

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSEPH SCHEIDLER, ANDREW :
4 SCHOLBERG, TIMOTHY MURPHY, :
5 AND THE PRO-LIFE ACTION :
6 LEAGUE, INC., :
7 Petitioners :

8 v. : No. 01-1118

9 NATIONAL ORGANIZATION FOR :
10 WOMEN, INC., ET AL.; :
11 and :
12 OPERATION RESCUE, :
13 Petitioner :

14 v. : No. 01-1119

15 NATIONAL ORGANIZATION FOR :
16 WOMEN, INC., ET AL. :

17 - - - - -X

18 Washington, D.C.

19 Wednesday, December 4, 2002

20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States at
22 10:06 a.m.

23 APPEARANCES:

24 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf
25 of the Petitioners.

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THEODORE B. OLSON, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the United
States, as amicus curiae.

FAY CLAYTON, ESQ., Chicago, Illinois; on behalf of the
Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 JUSTICE STEVENS: We'll hear argument in case
4 Number 01-1118, Scheidler against the National
5 Organization of -- of Women.

6 You may proceed.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. ENGLERT: Thank you, Justice Stevens, and
10 may it please the Court:

11 This case comes to the Court in a remarkable
12 posture. If you agree with the Hobbs Act arguments in the
13 blue briefs, you should reverse the jury verdicts and
14 direct entry of judgment for the defendants. But even if
15 you believe the arguments in the red and gray briefs, you
16 should still reverse, but for a new trial. And whatever
17 you do on the Hobbs Act, you should reverse the RICO
18 injunction because RICO simply does not authorize private
19 injunctive relief.

20 Now, why do I say so starkly that even
21 respondents and the Government's theories require reversal
22 of the jury verdict? Because the attempts in those
23 briefs, to salvage the theory of plaintiffs' case, concede
24 that someone must obtain the victim's property for the
25 offense of extortion to be shown. And the whole reason

1 the Court granted cert on the Hobbs Act issue was to
2 review the Seventh Circuit's holding directly contrary to
3 those concessions that, quote, a loss to, or interference
4 with the rights of the victim is all that is required,
5 closed quote. Likewise, the jury was instructed that all
6 it had to find was that the defendants caused someone,
7 quote, to give up a property right, closed quote.

8 You will find in the red and gray briefs very
9 elaborate efforts to suggest meanings of obtain and
10 property under which the record in this case supposedly
11 could support a finding that petitioners obtained some
12 abstract form of property from the clinics or women. But
13 no defense of the Seventh Circuit's holding and the jury
14 instructions that substituted the phrases, interference
15 with and give up for obtaining. So there ought to be no
16 question that some form of reversal is required.

17 Now, the reason why there should be reversal for
18 the entry of judgment for the defendants, and not just for
19 a new trial, is that respondents and the Government's
20 brief-formulated conceptions of obtaining and property are
21 wrong. The essence of the theories is that petitioners
22 obtained control over the use and disposition of clinic
23 assets. To refer to that as obtaining property of
24 another -- the language of the Hobbs Act -- is an awfully
25 broad use of language. It's a far cry from the New York

1 law on which the Hobbs Act was based.

2 QUESTION: I suppose in some instances one
3 competitor can buy another competitor's firm and just
4 close it up in a regular business transaction, and that --
5 that would be obtaining it in that sense. Now, of course,
6 I recognize that title transfers, et cetera, et cetera.

7 Here the result is about the same.

8 MR. ENGLERT: No, Your Honor. Respectfully,
9 it's not. My clients don't have the clinic's property
10 today as they would if they had, in fact, obtained it.
11 They may have temporarily interfered with some use of it.

12 QUESTION: Let's assume that the -- that the
13 boycott or -- or the protests are sufficient to close it
14 down. They have obtained it in a certain sense in that
15 they have obtained -- they have secured for themselves the
16 use that they want of it, i.e., no use.

