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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
UNITED STATES, :
Petitioners :
v. : No. 00-151
OAKLAND CANNABIS BUYERS' :
COOPERATIVE AND :
JEFFREY JONES :
- - - - -X

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

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.

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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 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

1 for a court to consider such a claim as a basis for
2 refusing to enjoin the marijuana operations of the
3 cooperative.

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

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

14 Congress anticipated there would be claims of
15 medical uses for controlled substances and provided an
16 administrative procedure for evaluating them allowing
17 trial judges and juries to redetermine that balance in
18 individual cases would undermine the procedure established
19 by Congress.

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

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

11 GENERAL UNDERWOOD: The -- on the assumption
12 that there are no such people because the Food and Drug
13 Administration charged with evaluating the medical -- the
14 scientific information and the DEA, that is the agency
15 that report to the Attorney General and the Secretary of
16 Health and Human Services having evaluated the claims of
17 medical use have found that there is no accepted medical
18 use, that some of the claims of medical use are simply
19 wrong.

20 QUESTION: General Underwood, may I just stop
21 you there because take one of the examples that was in the
22 brief, the one about the man who was constantly vomiting
23 and the only thing that calmed him down, he had a lymphoma
24 or something like that, that is not an uncommon experience
25 and what surprised me about this case was that that kind

1 of thing has been going on, individual doctor prescribing
2 marijuana just to prevent that kind of extreme suffering,
3 and that seemed to have gone without enforcement until
4 California passes this proposition and you get clinics
5 selling it, not individual doctor. Am I wrong in thinking
6 that there has been quite a bit of this going on in the
7 medical profession.

8 GENERAL UNDERWOOD: The record doesn't reflect
9 and I don't know how much of it has been going on. I
10 think there are two things to say in response to that
11 though, one is that the agencies charged with evaluating
12 the medical uses here have ongoing studies and have so far
13 concluded that there are -- that the particular use that
14 you're describing is best served -- there's now an extract
15 of marijuana that's been on the market -- been available
16 and been put on the lower schedule than schedule one for
17 15 or 16 years which is this Marinol and efforts are being
18 made to find other methods of administering the pure
19 substance and determining whether it has the effect that's
20 described.

21 QUESTION: Ms. Underwood, these judgments made
22 by the federal agencies, the FDA and the DEA, I think they
23 take into account the overall public interest, I mean,
24 they -- I'm not sure that they have come to the conclusion
25 that marijuana would never ever, ever be helpful to

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

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

21 There is an additional screen for controlled
22 substances that is in addition to considering and the
23 scheduling decision takes into account not just medical
24 utility but also the potential for abuse, but the FDA's
25 role in it, the Health and Human Services role in it is

1 just to assess or it has a role in simply assessing the
2 medical evidence and has concluded that to date there is
3 insufficient reason to think that it is a safe and
4 effective drug although there are continuing research
5 projects going on to try and pursue the anecdotal
6 information that it is sometimes helpful or that
7 components of marijuana are sometimes helpful.

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

18 GENERAL UNDERWOOD: Well the California law
19 doesn't actually purport to authorize the distribution of
20 marijuana with a doctor's note, it provides a defense to
21 California law. Now it is true that an effort is being
22 made here to invoke the judgment behind that law as in
23 support of the claim of medical necessity, but California
24 didn't purport to create a defense to federal law as it
25 couldn't have if it had tried it would have been

1 presumably preemptive -- preempted. But it's perfectly
2 possible to comply with both California law and federal
3 law. There isn't that kind of conflict here.

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

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

10 QUESTION: All it says you'll be at the mercy of
11 the feds and we won't go after you.

12 GENERAL UNDERWOOD: That's correct. That's
13 correct. And I should say that the decision of the
14 federal agencies not to accept the kind of anecdotal
15 evidence that you're suggesting is a decision that the
16 federal -- the Food and Drug Administration has made again
17 not just in the controlled substance area but it has
18 concluded that the anecdotal reports of individuals are a
19 basis for research, a reason to conduct research and not a
20 basis for authorizing the use of a drug or changing its
21 scheduling.

