. DEA

Case No. 03-71366

Oral Arguments – 9th Circuit Court of Appeals

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JUDGE MARY M. SCHROEDER: Good afternoon, ladies and gentlemen. This is the time for argument in Hemp Industries Association v. the DEA. We understand all those who intend to present argument are present, so we'll hear the case.

Mr. Sandler, you may proceed.

ATTORNEY JOE SANDLER: Thank you, Your Honor.

Good afternoon. And may it please the Court, I represent the Petitioners in this case who are challenging the Drug Enforcement Administration's final rule, Rule 205(f): Banning hemp stalk, fiber, seed, and oil all of which have been legal for many years under the express statutory exemption for hemp in the Controlled Substances Act. The only effect of DEA's new final rule, 205(f), is to add hemp stalk, fiber, seed, and oil to the Controlled Substances Act to bring them under control for the first time. And the key issue in this case is whether these substances were already covered by the Controlled Substances Act prior to DEA's promulgation of this new final rule. Because, if they were not, the statute is clear that DEA has added to a CSA schedule, Controlled Substances Act Schedule, substances that were not previously on any schedule, and the statute is clear that in order to do that, DEA must undertake a formal rulemaking. Rulemaking on the record offers the opportunity for hearing notice and comment, rulemaking not being sufficient under the statute. And the DEA must make certain specified findings with respect to these new substances in order to put them on the applicable schedule.

We submit, of course, that hemp stalk, fiber, seed and oil were not covered by the Controlled Substances Act prior to DEA's new rule because the statute is plain on its face that hemp stalk, fiber, seed and oil are excluded from the definition of marijuana set forth in Section 802.16, of Title 21. Now, DEA's argument basically is that hemp fiber, stalk, seed and oil are nonetheless covered under the separate listing in Schedule 1 in the CSA for THC, tetrahydrocannabinol, the active drug ingredient in marijuana, because of the trace infinitesimal amounts of THC naturally occurring in these hemp plant parts.

The key --

JUDGE ALEX KOZINSKI: The Court is specific on that part that any substance containing THC is covered, no matter how little.

ATTORNEY JOE SANDLER: That's true, Your Honor, but, in fact, the way the statute is structured, all forms of naturally occurring THC known to exist in the world are already covered as marijuana except for the very substances that are explicitly excluded from the definition of marijuana, hemp stalk, fiber, seed and oil.

JUDGE ALEX KOZINSKI: So, you're saying that somewhere in the Amazon they find a new plant that's not hemp, that's not marijuana, but that has THC in it, it is your position that the DEA could not prohibit use of the drug in commerce or of the plant in commerce without actually amending the schedule going through on the record rulemaking?

ATTORNEY JOE SANDLER: That is exactly right, Your Honor. Were that case to ever --

JUDGE ALEX KOZINSKI: That's a little strange, isn't it?

ATTORNEY JOE SANDLER: Excuse me?

JUDGE ALEX KOZINSKI: That's a little strange, is it not, when the statute specifically says any substance containing THC. I believe it says no matter what quantity, no matter how small.

ATTORNEY JOE SANDLER: Exactly. It's not a question --

JUDGE ALEX KOZINSKI: It's a completely new plant that has this stuff in it in copious quantities, people can use it until the DEA takes the time to go through, what, six months, a year, whatever.

ATTORNEY JOE SANDLER: Well actually, in that situation, of course, the DEA could exercise its emergency interim scheduling authority. Which --

JUDGE ALEX KOZINSKI: They could come to us and we'd enjoin it under this same argument. You would say, look, you can amend the schedule, and after you've amended the schedule you can prohibit it, but you can't do an interim rule to cover something that's not in the schedules now. And we have exactly the same argument to say the only way you can accomplish this is by having a final rule. Trust me, you would successfully argue that.

ATTORNEY JOE SANDLER: I don't think so, Your Honor, because if they exercise their scheduling authority, again, involving a formal rulemaking, and the necessary findings, and then pursuant to that there's an interim emergency authority they can exercise, there wouldn't be such an argument. The other is that the hypothetical, or the new plant that you're hypothesizing is not something that Congress specifically on the face of the statute thought about and addressed.

JUDGE ALEX KOZINSKI: That's a better argument, that's a better argument. So, you could say that's a plausible interpretation of the statute. But as it happens, it conflicts with these other provisions which Congress already covered. So, the specific becomes general. I think that's a better argument.

