Smoking the Pot, Tying the Knot

Supreme Court hears medical marijuana, declines Massachusetts marriage case

by Bob Roehr

Advocates and opponents of medical marijuana argued their cases Nov. 22 before the U.S. Supreme Court. The central issues in Ashcroft vs. Raich concern interpretations of interstate commerce and whether federal authorities can overrule state law in this area.

Last December a three-judge panel of the Ninth Circuit Court ruled that "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician is, in fact, different in kind from drug trafficking.... Further, the limited medical use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse."

The 2-1 majority wrote, "The cultivation, possession and use of marijuana for medical purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." Therefore, "The [Controlled Substances Act], as applied to the facts of this case, is unconstitutional under the Commerce Clause."

The legal reasoning drew heavily upon a 1995 interstate commerce opinion penned by Chief Justice William H. Rehnquist, which limited federal authority in that arena.

Rehnquist was not present for the oral arguments, as he is being treated for an aggressive form of thyroid cancer. He has said he will participate in all decisions of the court, basing his opinions upon the submitted legal briefs and transcripts of the arguments.

Some have speculated as to whether Rehnquist might benefit from using marijuana to relieve some of the symptoms associated with his cancer therapy.

Chief Justice William Rehnquist

Acting Solicitor General Paul D. Clement argued the government's case. He said it's irrelevant that the plaintiffs—both sick women who had grown their own marijuana to treat their own illnesses—did not sell or intend to sell their pot. Because there is a market for marijuana, Clement asserted, growing it for their own use affected that market even if the women did not participate in the marketplace, as they would have bought it elsewhere.

That argument resonated with conservative Justice Antonin Scalia, who saw the case as similar to a cornerstone interstate commerce decision involving wheat that the court issued in the 1940s.

Justice David H. Souter indicated some sympathy for compassionate use of marijuana by a limited number of patients, but he feared that the large numbers likely to embrace the product would make a shamble of federal policy concerning controlled substances.

Justice Sandra Day O'Connor appeared to be more sympathetic to the plaintiffs' arguments, perhaps because she has undergone treatment for breast cancer. She noted that medicine is "an area traditionally regulated by the states" and that the marijuana was grown for personal use.

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> —David Buckel

Justice Stephen G. Breyer suggested that plaintiffs apply to the Food and Drug Administration to reclassify marijuana as a drug. If it refused to do so, then they would have grounds to sue the agency for abusing its discretionary authority. He concluded, "Medicine by regulation is better than medicine by referendum."

The patients and the relief that they gained from using marijuana were largely ignored during the one hour of legal arguments. The court is likely to issue its decision next spring.

Marriage

Diehard religious conservatives claim the Massachusetts Supreme Judicial Court decision mandating equal treatment of same-sex couples under the marriage law usurped the function of the legislature. They cite the U.S. Constitution's guarantee of a republican form of government—an arcane point of constitutional law that the courts have studiously avoided ruling on.

Most observers predicted the anti-gay petition would go nowhere. The federal district and appeals courts ruled that the parties had no standing. The Supreme Court declined to accept the case without comment Nov. 29.

"We're not at all surprised that the U.S. Supreme Court declined to weigh in on the state marriage law in Massachusetts," said David Buckel, Lambda Legal's Marriage Project director. "The bottom line is that nobody is being harmed by the Massachusetts state law treating all couples equally."

White House spokesman Scott McClellan said, "President [Bush] continues to emphasize the importance of moving forward on an constitutional amendment that would allow the people's voice to be heard and not allow this issue to be decided by activist judges or local officials who seek to redefine what is a sacred institution."

The issue will continue to play out nationally and at the state level for a number of years. jo