17 MR. ENGLERT: That is a sense of the word
18 obtain, but it's not the sense relevant for interpreting
19 the Hobbs Act for several reasons. One is the Hobbs Act
20 has historical predecessors that this Court has said
21 should be looked to in interpreting its terms.

22 QUESTION: You -- you concede it's a sense of
23 the term obtained? I mean, would you really speak of
24 obtaining somebody's property when you -- when you
25 interfere with that person's use of it?

1 MR. ENGLERT: Well, I certainly don't -- I'm
2 sorry, Justice Scalia. I certainly don't concede it's a
3 relevant sense of obtain.

4 Because of -- because of the Hobbs Act
5 historical antecedents, because of the rule of lenity,
6 because of the very odd use of language, for all those
7 reasons, that's not how the Court should interpret obtain.

8 But more important than any of those things is
9 the implications of such a theory. When Carry Nation went
10 into saloons with her axe and destroyed property, she
11 certainly interfered with the property owner's unfettered
12 use and control over disposition of his assets, and that's
13 exactly what she intended to do. Was that extortion?

14 The civil rights boycott of white merchants that
15 the Court considered in Claiborne Hardware certainly
16 affected the ability of the boycotted merchants to use
17 their property and involved isolated acts of violence as
18 well. Was that extortion?

19 These aren't hypothetical concerns.

20 QUESTION: Of course, that -- extortion wasn't
21 charged in that case, was it?

22 MR. ENGLERT: No, Your Honor, but were the Court
23 to uphold the theory in the red and gray briefs, which
24 wouldn't support the judgment, but if the Court were to
25 uphold that theory, it certainly could be charged the next

1 time the facts of Claiborne Hardware come along.

2 QUESTION: One must wonder why it wasn't
3 charged.

4 MR. ENGLERT: Yes.

5 QUESTION: Because it was a State case it
6 wasn't -- the reason -- reason it wasn't charged. It grew
7 up through the Mississippi court system, if I remember
8 correctly, didn't it?

9 MR. ENGLERT: Well, my -- that's correct, of
10 course, Justice Stevens. But my fundamental point is not
11 that one case was or wasn't charged as -- as extortion.
12 It's if you uphold the theory of the red and gray briefs,
13 it can be charged as extortion in the future. And that's
14 actually happened to People for the Ethical Treatment of
15 Animals. It's happened to other animal rights groups.
16 Because of these implications, the Southern Christian
17 Leadership Conference joined the amicus brief of the
18 Seamless Garment Network at the cert stage. Disability
19 rights groups that conduct protests have joined the
20 Seamless Garment Network brief at the merits stage.
21 Activists of all stripes and their admirers -- Daniel and
22 Philip Berrigan, Nat Hentoff, Martin Sheen --

23 QUESTION: But are we talking about actions that
24 constitute the commission of some kind of criminal offense
25 in the process?

1 MR. ENGLERT: Oh, yes.

2 QUESTION: Yes.

3 MR. ENGLERT: Oh, yes. Trespass.

4 QUESTION: Yes, and other things, destruction of
5 property and so forth, I suppose.

6 MR. ENGLERT: Oh, yes, Justice O'Connor.

7 QUESTION: Yes.

8 MR. ENGLERT: There's never been any doubt in
9 this case --

10 QUESTION: I mean, we're not talking about
11 conduct that is lawful here.

12 MR. ENGLERT: We are not talking about
13 extortion, but we are talking about some things that could
14 be punished much less severely.

15 It has never been disputed in this case, from
16 the opening statement through the closing statement of the
17 trial or in the earlier phases of the case, that there
18 were trespasses. There could be in particular
19 circumstances --

20 QUESTION: -- more than that. In some cases,
21 assaults and so forth.

22 MR. ENGLERT: Well, fair enough except the --
23 the jury verdict really is quite at rejection of
24 petitioners' proof in many respects rather than supporting
25 it. But, yes, Justice O'Connor. I really don't want to

1 fight with you on that particular point.