ATTORNEY JOE SANDLER: Right. The way that --

JUDGE ALEX KOZINSKI: Not necessarily a winning argument, but better.

ATTORNEY JOE SANDLER: Our view, and that's just the point, Your Honor. Our view is that the statute, as Congress -- Congress knew what they were doing. That the statute should have been integrated whole in which all forms of naturally occurring THC are known in the world, there is this hypothetical possibility of discovering something new, but currently known in the world are covered.

JUDGE ALEX KOZINSKI: They did not distinguish between naturally occurring THC and synthetic THC, they just said THC.

ATTORNEY JOE SANDLER: Right. But the --

JUDGE ALEX KOZINSKI: Remind me, was there synthetic forms of THC in 1937?

ATTORNEY JOE SANDLER: I don't think it's a question of interpreting the term --

JUDGE ALEX KOZINSKI: I realize that you may not think this is important, but just help me out historically.

ATTORNEY JOE SANDLER: I don't believe there was synthetic THC.

JUDGE ALEX KOZINSKI: And yet Congress did talk about substances containing THC. So they must have been referring to natural, no?

ATTORNEY JOE SANDLER: No, I don't think so, one, because any THC that is naturally occurring, and the non-exempted parts of marijuana, of course, are covered as marijuana, and any THC naturally occurring in these exempted parts to the extent that it is separated, extracted, concentrated, somehow exists in any other form would be covered as a derivative of the resin, a derivative of the resin from the hemp seed and oil, which is re-controlled, which is covered as marijuana.

JUDGE ALEX KOZINSKI: I understand your argument. Just help me out, I'm serious, I just want to understand the history of it. Congress passes the '37 statute, was that the Controlled Substances Act?

ATTORNEY JOE SANDLER: No, the Controlled Substances Act did not pass until 1970. The 1937 Act was the Marijuana and Marijuana Tax Act, and that's where the definition of marijuana comes from.

JUDGE ALEX KOZINSKI: Okay. And it contains a reference to THC?

ATTORNEY JOE SANDLER: The Marijuana Tax Act?

JUDGE ALEX KOZINSKI: Yes, did it?

ATTORNEY JOE SANDLER: I don't believe so.

JUDGE ALEX KOZINSKI: Okay, so that was something that was brought in in 1970?

ATTORNEY JOE SANDLER: Yes, exactly.

JUDGE ALEX KOZINSKI: So, the 1937 Act, which exempts, as you say, the stalks, fibers, and seeds.

ATTORNEY JOE SANDLER: That's right.

JUDGE ALEX KOZINSKI: Right, and then in 1970, Congress adds this provision dealing with THC.

ATTORNEY JOE SANDLER: That's right.

JUDGE ALEX KOZINSKI: And does not at that point, in 1970, it was clear that there was both natural occurring and synthetic THC?

ATTORNEY JOE SANDLER: That's right.

JUDGE ALEX KOZINSKI: Congress does not say synthetic THC, it just says THC?

ATTORNEY JOE SANDLER: That's right. But again, we believe that it's not a question of interpretation of what they meant, it's a question that all naturally occurring forms of THC were already covered as marijuana. And so, that's why it's just a logical corollary, that since everything natural that exists in the world, even aside your hypothetical of a new plant that's covered in the Amazon, is already covered as marijuana. It's only logical that the term THC is -- refers only to synthetic THC. And this court in explaining that in the first case dealing with the interpretive rule, *Hemp Industries Association v. DEA*, which the parties have been referring to as *Hemp 1*, explained that in promulgating its existing regulations, limiting the definition of THC to synthetic THC, the DEA wasn't interpreting anything, they were simply, by the words of this court, giving effect to the exemption for sterilized seeds under marijuana, and recognized that the listing of THC in Schedule 1 did not cover the trace amounts of organic THC

in the sterilized seeds, that being the only form of naturally occurring THC that isn't covered because it is specifically exempted by --

JUDGE ALEX KOZINSKI: Let me ask you this, isn't this exactly the kind of situation covered by Chevron? I mean --

ATTORNEY JOE SANDLER: No, Your Honor.

JUDGE ALEX KOZINSKI: Congress gives, paints with broad strokes, and then it has this agency which it funds that develops expertise. And Chevron teaches us that details like that are to be left to be resolved by the agency. The agency can change its mind and its policy.

