

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROBERT A. BECK, Petitioner v. RONALD M. PRUPIS,
ET AL.

CASE NO: No. 98-1480 e. l

PLACE: Washington, D.C.

DATE: Wednesday, November 3, 1999

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Supreme Court U.S.

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UNITED STATES
OF THE
CAPTION: ROBERT A. BLOK V. UNITED STATES
CASE NO. 00-1480-1
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PAGES: 11-12
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT A. BECK, II, :
4 Petitioner :
5 v. : No. 98-1480
6 RONALD M. PRUPIS, ET AL. :

7 - - - - - X
8 Washington, D.C.
9 Wednesday, November 3, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 JAY STARKMAN, ESQ., Miami, Florida; on behalf of the
15 Petitioner.

16 MICHAEL M. ROSENBAUM, ESQ., Short Hills, New Jersey; on
17 behalf of the Respondents.

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(10:03 a.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 98-1480, Robert A. Beck v.
5 Ronald Prupis.

6 Mr. Starkman.

7 ORAL ARGUMENT OF JAY STARKMAN

8 ON BEHALF OF THE PETITIONER

9 MR. STARKMAN: Mr. Chief Justice, and may it
10 please the Court:

11 This case, like many cases previously before
12 this Court, begins and ends with the language that
13 Congress chose to use in RICO. Section 1964(c) does not
14 provide a civil remedy only for predicate acts as defined
15 in section 1961. Congress also did not draft section
16 1964(c) to provide civil remedies only for violations of
17 1962(a), (b), and (c), or, for that matter, only for
18 violations of 1962(c).

19 Congress drafted section 1964(c) in plain and
20 unambiguous terms to provide a civil remedy for all four
21 of the subsections of section 1962, and that includes
22 1962(d), conspiracies to violate RICO.

23 The petitioner here, Robert Beck, was injured by
24 reason of a violation of section 1962(d), a conspiracy to
25 violate RICO, and under the plain and unambiguous terms of

1 that statute, that is all that is required to provide him
2 with a civil remedy.

3 QUESTION: Well, he wasn't injured by the
4 formation of the agreement, and that was the conspiracy.

5 MR. STARKMAN: Yes, that's correct, he's not
6 injured --

7 QUESTION: And that's all the conspiracy was.

8 MR. STARKMAN: The conspiracy itself, though,
9 has several objects.1 One of the objects -- well, the
10 objects are obviously to violate the substantive sections
11 of that statute, but overall the conspiracy was, let's
12 shake down contractors, let's commit fraud, and let's hide
13 it all, get money, invest it in the enterprise.

14 As that conspiracy develops, though, as with all
15 conspiracies, the object has to expand, and it has to
16 include getting rid of Beck, who stood in the way of that
17 conspiracy continually. He was a threat to the very
18 existence of the conspiracy. He actually was more
19 important than one of the victims of the 100 of predicate
20 acts.

21 I mean, one contractor who's shaken down, he
22 could sue through RICO, but which is more vital to the
23 continuance of the conspiracy, that person, or Beck, a
24 person who could have brought the entire conspiracy down.

25 QUESTION: Well, let's say that we rule against

1 you on this point. Predicate acts still are committed
2 sometimes in concert with others, in joint participation.
3 The standard law of torts would give recovery for that in
4 most instances, so you wouldn't really need the conspiracy
5 section for vicarious liability, or for joint liability.

6 MR. STARKMAN: But here, the way that the
7 statute was drafted, Justice Kennedy, the statute itself
8 created four separate causes of action, and this Court in
9 Salinas defined the words, to conspire, which only appear
10 in the statute once, as being this criminal animal.

11 QUESTION: Well, that was a criminal case, was
12 it not, Salinas?

13 MR. STARKMAN: Yes, sir, but just because those
14 words are defined in a criminal context, they shouldn't
15 have a different meaning in another section when that
16 other section refers to them.

17 QUESTION: Well, you say it creates four
18 separate causes of action, but that's the issue, does it?

19 MR. STARKMAN: It is the -- well, it's the way
20 the statute's written, though. The plain language of the
21 statute provides a forbidden activities, or prohibited
22 activities in (a), (b), (c), and (d), and all of these
23 were new causes of action that had to be created.

24 In Commonwealth, for example, there was no civil
25 action for investment of proceeds from racketeering

1 activity to acquire control in an entity.

2 QUESTION: Well, all of those were criminal
3 acts. The question here is whether they were all causes
4 of action.

5 MR. STARKMAN: The question here --

6 QUESTION: I mean, you're just stating the
7 conclusion when you say that.

8 MR. STARKMAN: The question here, Justice
9 Kennedy, is whether or not 1964(c) provides a civil remedy
10 for each of those causes of action.

11 QUESTION: Well, they could provide a remedy for
12 (d) without necessarily providing a remedy that gives you
13 recovery here.

14 You use the word conspiracy as what is outlawed
15 by 1962(d). The noun conspiracy really can have two
16 different meanings. It can refer to the act of
17 conspiring, or it could refer to the confederation formed
18 by the act of conspiring, you see. You know, saying he's
19 part of the conspiracy, the group of -- 1962(d) does not
20 use the noun conspiracy. It uses the verb, which really
21 has only one meaning. It shall be unlawful for any person
22 to conspire to violate, so the act of violating (d) is the
23 act of conspiring.

24 MR. STARKMAN: Yes, sir.

25 QUESTION: Now, how has your client been harmed

1 by the act of conspiring, directly harmed by the act of
2 conspiring?

3 MR. STARKMAN: Section 1964(c) requires an
4 injury committed by reason of this section.

5 QUESTION: By reason of a violation of 62.

6 MR. STARKMAN: Yes, and that violation, the
7 conspiracy --

8 QUESTION: You're using the noun again. Stick
9 with the verb. How did the conspiring, the formation of
10 that agreement harm your client?

11 MR. STARKMAN: There had to be overt acts that
12 are performed as a result of that these people conspire in
13 order to trigger 1964(c)'s injury requirement.

14 QUESTION: That may well be, and he may have
15 been injured by the overt act, but I don't see how he was
16 injured by the violation of (d), which is the conspiring.

17 MR. STARKMAN: In order to have this conspiring
18 of people, they have to have an object, which is the three
19 subsections of -- the three prior subsections of 1962.
20 That object expands. The conspiring has as one of its
21 goals, let's get rid of this guy, who is in the way of
22 this conspiracy. It is one of the agreements that they
23 make. They put that agreement into action by getting rid
24 of Beck, and once they do that --

25 QUESTION: Well, that's further down the line,

1 though. I mean, we're talking about directly injured, and
2 you could say, sure, you know, the act of conspiring had
3 as its object this, and in pursuing that object they
4 injured your client, but that's further down the line.

5 MR. STARKMAN: No, it's directly down the line,
6 Justice Scalia, from the decision that's made in the
7 conspiracy that we have to continue with this conspiracy,
8 and to do that we have to get rid of this person.

9 In order to get rid of him, they have to
10 terminate him, and wrongfully. Once they do that, he is
11 injured by the act of conspiring, by the agreement that
12 they have made to continue this pattern of criminal acts,
13 the pattern of racketeering, to do all of the things that
14 they were doing. This injury is directly related to the
15 conspiracy. This is not some incidental bystander.