2 But -- but let's --

3 QUESTION: -- I think to paint the picture that
4 we're talking about, just pure speech is -- is not the
5 case.

6 MR. ENGLERT: No, but that's why I used the
7 examples of Carry Nation and Claiborne Hardware which
8 weren't pure speech either. There was certainly violence
9 in those cases, but not extortion.

10 QUESTION: Would you say coercion? One of the
11 questions was, well, coercion -- if that's defined as
12 using compulsion to force a person to do or not do
13 something that she otherwise would do or not do, does this
14 conduct fit that crime?

15 MR. ENGLERT: Yes.

16 QUESTION: That crime --

17 MR. ENGLERT: And that's a very important point
18 supporting our position because Congress at one point had
19 coercion as a predicate act in the Anti-Racketeering Act
20 of 1934 and, at the request of organized labor, took it
21 out. In the Hobbs Act, in the passage of the Hobbs Act in
22 1946, again, organized labor lobbied to make sure that
23 coercion was not part of the Hobbs Act. Coercion is a
24 different crime from extortion, and interfering with
25 someone's rights is the crime of coercion under the Model

1 Penal Code, under New York law, under various other bodies
2 of law, but it's not the crime of extortion.

3 QUESTION: Just -- just on the obtain point,
4 which I -- I agree with you is of great relevance here,
5 if -- if a group trespasses on property and -- and remains
6 there for a period of days, can it be said that they're
7 obtaining the use of the property, or is -- is that too
8 much of a stretch?

9 MR. ENGLERT: I think it's a stretch, Justice
10 Kennedy, but even if it weren't a stretch, it still
11 wouldn't be a Hobbs Act violation for a different reason.
12 There must be consent to the obtaining of property or --
13 of another, and simply going in and engaging in adverse
14 possession doesn't necessarily entail consent.

15 QUESTION: Well, suppose you withdraw in order
16 to avoid confrontation. I suppose if A robs B, and B
17 turns over the wallet, in a sense there's consent, not --
18 not the kind of consent that the law would ever recognize.
19 It's a consent in a -- just from the standpoint that
20 there's a voluntary act in handing over the -- the wallet.

21 MR. ENGLERT: Well, that actually --

22 QUESTION: You make your -- you make your
23 muscles move and that's about it.

24 MR. ENGLERT: Yes. Words can be stretched to
25 make lots of things into lots of things that the law

1 doesn't want them to be. And in fact, the common law
2 distinction between robbery and extortion, which are both
3 Hobbs Act predicates, is one is with consent and the other
4 is without. So robbery is a classic example of something
5 that you could stretch the word of consent to cover, but
6 it isn't extortion.

7 QUESTION: I guess it's obtaining property if a
8 group of people through criminal means tell an owner of a
9 business precisely and in detail how he has to run his
10 business.

11 MR. ENGLERT: Oh, I don't think so, Justice
12 Breyer.

13 QUESTION: No? In other words, if -- if, say,
14 you have a group of terrible criminals, and they say here
15 is what -- we're going to kill you unless you do the
16 following, and then they say, today you serve X and
17 tomorrow you serve Y, and you send the money over to Z,
18 and you do all these different things; in other words,
19 they run the business.

20 MR. ENGLERT: If it --

21 QUESTION: Now, why haven't they obtained that
22 business?

23 MR. ENGLERT: In the hypothetical example you
24 just gave me, they most certainly have obtained property.
25 You said send the money over to Z.

1 QUESTION: Because I said -- say -- I regretted
2 putting that in the hypothetical the instant I did.

3 (Laughter.)

4 QUESTION: I'm simply looking for an example of
5 a group of criminals who will tell a property owner, a
6 businessman, exactly and precisely how to run his business
7 in a way that he doesn't want to run it. Now, why isn't
8 that obtaining the property called the business? I mean,
9 that's what the SG I think is suggesting basically.

10 MR. ENGLERT: And the SG is wrong because that's
11 not what obtaining property meant under the New York law
12 in 1946. It -- it's a stretch of words. It's a modern
13 concept of property.