ATTORNEY JOE SANDLER: We don't agree that that's at all what they've done, Your Honor. We believe it's not a question of interpreting the language at all. That the structure of the statute itself is clear on its face, leaves no room for ambiguity. And that what they're doing is adding something to the schedules that's not there.

JUDGE ALEX KOZINSKI: Let me ask you this, put aside the provision dealing with marijuana, let's just strike it from the statute for purposes of the discussion. OK?

ATTORNEY JOE SANDLER: OK.

JUDGE ALEX KOZINSKI: It's a hypothetical. So, all the statute now contains is this other provision that says, any substance containing THC, no matter how small or how miniscule an amount. You would agree, would you not, that under those circumstances the agency could say, THC is used in the statute, again leaving out this other provision, could mean both synthetic and natural THC?

ATTORNEY JOE SANDLER: If Congress had not spoken to that issue at all elsewhere in the very same statute, the very same schedule of the statute, of course we'd agree with that. But of course --

JUDGE ALEX KOZINSKI: You agree that when they say THC, that standing alone is ambiguous, or at least it's capable in interpretation that you could say it refers to synthetic THC, which is the long-standing policy of the agency, or it could refer to all THC, either interpretation would be plausible?

ATTORNEY JOE SANDLER: Well in hypothetical -- theoretical isolation from the rest of the statute as it's actually written such an interpretation would be possible, and what precludes it is the express words of Congress and the structure of the statute taken as a whole which doesn't raise any question of interpretation or ambiguity. We agree, Your Honor, and there's no question that under the CSA, the DEA actually had delegated legislative authority to amend the statute to add substances that aren't there already. But it's not surprising that Congress has carefully circumscribed that extensive delegated legislative authority that by providing that when DEA does, in effect, amend the statute to add something that's not there, they have to

follow the scheduling procedure involving the formal rulemaking specified findings. And they've done that successfully.

JUDGE ALEX KOZINSKI: If you are, in fact, right, probably the DEA couldn't add it, even if went ahead and did on the record rulemaking because according to your reading of the statute, Congress has specifically exempted this. And I would think that your theory would mean that if Congress has something specifically exempted something from the schedules, that the agency couldn't come back and add it back in. It couldn't, for example, tomorrow, I would guess you would say, amend the schedule by saying we now do include stalks, and seeds, and fiber. Congress has specifically left from the definition of marijuana --

ATTORNEY JOE SANDLER: No, I think they could do that if the subject of the scheduling proceeding rules that actually hemp stalk, fiber, seed and oil and they found that they have substances, not extracted and concentrated, because that's already covered under marijuana, but if those parts of the plant in and of themselves had a potential for abuse, and they consulted with HHS and went through the whole scheduling procedure, then they could add something.

JUDGE ALEX KOZINSKI: Even though, according to your theory, Congress has specifically exempted it?

ATTORNEY JOE SANDLER: Specifically exempting, and then Congress left very clear that they were currently not on the schedule. It is always open to DEA to find that a substance through the scheduling procedure, find that a substance that Congress didn't think about which had no intention of including as a controlled substance should now be added as a controlled substance. They've done this with a new drug that Congress had never heard of even in 1970, like Ecstasy, and some of these other dangerous new drugs which they've successfully scheduled and added to the schedule.

JUDGE ALEX KOZINSKI: It is your position that if Congress said Ecstasy shall not be on the schedule, the agency could then do a rulemaking and add it back in, even though Congress has -- ?

ATTORNEY JOE SANDLER: That would be somewhat different, but if they said "such and such" --

JUDGE ALEX KOZINSKI: It would not be different at all.

ATTORNEY JOE SANDLER: If Congress had left -- had thought about Ecstasy, left it off it, but DEA now said, we think this substance is now capable of abuse, they can go through a scheduling procedure to add it. What they can't do --

JUDGE ALEX KOZINSKI: You see why it matters, because if you're buying your argument, the full force of your argument, it seems to me that the agency couldn't add it even if it does go through a rulemaking because, according to you, Congress has clearly exempted it.

ATTORNEY JOE SANDLER: No, I think --

JUDGE ALEX KOZINSKI: I'm not sure how the agency can go about amending the statute that to actually contravene an exemption that Congress has created.