22 QUESTION: General Underwood, there's some
23 indication in the trial court's observation, he had no
24 choice but to enter this injunction, that's something of
25 an over-reading, but suppose I were the district judge and

1 I said, you know, General Underwood, you want me to
2 basically supervise what's going to be a major effort to
3 prosecute people and you're doing this under my contempt
4 power, I don't want the court to get involved in this, you
5 have your own United States and assistant United States
6 attorneys, you have investigate these, bring these as
7 prosecutions and then we'll hear these cases and if
8 there's a necessity defense or something we can rule on
9 it, but you're basically asking me to issue an injunction
10 and in order to enforce it I'm going to have to make
11 prosecutorial decisions, I don't want to be bothered with
12 that because I think it intrudes upon a separation of
13 powers balance, it's making me more of a prosecutor than a
14 neutral judge. If he said that would he be abusing his
15 discretion.

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

1 does that the executive is not free to choose the
2 enforcement mechanism, the civil enforcement mechanism
3 that --

4 QUESTION: May I ask this question, does the
5 executive, the district attorney have prosecutorial
6 discretion not to bring a case if he thinks a particular
7 defendant really is a person that has this serious illness
8 and so forth.

9 GENERAL UNDERWOOD: There's always prosecutorial
10 discretion.

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

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

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

20 GENERAL UNDERWOOD: Yes it would. The court's
21 role in the process is not the executive's role. The
22 court cannot deny an injunction on the grounds that the
23 executive should for instance have chosen the criminal
24 sanction or should not have brought the case at all. If
25 --

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

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

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

18 GENERAL UNDERWOOD: There's a reason why civil
19 injunctive enforcement is authorized and why it's
20 appropriate. I don't think it's for the court to
21 second-guess the prosecutor but there is a reason. The
22 civil injunctive remedy in this statute was patterned on a
23 similar provision in the Food, Drug and Cosmetic Act, and
24 the purpose of that was to provide a way to resolve legal
25 disputes without the harshness of a criminal prosecution.

1 This is just that kind of dispute, open and ongoing
2 violations of the law designed to test its statute with
3 the California state law in the background, once --
4 there's no reason to think that once a court resolves the
5 question that -- holds, for instance, that there is no
6 medical necessity defense or holds that in any event
7 whatever medical necessity defense there might be doesn't
8 authorize the operations of marijuana pharmacies as in
9 this case, that the Oakland Cannabis Buyers' Cooperative
10 won't comply with the law.

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

21 If the trial court in fact were to conclude that
22 that is the reason and that's why the injunctive remedy
23 was being invoked, would that be a good reason for the
24 court to say it is not certainly a necessary and maybe not
25 an appropriate use of equity to give the government an

1 alternative to six month or less sentences for criminal
2 contempt in order, in effect, to make a criminal statute
3 enforceable which in the normal criminal course is not.
4 Would that be an abuse of discretion?

5 GENERAL UNDERWOOD: Not if the statute
6 authorizes a civil injunctive remedy and -- but I would
7 like --

8 QUESTION: It would not be an abusive --

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

11 QUESTION: You scared me there for a minute.

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

20 QUESTION: No matter what the lengths of
21 sentence requested?

22 GENERAL UNDERWOOD: Yes.

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

25 GENERAL UNDERWOOD: No.

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

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

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

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

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

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

23 QUESTION: There's one aspect of this General
24 Underwood that Respondent says and this I think you might
25 know the answer to, Respondent says that overwhelmingly

1 this Act is enforced by a criminal prosecution rather than
2 civil injunction. And do you know that, what is the
3 enforcement practice with respect to the CSA.