14 QUESTION: It's like a theft of services.
15 I mean, you go in and you -- there was a -- years ago a
16 person who figured out how to whistle various tones into
17 the telephone so that it would connect people without
18 charge. All right. Now, hasn't that person stolen the
19 use of the telephone?

20 MR. ENGLERT: Yes.

21 QUESTION: Yes. And -- and a person who tells
22 the telephone company owner, I want you to go and provide
23 the services to A, B, and C, hasn't he stolen those
24 services?

25 MR. ENGLERT: Well, that's getting to be more of

1 a stretch, but probably yes, under United States v. --

2 QUESTION: Then -- then the difference between
3 that and a person who tells the business owner to provide
4 his services to A, B, C, D, and E, whom he doesn't want
5 to, that doesn't seem a difference.

6 MR. ENGLERT: No. There is a major difference,
7 with respect, Justice Breyer. Saying do provide services
8 to A, B, C, D, and E is quite different from saying don't
9 provide services to A, B, C --

10 QUESTION: That's what I wondered, and what is
11 the difference there?

12 MR. ENGLERT: The difference is that A, B, C, D,
13 and E have obtained the services in one case and they
14 have -- and no one has obtained any property in the other
15 case, exactly the words of the Hobbs Act.

16 QUESTION: Except that services is not property,
17 and the one thing that is common in both the negative and
18 the positive examples is the obtaining of control.
19 It's -- it's -- it seems to me it's -- it's the control
20 that's important when he says serve A, B, and C. It isn't
21 property that he has obtained. It's -- it's an action.
22 It's a service.

23 MR. ENGLERT: Justice Souter --

24 QUESTION: And that's true in each case.

25 MR. ENGLERT: -- if I've understood you

1 correctly, that's even more support for our position
2 because the words of the Hobbs Act are obtaining of
3 property from another. So if all of Justice Breyer's
4 examples --

5 QUESTION: No, no --

6 MR. ENGLERT: -- property --

7 QUESTION: I -- I agree with you on that point,
8 but I -- I guess I'm saying that if you concede in the one
9 case, I don't see why you -- you really don't have to
10 concede in -- in the other case because the one thing that
11 is common to each is control, and there is no property in
12 a tangible sense that is obtained in -- in the positive
13 service examples.

14 MR. ENGLERT: No. With respect, what is common
15 is not control. It's acquisition. It's obtaining.
16 That's what obtaining means. The Solicitor General's own
17 brief on page 21 in footnote 11 says that's what obtaining
18 means. And --

19 QUESTION: And what does one obtain? One
20 obtains, in each case, control --

21 MR. ENGLERT: But control --

22 QUESTION: -- i.e., direction.

23 MR. ENGLERT: I apologize, Justice Souter, for
24 interrupting, but control is not property. Property is
25 property.

1 QUESTION: My point is if you are conceding that
2 Justice Breyer's positive examples would fall within the
3 statute, I don't see why you don't have to concede that
4 the negative example, i.e., don't serve, doesn't also
5 fall --

6 MR. ENGLERT: The --

7 QUESTION: -- on -- on your own theory.

8 MR. ENGLERT: I don't think so, respectfully,
9 Justice Souter. The distinction I draw is that in the
10 words of the statute, one involves obtaining property, and
11 the other doesn't, on the assumption that the services are
12 property. If they aren't property, I win the case for a
13 different reason.

14 QUESTION: What do you do with the New York case
15 involving a work stoppage? Do you agree with that case,
16 or do you think it's wrong? The one the Solicitor General
17 cites in his brief, the -- the old 1890 case involving
18 a stop -- a strike, I guess, is what you'd say. Do you
19 think that case would -- would be decided the same way
20 under your view?

21 MR. ENGLERT: I -- I think so, Justice Stevens,
22 but the case is not immediately coming to mind. I'm
23 sorry. I -- I do think the New York courts construed
24 rather strictly the obtaining of property, and the
25 Solicitor General's more expansive cases are from long

1 after 1946.

2 QUESTION: It's People against Barondess,
3 decided in 1892. It was under the -- under the New York
4 statute, which I think everyone agrees was the model for
5 the Federal statute.