ATTORNEY JOE SANDLER: If they found that those substances now present a potential -- in and of themselves, again, not extracted, not processed, but in and of themselves pose a potential for abuse that Congress ever thought of, they could undertake a scheduling proceeding for those substances. The exemption means it's not on there now, but they have authority. They have authority, effectively, to amend the statute, provided that they go through a scheduling proceeding, and that's not what they did.

JUDGE MARY M. SCHROEDER: If they wanted to cover natural substances that contain these very small trace elements of THC, then they have to go through a separate rulemaking?

ATTORNEY JOE SANDLER: That's exactly right, Your Honor. They have not -- it's undisputed that they haven't done that in this case, and it's for that reason that their Rule 205(f) is invalid.

And with the Court's permission, I would like to reserve the balance of my time for rebuttal. Thank you, Your Honor.

ATTORNEY DANIEL DORMONT: Good afternoon. May it please the Court, Daniel Dormont, United States Department of Justice, Drug Enforcement Administration.

The rules at issue here, Your Honors, are the first rules ever issued under the Controlled Substances Act to specifically address the legal status of products made from the cannabis plant. In addressing this question, Your Honors, the Drug Enforcement Administration took into account all the relevant provisions of the Controlled Substances Act. Most notably, those provisions are the definition of marijuana, the listing of THC, tetrahydrocannabinols, in Schedule 1, and an important point, the disallowance under the Act of human consumption of Schedule 1 controlled substances in any amount.

JUDGE MARY M. SCHROEDER: Did you take into account the objections of people who might say that this doesn't make a lot of sense? You say they took everything into account, but just went ahead and published a rule?

ATTORNEY DANIEL DORMONT: Actually, we did, Your Honor, in this sense, going to notice and comment, there were comments. The agency received many, many comments, and some were just along the lines of what you said, in fact, not even in those nice words. And the agency understood this. And what the agency did clearly it wasn't popular with everyone, but the agency attempted to strike a balance between the competing statutory provisions and what the agency felt were the appropriate policy decisions here.

JUDGE BETTY BINNS FLETCHER: What was the policy decision?

ATTORNEY DANIEL DORMONT: The policy decision, Your Honor, was that, first of all, the agency thought it had to give effect to what it believed was the appropriate reading of the statute. And in the first instance, that looks to tetrahydrocannabinols.

JUDGE BETTY BINNS FLETCHER: Behind that wording, what possible policy does the DEA have for saying that these substances have any capacity for harm?

ATTORNEY DANIEL DORMONT: Well, the concern of the Drug Enforcement Administration isn't particularized to the particular products that these Petitioners make. The DEA has never said, has never focused on the particular products and said anyone can get high from them, or that they pose a harm to people. Now, at the same time, we certainly haven't said that with any degree of certainty we know that these are necessarily safe for people. But the point is, it's not focusing on these particular products, the question is, can you have a product intended for human consumption that contains a Schedule 1 hallucinogen? And DEA felt that what Congress did was appropriate to say that there are no de minimus amounts of Schedule 1 hallucinogens. Clearly, you can have any of the Schedule 1 hallucinogens in trace amounts, that aren't going to harm anyone. But, would that be appropriate to allow that, to make an allowance for that?

JUDGE ALEX KOZINSKI: So, you think the position of DEA could ban poppy seed bagels, right?

ATTORNEY DANIEL DORMONT: No, the reason -- we specifically addressed that -- could we ban them?

JUDGE ALEX KOZINSKI: Yes, I realize you haven't because you'd get a lot of flack for that.

ATTORNEY DANIEL DORMONT: Not just because of the flack.

JUDGE ALEX KOZINSKI: But, let's say -- what is the distinction?

ATTORNEY DANIEL DORMONT: The distinction is in the statute itself, and it's a very important distinction. The wording of the statute is clearly different for poppy seed, for poppy seeds than it is for cannabis seeds.

JUDGE BETTY BINNS FLETCHER: But what I was asking you about policy --

ATTORNEY DANIEL DORMONT: Yes.

JUDGE BETTY BINNS FLETCHER: Now, tell me what's a policy reason for distinguishing between poppy seeds and cannabis seeds?

ATTORNEY DANIEL DORMONT: In addition to the point I mentioned, Judge Fletcher, the other important, very important consideration is this, if natural THC is not considered controlled. That is, if the ruling is that it is only synthetic THC that is controlled --

JUDGE BETTY BINNS FLETCHER: Marijuana is controlled.