16 For example, I think in the Seventh Circuit they
17 use the example of somebody driving to rob a bank and
18 hitting one of the --

19 QUESTION: But it wasn't one of the predicate
20 acts.

21 MR. STARKMAN: No.

22 QUESTION: I mean, your argument for direct
23 results of the conspiracy would be much stronger if,
24 indeed, it was one of the predicate acts.

25 MR. STARKMAN: Yes, it would, Justice Scalia,

1 but there's no basis to make a distinction between overt
2 acts committed in furtherance of the conspiracy and
3 predicate acts committed in furtherance of the conspiracy
4 when we're under 1962(d).

5 QUESTION: If we're under (d), right?

6 MR. STARKMAN: If we're under (d), and here
7 that's all that we're under. Here, we are arguing whether
8 or not the 1962(d) violation proximately caused injury to
9 this individual, and under any of the definitions of
10 proximate cause, whether it be direct, as was articulated
11 in Holmes, or foreseeable consequences, intended
12 consequences, lack of intervening causes, all of those
13 tests are satisfied when the injury is directly related to
14 the core, if you will, of this conspiracy.

15 QUESTION: What do you say about, is the -- the
16 language of 1964(c) is very similar to the private treble
17 damage antitrust suit.

18 MR. STARKMAN: Yes, sir.

19 QUESTION: And can a whistleblower bring an
20 antitrust suit against a group of price fixers?

21 MR. STARKMAN: Probably not.

22 QUESTION: Not, all right, so how -- what's the
23 distinction?

24 MR. STARKMAN: The distinction is an antitrust.
25 The rationale used by all of the lower courts that fits is

1 that there is a requirement of antitrust injury in an
2 antitrust action. Antitrust injury requires an analysis
3 to make sure that the violation is being caused by that
4 which the antitrust laws --

5 QUESTION: So I thought perhaps this -- your
6 opponents are basically saying -- it's the same concept
7 that's here. It's not literally the same, but it's the
8 same idea. It's really -- this statute's aimed at
9 substantive violations, giving people treble damages for
10 those, not for these other things.

11 MR. STARKMAN: That is what my opponents are
12 saying in this case. However, that policy rationale that
13 underlies the reasons for not allowing antitrust
14 whistleblowers to sue doesn't apply in RICO. There is no
15 countervailing policy to --

16 QUESTION: But Mr. Starkman, it does undercut
17 your plain meaning. If it doesn't have a plain meaning in
18 an antitrust concept, context, if there is the core
19 antitrust injury explanation, then why can't there also be
20 here a RICO-related interpretation?

21 In other words, if we reject your plain meaning,
22 isn't it appropriate for the Court to take into account
23 the presumption that Congress does not mean to sweep too
24 deeply into what is traditionally a domain of State law?

25 MR. STARKMAN: There are three answers to that,

1 Justice Ginsburg. First, it was not Congress' desire to
2 only eliminate predicate acts. Those were already
3 illegal. Congress was going further, to supplement
4 existing State remedies, and attacking organized crime.

5 There was a need, Congress felt, to go beyond
6 what was already existing, so it only federalized the RICO
7 enterprise itself, and it used language that was broad but
8 not ambiguous.

9 QUESTION: I find it ironic that you're
10 appealing to what Congress intended, and you tell us it
11 intended to reach organized crime, which indeed I think it
12 did, which -- you know, I view that as people in pin-
13 striped suits carrying machine guns, and here you're going
14 after people in doctor's robes carrying scalpels. I --
15 why should I interpret RICO any more broadly than I
16 absolutely must, given the fact that it has misfired so
17 much from what it was aimed at?

18 MR. STARKMAN: We only need to go so far as what
19 the language itself says. This Court has repeatedly
20 refused to write in requirements that don't exist in the
21 statute in order to satisfy this concern that this statute
22 is misfiring.

23 For example, in National Organization of Women
24 v. Scheidler, this Court refused to write in an economic
25 motive requirement because the statute -- and the lower

1 court did, because it was concerned for this very reason,
2 that the statute was going too far.

3 But the language of RICO didn't require that,
4 and in Sedima this Court refused to put into RICO the
5 requirement that we're talking about here, which is the
6 racketeering injury.

7 QUESTION: I don't think it reads in anything to
8 say that you have not been hurt by the conspiring. I
9 think it reads in something to say, well, you may not have
10 been hurt by the conspiring, but the conspiring had as its
11 purpose something else, and you have been hurt by the
12 furtherance of that purpose. If I read it as narrowly as
13 it must be read, it seems to me you haven't been hurt by
14 the conspiring.

15 MR. STARKMAN: But the conspiring is not just
16 the conspiring to commit the predicate acts that happens
17 when they first sit down, Justice Scalia. The conspiring
18 has to continue throughout the life of this conspiracy,
19 and this person that is injured is injured directly by the
20 conspiring. He is injured because the conspiring has had
21 to make one its goals, we need to get rid of this guy,
22 because if we don't, this conspiring is not going to be
23 able to continue.

24 QUESTION: Well, I think you're right, I think
25 the strongest argument -- incidentally, I don't think it's

1 your opponent who makes the argument about the conspiring.
2 It's one of the amicus, as I recall.

3 MR. STARKMAN: Yes, sir, Washington Law
4 Foundation.

5 QUESTION: And the weakest point of that
6 argument, it seems to me, which the amicus is willing to
7 accept, is that if that argument is right, you would not
8 only -- your client would not only be not able to recover
9 for a -- an act that is in furtherance of the conspiracy
10 but not one of the predicate acts --

11 MR. STARKMAN: Uh-huh.

12 QUESTION: -- your client wouldn't even be able
13 to recover for a predicate act.

14 MR. STARKMAN: Yes.

15 QUESTION: And you say that deprives (d) of all
16 of its meaning.

17 MR. STARKMAN: Which it does.

18 QUESTION: But why does it deprive (d) of all of
19 its meaning? I mean, it seems to me conspiracy law has
20 two effects. Number 1, it makes the act of conspiring
21 unlawful, so that you can prosecute even before there's
22 been any crime. The act of conspiring becomes a crime.
23 That's one effect.

24 The second effect is that all of the people who
25 are in the conspiracy can be held liable for the effects

1 of the conspiracy.

2 Now, why doesn't it give (d) enough of an effect
3 to say that it continues to have in the civil context that
4 second consequence?

5 MR. STARKMAN: Because, Justice Scalia, in order
6 to do that, we have to take the words, to conspire, and
7 give them two completely different meanings in two
8 different sections. Those words, to conspire, are defined
9 as being the first of the two situations that Your Honor
10 described, the act of conspiring, this conspiracy animal,
11 and what 1964(c) does is gives a civil remedy for that
12 conspiracy that is pernicious and overrides the --

13 QUESTION: But I'm not giving them two different
14 meanings. I'm perfectly willing to say that it means the
15 same thing. I am just responding to your argument that
16 (d) has no effect, and I think you're right that one of
17 the consequences of conspiracy law would have very little
18 effect under (d). It would be very rare that the mere
19 conspiring would harm anybody. I concede that.

20 However, the other effect of (d) would still be
21 considerable, namely, where there is an injury under (a),
22 (b), and (c), it's not only the person who actually
23 committed that injury who is held liable under RICO, but
24 all of the co-conspirators. That seems to me to be quite
25 an adequate scope of operation for (d).