4 GENERAL UNDERWOOD: I know that civil
5 injunctions have been used on other -- exactly on
6 occasions under this statute as well as under other
7 statutes where there is a business enterprise going on
8 that has a dispute with the government about whether what
9 they're doing is outside the statute. I don't think it's
10 --

11 QUESTION: Romero-Barcelo was a civil injunction
12 in connection with the EPA, wasn't it?

13 GENERAL UNDERWOOD: That's correct but -- and
14 under this statute in particular though the Controlled
15 Substances Act it is not customary to seek injunctions
16 against street dealers of narcotics but it is customary to
17 seek injunctions against, for instance, manufacturing
18 plants that are claiming that their use of particular
19 chemicals is -- what they're doing is within the Act or
20 without the Act, I mean, when there is essentially a
21 dispute with the business enterprise about the legality
22 and propriety of what they're doing and that is actually
23 not just under the Controlled Substances Act but under
24 many statutes, the kind of occasion when an injunction is
25 used to resolve the legal dispute on the assumption that

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1 once that legal dispute is resolved it will not be
2 necessary to seek further enforcement but there will be --

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

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

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

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

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

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

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

25 QUESTION: Yes but those are cases where there's

1 a legitimate difference of opinion on whether there was a
2 violation of law. Your view here that violation of law is
3 so obvious and clear that there isn't even any colorable
4 argument to the contrary.

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

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

23 GENERAL UNDERWOOD: For example, here, where we
24 are arguing where it is our position that there simply is
25 no medical-necessity defense at all and therefore that one

1 shouldn't be entertaining evidence and adjudicating the
2 appropriateness of a medical-necessity defense in a
3 particular case, the way to get that resolved systemically
4 is in a civil -- a civil proceeding that simply presents
5 that legal question.

6 QUESTION: Then you do want us to rule on the
7 issue that the Ninth Circuit -- you're ruling just as a
8 general matter that there's no medical-necessity defense.

9 GENERAL UNDERWOOD: It is a part of our argument
10 --

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

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

25 QUESTION: Well, then you're very pleased with

1 what the Ninth Circuit did in one sense because now you
2 can get the issue resolved up here.

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

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

7 QUESTION: Out of evil cometh good, General
8 Underwood, isn't that wonderful.

9 GENERAL UNDERWOOD: Pardon me?

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

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

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

24 GENERAL UNDERWOOD: That's correct.

25 QUESTION: General Underwood, what is the

1 penalty for violating an injunction?

2 GENERAL UNDERWOOD: The statute calls for
3 enforcement by contempt.

4 QUESTION: Would be criminal contempt?

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

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

9 GENERAL UNDERWOOD: Yes, I said earlier the
10 defendant by statute is entitled to a jury.

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

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

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

23 QUESTION: But the juries -- there can be a
24 criminal contempt proceeding if the injunction is violated
25 under the statute, correct? Something was said a minute

1 ago about its being just a civil jury. The U.S. attorney
2 could bring criminal contempt if someone violated it and I
3 thought your answer was under the statute even if it's
4 criminal contempt and the penalty would be -- the penalty
5 requested would be within the minor offense range, they'd
6 still get a jury trial and that was the answer to my
7 suggestion.

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

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

18 GENERAL UNDERWOOD: Want to stop it from
19 engaging in the unlawful distribution of marijuana, it
20 might have some other business, but I don't believe the
21 Oakland Cannabis Buyers' Cooperative at the moment is
22 engaged in other businesses, and as I've said, that's the
23 dispute that we have with the Oakland Cannabis Buyers'
24 Cooperative about whether what they're doing is lawful or
25 not is one that is ideally suited to resolution in a civil

1 -- in a civil litigation. I think I'll reserve the rest
2 of my time for rebuttal.

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

5 ORAL ARGUMENT OF GERALD F. UELMEN
6 ON BEHALF OF THE RESPONDENTS

7 MR. UELMEN: Mr. Chief justice and may it please
8 the Court:

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

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

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

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

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

1 QUESTION: You mean for a criminal contempt?

2 MR. UELMEN: For a civil contempt.

3 QUESTION: What about criminal?

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

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

9 MR. UELMEN: No. I believe they could be fined.

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

14 MR. UELMEN: If you refuse to --

15 QUESTION: Right.

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

19 QUESTION: Did they ask for a jury trial?

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

25 QUESTION: And what was the penalty that was

1 being requested, was the penalty a fine or cumulative
2 incarceration?

3 MR. UELMEN: No fine was imposed.

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

8 MR. UELMEN: No, the government asked that the
9 sheriff or the marshal seize the premises in which the
10 business was being operated and of course the Respondents
11 were at risk of incarceration if they remained in
12 contempt.