ATTORNEY DANIEL DORMONT: Yes. And that covers, at present, covers just about everything you see in trafficking up to this point. However, there's an important loophole that would be created if the THC were limited to synthetic THC.

JUDGE BETTY BINNS FLETCHER: What is the loophole?

ATTORNEY DANIEL DORMONT: As the agency stated in the text accompanying the rules, Judge Fletcher, the loophole is this, you can take any parts, any plant material that contains any amount of THC, even in tiny amounts, and you can make an extract from that plant material.

JUDGE BETTY BINNS FLETCHER: I think all the evidence is to the contrary.

ATTORNEY DANIEL DORMONT: Respectfully, I would suggest it's not, and that's why the case that I provided to opposing counsel and to the clerk, the United States v. Ticchiarelli (sp), indicates something very close, and I'll explain why it's not the same but it's very close. In that case, what took place is that marijuana grown in Jamaica, which was used -- well what the traffickers who grew it did was, they harvested off the good parts of the plant, the stuff that's good for smoking, the buds and the leaves. And what they had left, the discarded part that nobody would want to smoke, even though that had very low THC content, that was still used to make a very potent extract known as Hashish oil. And what the case revealed is that, indeed, it's not just a fantasy, but that might occur. It, indeed, could be used. It's a scientific fact, Your Honor, that any natural source of THC can be used to make this extract.

JUDGE ALEX KOZINSKI: The exemption specifically speaks to that because it has exemptions, and exemptions within the exemption. It says marijuana is banned, but the seeds, stalks, and fiber are not, except resin extracted from them. So, Congress -- that's a difficult provision for you to get past, because it recognizes that Congress was aware that -- it wasn't acting under the delusion that stalks and seeds don't contain any THC. They were aware that it did contain some. But, nevertheless, they exempted it. But they were aware enough of the fact that these things could be distilled to dangerous levels, by saying if you do extract the resin, then that's back under the definition of marijuana. That shows quite a bit of congressional awareness of what they were doing.

ATTORNEY DANIEL DORMONT: Well, actually, Your Honor, respectfully, they weren't that aware, and if I may explain why --

JUDGE ALEX KOZINSKI: Just like every other piece of legislation?

ATTORNEY DANIEL DORMONT: Uh, I -- there are other examples of that in the Controlled Substances Act. It's far from a perfect document.

JUDGE ALEX KOZINSKI: How do you deal with that?

ATTORNEY DANIEL DORMONT: That's not --

JUDGE ALEX KOZINSKI: That's exactly with your case, where they cook the stuff, I don't know how they got the extract, I assume through some form of cooking, or chemical extraction process, and that got exactly to the point, that's back covered in the statute. They now got the resin that has the important stuff in it, and that's --

ATTORNEY DANIEL DORMONT: It is not, and this is an extremely important point that I'd like to very much emphasize to the court, and that's one of the reasons why we said it in the Ticchiarelli (sp) case, because Your Honor's point is the point emphasized to a great degree in the petitioner's reply brief. That is not resin extracted from the plant. And what it boils down to is a distinction between hashish and hashish oil. Resin extracted from the plant is hashish, hashish, as the court may be aware, is from the plant, in the flowering tops and in the leaves there are glands in the plant the secrete the resin, and that comes to the surface of the plant. And when you make hashish, or you gather hashish what you do is you scrape off the hashish, and that's been done for years, and you press it into blocks. That is resin extracted from the plant. In the Ticchiarelli case, I think, forgive the pun, hashes that out rather nicely. The uh, what Ticchiarelli reveals is that hashish oil is something different, hashish oil is an extract, produced by chemical extract along the lines of what Judge Kozinski just explained, but it is clearly not resin extracted from the plant.

JUDGE ALEX KOZINSKI: I'm sorry, I may be misremembering the statute, maybe we can just look at the language. I thought the statute itself refers not to simply resin, but resin extracted from stalks, seeds, and fiber. So Congress was aware that you could pull the resin off the flowering tops and get hashish.

ATTORNEY DANIEL DORMONT: Yes, exactly.

JUDGE ALEX KOZINSKI: So, it wasn't talking about that?

ATTORNEY DANIEL DORMONT: Yes, it was.

JUDGE ALEX KOZINSKI: It was talking about --

ATTORNEY DANIEL DORMONT: It was talking about the hashish.