1 MR. STARKMAN: It is a procedural device, then.
2 We are relegating 1962(d), rather than providing a civil
3 remedy that expands plaintiffs' abilities to bring suits,
4 we are changing it to be a procedural device that
5 identifies defendants that can be named, and that is not
6 what 1964(c) provides.

7 1964(c) by its title provides civil remedies,
8 and identifies any person who is able to sue under its
9 provisions, and here any --

10 QUESTION: Although that is the usual
11 consequence of conspiracy law in the civil context.

12 MR. STARKMAN: Yes.

13 QUESTION: It renders more people liable. It
14 doesn't render acts unlawful that are otherwise not
15 unlawful.

16 MR. STARKMAN: Yes, Justice Scalia, but here,
17 1962(d) is identified as one of the prohibited conduct,
18 areas of conduct, and in Salinas this Court defined what
19 that was, and all 1964(c) says, its plain language is that
20 we are going to recognize a civil remedy, a civil action
21 for that criminal violation. That's the plain meaning of
22 this statute. That is what it says.

23 And in Holmes this Court restricted the reach of
24 1962(d), as well as all of RICO, by placing in the time-
25 tested solution for this problem of endless ripples of

1 civil liability, proximate cause. There is no need to
2 make a distinction between predicate acts committed in
3 furtherance of a conspiracy and overt acts committed in
4 furtherance of a conspiracy.

5 QUESTION: May I ask in that connection, how
6 significant to your case is it that there may be a
7 whistleblower involved? On your theory, does it matter
8 whether he's a whistleblower or not?

9 MR. STARKMAN: I think it does, Justice Stevens,
10 but it's not crucial. The crucial point is that he is a
11 threat to the continuing viability of this conspiracy.

12 QUESTION: Is that because he's a whistleblower,
13 or independent of his possibility of doing any
14 whistleblowing?

15 MR. STARKMAN: It's independent, because for
16 example, if they were just retaliating, and this
17 whistleblower -- for blowing the whistle, first it's not
18 in furtherance of the conspiracy, but it's also not
19 proximately caused by the conspiracy, so it's not the
20 fundamental issue of whistleblowing. It is that this
21 person has become a threat, and in order to deal with --

22 QUESTION: What under the allegations of the
23 complaint, what was the nature of his threat?

24 MR. STARKMAN: That he could cause the
25 conspiracy to cease to exist. He stood in the way of

1 predicate acts being committed. He stood in the way of
2 the continuation of the conspiracy. The directors --

3 QUESTION: Would you translate that to facts
4 instead of sort of a general -- what did he do that
5 prevented the conspiracy from being consummated?

6 MR. STARKMAN: Well, one thing he did was,
7 report this to the regulators. Another thing he did --

8 QUESTION: But if he's already done that --

9 MR. STARKMAN: He began to report it to the
10 regulators. He had not finished reporting everything,
11 and --

12 QUESTION: And your notion is that by firing him
13 they would prevent him from reporting facts to the
14 regulators?

15 MR. STARKMAN: No. No, Justice Stevens. My
16 notion is that what happened here, one of the key facts is
17 that they wanted to start looting this company. They
18 wanted to start taking money out, and Mr. Beck stood in
19 the way of that.

20 He said no, you can't do that, and I'm not going
21 to let you, and what they did thereafter was get rid of
22 him, and then right after they got rid of him, within
23 months, they commit these very predicate acts that he was
24 preventing before, this theft of money from the lower --
25 from the subsidiaries, this -- and they were then able to

1 continue the things that he was starting --

2 QUESTION: Would you say, in an analogy, as
3 Justice Breyer suggested to the antitrust cases, is this
4 like firing a salesman who refuses to go to price-fixing
5 meetings?

6 MR. STARKMAN: No, it's not, because there you
7 again have -- well, it is on some levels, but the analogy
8 isn't apropos because you have the antitrust injury
9 requirement, which this Court has rejected in the RICO
10 context. The reason that that salesperson who doesn't go
11 to the meetings doesn't have standing under the
12 antitrust --

13 QUESTION: Well, you say that we've rejected the
14 antitrust injury concept in RICO. Have we expressly
15 rejected it?

16 MR. STARKMAN: Yes, sir.

17 QUESTION: In Sedima?

18 MR. STARKMAN: In Holmes.

19 QUESTION: In Holmes?

20 MR. STARKMAN: It was actually stated in a
21 footnote that -- and this is almost a literal quote -- the
22 antitrust injury requirement has no analogue to the -- to
23 RICO, and it was for this very reason that there is no
24 underlying, or there's no countervailing policy to promote
25 racketeering that would work in the RICO setting.

1 QUESTION: So it's any injury that is a
2 consequence of an act that's necessary for the completion
3 of the conspiracy.

4 MR. STARKMAN: If that satisfies proximate
5 cause.

6 QUESTION: Yes, well, okay.

7 MR. STARKMAN: Because proximate cause can go
8 further.

9 QUESTION: Let's assume that in order to
10 complete their scheme they have to close one factory and
11 give the business of that factory to another factory, and
12 they do it. They shut down the factory. I assume that
13 everyone who loses a job in factory A has a RICO cause of
14 action.

15 MR. STARKMAN: No.

16 QUESTION: Why not?

17 MR. STARKMAN: Because they would not be direct
18 victims.

19 QUESTION: Why wouldn't they be direct victims?

20 MR. STARKMAN: Because --

21 QUESTION: It is essential to the scheme that
22 you close A, just as it was essential to their scheme
23 here, according to your complaint, that they get rid of
24 your client.

25 MR. STARKMAN: The factory is the nearest

1 analogy to Beck. The employees at the factory are one
2 step removed. They're incidental. They are not the
3 direct victims, so if the factory --

4 QUESTION: They hurt the factory?

5 MR. STARKMAN: Let's assume the factory was a
6 separate subsidiary, because then I think it makes a
7 little more sense. Otherwise, we get into these proximate
8 cause problems.

9 But what Your Honor is fleshing out is whether
10 or not the overt act has to be wrongful, if it is
11 crucial --

12 QUESTION: Take the factory out of the picture.
13 In order to effectuate the scheme, they have to get rid of
14 one group of executives and put the business in question
15 with another group of executives, so they get rid of the
16 first group of executives.

17 All of those executives who were fired were
18 fired by an act in furtherance of the conspiracy. They
19 would all have a cause of action.

20 MR. STARKMAN: Yes, because they are proximately
21 injured by the act of conspiring.

22 QUESTION: But if they were executives of the
23 factory --

24 MR. STARKMAN: If the --

25 QUESTION: -- they wouldn't have a cause of

1 action.

2 MR. STARKMAN: Assuming the factory is a
3 separate animal, that it's a separate company, then the
4 company would have that action. For example, let's assume
5 in your hypothetical --

6 QUESTION: I assume these were executives of a
7 separate company.

8 MR. STARKMAN: No, because --

9 QUESTION: Then they wouldn't have a cause of
10 action.

11 MR. STARKMAN: No, I don't believe so, sir,
12 because I don't think that their injury is direct. I
13 believe at that point there are attenuating circumstances
14 in the chain of causation, and that is the proper
15 analysis.

16 The distinction is not whether or not it's an
17 overt act, or whether or not it's a predicate act. The
18 distinction is whether or not their injury is proximately
19 caused by the conspiracy.