6 MR. ENGLERT: Yes, Your Honor.

7 QUESTION: It seemed to me there was no
8 obtaining in the very literal sense that you used the
9 term, but there was merely acquisition of control of the
10 operation in that. And I'm not quite sure how you come
11 out on -- on those facts.

12 MR. ENGLERT: Well, Your Honor, I'm -- I'm, as I
13 stand here, blanking on those facts. I -- I believe the
14 New York courts did construe obtaining of property rather
15 strictly in that case and in every other pre-1946 case,
16 but I can't -- I apologize. I can't give you an
17 intelligent discussion of that right at this moment.

18 I'd like to turn to the RICO injunction issue,
19 if I may. It's very straightforward. I plan to address
20 it only briefly.

21 First, this Court has held in several cases that
22 section 7 of the Sherman Act and section 4 of the Clayton
23 Act, both worded almost identically to section 1964(c) of
24 RICO, did not authorize private injunctive relief.

25 The dissent in Paine Lumber contended that

1 courts had inherent power to grant injunctions --

2 QUESTION: The language of the acts, though, is
3 a little different than this, isn't it?

4 MR. ENGLERT: Well, very, very slightly
5 different, Justice O'Connor.

6 QUESTION: The analogy may not be perfect
7 because the language differs.

8 MR. ENGLERT: Very slightly, but the -- where
9 there's a world of difference and not a slight difference
10 is between section 16 of the Clayton Act and section 1964
11 of RICO. And in section 16 of the Clayton Act, Congress
12 authorized private injunctive relief. No language
13 remotely resembling section 16 appears in section 1964 of
14 RICO, but all of the language from the statutes this Court
15 held didn't authorize injunctive relief with very tiny
16 variations appears in RICO.

17 Besides the obvious statutory language borrowed
18 from the Clayton and Sherman Acts, as this Court has
19 recognized throughout its cases, the statutory evolution
20 of RICO presented Congress with repeated opportunities
21 expressly to provide private parties with injunctive
22 relief under RICO. Every such proposal failed before and
23 after the final enactment of RICO.

24 The court below dismissed the reliance on
25 legislative history on the theory that this Court would

1 not ascribe any significance to legislative inaction. But
2 ironically the very day the Seventh Circuit decided this
3 case, this Court was hearing argument in Chickasaw
4 Nation v. United States, and the opinion of the Court in
5 that case reiterated the longstanding principle -- with
6 which some members of the Court disagreed, but the
7 longstanding principle in majority opinions -- that courts
8 ordinarily will not assume that Congress intended to enact
9 statutory language that it has earlier discarded in favor
10 of other language.

11 QUESTION: Would you clarify one thing on the --
12 on the rejected amendment? Was it voted down or
13 withdrawn? I can't remember.

14 MR. ENGLERT: It was actually passed unanimously
15 by the Senate, but then the House didn't take a vote on
16 it.

17 QUESTION: But we don't know why they --

18 MR. ENGLERT: I'm sorry. I -- Justice Stevens,
19 I -- I've misspoken slightly. Excuse me. The -- the
20 post-RICO effort --

21 QUESTION: Well, no. I'm talking about the one
22 before enactment. The post -- the later statute is a
23 little less persuasive.

24 MR. ENGLERT: The pre-RICO effort was withdrawn.
25 The pre-RICO effort was withdrawn by Representative

1 Steiger on the ground that it would complicate matters too
2 much to take it up at that stage of the legislation, but
3 it was very important. He'd come -- come back again with
4 it next year. But he recognized that the statute didn't
5 have private injunctive relief in it in his floor
6 statements.

7 QUESTION: At the -- on the second round,
8 when -- when the Senate passed and the House didn't,
9 there's no explanation in the House record, is there?

10 MR. ENGLERT: Nothing that sheds tremendous
11 light on this except for Representative Steiger's --

12 QUESTION: Yes.

13 MR. ENGLERT: -- own statements.

14 QUESTION: It would -- it would be -- I -- the
15 trouble I'm having is I don't have any trouble seeing the
16 argument your way.

