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UNITED STATES, Petitioners v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

No. 00-151

SUPREME COURT OF THE UNITED STATES

2001 U.S. TRANS LEXIS 23

March 28, 2001, Wednesday, Washington, D.C.

NOTICE: [*1] Transcribed by Alderson Reporting Company, Inc., 1111 14th Street, N.W., Suite 400, Washington D.C. 20005-5603, Telephone Number: 202-289-2260

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES: BARBARA D. UNDERWOOD, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

GERALD F. UELMEN, ESQ., Santa Clara, California; on behalf of the Respondents.

OPINION: PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-151, the United States v. Oakland Cannabis Buyers.

General Underwood.

ORAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF THE PETITIONER

GENERAL UNDERWOOD: Mr. Chief Justice, and may it please the Court:

The Controlled Substances Act prohibits the distribution of marijuana outside federally authorized research programs because Congress, the Attorney General and the Secretary of Health and Human Services have each determined that there is no currently accepted medical use for the drug, and it has a high potential for abuse.

The statute also recognizes that new information might come to light that would justify [*2] less restrictive controls so it establishes administrative procedure for changing the classification and the restrictions for marijuana and other controlled substances.

That statutory scheme leaves no room for the Oakland Cannabis Buyers' Cooperative to distribute marijuana without the approval of the Attorney General under a claim of medical necessity, and it leaves no room for a court to consider such a claim as a basis for refusing to enjoin the marijuana operations of the cooperative.

The Ninth Circuit's ruling in effect authorizes the operation of marijuana pharmacies outside the safeguards and restrictions of the Act and undermines the ability of the Act to protect the public from hazardous drugs.

The common law defense of necessity can sometimes authorize a person to violate the law in order to avoid a more serious harm but it doesn't apply here for three reasons. First, because the legislature has already balanced the harms and come to a different conclusion.

Congress anticipated there would be claims of medical uses for controlled substances and provided an administrative procedure for evaluating them allowing trial judges and juries to redetermine that balance in individual [*3] cases would undermine the procedure established by Congress.

Second, because the defense has no application because the co-ops members and the co-op itself have alternatives to violating the criminal law. They have substantive alternatives, other lawful medications including a synthetic form of the active ingredient of marijuana.

Stevens QUESTION: May I ask one question on that subject Ms. Underwood? You have a footnote in your brief, footnote 11, that describes some of the situations there that gives the impression that this whole case is a sham, that it's really just a front for using marijuana and I'm wondering if -- and your argument you're just making now suggests there are always alternatives. Do you think we should take the case on the assumption that there really are some people for whom this is a medical necessity or should we assume that there are no such people.

GENERAL UNDERWOOD: The -- on the assumption that there are no such people because the Food and Drug Administration charged with evaluating the medical -- the scientific information and the DEA, that is the agency that report to the Attorney General and the Secretary of Health and Human Services having evaluated the claims [*4] of medical use have found that there is no accepted medical use, that some of the claims of medical use are simply wrong.

Ginsburg QUESTION: General Underwood, may I just stop you there because take one of the examples that was in the brief, the one about the man who was constantly vomiting and the only thing that calmed him down, he had a lymphoma or something like that, that is not an uncommon experience and what surprised me about this case was that that kind of thing has been going on, individual doctor prescribing marijuana just to prevent that kind of extreme suffering, and that seemed to have gone without enforcement until California passes this proposition and you get clinics selling it, not individual doctor. Am I wrong in thinking that there has been quite a bit of this going on in the medical profession.

GENERAL UNDERWOOD: The record doesn't reflect and I don't know how much of it has been going on. I think there are two things to say in response to that though, one is that the agencies charged with evaluating the medical uses here have ongoing studies and have so far concluded that there are -- that the particular use that you're describing is best served -- there's now an extract [*5] of marijuana that's been on the market -- been available and been put on the lower schedule than schedule one for 15 or 16 years which is this Marinol and efforts are being made to find other methods of administering the pure substance and determining whether it has the effect that's described.

Scalia QUESTION: Ms. Underwood, these judgments made by the federal agencies, the FDA and the DEA, I think they take into account the overall public interest, I mean, they -- I'm not sure that they have come to the conclusion that marijuana

would never ever, ever be helpful to someone who's in extreme pain. I think what they've probably done is made the judgment that the chances of its being that helpful and not being replaceable by something else are so slim that in view of the abuses to which general permission for its use would lead it's best that it be proscribed, is that an inaccurate determination on my part? Could you really say that there has been a determination by the federal government that marijuana is never medically useful.

GENERAL UNDERWOOD: Well the determination that's been made is that the medical utility of it has not been established which is a slightly different way of putting [*6] it but there is a separate determination the FDA makes determinations as it does with substances that aren't on the controlled substances list, that is there are new drugs that are proposed all the time which might possibly be useful and aren't authorized for use until after tests satisfy the FDA that the drug is safe and effective for use and marijuana has not passed that screen.

There is an additional screen for controlled substances that is in addition to considering and the scheduling decision takes into account not just medical utility but also the potential for abuse, but the FDA's role in it, the Health and Human Services role in it is just to assess or it has a role in simply assessing the medical evidence and has concluded that to date there is insufficient reason to think that it is a safe and effective drug although there are continuing research projects going on to try and pursue the anecdotal information that it is sometimes helpful or that components of marijuana are sometimes helpful.

Ginsburg QUESTION: Ms. Underwood, it would help me, General Underwood, if you would tell me why the word preemption doesn't appear in the government's brief because I took the simple-minded approach [*7] looking at this, Congress says this is a schedule one drug and California says you can have it if you've got a note from a doctor that says you have a migraine headache. Why isn't the federal law that says this is the schedule one drug preemptive, it must have been with some thought that you didn't use that word.