20 QUESTION: But I take it on Justice Scalia's
21 hypothetical if you don't interpose the subsidiary
22 structure, if they simply close the factory that's part of
23 their operation, every employee in the factory would have
24 the RICO cause, for the same reason that the executives
25 would in the second hypo.

1 MR. STARKMAN: I think so, Justice Souter.

2 QUESTION: Yes.

3 MR. STARKMAN: I think so under the plain
4 language of the statute.

5 The statute provides that any person injured by
6 reason of, which is proximately injured, by the violation,
7 here the violation is the conspiracy, and the only
8 analysis then, I think, under the plain meaning of the
9 statute, is whether or not those people who lose their
10 jobs proximately lost their jobs as a result of the
11 conspiracy, not as a result of the overt act of closing
12 the factory, because if that's the analysis, then
13 everything would fall into this category.

14 The question is whether or not it is proximately
15 caused by the violation. Here, the violation is the act
16 of conspiring.

17 QUESTION: I find it --

18 QUESTION: I'm sorry.

19 QUESTION: No, no, it's your question.

20 QUESTION: As I understand it, when you say the
21 conspiracy, you mean by conspiracy an agreement to do
22 everything that is necessary, ultimately to effect a
23 predicate act.

24 MR. STARKMAN: Ultimately to effect the objects
25 of the conspiracy.

1 QUESTION: Which is ultimately a predicate act.

2 MR. STARKMAN: Maybe, and maybe not.

3 QUESTION: Well, it must include a predicate
4 act. All right, I -- yes. Yes, I understand your point.
5 Yes.

6 MR. STARKMAN: Ultimately --

7 QUESTION: Yes.

8 MR. STARKMAN: -- the object has to be to invest
9 the proceeds, for example, of the predicate acts.

10 QUESTION: Yes.

11 MR. STARKMAN: Or to acquire control of the
12 enterprise, or the situation which would come the closest
13 here, 1962(c), which is the conducting of the affairs of
14 the enterprise through a pattern. As long as those are
15 the objects -- those have to be the objects.

16 QUESTION: Yes.

17 MR. STARKMAN: Then the overt acts, or -- that
18 are taken, that are necessary, to use Your Honor's words,
19 or the heart, or the goal, would --

20 QUESTION: Reasonably necessary.

21 MR. STARKMAN: Reasonably.

22 QUESTION: Yes.

23 MR. STARKMAN: But I don't want to get into a
24 debate about what is the most efficient one. We're not
25 rewarding efficiency here. We're just following the

1 language of the statute.

2 QUESTION: Mm-hmm.

3 QUESTION: Mr. Starkman, don't you see any
4 inconsistency between your insistence upon absolute
5 proximity of causation with respect to the issue we've
6 just been talking about, who can sue because of a
7 nonpredicate act, and your willingness to allow quite
8 extensive causation, not at all proximate, on the very
9 basic issue of whether (d) makes unlawful the consequences
10 of a conspiracy, or just the conspiring?

11 MR. STARKMAN: No.

12 QUESTION: I mean, on that issue, you know, when
13 I put it to you that all it makes unlawful is the
14 conspiring, you say, well, the conspiring, that
15 automatically includes not only the predicate acts, but
16 any acts that are ultimately necessary to conduct the
17 conspiracy. I mean, that's really stretching out the
18 causation from the mere language, to conspire.

19 MR. STARKMAN: No, I don't think it is, because
20 we're not focusing then on the language, to conspire.
21 We're focusing on the proximate cause of --

22 QUESTION: I'm still curious, while you have a
23 chance --

24 MR. STARKMAN: Yes, sir.

25 QUESTION: -- why isn't it just like the

1 antitrust laws?

2 MR. STARKMAN: Again --

3 QUESTION: I mean, the policy of the antitrust
4 laws are simply, treble damages is a very big gun --

5 MR. STARKMAN: Right.

6 QUESTION: -- and since it's a huge gun, we're
7 going to keep the court's attention fixed on the real harm
8 that flows from this, not side issues, where there are
9 other laws that can help the people. Why isn't that
10 reasoning exactly the same here?

11 MR. STARKMAN: Because there's no countervailing
12 policy --

13 QUESTION: I just said what the policy was. The
14 policy is to help people who are hurt by the racketeering,
15 you know, directly. Racketeering is what's bad, the
16 predicate acts, just as the antitrust thing is especially
17 bad, the price-fixing, and side issues of whistleblowers
18 and so forth are dealt by other laws. That would be the
19 policy.

20 MR. STARKMAN: I don't think that's accurate,
21 though, because the evil here that we're combatting is not
22 the racketeering activity. That's not what Congress was
23 targeting. Those were already unlawful. What Congress
24 was doing was seeking to eradicate organized crime, and
25 organized crime has no countervailing policy.

1 If I could, I'd like to reserve the rest of my
2 time for rebuttal.

3 QUESTION: Mr. Starkman, I'm sorry, but I would
4 like to ask you a question. Going back to your answer to
5 Justice Scalia the last time, let me put it this way. The
6 object of a proximate cause concept is, as you put it, to
7 prevent the ripple effect of causation from going on
8 infinitely, but it seems to me that what you are doing in
9 your argument is avoiding the proximate cause requirement
10 simply by expanding the concept of the conspiracy.

11 We apply proximate cause between the appropriate
12 act and the effect. You're saying, we're going to broaden
13 the class of appropriate acts, and we're going to end up
14 with the same kind, it seems to me, the same breadth of
15 scope for subsection (d) that we would have if we didn't
16 have the proximate cause requirement.

17 MR. STARKMAN: No, sir.

18 QUESTION: Why isn't that what you're doing?

19 MR. STARKMAN: Because proximate cause is the
20 limiting factor. It is not overt act versus predicate
21 act.

22 QUESTION: Yes, but I'm saying -- forget the
23 labels, overt, predicate for a minute, just, act that
24 causes injury which is actionable under the statute. I
25 couldn't care less about proximate cause if I have carte

1 blanche to expand the scope of the conspiracy to include
2 all subsidiary acts which may be necessary. In other
3 words, I'm -- you know, I'm getting at the front end what
4 I would otherwise lose at the rear end.

5 MR. STARKMAN: It has to be at the heart of the
6 conspiracy, though. It has to be necessary to effect the
7 object, the object, again, being those three first
8 subsections, and the object here was being prevented by
9 Beck. Nobody should have more of an appropriate --
10 there's no more appropriate person to bring this suit
11 than --

12 QUESTION: You're saying, in effect, you -- when
13 you conspire to rob a bank, you conspire to get by the
14 guard, and you're saying, that's pretty darned close to
15 the core of it. That's the nub of your argument.

16 MR. STARKMAN: Yes.

17 QUESTION: Yes.

18 MR. STARKMAN: That guard -- there's a question
19 about whether the guard's incidental, but if the
20 conspiracy was, we've got to get past that guard also,
21 because he's stopped all of these things, and we're going
22 to take care of him one way or another, then that would be
23 actionable.

24 QUESTION: Suppose, as a matter of fact, Beck
25 was not all that essential. It would be nice to get rid

1 of him, but we can carry on this conspiracy even if he
2 stays there, after all, look at all the years he was there
3 and didn't even know what was going on, how harmful could
4 he be.