JUDGE ALEX KOZINSKI: Well, how could it do that, otherwise you'd just have the resin.

ATTORNEY DANIEL DORMONT: Hashish is resin.

JUDGE ALEX KOZINSKI: Well, I'm sorry, do you have the statute? Help me out here.

ATTORNEY DANIEL DORMONT: Yes. The terminology, as the Ticchiarelli court points out, it's somewhat arbitrary.

JUDGE ALEX KOZINSKI: I'm sorry?

ATTORNEY DANIEL DORMONT: The terminology, hashish, hashish oil, is somewhat arbitrary, but nonetheless what is considered to be resin extracted from the plants, and there are several places in the Ticchiarelli decision, and in the decision by the court of appeals in the same case, which I also attached, which addresses this. Footnote 2 on page 78 of the Ticchiarelli opinion indicates that hashish is variously defined as a drug formed from the resin scraped from the flowering tops of the cannabis plant.

JUDGE ALEX KOZINSKI: Yes, but, so what, that's not what the statute says, is it? I mean, when the statute created an exemption within an exemption, it is talking about the resin extracted from the stalks, fiber, and seeds? Am I confused about that?

ATTORNEY DANIEL DORMONT: Not at all. Resin extracted from any part of the plants is controlled as marijuana, you are absolutely correct about that.

JUDGE ALEX KOZINSKI: I'm sorry. I have a statute here, 21 USC 802.16, right. Such term does not include the mature stalks of such plants, fiber products from such stalks, or cake made from seeds of such plants, any other compound manufactured, salt, derivative, and so on, except the resin extracted there from. I thought that there from includes stalks, fiber and seeds?

ATTORNEY DANIEL DORMONT: Yes, absolutely right. And in the first sentence it fact includes resin extracted from any part of the plant, so there's no part of the plant, if you got resin from any part of the plant.

JUDGE ALEX KOZINSKI: No, I'm sorry, I'm going to have to go over this one more time. You were saying the resin, as in hashish, is the stuff if you go out -- I'm taking your word for that, I have no idea, I'm assuming what you're telling me is correct, you go out there, you find a plant, it has leaves, it has a flowering top, and then you tell me it has some resin that can be scraped off the plant.

ATTORNEY DANIEL DORMONT: Yes.

JUDGE ALEX KOZINSKI: That stuff is marijuana.

ATTORNEY DANIEL DORMONT: Yes.

JUDGE ALEX KOZINSKI: The leaves are, the resin is, the stuff that you don't have to squeeze out, that just -- all you have to do is scrape it off, and the flowering tops. Then the statute says, but when you've gotten rid of all those things you still have stalks, fiber, and seeds, and those things are not marijuana. Are we together on that?

ATTORNEY DANIEL DORMONT: Sterilized seeds, yes, yes.

JUDGE ALEX KOZINSKI: Well, sterilized seeds. OK, Right?

ATTORNEY DANIEL DORMONT: Yes.

JUDGE ALEX KOZINSKI: Then it says, but if you have resin extracted there from. Which must mean the resin extracted from those three things, it cannot be extracted when you just scrape off when the plant is in the wild, because that's already covered by the first sentence.

ATTORNEY DANIEL DORMONT: But it does, Your Honor, in this sense, the resin while it is secreted by the flowering tops, and in the leaves, because those are the parts of the plant that have the glands from which the resin is secreted, the resin can also adhere to, and does, indeed adhere to the seeds, the stalks, and any other part that comes into contact with the buds or the leaves.

JUDGE ALEX KOZINSKI: Fine, no problem with that, but it has to -- the resin in the second sentence in the parenthetical, cannot be the resin that you can just scrape off, because that's already covered in the first sentence, it must mean something that you get when you take the seeds, the stalks, and the fiber, and somehow get the resin that's associated with that.

ATTORNEY DANIEL DORMONT: Yes, yes, that's true, but, but --

JUDGE ALEX KOZINSKI: So if Ticchiarelli was not scraping things off in the wild doesn't really help. So it must be that this resin, the one in the parenthetical, involves something that is gotten in a chemical process, by cooking or something.

JUDGE BETTY BINNS FLETCHER: They used the word extracted?

ATTORNEY DANIEL DORMONT: Yes, that's right.

JUDGE ALEX KOZINSKI: Not scraped off.