17 The -- the reason I'm -- at this point, I'm not
18 convinced is that you do have in subsection (c) the
19 language referring -- it says may. What is it? May
20 sue -- I can't -- yes, may sue therefor. And we've got
21 the general presumption that all appropriate remedies go
22 with a cause of action. And I'm -- I'm wondering if in a
23 case in which it's uncertain what to infer, either from
24 the legislative record in -- on intent, or from the
25 textual record here, whether the presumption not to carry

1 the day in a case of doubt --

2 MR. ENGLERT: It shouldn't because, as is
3 pointed out at pages 7 and 8 of the Operation Rescue reply
4 brief and correctly so, this Court has two lines of cases:
5 one when Congress doesn't specify the remedies. That's
6 cases like Franklin v. Gwinnett County which was an
7 implied right of action case, and like Califano v.
8 Yamasaki.

9 And a different line of cases saying, when
10 Congress does specify remedies, they're intended to be
11 exclusive. A line of cases that -- that --

12 QUESTION: Well, it -- may I tell you the reason
13 I wasn't convinced on that is that if -- if Congress
14 were -- were specifying in the text here choices among
15 ordinary remedies, I think that would be a very strong
16 argument.

17 The reason it seems less strong here is that the
18 choices that -- or the -- the remedies that Congress has
19 specified are extraordinary remedies, e.g., right in this
20 section. What is specified is treble damages, not
21 damages. If they had simply said can get damages, I think
22 it would be a slam-dunk, but -- but what they did was --
23 was to specify something out of the ordinary, and I'm not
24 sure that that carries the implication that ordinary
25 remedies, consistent with what it specifies, are -- are

1 meant to be excluded.

2 MR. ENGLERT: Well, Justice Souter, this Court
3 said over and over again that it did carry that
4 implication when the exact same language was used in the
5 Sherman and Clayton Acts. The Paine Lumber case, the
6 D.R. Wilder Manufacturing case, a whole host of antitrust
7 cases.

8 QUESTION: And I just don't remember this.
9 Does -- does the -- does Clayton use the phrase, sue
10 therefor?

11 MR. ENGLERT: Oh, yes.

12 QUESTION: I have to go back and look. Is that
13 the term of art that's in there?

14 MR. ENGLERT: Oh, yes. Oh, yes. The -- the
15 language of Sherman and Clayton is in the appendix to the
16 Scheidler blue brief --

17 QUESTION: Yes. I just -- I just didn't go back
18 and look. That is the phrase?

19 MR. ENGLERT: It is. It is. The terms that
20 differ are quite trivial, and some sections are separated
21 into different subsections. That's about all the
22 difference there is.

23 I'd like to reserve the balance of my time for
24 rebuttal.

25 QUESTION: Mr. Solicitor General.

1 ORAL ARGUMENT OF THEODORE B. OLSON
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE

4 MR. OLSON: Justice Stevens, and may it please
5 the Court:

6 The right to control a business, whether or not
7 for profit, is a well-recognized and longstanding interest
8 in property. When that control is surrendered in response
9 to unlawful force, whether motivated by economics,
10 politics, or ideals, the extortionist has attained his
11 objective, and the Hobbs Act has been violated.

12 QUESTION: Well, under that definition, I
13 suppose that anytime protesters trespass on property,
14 they've obtained the use of that property and there's a
15 Hobbs Act violation --

16 MR. OLSON: If --

17 QUESTION: -- Hobbs Act predicate violation?

18 MR. OLSON: If there's an unlawful use of force
19 or threats or violence, Justice Kennedy, whether it be in
20 the form of trespassing -- and the aim -- which this Court
21 recognized 8 years ago in this -- in this very predecessor
22 case was to shut down the clinics. If that aim is
23 achieved, the control of the property has been transferred
24 from the owner of those clinics to the extortionist.