5 MR. STARKMAN: Essentiality shouldn't really be
6 the question here, because, for example, what if they
7 could have just intercepted his mail to prevent it from
8 going to the regulators. The test is, though, whether or
9 not it was at the core of the conspiracy, and whether or
10 not it was necessary to effect its object.

11 QUESTION: Thank you, Mr. Starkman.

12 Mr. Rosenbaum, we'll hear from you.

13 ORAL ARGUMENT OF MICHAEL M. ROSENBAUM

14 ON BEHALF OF THE RESPONDENTS

15 MR. ROSENBAUM: Mr. Chief Justice, if it please
16 the Court:

17 In response to a question posed to Mr. Starkman
18 as to why there should not be RICO-type injury, just as
19 there is in antitrust law, antitrust-type injury, he
20 referred to the Holmes decision and suggested that the --
21 the Holmes decision, at least in a footnote, stands for
22 the proposition that RICO injury is not necessary.

23 What Mr. Starkman is referring to is -- excuse
24 me -- footnote 15 in the Holmes case, which he misreads in
25 its entirety. Footnote 15 to the Holmes case simply says,

1 based upon Sedima, that we don't require -- the Court in
2 that case said, we don't require the amorphous concept of
3 racketeering-type injury, because that was the holding in
4 Sedima.

5 The holding in Sedima also was, however,
6 pursuant to a 1962(c) substantive claim, that there must
7 be, not racketeering injury, because the term is too
8 amorphous. There must be predicate act injury.

9 So when you read the footnote that Mr. Starkman
10 is referring to in the context of the questions posed to
11 him as to why there shouldn't have to be RICO-type injury,
12 what comes from it, what flows from it is the necessity,
13 at the very least, that there be predicate act injury.

14 QUESTION: Sedima did say, though, that Congress
15 did not want to have the standing problems that antitrust
16 cases had. Sedima did say that, did it not?

17 MR. ROSENBAUM: In a way, Your Honor, but Sedima
18 ultimately stands for the proposition that there must be
19 predicate act-type injury as opposed to the more amorphous
20 concept of racketeering injury.

21 QUESTION: Correct.

22 MR. ROSENBAUM: Holmes, which flows from Sedima,
23 comes to a similar conclusion, comes to a --

24 QUESTION: His better argument I think was that
25 the essential nature of RICO is to talk about an

1 enterprise, and the harm involved is a certain kind of a
2 company.

3 The harm involved in the antitrust area is a
4 certain thing that happens in the world, and firing and
5 hiring people is part of the operations of the company.
6 Firing and hiring people is not part of the operations of
7 the price fix insofar as it affects the world, and
8 therefore there's no good analogy for purposes of his
9 argument. I think that was basically his point.

10 MR. ROSENBAUM: I think the analysis, the
11 analogue to antitrust, applies even in the situation that
12 you described, Your Honor.

13 Congress delineated no fewer than 50 predicate
14 acts. The obvious intent of Congress by virtue of the
15 written word was to deter the commission of the predicate
16 acts.

17 Justice Scalia asked Mr. Starkman about the
18 difference between the verb, to conspire, as opposed to
19 the noun, the existence of the conspiracy. When you read
20 1962(d) in context, it simply says, it's unlawful to
21 conspire to violate, in this instance 1962(c), by
22 conducting the affairs of an enterprise through a pattern
23 of racketeering conduct.

24 Reading the two together, and I'll get to
25 1964(c) in a moment, I think it's clear that the purpose

1 of the unlawful conspiracy must be to conduct the
2 predicate acts in violation of 1962(c) that shaped, the
3 civil remedy that flows from the conspiracy to violate is
4 shaped by the language in 1964(c). That language says,
5 anyone injured by reason of, in this instance a violation
6 of 1962(d), has civil RICO standing.

7 The words, by reason of, cry out for shaping,
8 which is what the Court said in the analogous antitrust
9 case of AGC, Associated General Contractors, which the
10 Court also picked up on, obviously, in Holmes. Those
11 words cry out for shaping, and the Court shaped those
12 words in the antitrust context in Associated General
13 Contractors. The Court thereafter shaped those words in
14 the context of RICO by limiting standing to those
15 proximately injured by the unlawful conduct.

16 What the Court said in Holmes --

17 QUESTION: But that was under a (c), that was
18 under a (c) claim, right --

19 MR. ROSENBAUM: That's correct.

20 QUESTION: -- not under a (d) claim.

21 MR. ROSENBAUM: That's correct, but the --

22 QUESTION: I mean, you had to do it under (c).

23 I mean --

24 MR. ROSENBAUM: I think you also have to do it
25 under (d), because 1964 (c) is equally as applicable to

1 (d) as it is to (c). Therefore, when the Court decided
2 Holmes, it was really deciding the extent, the limitations
3 of the by-reason-of language in 1964(c), whether it's an
4 (a), a (b), a (c), or a (d) violation.

5 QUESTION: But his argument is that it makes no
6 sense, as a practical matter, and hence should make no
7 sense in construing the statute, to think of the -- to
8 conceptualize the conspiracy to commit the predicate acts
9 without including a conspiracy to do at least what is in
10 some close sense necessary to effect those acts.

11 I gave him -- it wasn't his analogy, but I said,
12 you know, you rob the bank, you include in your conspiracy
13 the knocking off the guard to get out, and he's saying
14 that to construe a conspiracy as narrowly as you would
15 have us do is simply unrealistic in the way people
16 conspire to effect an object, and the statute should
17 reflect that common sense.

18 What's your answer to that?

19 MR. ROSENBAUM: My answer to that, Your Honor,
20 is that on this record -- on this record, and I think my
21 adversary essentially conceded away his argument when
22 stating that if it is a conspiracy which is interfered
23 with as a result of the termination, you should have
24 standing, but if it's in retaliation for already having
25 blown the whistle -- he made that response to one of the

1 questions -- then obviously the retaliation is not in
2 furtherance of the conspiracy.

3 On this record, that's precisely what occurred
4 here based upon the pleadings that the plaintiff, that the
5 petitioner filed in the lower courts --

6 QUESTION: Okay, but that's --

7 QUESTION: That's your only response to that
8 argument?

9 QUESTION: That in effect is saying, even if
10 he's right, I will still win, and my question is, why
11 isn't he right in his claim that to conspire under (d)
12 must be read as broadly as he says?

13 MR. ROSENBAUM: Because, aside from the factual
14 basis on which this case came to this Court, the injury
15 sustained by the whistleblower, even if it was allegedly
16 in furtherance of the conspiracy, are tangential to, are
17 tangential to the principle goal of the conspiracy, which
18 was to commit the predicate acts --

19 QUESTION: Yes, but you're -- that -- it
20 seems -- maybe I misunderstand you, but it seems to me
21 that you're in effect just denying the predicate of his
22 argument. You're saying, well, this would not fall within
23 what is necessary to effect the conspiracy. This is too
24 tangential to it.

25 What about his argument that, in fact, the

1 conspiracy has got to include something more than simply
2 the agreement to commit a predicate act, and the more has
3 got to be, whatever is in some close sense, narrow sense
4 necessary to effectively, to commit the predicate acts.
5 What's your answer to that?

6 MR. ROSENBAUM: My answer to that lies in the
7 Holmes analysis. While there may be injuries that flow
8 from the conspiracy, and perhaps cause --

9 QUESTION: Yes, but that's a proximate cause
10 analysis, and you apply proximate cause analysis once
11 you -- once you have identified the acts which are
12 wrongful.