GENERAL UNDERWOOD: Well the California law doesn't actually purport to authorize the distribution of marijuana with a doctor's note, it provides a defense to California law. Now it is true that an effort is being made here to invoke the judgment behind that law as in support of the claim of medical necessity, but California didn't purport to create a defense to federal law as it couldn't have if it had tried it would have been presumably preemptive -- preempted. But it's perfectly possible to comply with both California law and federal law. There isn't that kind of conflict here.

Ginsburg QUESTION: Explain that to me because I thought to comply with federal law you can't sell it.

GENERAL UNDERWOOD: Well that's right but California law doesn't require you to sell it. It simply says that you won't be -- California could remove the -- could eliminate --

Ginsburg QUESTION: All it says you'll [*8] be at the mercy of the feds and we won't go after you.

GENERAL UNDERWOOD: That's correct. That's correct. And I should say that the decision of the federal agencies not to accept the kind of anecdotal evidence that you're suggesting is a decision that the federal -- the Food and Drug

Administration has made again not just in the controlled substance area but it has concluded that the anecdotal reports of individuals are a basis for research, a reason to conduct research and not a basis for authorizing the use of a drug or changing its scheduling.

Kennedy QUESTION: General Underwood, there's some indication in the trial court's observation, he had no choice but to enter this injunction, that's something of an over-reading, but suppose I were the district judge and I said, you know, General Underwood, you want me to basically supervise what's going to be a major effort to prosecute people and you're doing this under my contempt power, I don't want the court to get involved in this, you have your own United States and assistant United States attorneys, you have investigate these, bring these as prosecutions and then we'll hear these cases and if there's a necessity defense or something we can [*9] rule on it, but you're basically asking me to issue an injunction and in order to enforce it I'm going to have to make prosecutorial decisions, I don't want to be bothered with that because I think it intrudes upon a separation of powers balance, it's making me more of a prosecutor than a neutral judge. If he said that would he be abusing his discretion.

GENERAL UNDERWOOD: Yes. There are grounds on which a court can deny injunctive relief. For example, if the court found that violations had stopped and are unlikely to recur and an injunction wasn't necessary to effectuate the purposes of the act, this Court noted that in Hecht against Bowles, and there may be other grounds but I would say that the judge who said what you just said would be, in fact, intruding on Article II executive prerogatives by insisting that when Congress has provided both civil and criminal enforcement mechanisms as it often does that the executive is not free to choose the enforcement mechanism, the civil enforcement mechanism that --

Stevens QUESTION: May I ask this question, does the executive, the district attorney have prosecutorial discretion not to bring a case if he thinks a particular defendant really is a [*10] person that has this serious illness and so forth.

GENERAL UNDERWOOD: There's always prosecutorial discretion.

Stevens QUESTION: Why would a judge have less discretion than a prosecutor?

GENERAL UNDERWOOD: The judge has different discretion from a prosecutor, it is for the prosecutor to decide whether a case merits prosecution or whether a civil injunction is worth bringing.

Kennedy QUESTION: If the judge reacts to precisely the same reasons that motivate a prosecutor not to bring a case, would that be an abuse of discretion?

GENERAL UNDERWOOD: Yes it would. The court's role in the process is not the executive's role. The court cannot deny an injunction on the grounds that the executive should for instance have chosen the criminal sanction or should not have brought the case at all. If --

Kennedy QUESTION: Suppose the judge has legitimate concerns that given the resources of the court that it's going to make him basically substitute for the United States attorney in the Northern District of California, he's going to have to decide who to prosecute for contempt and it's going to be criminal contempt and so forth, basically it seems to me that he's now being put in the role of the supervising prosecutor [*11] just in order to enforce his injunction.

GENERAL UNDERWOOD: Well no the contempt actions of him would be brought by prosecutor and I'd like to point out why civil --

Kennedy QUESTION: I'm sure that he has or should have a major say in how he's going to enforce his injunction, who he's going to bring to court for the contempt action in the first instance, what kind of examples he's going to make, et cetera.

GENERAL UNDERWOOD: There's a reason why civil injunctive enforcement is authorized and why it's appropriate. I don't think it's for the court to second-guess the prosecutor but there is a reason. The civil injunctive remedy in this statute was patterned on a similar provision in the Food, Drug and Cosmetic Act, and the purpose of that was to provide a way to resolve legal disputes without the harshness of a criminal prosecution. This is just that kind of dispute, open and ongoing violations of the law designed to test its statute with the California state law in the background, once -- there's no reason to think that once a court resolves the question that -- holds, for instance, that there is no medical necessity defense or holds that in any event whatever medical necessity defense there [*12] might be doesn't authorize the operations of marijuana pharmacies as in this case, that the Oakland Cannabis Buyers' Cooperative won't comply with the law.

Souter QUESTION: Well, maybe it will, but isn't the real concern, and I want to state a variant on Justice Kennedy's question, isn't the real concern behind this that with the passage of the California proposition and the popularity within the California population that that necessarily entails, it will be very, very difficult for the government ever to get a criminal conviction in a jury trial, and the reason, it seems to me, that the reason I assumed this was being brought was to avoid hung juries in criminal cases.

If the trial court in fact were to conclude that that is the reason and that's why the injunctive remedy was being invoked, would that be a good reason for the court to say it is not certainly a necessary and maybe not an appropriate use of equity to give the government an alternative to six month or less sentences for criminal contempt in order, in effect, to make a criminal statute enforceable which in the normal criminal course is not. Would that be an abuse of discretion?