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

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

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

24 MR. UELMEN: Absolutely.

25 QUESTION: Okay.

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

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

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

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

22 MR. UELMEN: He did not in this case because the
23 Respondents agreed to refrain from the conduct, the
24 contempt was purged ultimately, but if the -- if the
25 Respondents insisted on continuing their operation in

1 violation of the injunction, they could have been jailed.

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

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

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

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

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

25 QUESTION: To say this civil action should not

1 have been brought, I disagree with the United States
2 attorney that this civil action which is authorized --
3 which he's authorized to bring under the statute should
4 have been brought and therefore I will nullify it, you
5 think a court has that power.

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

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

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

1 to exercise its jurisdiction --

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

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

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

20 MR. UELMEN: Well, first of all, by declining to
21 enjoin, the court is not allowing the violations to
22 continue because the government still has the option of
23 initiating a criminal prosecution at any time and that's
24 --

25 QUESTION: It seems to me what happened here is

1 that it originally went to a federal district court judge
2 who granted an injunction and then it was appealed --

3 MR. UELMEN: That's correct.

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

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

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

20 MR. UELMEN: Well, it's not a blanket defense,
21 Your Honor, in is the sense that every Respondent who
22 wishes to take advantage of it is going to have to show
23 that they are suffering from a serious medical condition,
24 that they face imminent harm of death or blindness, that
25 cannabis will alleviate their condition and that they have

1 no reasonable alternative, that everybody alternative
2 available has been tried and found ineffective for them so
3 --

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

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

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

22 MR. UELMEN: Well our contention is that --

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

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

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

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

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

21 MR. UELMEN: The criteria for placement on
22 schedule one or movement off of schedule one when it's
23 done administratively by the DEA are set forth in Section
24 812 and those criteria do include no currently accepted
25 medical use, but Congress itself put cannabis on schedule

1 one, so it wasn't bound by those criteria.

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

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

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

20 MR. UELMEN: That's right.

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

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

1 prescription.

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

4 MR. UELMEN: Well, by putting it on schedule one
5 they're saying you can't -- you can't use it by
6 prescription, now when a doctor issues a prescription all
7 he's concluding is that this will help you, he's not
8 required to conclude that you have no other alternative.
9 He's not required to conclude you have a serious condition
10 and you may die or go blind if you don't have this
11 medicine, all he's got to say is, this will help you,
12 here's a prescription, go get it and take it. But the
13 medical-necessity defense requires much more. It requires
14 a conclusion that the patient is facing a serious medical
15 crisis.

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

18 MR. UELMEN: Well, calling it medical necessity
19 --

20 QUESTION: Well, I asked you a question.

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

25 QUESTION: That's based on common law, is it

1 not?

2 MR. UELMEN: Yes, it is.

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

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

10 QUESTION: Or from its placement on schedule
11 one.

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

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

23 MR. UELMEN: That is absolutely correct. This
24 defense should be available to any patient in any state
25 regardless of whether that state has approved under

1 broader conditions the general use of cannabis as
2 medication.

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

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

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

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

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

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

25 QUESTION: How serious does your medical

1 condition have to be? I mean, I gather cannabis is not a
2 life-saving drug. It alleviates great pain and
3 discomfort.

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

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

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

15 QUESTION: What sort of harm?

16 MR. UELMEN: Death, starvation, blindness.

17 QUESTION: Stomachache?

18 MR. UELMEN: No.

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

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

24 QUESTION: You have to add some adjective to
25 just imminent harm, you want imminent life-threatening

1 harm, imminent what? You want to exclude a stomachache
2 and an earache maybe.

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

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

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

16 QUESTION: May I just ask you a question? I take
17 it there was no constitutional litigation below that
18 you're raising the constitutional issue here on the
19 constitutional avoidance rationale.

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

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

25 MR. UELMEN: It was argued in the context of the

1 broader motion to dismiss, but with respect to the
2 medical-necessity issue that's before this Court, our
3 position is that if this statute is construed to preclude
4 a medical-necessity defense under these circumstances
5 where the patient faces loss of life or loss of sight
6 there would be a violation of a substantive due process
7 right --

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

10 MR. UELMEN: We did, we did.

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

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

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

18 MR. UELMEN: No, they didn't, although they
19 didn't address it specifically in the context of the
20 medical-necessity defense.