13 He is saying, we are now at the stage when we're
14 trying to identify the acts that are wrongful, we'll get
15 to proximate cause later, and he's saying, wrongful acts
16 must include those acts which in a narrow sense are
17 necessary to commit the predicates.

18 MR. ROSENBAUM: Every wrongful act under this
19 statute does not necessarily result in standing. If I
20 concede for the purposes of argument that the termination
21 was unlawful and was in furtherance of the conspiracy,
22 that does not necessarily lead to the conclusion that a
23 whistleblower has RICO standing.

24 QUESTION: Does it -- does your argument assume
25 that there may be -- I think your argument, however, as

1 you're making it now, assumes that there may be some
2 nonpredicate acts which are within the concept of the
3 conspiracy and, hence, actionable.

4 You're saying not everything is. He would agree
5 with you. How about some, and the some that he proposes
6 to be within the concept of the conspiracy are those
7 without which you can't effect your conspiracy.

8 MR. ROSENBAUM: I tried to think of examples,
9 prior to coming here today, of where some nonpredicate
10 acts could be the basis of RICO standing, and I, at least
11 within my own thinking, have been unable to come up with
12 any, based upon the underlying theme in my argument that
13 any act not a predicate act, even an act which may be
14 necessary for --

15 QUESTION: Well, take a simple -- no, you go.

16 QUESTION: I think I know what your problem is,
17 Mr. Rosenbaum. It's the statement you made earlier that
18 these nonpredicate acts have nothing to do with the goal
19 of the conspiracy, which is to commit the predicate acts.
20 That's simply not true.

21 The goal of the conspiracy is not necessarily to
22 commit the predicate acts. Most of the predicate acts are
23 simply means along the end to the goal. Some of the means
24 along the end to that goal, killing the bank guard, happen
25 to be unlawful acts covered by RICO, and therefore they

1 become predicate acts, not because they are the goal of
2 the conspiracy -- they didn't intend to kill -- the object
3 wasn't to kill the guard. It was to get the money in the
4 bank.

5 So whether something is a predicate act or not a
6 predicate act has nothing to do, whether it is central to
7 the object of the conspiracy. Something can be just as
8 central, in fact more central, more essential to the
9 furtherance of the conspiracy than a predicate act is and
10 not be a predicate act.

11 MR. ROSENBAUM: That may be so, Justice Scalia,
12 but the answer to the question that I think is being posed
13 to me is whether or not that goal, albeit essential to the
14 completion of the conspiracy, still provides a basis for
15 RICO standing.

16 You can draw inferences from the antitrust
17 analogue that while there is an injury that is essential
18 to the outcome of the conspiracy to violate in this
19 instance, or in the antitrust instances antitrust law,
20 that injury, so says this Court in several cases, is not
21 necessarily compensable under the statutory scheme that
22 the Court is being asked to consider. That was the result
23 in Associated General Contractors, where the very goal of
24 the conspiracy was to injure the labor union.

25 This Court said that we don't look at the

1 necessary intent of the respondents in that case, the
2 defendants in that case, to injure the plaintiff. He may
3 be injured, and he may have other remedies, but at least
4 within the statutory scheme of antitrust law, which this
5 Court essentially looked at in the Holmes case, he doesn't
6 suffer the necessary type of injury, even in the existence
7 of a conspiracy to make it actionable under the Federal
8 statute.

9 QUESTION: I don't see how you get there through
10 the text, is my problem.

11 MR. ROSENBAUM: I'm sorry, Justice --

12 QUESTION: I don't see how you get there through
13 the text. I mean, it may be a very nice disposition, but
14 how do you get there through the text of 1964 and 1962?

15 MR. ROSENBAUM: I get --

16 QUESTION: 1964 makes a violation of (a), (b),
17 (c), and (d) unlawful. (d), it shall be unlawful to
18 conspire. Once you say that the -- that you have
19 committed the unlawful act of conspiring, and once you
20 acknowledge that the unlawful act of conspiring has as its
21 direct consequence some predicate acts but also some
22 nonpredicate acts, it seems to me you've been injured by a
23 violation of (d).

24 MR. ROSENBAUM: I get there this way. I
25 distinguish, firstly, the difference between civil

1 conspiracy, which is just the existence of the agreement
2 which in and of itself is unlawful, whether or not it
3 injures anyone, and a civil conspiracy which requires more
4 than just the existence of a conspiracy, because nobody's
5 injured just by virtue of the existence of the conspiracy.

6 The law of civil conspiracy is that the act that
7 becomes actionable must be a tortious act, and in cases
8 from this Court going back to the late 1800's in the case
9 of Adler, in the case of Nalle, this Court said that the
10 act that gives standing must be the act that -- for which
11 the conspiracy was formed.

12 In an interesting opinion from the D.C. Circuit,
13 Justice Scalia, that -- the Halberstam opinion, there was
14 some interesting language. You were on the panel together
15 with Judge Bork and Judge Wall to issue the opinion. That
16 was the case where a prominent Washington physician was
17 murdered during the course of a burglary.

18 His estate brought suit against a coconspirator
19 who did not participate in the burglary, the wife of the
20 principal culprit.

21 QUESTION: Cat burglar in suburban Virginia. It
22 was a very prominent case around --

23 MR. ROSENBAUM: I thought you might remember it.

24 In any event, what the Court held in that case,
25 similar to what -- to the language in the late 1800 cases,

1 in Adler and Nalle, was that: one, the purpose of the
2 conspiracy, to give standing to a civil plaintiff, that
3 civil plaintiff must be injured essentially by the purpose
4 of the conspiracy, and the Court said in that opinion that
5 the conspiracy laws are essentially on the books, be it
6 common law or statutory, for the purpose of creating
7 vicarious liability.

8 Essentially, the statute, the common law said
9 the Court there was for the purpose of assuring that all
10 of those within the umbrella of the wrong, the wrong being
11 the intent to commit the particular tortious act there,
12 the burglary, ergo the murder, are held accountable.

13 Not everybody in the conspiracy is held
14 accountable for every single act done in furtherance of
15 the conspiracy. It depends upon whether the act was
16 foreseeable within the normal realm of what one might
17 expect based upon the particular type of conspiracy.

18 In the instance of a whistleblower, someone who
19 allegedly threatens the viability of the conspiracy, I
20 think that falls outside of that circle.

21 QUESTION: Okay, but --

22 QUESTION: Just foreseeability, I thought your
23 point was that you're only liable for unlawful acts --

24 QUESTION: Yes.

25 MR. ROSENBAUM: That is my --

1 QUESTION: -- that are done in furtherance of
2 the conspiracy.

3 MR. ROSENBAUM: That is my point.

4 QUESTION: Not for foreseeable acts.

5 MR. ROSENBAUM: That is my point, Justice --

6 QUESTION: That does get you where you want to
7 go.

8 QUESTION: Well, I'm not sure it does. I mean,
9 it may well be that we would still reverse the judgment
10 below on the basis that Mr. Starkman claims, and you would
11 go back to the court to argue whether in fact there was
12 sufficient -- sufficiently tortious character in what was
13 done here.

14 You might -- he might win this battle, you might
15 lose the war, but I don't think if we accept your view
16 that necessarily disposes of the case at this point.