GENERAL UNDERWOOD: Not if the statute authorizes [*13] a civil injunctive remedy and -- but I would like --

Souter QUESTION: It would not be an abusive --

GENERAL UNDERWOOD: Excuse me. I misspoke. That would not be --

Souter QUESTION: You scared me there for a minute.

GENERAL UNDERWOOD: It would be an abuse of discretion. It would not be an appropriate ground for withholding injunctive relief but I would like to point out that the statute, this statute, perhaps out of a concern like that or perhaps for some other reason, contains a jury trial requirement -- provides a jury trial for a trial of the contempt of an injunction that is obtained --

Souter QUESTION: No matter what the lengths of sentence requested?

GENERAL UNDERWOOD: Yes.

Scalia QUESTION: General Underwood, do you agree with all of the premises of these questions? I mean is --

GENERAL UNDERWOOD: No.

Scalia QUESTION: Is it true that California juries generally don't convict people of crimes that they don't agree with? Is that the practice in -- I haven't lived in California in quite a while but California juries only enforce those criminal laws they like, is that the general practice.

GENERAL UNDERWOOD: I have no information about that but I would like to point --

Scalia QUESTION: Do we know whether this United [*14] States attorney brought this as a civil -- as a civil matter precisely because of the legal doubt or rather in order to avoid a jury trial, do we have any idea which of the two it is.

GENERAL UNDERWOOD: I was not -- I don't have the answer to that question but I know --

Scalia QUESTION: And of course, this entire argument would disappear if Congress eliminated the criminal penalty and then presumably the U.S. attorney would be free to get as many injunctions as he liked with the same consequences.

GENERAL UNDERWOOD: I should think so. I would just like to --

Ginsburg QUESTION: There's one aspect of this General Underwood that Respondent says and this I think you might know the answer to, Respondent says that overwhelmingly this Act is enforced by a criminal prosecution rather than civil injunction. And do you know that, what is the enforcement practice with respect to the CSA.

GENERAL UNDERWOOD: I know that civil injunctions have been used on other -- exactly on occasions under this statute as well as under other statutes where there is a business enterprise going on that has a dispute with the government about whether what they're doing is outside the statute. I don't think it's --

Ginsburg QUESTION: [*15] Romero-Barcelo was a civil injunction in connection with the EPA, wasn't it?

GENERAL UNDERWOOD: That's correct but -- and under this statute in particular though the Controlled Substances Act it is not customary to seek injunctions against street dealers of narcotics but it is customary to seek injunctions against, for instance, manufacturing plants that are claiming that their use of particular chemicals is -- what they're doing is within the Act or without the Act, I mean, when there is essentially a dispute with the business enterprise about the legality and propriety of what they're doing and that is actually not just under the Controlled Substances Act but under many statutes, the kind of occasion when an injunction is used to resolve the legal dispute on the assumption that once that legal dispute is resolved it will not be necessary to seek further enforcement but there will be --

Ginsburg QUESTION: Of course you can make the same argument for bringing criminal prosecution, so presumably you put somebody in jail, they'll stop doing it too.

GENERAL UNDERWOOD: Yes, but what Congress said actually in authorizing injunctive relief is that when there is this kind of dispute it is desirable [*16] to provide a mechanism for resolving it without putting people at risk of going to jail if -- and that's one --

Ginsburg QUESTION: You're referring to the legislative history I presume, it doesn't say that in the statute, does it?

GENERAL UNDERWOOD: No, it does not. I'm referring to legislative history actually --

Ginsburg QUESTION: Some little piece of Congress said that, right?

GENERAL UNDERWOOD: Well, I'm actually referring to legislative history of the Food, Drug -- of the analog provision in the Food, Drug and Cosmetic Act simply to suggest not that we know that that's what Congress voted on but that that is a common widely-understood reason --

GENERAL UNDERWOOD: That is a common widely-understood reason --

Ginsburg QUESTION: Yes but those are cases where there's a legitimate difference of opinion on whether there was a violation of law. Your view here that violation of law is so obvious and clear that there isn't even any colorable argument to the contrary.

GENERAL UNDERWOOD: That's our view but there is a claim to the contrary and I don't think it requires that we credit that claim to decide that an appropriate way to resolve that dispute is in a civil enforcement action, and that -- so that's [*17] the story about when we sometimes use civil enforcement actions. Actually very often -- Respondent has suggested that it's hardly ever used because there aren't reported opinions, the most common occasion where civil enforcement actions are used they're also settled. That is, the injunction -- the complaint is filed and there's a civil settlement involving money and agreements to change practices and make an agreement not to deal in a particular drug, chemical for some period of time. There are numerous examples of that.

Kennedy QUESTION: What is the advantage the government has from an injunction rather than a concerted effort of discrete prosecutions by the United States attorney's office?

GENERAL UNDERWOOD: For example, here, where we are arguing where it is our position that there simply is no medical-necessity defense at all and therefore that one shouldn't be entertaining evidence and adjudicating the appropriateness of a medical-necessity defense in a particular case, the way to get that resolved systemically is in a civil -- a civil proceeding that simply presents that legal question.

Kennedy QUESTION: Then you do want us to rule on the issue that the Ninth Circuit -- you're ruling just [*18] as a general matter that there's no medical-necessity defense.

GENERAL UNDERWOOD: It is a part of our argument --

Kennedy QUESTION: I'm concerned about using the courts to answer questions so remote from specific disputes.