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

1 MR. UELMEN: Well, it may be better.

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

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

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

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

19 QUESTION: I think it was pointed out earlier
20 that the district court here whose discretion it is
21 originally granted the injunction just what the government
22 asked for, and it was the court of appeals who does not
23 have discretion which directed the district court to
24 exercise it in a different way.

25 MR. UELMEN: Well, the court of appeals was

1 saying that the district court misconceived the law when
2 the court was asked to modify the junction.

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

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

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

21 MR. UELMEN: That's correct.

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

1 heard of before.

2 MR. UELMEN: Well it's perfectly --

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

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

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

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

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

21 MR. UELMEN: Well --

22 QUESTION: You say letting someone die.

23 MR. UELMEN: We're saying the necessity defense
24 permits or justifies this choice even by the provider as
25 well as the patient. Actually the choice of evils defense

1 as described in the model penal code offers this as an
2 example, a druggist may dispense a drug without the
3 requisite prescription to alleviate grave distress in an
4 emergency.

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

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

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

20 MR. UELMEN: Well, we're saying the requirement
21 of a prescription is not a judgment with respect to the
22 availability of a necessity defense. Even a drug as to
23 which no prescription is permitted --

24 QUESTION: It's one thing to say that a state
25 law requiring a prescription for a bunch of drugs can be

1 violated in an emergency. It's another thing to say that
2 a schedule one law which says there's no useful medical
3 purpose for this drug shall be violated.

4 MR. UELMEN: Well the government's position
5 actually is that there is no necessity defense for any
6 drug under the Controlled Substances Act, and I think it's
7 very important that the court realize that the reason
8 we're here is because the government shut down the only
9 program that could accommodate these patients. For many
10 years they provided Cannabis and still do for eight
11 patients who come within this medical necessity criteria,
12 and they closed that program down in 1992 and they say in
13 their brief we can do it because we're the Federal
14 Government. You can't do it because you're a private
15 citizen.

16 Well, we're saying if you won't do it, we can do
17 it because the only justification you have to do it is the
18 same necessity defense that we're asserting and the way
19 the necessity defense works is if a patient comes in and
20 says I have to have this to live and the court says well,
21 the government has a program. They'll give it to you.
22 Therefore you have a reasonable alternative. You don't
23 have a necessity defense and that's exactly what happened
24 in United States versus Burton the sixth circuit case. A
25 patient with glaucoma comes into court, asserts a

1 necessity defense. The court says you have a reasonable
2 alternative and that patient then goes to the government
3 and they put him on the compassionate IND program and
4 provide him with cannabis. Well, now the government
5 decides we're not going to operate that program anymore
6 and we say if you're not going to do it then we can
7 because the only justification you had to do it was this
8 medical necessity concept.

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

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

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

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

1 to preserve your sight.

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

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

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

10 REBUTTAL ARGUMENT OF BARBARA D. UNDERWOOD

11 ON BEHALF OF THE PETITIONER

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

22 There's no constitutional problem with the
23 statutory procedure for deciding when and if medical uses
24 for a drug exist where with -- and the court held in
25 Weinberger against Hynson that it's perfectly appropriate

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1 for the FDA to reject anecdotal evidence and insist on
2 controlled studies. There's also no problem with
3 protecting sick people from charlatans or unsafe and
4 ineffective drugs as this Court held in Rutherford in
5 dealing with Laetrile the claim that there was a right to
6 use Laetrile.

7 Respondents in this case have never presented
8 their claims, the claims they're making here, to the FDA.
9 They've never sought review of the classification of
10 marijuana in schedule one, they've never sought access to,
11 at least so far as the record reflects, to the clinical
12 trials that are ongoing right now to deal with synthetic
13 manufacture of components of marijuana, and on the remedy
14 for contempt at the petition appendix at 25 A and again at
15 37 A it's perfectly clear that the government was not
16 seeking fines or incarceration, that the judge wasn't
17 contemplating fines or incarceration but just evicting and
18 padlocking, closing down this business.

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

21 (Whereupon, at 12:04 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25