17 QUESTION: I'm probably missing -- no, go ahead.
18 Is there -- was -- did you answer that? I don't want
19 to --

20 MR. ROSENBAUM: No, I haven't. I haven't.

21 The Court a moment ago asked me for a conceptual
22 answer to that question. With the Court's permission, I'd
23 like to answer the question based upon what happened in
24 the Eleventh Circuit, and what happened prior to that
25 based upon this record. I am dealing, obviously, on

1 behalf of my client with respect to this record.

2 There is no issue of Beck being a stop-gap, him
3 being necessary, his elimination being necessary to allow
4 the conspiracy to go forward. On this record, the
5 Eleventh Circuit held that this was a retaliatory
6 discharge. That wasn't its legal conclusion.

7 The way the case was pleaded, if you look at the
8 joint appendix, page 69, paragraphs 49 through roughly 51,
9 that was the allegation of conspiracy. In that allegation
10 of conspiracy, the plaintiff contended, Mr. Beck contended
11 that after he notified the Florida Department of Insurance
12 of alleged wrongdoing, he was discharged.

13 That theme was the theme on the summary judgment
14 motion, Your Honor. That theme was also the theme in the
15 Eleventh Circuit opinion from which the writ of certiorari
16 was granted, and the Eleventh Circuit said that there was
17 a partial, using the Eleventh Circuit's language, there
18 was a partial disclosure, the cat already being out of the
19 bag.

20 Ergo, under the facts as pleaded and as argued
21 in the summary judgment motion, there could not be an act
22 in furtherance, even if there was an unlawful conspiracy,
23 and assuming that the purpose of the conspiracy was to
24 continue undetected, because the detection had already
25 occurred by virtue of Mr. Beck's conduct.

1 He alerted the very agency that had sole
2 jurisdiction over this company to investigate, and did
3 investigate the company, and to determine whether or not
4 there was any improper acts occurring.

5 So on this record -- on this record, as
6 Mr. Starkman said, if, in fact, the whistleblowing had
7 occurred before the termination, which it did, then the
8 act of termination couldn't be in furtherance of the
9 alleged conspiracy.

10 There's another reason, however, why
11 whistleblowing of this sort cannot be and should not be
12 the basis of RICO standing. In listing the predicate acts
13 of 196 -- sorry, 1961(1), several of the predicate acts
14 include obstruction of justice. Listed as one of the
15 predicate acts is a violation of 18 U.S.C. section 1513,
16 which is a retaliatory aspect of the obstruction of
17 justice statute.

18 Congress limited conduct to be obstruction of
19 justice, limited it to physical harm to one's person, or
20 harm to tangible personal property. A precursor, a draft
21 precursor of the statute included within it harm to a
22 person's business, or harm to property nontangible in
23 nature, wrongful discharge.

24 That was eliminated from the final draft, which
25 to me reflects the fact that Congress at least had in mind

1 potential claims by whistleblowers who were making
2 obstruction of justice a predicate act, and determined
3 that there were too many difficulties -- too many
4 difficulties in seeking to enforce that because of the
5 multitude of motives that may exist when terminating
6 somebody.

7 Was someone terminated because he really was a
8 threat to criminal proceeding, or the prosecution of a
9 criminal proceeding, or the detection of a criminal
10 proceeding, or was he terminated because of legitimate
11 business reasons.

12 QUESTION: We really didn't take this case to
13 determine whether, you know, whether Beck was terminated
14 because what he -- of what he had already done, or what he
15 would do. That's not why the case is up here, and I think
16 the point you're now arguing is precluded by the question
17 presented.

18 I mean, the question presented is whether an
19 employee who is terminated for both blowing the whistle on
20 and refusing to participate in a pattern of predicate acts
21 may assert a civil RICO conspiracy claim where he has been
22 injured by an overt act in furtherance of the RICO
23 conspiracy.

24 What you're now arguing to us is that the act
25 was not in furtherance of a RICO conspiracy. That's not

1 why we took the case. Let's assume that it was in
2 furtherance of the RICO conspiracy and get on with the
3 argument on that point.

4 MR. ROSENBAUM: I'm arguing, Justice Scalia,
5 that even if it was in furtherance of, he doesn't have
6 standing, a) because this is not, as I said before, a --

7 QUESTION: Not in furtherance.

8 MR. ROSENBAUM: Not -- no, this is not a
9 whistleblower statute. There is no specific remedy in
10 this statute for whistleblowers, as there are in other
11 Federal statutes, environmental statutes, civil rights
12 statutes -- had Congress intended to create that breadth
13 of a remedy --

14 QUESTION: I thought you were arguing they were
15 punishing him for past conduct.

16 MR. ROSENBAUM: From a factual standpoint, yes,
17 but I'm trying to respond to Your Honor's question.
18 Assuming that the facts were different, assuming that he
19 was terminated because he threatened to blow the whistle
20 and was terminated essentially to prevent him from doing
21 so -- not the facts in this case, but I'll assume it for
22 Your Honor's question.

23 QUESTION: That's fine.

24 MR. ROSENBAUM: Even so, he lacks standing,
25 a) because this is not a whistleblower statute -- Congress

1 has enacted whistleblower statutes in other contexts when
2 seeking to enforce violations of other -- other violations
3 of other types of statutes, environmental statutes, civil
4 rights statutes, so on and so forth, so had Congress
5 intended to do that, it certainly knew how and could have.

6 QUESTION: Mr. Rosenbaum, you keep using the
7 term standing, and I think Mr. Starkman did also, I
8 thought what's presented here is did Congress create a
9 civil right of action of this nature, where the act
10 complained of is not a predicate act.

11 That sounds to me like a 12(b)(6) question, is
12 there a claim for relief that can be stated, but you keep
13 using the word standing, and to that extent Mr. Starkman
14 is in agreement with you.

15 Isn't this a question of, did Congress create a
16 private claim for relief?

17 MR. ROSENBAUM: Yes, it is, Justice Ginsburg. I
18 think the two go hand-in-glove. I think, as the Court
19 indicated in Holmes, it used a proximate cause analysis to
20 determine whether someone remotely down the linear chain
21 in effect had standing to seek relief under RICO, so I
22 think the two go together.

23 It's a question of nomenclature. I don't think
24 the answer to the question is essential to the outcome.

25 QUESTION: Mr. Rosenbaum, section 1962(d) I

1 gather has been held to give rise to criminal liability as
2 well as a civil cause of action.

3 MR. ROSENBAUM: Absolutely, Justice O'Connor.
4 Absolutely.

5 QUESTION: And could there be a criminal
6 prosecution brought here without proof of any predicate
7 act?

8 MR. ROSENBAUM: Absolutely. Under the criminal
9 concepts of conspiracy, or --

10 QUESTION: Or overt act --

11 MR. ROSENBAUM: Yes.

12 QUESTION: Or an act -- proof of an overt act
13 would not be required if it were a criminal prosecution.

14 MR. ROSENBAUM: That's correct. All that's
15 necessary for a criminal prosecution is proof of the
16 unlawful agreement.

17 However, in the criminal context, which
18 distinguishes section (d), the interpretation of section
19 (d) from the similar -- a similar interpretation in the
20 civil context, the -- if there is an overt act, it may be
21 a completely innocent overt act, but it's demonstrated to
22 the court to show that the conspiracy is at work, so that
23 in a criminal context, a completely innocent overt act --
24 if it's a mail fraud conspiracy I go out and buy
25 stationery to facilitate the mail fraud.