GENERAL UNDERWOOD: It isn't necessary to reach that result but it is a part of our argument that the reason the injunction -- the reason the Ninth Circuit was wrong to suggest that the injunction might not issue or might be limited that the court predicated that holding on an error of law, I mean one -- there are many reasons why a court might exercise its discretion but it is not a good reason to exercise its discretion to rely on a mistake of law and a mistaken view of the law and that mistake is that the Controlled Substances Act authorizes, contemplates or is consistent with a medical-necessity defense.

QUESTION: Well, then you're very pleased with what the Ninth Circuit did in one sense because now you can get the issue resolved up here.

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GENERAL UNDERWOOD: I would say that's the result of what the Ninth Circuit --

QUESTION: But I just don't think that's a good use of the federal district court's authority.

QUESTION: Out of evil cometh good, General Underwood, [*19] isn't that wonderful.

GENERAL UNDERWOOD: Pardon me?

QUESTION: I just said out of evil cometh good is your position on the Ninth Circuit.

GENERAL UNDERWOOD: Our initial position was not that we wanted to bring this to the United States Supreme Court but that the practice -- that the Oakland Cannabis Buyers' Cooperative and similar cooperatives should be enjoined from engaging in the open and notorious violation of the Controlled Substances Act --

Rehnquist QUESTION: General Underwood, if you take it as a criminal prosecution and it's an unsettled question of law whether it is a medical-necessity defense, a typical district trial judge is probably going to err on the side of letting it in since you can't say one way or the other and you may not get it resolved in a criminal prosecution.

GENERAL UNDERWOOD: That's correct.

Scalia QUESTION: General Underwood, what is the penalty for violating an injunction?

GENERAL UNDERWOOD: The statute calls for enforcement by contempt.

Scalia QUESTION: Would be criminal contempt?

GENERAL UNDERWOOD: Well there's a -- no, well, there's a civil contempt in the statute.

Scalia QUESTION: What I'm getting to is would you be entitled to a jury in the trial for contempt?

GENERAL [*20] UNDERWOOD: Yes, I said earlier the defendant by statute is entitled to a jury.

Scalia QUESTION: Still it's civil so it wouldn't be beyond a reasonable doubt, it would be I think it's clear and convincing in this case; is that right?

GENERAL UNDERWOOD: It's not a criminal proceeding it's a trial under Federal Rules of Civil Procedure --

Scalia QUESTION: That would make a big difference to a jury who doesn't want to convict this person. I mean, at the end of the road there's a jury, which is going to let you off if it wants to let you off, whatever the standard of proof is so that if the U.S. attorney here were only trying to avoid a jury, he ought to be replaced.

Rehnquist QUESTION: But the juries -- there can be a criminal contempt proceeding if the injunction is violated under the statute, correct? Something was said a minute ago about its being just a civil jury. The U.S. attorney could bring criminal contempt if someone violated it and I thought your answer was under the statute even if it's criminal contempt and the penalty would be -- the penalty requested would be within the minor offense range, they'd still get a jury trial and that was the answer to my suggestion.

GENERAL UNDERWOOD: The statute's [*21] Section 882 says in case of an alleged violation of an injunction or a restraining order issued under this Section, trial shall upon demand of the accused be by a jury under the -- in accordance with the Federal Rules of Civil Procedure. That's what Congress contemplated and instructed.

Rehnquist QUESTION: I understood you before in answer to the question about why the civil injunction to say that you wouldn't do that with a street peddler but you want to put this clinic out of business.

GENERAL UNDERWOOD: Want to stop it from engaging in the unlawful distribution of marijuana, it might have some other business, but I don't believe the Oakland Cannabis Buyers' Cooperative at the moment is engaged in other businesses, and as I've said, that's the dispute that we have with the Oakland Cannabis Buyers' Cooperative about whether what they're doing is lawful or not is one that is ideally suited to resolution in a civil -- in a civil litigation. I think I'll reserve the rest of my time for rebuttal.

Rehnquist QUESTION: Very well General Underwood. Mr. Uelmen, we'll hear from you.

ORAL ARGUMENT OF GERALD F. UELMEN

ON BEHALF OF THE RESPONDENTS

MR. UELMEN: Mr. Chief justice and may it please the Court: [*22]

When the government initiated these proceedings, it made a tactical choice to forego criminal prosecution in favor of seeking injunctive relief pursuant to Section 882. That choice had serious consequences for the Respondents because it deprived them of the full opportunity to a jury trial.

Scalia QUESTION: Did your Respondents ask to be prosecuted criminally, was that their preference?

MR. UELMEN: We had no choice in the matter, Your Honor.

Souter QUESTION: How did it deprive them, I mean, Ms. Underwood's answer was they get a jury trial in any case.

MR. UELMEN: It's a jury trial in accordance with the Federal Rules of Civil Procedure which means that the court can enter a summary judgment and the court does not apply the standard of proof beyond a reasonable doubt and that actually happened in this case.

Rehnquist QUESTION: You mean for a criminal contempt?

MR. UELMEN: For a civil contempt.

Rehnquist QUESTION: What about criminal?

MR. UELMEN: Well, they have not initiated a criminal contempt prosecution. That would be a criminal prosecution and we would have a right, full right to --

Rehnquist QUESTION: What's the sanction for finding of a civil contempt violation? It can't be jail.

MR. UELMEN: No. I believe they [*23] could be fined.

QUESTION: In a civil contempt they say you have the key to the jail in your own pocket because it's enforced to cause to you do something, you can be jailed I believe on civil contempt.

MR. UELMEN: If you refuse to --

QUESTION: Right.

MR. UELMEN: Yes, until you conform with the order. And that happened here. I mean, these Respondents were found in contempt of court without a jury trial.

Souter QUESTION: Did they ask for a jury trial?