ATTORNEY DANIEL DORMONT: Well, extracted is, I -- again that's why I refer the court to Ticchiarelli, because I think that is, of the cases we've seen, that best describes what we're talking about. It's -- the resin --

JUDGE ALEX KOZINSKI: Let me tell you what this tells me, and I tried to say it once before. What this tells me is Congress knew full well that stalks and seeds and fiber could be carriers of some level of tetrahydrocannabinol.

ATTORNEY DANIEL DORMONT: In the resin.

JUDGE ALEX KOZINSKI: They were aware of that. Nevertheless, it says unless you do the extracting part they are not marijuana under the definition. That is what it says to me. And hasn't the agency, in fact, nullified this sentence in the statute by modifying the definition of THC to cover exactly what Congress exempted?

ATTORNEY DANIEL DORMONT: No, because, and this is where I've failed to be clear enough for the court, thus far, the resin can be --

JUDGE ALEX KOZINSKI: Perhaps clear, but not persuasive.

ATTORNEY DANIEL DORMONT: The resin when I refer to scraping it off, it can be scraped off from any part of the plant.

JUDGE ALEX KOZINSKI: They're talking about extract, and surely extract is something else, and they've already covered the stuff you scrape in the previous sentence.

ATTORNEY DANIEL DORMONT: If I may, perhaps it will help if I add this additional fact, the THC found in stalks, from in oil from its seeds, and found in the seeds, is not simply from the resin, the THC is that if you exclude the resin completely from the stalks, from the seeds, as the petitioners say they attempt to do, that's why their products, they say, have an extremely low THC content, because they do a thorough cleaning job, and they remove to the full extent possible the resin, it's been determined, and both the government and the government and the petitioners have cited the studies, as recently as 2000 and 2001, they're cited in both the briefs, where not only the resin, but also the stalks, the clean stalks and seeds have THC in them. In other words, any part of the plant, of the cannabis plant, has THC in its cells.

JUDGE ALEX KOZINSKI: But, that's not a new fact. That's obviously a fact Congress must have known, or else it would not have needed to have the parenthetical. If Congress naively thought that you could not get any THC, or whatever the hallucinogenic substance is, you couldn't get it from the seeds, the stalks, and the fiber, they wouldn't have needed the parenthetical.

ATTORNEY DANIEL DORMONT: The parenthetical refers solely to the resin, meaning the recognition that Congress had is that those parts of the plant, the stalks, did indeed have resin on the surface from contact with the more potent parts of the plant. But, Congress, I think it's fairly safe to say, did not know what we know now. In fact, the leading experts in the country just released the studies in 2000 and 2001 that specifically looked at the question of whether the seeds cleaned of the resin still have THC, and they reached the conclusion that they did.

JUDGE BETTY BINNS FLETCHER: Well council, why is the government so resistant to a scheduling procedure?

ATTORNEY DANIEL DORMONT: The government believes that it's just not consistent with the structure of the Act. It's not consistent with -- even putting aside really what is our primary response to that question, the government believes it's already scheduled as tetrahydrocannabinols, the government believes that the way the schedules are set up, particularly for Schedule 1 hallucinogens, any material compound or mixture that contains any amounts of a substance is scheduled under the listing of that substance. Therefore, it would be inconsistent with the structure of the Act to do a separate scheduling based on parts of the plant that already have that substance in them. That wouldn't be consistent with that. In addition to that, for THC, the determination has already been made that it meets the criteria for placement in Schedule 1, at least for synthetic THC, everyone agrees that synthetic THC is in Schedule 1, and it meets the criteria. Well, scientifically speaking, there's absolutely no distinction between synthetic and natural THC as a molecule. And therefore, there's no scientific point in going forward with a scheduling action for natural THC, it's exactly the same thing. If you isolated it, no one would be able to tell where it came from, natural or synthetic.

JUDGE BETTY BINNS FLETCHER: Well, we have the definition of marijuana, and then we have THC, and historically all everybody thought it meant synthetic THC. And I'm sure a great many people in the agencies thought it was synthetic, and sure that there was a big battle within the agency is what we should do if you want to add this. And it seems that the government is a bit disingenuous not to do a scheduling action if they want to add in these things which are excluded.