25 QUESTION: Well, if -- if that's -- if that's a

1 strained reading of obtained, shouldn't we be -- take
2 counsel of -- that there's a -- serious First Amendment
3 consequences -- consequence if we adopt that extensive
4 definition?

5 MR. OLSON: As Justice Souter said in -- in the
6 dissent, which you joined, in the earlier case, the First
7 Amendment is not an issue in this case, and it can be
8 dealt with in particular circumstances in particular cases
9 where it arises. The issue here is if the use of force --

10 QUESTION: Well, the -- there's always a First
11 Amendment implication in a protest case. There's -- at
12 this point there is a First Amendment issue in the case
13 because of the broad definition you're proposing, it seems
14 to me.

15 MR. OLSON: Well, it was the question that was
16 presented that was not accepted by this Court. Question
17 3, I think it was, or 4 in the -- the one Scheidler
18 petition was not accepted by this Court.

19 QUESTION: Well, but the point -- the point
20 is -- the point is not whether there's a First Amendment
21 violation here. The point is whether the interpretation
22 of the word obtain that the Government is -- is suggesting
23 we adopt does not threaten to -- to bring us constantly
24 into difficult situations where we're going to have to try
25 to sort out whether that definition doesn't sail too close

1 to the wind with respect to First Amendment rights.

2 MR. OLSON: I submit, Justice Scalia, that that
3 is not going to be the -- the problem that this Court or
4 any courts are going to have to face.

5 First of all, the definition of property as
6 controlling a business has been accepted for a long time.
7 Now, the only question that is --

8 QUESTION: You -- you -- do you agree that your
9 interpretation would have been applicable to the civil
10 rights sit-ins?

11 MR. OLSON: Under some circumstances, it could
12 have if illegal force or threats were used to prevent a
13 business from operating.

14 QUESTION: Do you --

15 MR. OLSON: In many --

16 QUESTION: Do you agree that it would be
17 applicable to many labor picketing situations --

18 MR. OLSON: Well, they --

19 QUESTION: -- where they obstruct entrance?

20 MR. OLSON: This -- this Court specifically
21 carved out an exemption in -- in the Enmons case with
22 respect to legitimate labor objectives --

23 QUESTION: No, but --

24 MR. OLSON: -- and made it --

25 QUESTION: The exception wasn't with regard to

1 labor objection. What -- what is there in the statute
2 that -- that enables you to make an exception for labor
3 picketing?

4 MR. OLSON: What -- what this Court --

5 QUESTION: What language of the statute enables
6 you to separate labor?

7 MR. OLSON: Well, I -- I can't pull a specific
8 piece of the language out of the statute, but this Court
9 said nearly 20 times in the Enmons case that the Hobbs Act
10 was not intended to cover achievement of legitimate
11 collective bargaining demands, and because the Court did
12 not want to --

13 QUESTION: It said any legitimate demands --

14 MR. OLSON: No, it --

15 QUESTION: -- elsewhere. It didn't always limit
16 it to just legitimate collective bargaining demands, did
17 it?

18 MR. OLSON: I -- I take that the Court, because
19 it said over 15, nearly 20 times legitimate collective
20 bargaining demands, legitimate union objectives --

21 QUESTION: Because that's what was involved in
22 the case. But why would you separate legitimate
23 collective bargaining demands from other legitimate
24 demands? What is there possibly in the word obtain that
25 could cause you to separate legitimate collective

1 bargaining demands from legitimate demands that you --
2 that you refrain from doing something else?