MR. UELMEN: Yes, but the court ruled that under Section 882 the trial as conducted in accordance with the Federal Rules of Civil Procedure. Therefore a summary judgment could be entered and the government succeeded in obtaining a summary judgment.

Souter QUESTION: And what was the penalty that was being requested, was the penalty a fine or cumulative incarceration?

MR. UELMEN: No fine was imposed.

Souter QUESTION: What was requested when you went to trial, did the government say, we forego any incarceration as punishment we're going to ask for a fine as punishment, did the government make any specification of that sort?

MR. UELMEN: No, the government asked that the sheriff or the marshal seize the premises in which the business was being operated [*24] and of course the Respondents were at risk of incarceration if they remained in contempt.

Souter QUESTION: Well, that's just like a civil nuisance action, it's just a nuisance action in the federal court is all it amounts to.

MR. UELMEN: But the point is the defenses that the Respondents wished to assert were never determined by a jury.

Souter QUESTION: But you're in effect saying that even if it's purely civil contempt if they are found to violated the injunction and they do not agree to abide by the injunction in the future they can at least be jailed coercively. Is that the point?

MR. UELMEN: Absolutely.

Souter QUESTION: Okay.

MR. UELMEN: Yes. It would truly be ironic to hold that federal prosecutors have full discretion to decline prosecution but when they elect to come into a federal court sitting as a court of equity, that court has no discretion to decline to issue an injunction.

QUESTION: Just -- I take it that if I'm a trial judge and I have someone who's violated my injunction, I can't say, I'm going to put you in jail now until you sign an agreement not to do this anymore. I can't do that. It's a coercive action for something that's within the power -- within your power to perform, to [*25] turnover some goods, to unlock a locker to -- but that's not -- so there can't be any -- there can't be incarceration --

MR. UELMEN: Clearly, you could incarcerate me until I obey the court order. I mean, that's done all the time with a witness who refuses to testify and is held in contempt.

QUESTION: But these are all past acts, there's nothing to incarcerate for or am I wrong? Am I missing something, did the judge incarcerated these people? He couldn't.

MR. UELMEN: He did not in this case because the Respondents agreed to refrain from the conduct, the contempt was purged ultimately, but if the -- if the Respondents insisted on continuing their operation in violation of the injunction, they could have been jailed.

QUESTION: Well, I disagree with that but we'll leave it.

Scalia QUESTION: Right. I thought that this kind of civil contempt where you have the key in your pocket is only for the kind of contempt that's in the presence of the court where you refuse to testify or disrupt proceedings or something like that, I'm not sure that -- any way, we can look that up. Let me come to your perception that it would be unthinkable that it could be up to the U.S. attorney whether to bring a [*26] criminal action or not, but a federal judge could not decide that he won't issue an injunction using the same sort of discretion, why is that so unthinkable? I mean, in a criminal case the federal judge certainly can't say, you know, I don't think this criminal case should have been brought at all.

MR. UELMEN: In a criminal case, Your Honor --

Scalia QUESTION: It's a stupid prosecution and I'm going to ignore it. He can't do that, can he?

MR. UELMEN: In a criminal case a judge is sitting as a court of law, what we're saying is when a federal court is sitting as a court of equity it has the traditional discretion to weigh the interests, to balance the interests --

Scalia QUESTION: To say this civil action should not have been brought, I disagree with the United States attorney that this civil action which is authorized -- which he's authorized to bring under the statute should have been brought and therefore I will nullify it, you think a court has that power.

MR. UELMEN: What we're saying is that all the statute says is if the court has jurisdiction to issue an injunction surely they can come in and ask for an injunction and we're saying the court has discretion to say under these circumstances [*27] I'm not going to issue an injunction.

Rehnquist QUESTION: What's your case authority for that sort of a proposition because the cases you cite in your brief strike me as quite far off the point, Hecht and company and Romero-Barcelo. In those cases the person was either in compliance by the time it got to court or else the court said, look, I won't issue an injunction, Romero-Barcelo, but you have to go get a permit. In no case did the Court ever say well we think you've got a defense to this act so we're not going to issue the injunction.

MR. UELMEN: Well we believe that Hecht v. Bowles and Weinberger v. Romero-Barcelo are quite on point because in both cases it was within contemplation that future violations would occur and the Court still declined to exercise its jurisdiction --

Rehnquist QUESTION: Because in one way it said, the violations had been cured as promptly as they'd been called the attention that Hecht's had put in a new staff to try to do things. I mean, it's quite different from your case where you say we're going to just go ahead and do this.

MR. UELMEN: Well in Romero-Barcelo the Court, in effect, said that the Navy can continue to drop its bombs while it applies for a permit, so [*28] --

Rehnquist QUESTION: But there wasn't any failure to rule on what the law is in both of those cases. The judge adjudicated the case and said you did wrong, but I'm not going to slap you with an injunction because in the Bowles case it was inadvertent and I have ever reason to believe you won't do it again. I didn't get from any of the cases you cite authority that a judge would have to say, I'm just not going to participate in the adjudication of this case.

MR. UELMEN: Well, first of all, by declining to enjoin, the court is not allowing the violations to continue because the government still has the option of initiating a criminal prosecution at any time and that's --

O'Connor QUESTION: It seems to me what happened here is that it originally went to a federal district court judge who granted an injunction and then it was appealed --

MR. UELMEN: That's correct.

O'Connor QUESTION: -- at the Ninth Circuit and the Ninth Circuit appeared at least to create some kind of a blanket exception to the provisions of the Controlled Substances Act and returned it to the district court which it required to withdraw or to enter.