1 QUESTION: But is an overt act required for
2 liability in a criminal conspiracy?

3 MR. ROSENBAUM: No.

4 QUESTION: An attempt, yes, but not a criminal
5 conspiracy.

6 MR. ROSENBAUM: It's not necessary to show, but
7 it's certainly helpful in demonstrating that there is a
8 conspiracy.

9 QUESTION: But the effect of this is that we
10 have very different rules applicable in the civil action
11 context --

12 MR. ROSENBAUM: That's correct --

13 QUESTION: -- under the very same statute.

14 MR. ROSENBAUM: That's correct, Justice
15 O'Connor, for a very good reason. This is both a criminal
16 and a civil statute.

17 In order to have criminal liability, as I said
18 before, all that's necessary is to show from a criminal
19 standpoint the existence of the conspiracy, but that
20 doesn't provide a civil cause of action, because the mere
21 existence of a conspiracy absent some injury, some
22 tortious conduct directed at someone as a result of the
23 conspiracy doesn't create civil liability because, as this
24 Court has said, as have other, lower courts have said, a
25 conspiracy absent an injury does not provide a civil cause

1 of action.

2 QUESTION: May I ask one question at this point.
3 You've explained -- say you've convinced me that this
4 doesn't apply to whistleblowers. That's only half of the
5 question presented by the cert petition, which is, he was
6 terminated for both blowing the whistle and refusing to
7 participate in the pattern of activity.

8 And what if one could show that in order to
9 close the factory, which is the objective, you had to fire
10 executive A, who would otherwise have had sufficient
11 strength to prevent the closing of the factory. Why isn't
12 that covered?

13 MR. ROSENBAUM: I'm sorry, Justice, why isn't --

14 QUESTION: Why isn't that covered with -- as an
15 overt act in pursuance of the conspiracy, even if the
16 statute has nothing to do with whistleblowers?

17 MR. ROSENBAUM: For the same reason that it's
18 not covered as a basis of whistleblower standing in
19 antitrust cases, which -- in which the Clayton Act uses
20 the same language as 1964(c).

21 That issue has been presented to circuit courts
22 throughout the country, and except for one circuit court,
23 in an opinion which was later limited in the Ninth
24 Circuit, in the Ostrofe case, all of the circuit courts
25 say that the nature of the injury suffered by the

1 whistleblower, even in the context that you gave me, is
2 not compensable based on the statutory scheme, which
3 requires, in an antitrust concept, antitrust injury.

4 All of the courts have said -- all of the courts
5 have said that even though there may be wrongful conduct
6 in terminating the employee because of his threat, that
7 isn't enough to give that person standing. By analogy, by
8 analogy that logic seems applicable here.

9 The only court that has held that such a
10 whistleblower in that situation has standing is the Ninth
11 Circuit, in which Justice Kennedy dissented, and that
12 decision in Ostrofe, which was a Ninth Circuit decision,
13 was then about a year or two later, severely limited to
14 say that it was -- that the case was limited to its facts,
15 and virtually all of the circuits deny standing in an
16 antitrust concept based upon that.

17 QUESTION: You know, I thought we had gotten
18 over the use of the standing point. Justice Ginsburg
19 directed your attention to whether it's a violation of the
20 statute. I don't see how we're getting into standing,

21 MR. ROSENBAUM: It's a violation of the statute,
22 Justice O'Connor, to unlawfully conspire. In a civil
23 context, absent injury, absent injury, the mere existence
24 of the conspiracy does not provide a civil cause of
25 action. The question therefore becomes, what type of

1 injury must be sustained in order to have a claim under
2 1962(d).

3 It's our position that the only type of injury
4 that must be sustained where it's a 1962(d) claim related
5 to a 1962(c) violation, the only type of injury is a
6 predicate act injury, because the unlawful conspiracy is
7 formed for the purpose of committing the predicate acts,
8 that there may --

9 QUESTION: I disagree with that. That is simply
10 wrong. It is not formed for the purpose of committing the
11 predicate acts. Indeed, some predicate acts may not even
12 be foreseen.

13 It is formed for the purpose of robbing the
14 bank, and the -- now, that larceny, it may be one of the
15 predicate acts, but other predicate acts on the way to it,
16 such as killing the bank guard who unexpectedly shows up
17 to try to prevent -- that's not the object of the
18 conspiracy at all.

19 It's an overt act in furtherance of it, and it
20 happens also to be a racketeering act, but there are other
21 overt acts in furtherance of it which will not be
22 racketeering acts, such as firing people.

23 MR. ROSENBAUM: That's correct, Justice Scalia.

24 QUESTION: If that's correct, then -- your
25 language permits your interpretation and his, in my view.

1 Absolutely ambiguous, same as the antitrust laws.

2 Your -- I understood your argument all up to the
3 point, the reason is, I would have thought the reason is,
4 it has to be matters of policy. Is it more like the
5 antitrust laws, or isn't it, and he gave a reason why it
6 wasn't, and you know, and what's your response to that?

7 MR. ROSENBAUM: My --

8 QUESTION: I can't get anywhere beyond the
9 policy. It either is like the antitrust laws, or it
10 isn't.

11 MR. ROSENBAUM: It certainly is like the anti --

12 QUESTION: Because?

13 MR. ROSENBAUM: It certainly is like the
14 antitrust laws, because section 4 of the Clayton Act, the
15 language is --

16 QUESTION: No, the language is identical. I
17 just pointed out to you initially, he gave a reason of
18 policy, why the policies would be different, and what I'm
19 trying to get at is your response to his reason of policy.

20 MR. ROSENBAUM: If the law is to protect those
21 who are improperly terminated, there are more than
22 adequate State law remedies to protect that.

23 Virtually all, short of all of the States have
24 wrongful discharge statutes, or have wrongful discharge
25 common law that basically says that it's tortious to

1 discharge someone for the type of conduct that's alleged
2 here.

3 To incorporate that State common law into the
4 RICO statute would essentially be to federalize what are
5 otherwise State law claims, so that's my direct answer to
6 your question, Your Honor.

7 QUESTION: But that answer leaves open, it seems
8 to me, the basic policy, the broader policy question that
9 Justice Breyer's question to you raises.

10 Let's say in this particular instance you're
11 right, there is no policy reason, perfectly adequate State
12 law. That leaves open the question whether, on the
13 broader sense, the -- we should construe (d) to include
14 nothing but predicate acts, and there may be lots of
15 instances in which the conduct isn't adequately dealt with
16 at State law.

17 MR. ROSENBAUM: May I respond to your question?
18 The red light --

19 CHIEF JUSTICE REHNQUIST: Yes, shortly.

20 MR. ROSENBAUM: I think the answer to that
21 question, the policy reasons lies in this Court's opinion
22 in Holmes. Determining whether or not there is injury by
23 reason of, you look at the notions of what's judicially or
24 administratively convenient. Using that test, the Court,
25 as you know, then basically said that there must be direct

1 injury.

2 CHIEF JUSTICE REHNQUIST: Thank you.

3 MR. ROSENBAUM: Thank you, Your Honor.

4 CHIEF JUSTICE REHNQUIST: Thank you,

5 Mr. Rosenbaum. The case is submitted.

6 (Whereupon, at 11:03 a.m., the case in the
7 above-entitled matter was submitted.)

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