ATTORNEY DANIEL DORMONT: Well, respectfully, while Your Honor accurately points out that there is a historical practice to treat the THC from the non-marijuana parts of the plant as non-controlled, at least for practical purposes, that's absolutely correct, once these new products came on the market, consistent with Supreme Court precedent, the agency is permitted to adapt its reading of the statute in the manner it best sees fit to deal with the new circumstance, as long as it's acting in the range of permissible interpretations.

JUDGE ALEX KOZINSKI: Before you sit down, can you tell me how you are going to save the bagel?

ATTORNEY DANIEL DORMONT: How can -- I'm sorry?

JUDGE ALEX KOZINSKI: Save the bagel. You started to tell me about the language in the statute, and then Judge Fletcher then asked you to get back to policy. I'm less interested in policy than I am in the language of the statute, so you just very quickly tell me how what's stopping the agency from outlawing the poppy seed bagels tomorrow?

ATTORNEY DANIEL DORMONT: Because it does not say in the statute that anything that contains any amount of morphine, thebaine, and codeine, those are the controlled substances you could actually find in trace amounts in poppy seeds, it does not say that anything that contains any amount of those is controlled. Which is what it says for Schedule 1 hallucinogens. What it says that the substances must be extracted from substances of vegetable

origin. So if someone took poppy seeds and put them in an extraction process, by chemical extraction extracted out the morphine thebane, and codeine that would be controlled. The poppy seeds in their natural state are not.

JUDGE MARY M. SCHROEDER: Thank you.

ATTORNEY DANIEL DORMONT: Thank you, Your Honor.

ATTORNEY JOE SANDLER: Thank you. With respect to the acknowledgement of poppy seeds, which we do believe is highly instructing, the statute does define the term narcotic drug to mean opium, opiates, and so forth, and that any compound, mixture, or preparation which contains any quantity of the substances referred to, meaning opium or opiates. Notwithstanding that, and the fact that that definition clearly covers both natural and synthetic opium, the fact that the definition of opium poppy, the plant in Section 802.19, excludes the seed, takes the seed out of control. The DEA has never contended otherwise. With respect to the Ticchiarelli case, again, this dealt with the sentencing guidelines, the district court's decision was overruled by the first circuit, which observed that it's clear, and on page 13 in the case you've just been handed, it's clear that whether or not the substance at issue is hashish oil, it certainly qualifies as marijuana under the code, they're citing the definition of marijuana. It's not disputed that the substance at issue falls within this broad, catch all definition of marijuana. Likewise, the hypothetical extract, concentrated of natural THC from, again, even if it were scientifically and economically feasible, from hemp stalk, seed, and oil, would likewise be covered as marijuana within this broad, catch all definition.

JUDGE ALEX KOZINSKI: So this would be under what, the parenthetical?

ATTORNEY JOE SANDLER: Yes, under the parenthetical.

JUDGE ALEX KOZINSKI: Now, opposing counsel tells me that the resin has a very specific meaning, it means the stuff that is on the outside of the plant. And just cooking the stalks and fibers may get you some THC substance, but that's not resin.

ATTORNEY JOE SANDLER: No, we disagree with that, Your Honor, because in 1937, as Your Honor pointed out earlier, THC was unknown as such, and the term resin was clearly used by Congress in the legislative history, and it is replete with this, to mean, they didn't use the term THC it hadn't been discovered yet. Resin meant not just what we think of as resin as counsel has characterized it, to their meaning it was the active principal. So as it was used in 1937 and then in the parenthetical, that it just meant --

JUDGE ALEX KOZINSKI: Well, it was reenacted in 1970 when they did know.

ATTORNEY JOE SANDLER: That's right, reenacted --

JUDGE ALEX KOZINSKI: They may not have taken a close look at the language, but at least formally speaking they passed the statute again, and at that point it did make a difference.

ATTORNEY JOE SANDLER: Yes, at that point it did make a difference.

JUDGE ALEX KOZINSKI: Perhaps they didn't take a close look at the language.

ATTORNEY JOE SANDLER: Right, we believe it still retains -- that the term really wasn't an indication that they intended to change the meaning of that as it had been given in the 1937 act. Then finally, because DEA concedes that they have had an historical practice of treating hemp seed as being non-controlled, we believe, and we submit that the reason for that practice is because, in fact, it was not controlled. And that's, precisely, Your Honor, why they need to undertake a scheduling action if they want to control it at this point.

JUDGE MARY M. SCHROEDER: Thank you. The case is docketed and submitted for the schedule, and the court stands adjourned.

(End of proceeding.)