MR. UELMEN: What the Ninth Circuit held is that the district court had discretion to allow [*29] this exemption to the injunction for two reasons, first, because the Respondents who came within this common law necessity defense were not violating the Act so they should not be enjoined because --

O'Connor QUESTION: It was a kind of a blanket medical-necessity defense that it recognized when I would have thought that the initial trial judge did not abuse his discretion at all and that the Ninth Circuit erred at the point that it created this blanket defense.

MR. UELMEN: Well, it's not a blanket defense, Your Honor, in is the sense that every Respondent who wishes to take advantage of it is going to have to show that they are suffering from a serious medical condition, that they face imminent harm of death or blindness, that cannabis will alleviate their condition and that they have no reasonable alternative, that everybody alternative available has been tried and found ineffective for them so --

Kennedy QUESTION: But the action is brought against the clinic not against the individual sufferers, so you seem to be putting together two things that don't mix, you're saying that an individual might have a plea of medical necessity, but the judge who is faced with a clinic that's selling to all kinds [*30] of people, some of them don't fit that description at all.

MR. UELMEN: Well, no, actually selling to anyone other than the limited number of patients who come within this exception is enjoined by the preliminary injunction, all the court has done is to create a very narrow exception for a very limited number of patients who come within these four criteria.

Kennedy QUESTION: It doesn't sound to me limited at all, even with drugs that can be dispensed, doctors are required, prescriptions are required, that wasn't any part of this injunction as envisioned by the Ninth Circuit at all.

MR. UELMEN: Well our contention is that --

Kennedy QUESTION: Nonmedical people deciding the so-called medical necessity. That's a huge rewriting of the statute.

MR. UELMEN: Well, it's implicit in all of these conditions that there is a medical decision being made. That is, no patient qualifies under the California initiative unless they have a physician's recommendation or approval in meeting the criteria that all alternatives have been tried and failed implicitly assumes some medical supervision in that process. Our contention is that when we come within this medical-necessity defense no prescription is necessary. [*31] That we're dealing with highly unusual circumstances that were not contemplated by Congress when it required a prescription for the normal use of any drug, when a physician issues a --

Rehnquist QUESTION: To say it wasn't contemplated by Congress when Congress made a finding that there's no known medical use for it doesn't make much sense, I think.

MR. UELMEN: Well, Your Honor, Congress never made such a finding. They did not say there is no known medical use for cannabis.

Rehnquist QUESTION: What is the definition of schedule one in the Controlled Substances Act.

MR. UELMEN: The criteria for placement on schedule one or movement off of schedule one when it's done administratively by the DEA are set forth in Section 812 and those criteria do include no currently accepted medical use, but Congress itself put cannabis on schedule one, so it wasn't bound by those criteria.

Rehnquist QUESTION: But presumably if it did it itself, it must have thought that it qualified for schedule one under those criteria, it just didn't want to leave it up to an administrative agency to make the decision.

MR. UELMEN: All it had to conclude in terms of a rational basis test was that it wanted to impose the most restrictive limitation [*32] and that is schedule one, no use without a prescription, but we're saying even that finding, that there's no use without a prescription, is not a rejection that under limited circumstances where a patient is facing imminent harm and has no reasonable alternative, the drug cannot be used without a prescription, it's a classic illustration of the choice-of-evils defense.

Scalia QUESTION: If that's the case how could it be that the patient wouldn't be able to get a prescription. I mean, you're saying it's absolutely necessary for you to stop the patient from dying or from vomiting or whatever.

MR. UELMEN: That's right.

Scalia QUESTION: There's not a doctor in California who will say, you know, here I'll write you a prescription.

MR. UELMEN: Not for cannabis, not for cannabis because it is on schedule one, a physician cannot write a prescription.

Scalia QUESTION: Okay, so it's not just a requirement of a prescription that Congress is prescribing.

MR. UELMEN: Well, by putting it on schedule one they're saying you can't -- you can't use it by prescription, now when a doctor issues a prescription all he's concluding is that this will help you, he's not required to conclude that you have no other alternative. [*33] He's not required to conclude you have a serious condition and you may die or go blind if you don't have this medicine, all he's got to say is, this will help you, here's a prescription, go get it and

take it. But the medical-necessity defense requires much more. It requires a conclusion that the patient is facing a serious medical crisis.

Rehnquist QUESTION: Is there any other case in which this Court has recognized the medical-necessity defense.

MR. UELMEN: Well, calling it medical necessity --

Rehnquist QUESTION: Well, I asked you a question.

MR. UELMEN: No. Okay. But medical necessity is just an example of the classic necessity defense defined by the model penal code. In fact, one of the examples --

Rehnquist QUESTION: That's based on common law, is it not?

MR. UELMEN: Yes, it is.

Rehnquist QUESTION: What you have here is a statute that Congress enacted that quite arguably simply ruled out the sort of defense that you're urging.

MR. UELMEN: Well, Congress certainly didn't explicitly rule it out. What the government is arguing is that we can imply this limitation from the structure of the Act and from its purpose, but a careful --

Rehnquist QUESTION: Or from its placement on schedule one.

MR. UELMEN: Well, its placement [*34] on schedule one involves this issue of currently accepted medical use which is a term of art that does not address the question of whether under particular circumstances of an individual patient facing a medical crisis there might be medical utility for the drug.

Ginsburg QUESTION: Do I understand you correctly Mr. Uelmen from what you've argued about medical necessity, the California initiative is essentially irrelevant because you'd be making the same argument in any state; is that correct.

MR. UELMEN: That is absolutely correct. This defense should be available to any patient in any state regardless of whether that state has approved under broader conditions the general use of cannabis as medication.

Ginsburg QUESTION: I guess would it be limited to cannabis or would you have a similar exception to any of the prohibitions.

MR. UELMEN: Well, if the conditions are met that you face this imminent crisis and no other alternative is available, yes, it should be available for other medications as well.

Scalia QUESTION: It would be up to the individual who wants it to take his chances and say I think there's medical necessity and then try and prove that later --

MR. UELMEN: That's a risky venture because [*35] that individual is going to have to prove in a court of law that in fact he had -- he was facing this crisis and he had no alternative.

Scalia QUESTION: Well, you know if he really thinks he's going to die that's an easy gamble right, a jury versus the grim reaper, I'll take the jury any day.

MR. UELMEN: Well, at least in the confines of the modification of this injunction we're talking about more than that, we're talking about a requirement that you prove that you have tried all of the other alternatives that might be available and they didn't help.

Scalia QUESTION: How serious does your medical condition have to be? I mean, I gather cannabis is not a life-saving drug. It alleviates great pain and discomfort.

MR. UELMEN: Well, we believe it is a life-saving drug. It's a life-saving drug for AIDS patients who are not going to benefit from the new medications available to keep them alive if they can't keep their weight up, if they can't maintain their general health.

Rehnquist QUESTION: So how serious -- how serious does a case have to be before this medical-necessity defense kicks in, in your view.

MR. UELMEN: Well, in the injunction we're talking in terms of imminent harm, we believe that --

Rehnquist QUESTION: [*36] What sort of harm?

MR. UELMEN: Death, starvation, blindness.

Scalia QUESTION: Stomachache?

MR. UELMEN: No.

Scalia QUESTION: That's a harm, isn't it?

MR. UELMEN: We're talking about patients who are going to lose their sight, who are going to forego chemotherapy or radiation because they can't live with the severe nausea.

Scalia QUESTION: You have to add some adjective to just imminent harm, you want imminent life-threatening harm, imminent what? You want to exclude a stomachache and an earache maybe.

MR. UELMEN: No, I think we're talking about much more serious harm, but we're talking about balancing the choice of evils here.

Ginsburg QUESTION: Suppose Congress were to say we don't want a medical -- we didn't -- we thought controlled substance schedule one is prohibited. Now we're going to make clear there's no medical-necessity defense then what happens to your --

MR. UELMEN: Clearly Congress did not say that, but if it did, we would contend that we then have a serious constitutional problem in terms of a violation of the substantive due process right to preserve your life, then we can cite the Glucksberg case --

Souter QUESTION: May I just ask you a question? I take it there was no constitutional litigation [*37] below that you're raising the constitutional issue here on the constitutional avoidance rationale.

MR. UELMEN: Yes, the constitutional issue was raised but in a different context.

Souter QUESTION: Was it, I mean, did you put in evidence on it or did you argue it or was it just one of those things that you never got to?

MR. UELMEN: It was argued in the context of the broader motion to dismiss, but with respect to the medical-necessity issue that's before this Court, our position is that if this statute is construed to preclude a medical-necessity defense under these circumstances where the patient faces loss of life or loss of sight there would be a violation of a substantive due process right --

Rehnquist QUESTION: Do you also raise the Commerce Clause on constitutionality?

MR. UELMEN: We did, we did.

Rehnquist QUESTION: Did you press both of those in the court of appeals when you were appealing from the original junction.

MR. UELMEN: They were fully briefed in the court of appeals in the context of the dismissal motion --

Rehnquist QUESTION: And the court of appeals didn't pass on them I gather.

MR. UELMEN: No, they didn't, although they didn't address it specifically in the context of the medical-necessity [*38] defense.

Kennedy QUESTION: But you're asking us to uphold that this defense exists in broad general terms, it's a sweeping proposition with no specific plaintiff in front of us, with no specific symptoms or testimony from a doctor as to this person, which --

MR. UELMEN: Well, it may be better.

Kennedy QUESTION: Which led me to question that the whole use of the injunctive power to begin with but so long as we have the injunction, the statutory authority, it seems to me you have to wait for a specific case to raise this defense.

MR. UELMEN: Well, that's our position Justice Kennedy that the availability of the medical-necessity defense should await a criminal prosecution in which the defense is asserted and evidence is presented and --

Kennedy QUESTION: Well, but in the meantime it seems to me that nuisance can be enjoined and if the defendant wants to take his chances on a criminal contempt he can do so.

MR. UELMEN: Well, our contention is that you can decide this Court just based on the traditional discretion that a court of equity has to allow this exception to the injunction.

Rehnquist QUESTION: I think it was pointed out earlier that the district court here whose discretion it is originally granted the injunction [*39] just what the government asked for, and it was the court of appeals who does not have discretion which directed the district court to exercise it in a different way.

MR. UELMEN: Well, the court of appeals was saying that the district court misconceived the law when the court was asked to modify the junction.

QUESTION: And what should we do if we decide that the court of appeals misconceived the law? I mean, what should we do with this case?

MR. UELMEN: Well, if you feel that the court of appeals misconceived the law then of course you're going to have to reverse the court of appeals, but our position is the court of appeals was essentially correct on both grounds, that the court does have discretion to decline to enjoin and these -- this conduct doesn't violate the statute because it comes within this medical necessity defense.

Scalia QUESTION: Mr. Uelmen, let me talk about the medical, I had understood medical-necessity defense, if it existed, to be a defense on the part of the person who is in medical necessity and who uses marijuana or any other prohibited drug when he shouldn't. Now you would extend this also to the person who provides it to any persons who was in such needs.

MR. [*40] UELMEN: That's correct.

Scalia QUESTION: And you would extend it beyond that to someone who opens up a business in order to provide prohibited drugs to people who need them. That's a vast expansion beyond any necessity defense that I've ever heard of before.

MR. UELMEN: Well it's perfectly --

Scalia QUESTION: I've heard of necessity defense on the part of defendant who used it or whatnot, but you're saying by reason of a necessity defense you can open up a business to provide for these necessities.

MR. UELMEN: If it's perfectly consistent with the choice of evils concept of the necessity defense because the person who provides the substance to the patient is also faced with a choice of evils. The case of United States versus Newcomb which we cite in our brief on page 23 makes it very clear that this common law necessity defense extends to the third-party provider as well.

Rehnquist QUESTION: Well, what choice of evils is the provider faced with?

MR. UELMEN: Of letting someone die or violating the law.

Rehnquist QUESTION: Well, of not being able to supply the person. I mean it certainly isn't the provider's responsibility to look after the individual.

MR. UELMEN: Well --

QUESTION: You say letting someone die. [*41]

MR. UELMEN: We're saying the necessity defense permits or justifies this choice even by the provider as well as the patient. Actually the choice of evils defense as described in the model penal code offers this as an example, a druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency.

Scalia QUESTION: But is this is a regular druggist, this is not a druggist who's in the business of providing illegal drugs to people in necessity. I mean you're making a business out of it. I can understand --

MR. UELMEN: It's a very limited business under this injunction which can serve only patients who meet these criteria, and I might point out it's a business in which the government itself has been engaged. The government provides cannabis at the present time to eight patients who meet essentially the criteria of medical necessity and --

Scalia QUESTION: I don't think your example from the model penal code would envision a pharmacist filling a prescription or filling an order for some drug that is on schedule one which no prescription is good for.

MR. UELMEN: Well, we're saying the requirement of a prescription is not a judgment with respect to the availability [*42] of a necessity defense. Even a drug as to which no prescription is permitted --

Scalia QUESTION: It's one thing to say that a state law requiring a prescription for a bunch of drugs can be violated in an emergency. It's another thing to say that a schedule one law which says there's no useful medical purpose for this drug shall be violated.

MR. UELMEN: Well the government's position actually is that there is no necessity defense for any drug under the Controlled Substances Act, and I think it's very important that the court realize that the reason we're here is because the government shut down the only program that could accommodate these patients.

For many years they provided Cannabis and still do for eight patients who come within this medical necessity criteria, and they closed that program down in 1992 and they say in their brief we can do it because we're the Federal Government. You can't do it because you're a private citizen.

Well, we're saying if you won't do it, we can do it because the only justification you have to do it is the same necessity defense that we're asserting and the way the necessity defense works is if a patient comes in and says I have to have this to live and [*43] the court says well, the government has a program. They'll give it to you. Therefore you have a reasonable alternative. You don't have a necessity defense and that's exactly what happened in United States versus Burton the sixth circuit case. A patient with glaucoma comes into court, asserts a necessity defense. The court says you have a reasonable alternative and that patient then goes to the government and they put him on the compassionate IND program and provide him with cannabis. Well, now the government decides we're not going to operate that program anymore and we say if you're not going to do it then we can because the only justification you had to do it was this medical necessity concept.

There is no authorization within the Controlled Substances Act for the government to give Cannabis as medicine to patients and when this program was examined by Congress, and I especially invite the Court to carefully look at the hearings held by Congress on the therapeutic uses of marijuana in schedule one drugs.

The way this program was explained to Congress in 1980 was we are providing Cannabis for medical use by these patients and the reason we're doing it is because of compassion and [*44] because of the therapeutics. That was the explanation given by Congress.

Ginsburg QUESTION: I thought it came out of a settlement of a lawsuit.

MR. UELMEN: It came out of a settlement of a lawsuit where the patient successfully asserted a medical necessity defense and the federal authorities then stepped in and said we will provide you with the Cannabis you need to preserve your sight.

Ginsburg QUESTION: Successfully in what way did the plaintiff get a judgment in that case? You said there was a settlement.

MR. UELMEN: This was after he was acquitted he brought a civil lawsuit and in settlement of that suit this program was established.

Rehnquist QUESTION: Thank you, Mr. Uelmen. General Underwood, you have three minutes remaining.

REBUTTAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF THE PETITIONER

GENERAL UNDERWOOD: A medical necessity defense is foreclosed here not only by the fact that Congress contemplated and rejected it and not only by the fact that alternatives are available but also because any necessity defense is a response to unusual and unforeseen circumstances. It couldn't possibly, the common law necessity defense couldn't possibly authorize an ongoing enterprise designed to stand ready [*45] and provide supplies to people who might show up with their own individual claims of medical necessity.

There's no constitutional problem with the statutory procedure for deciding when and if medical uses for a drug exist where with -- and the court held in Weinberger against Hynson that it's perfectly appropriate for the FDA to reject anecdotal evidence and insist on controlled studies. There's also no problem with protecting sick people from charlatans or unsafe and ineffective drugs as this Court held in Rutherford in dealing with Laetrile the claim that there was a right to use Laetrile.

Respondents in this case have never presented their claims, the claims they're making here, to the FDA. They've never sought review of the classification of marijuana in schedule one, they've never sought access to, at least so far as the record reflects, to the clinical trials that are ongoing right now to deal with synthetic manufacture of components of marijuana, and on the remedy for contempt at the petition appendix at 25 A and again at 37 A it's perfectly clear that the government was not seeking fines or incarceration, that the judge wasn't contemplating fines or incarceration but just [*46] evicting and padlocking, closing down this business.

CHIEF JUSTICE REHNQUIST: Thank you General Underwood. The case is submitted.

(Whereupon, at 12:04 a.m., the case in the above-entitled matter was submitted.)