3 MR. OLSON: I -- I can only submit, Justice
4 Scalia, that it seemed to me a clear implication of the
5 words used by the Court and the fact that the Court
6 emphasized that it was -- that we were dealing with -- the
7 Court was dealing with the extraordinary -- the potential
8 extraordinary change in Federal labor law, that that
9 phrase was emphasized over and over again. Neither this
10 Court --

11 QUESTION: So -- so you say we simply made a
12 labor law exception to the extortion statute.

13 MR. OLSON: In the -- in the context of the
14 history --

15 QUESTION: Just -- just out of nowhere, a labor
16 law exception.

17 MR. OLSON: No, not out of nowhere, Justice
18 Scalia. There was a long history of --

19 QUESTION: You give me no language in the
20 statute that would justify it.

21 MR. OLSON: What -- what the statute -- what the
22 language of the statute does -- and here's -- here's
23 where -- what I would emphasize. The language of the
24 statute specifically makes it unlawful and makes no
25 exception for -- for whether the -- whether the -- the

1 petitioner -- the -- the protester, or the -- or the
2 alleged extortionist is motivated by ideals or politics or
3 wanting to shut down a business or a -- or a boycott of
4 Israel or -- this is a classic use of force and extortion
5 in the organized crime setting. The use of force or
6 threats to take over a labor union or a business --

7 QUESTION: But it says there, to obtain control.
8 To obtain control.

9 MR. OLSON: Yes.

10 QUESTION: Fine. What I don't understand is
11 whether there isn't a line somewhere between obtaining
12 control in the sense of taking over a business for a
13 period of time, shutting down a business, and just telling
14 the owner of the business to do one single thing once that
15 the blackmailer -- but not the owner -- wants to do.

16 MR. OLSON: Let me --

17 QUESTION: There's a spectrum that falls within
18 that word control or the word taking over that if you push
19 it to an extreme, the Hobbs Act becomes a coercion statute
20 in respect to a business owner.

21 MR. OLSON: It -- the question, it seems to me,
22 was answered in part by this Court in the earlier NOW case
23 by saying that the extortionist doesn't have to gain a
24 financial benefit or take possession.

25 Now, the -- the robbery and larceny statutes at

1 common law required the taking and acquiring of
2 possession.

3 QUESTION: I take where you're going is that it
4 is a coercion statute in respect to a businessperson
5 insofar as you ask the owner of the business to do
6 something that he doesn't want to do.

7 MR. OLSON: That's -- that's part of it, yes.
8 And the answer to the question about obtaining --

9 QUESTION: If I think that's too extreme, is
10 there any stopping place?

11 MR. OLSON: Well, there -- there is a stopping
12 point, is whether at the end of the day, through the
13 threats or the -- the actions of the extortionist, that
14 property interest that was held by the victim of the
15 extortion has been transferred to the hands of the
16 extortionist in the sense that the aim has been
17 accomplished. The aim was to shut down the clinics. That
18 was the attempt, and to the extent that that was or was
19 attempted to be accomplished, that control --

20 QUESTION: General Olson --

21 QUESTION: Mr. -- yes, Mr. Olson. If -- if we
22 agreed with your view -- and I'm not sure we will -- about
23 property including the right to control business assets,
24 it does not, I assume, cover some personal right of
25 somebody to obtain services in the clinic. And I guess

1 the jury verdict covered both. Could the jury verdict be
2 upheld here even if the Court agreed with your view?

3 MR. OLSON: We -- we have not addressed that,
4 Justice O'Connor. I do --

5 QUESTION: Well, I'm asking you to.

6 MR. OLSON: I do -- I do agree. I think that it
7 would have to be sent back to the Seventh Circuit for a
8 remand to examine that question. The jury instruction did
9 have the component to which you refer which we would
10 characterize as a liberty interest of a right of an
11 individual. And that was --

12 QUESTION: And we have no idea what the jury
13 went on. There were three pieces, and one involved the
14 people who worked in the clinic. One involved the women
15 who were served by the clinic, and the third involved the
16 clinic operation.

17 And that was exactly the question that I wanted
18 to ask you. Is your bottom line a new trial? Because the
19 charge doesn't match the theory you're putting forward.

20 MR. OLSON: I think that -- I think that at the
21 end of the day, although we haven't briefed it and the
22 Government is interested in the definition of extortion,
23 at the end of the day that might have to be the result
24 because the general -- generalized verdict does not make a
25 distinction between that which we contend is property

1 right which was obtained by the extortionist or -- or was
2 attempted to be obtained --

3 QUESTION: Well, you wouldn't want us to send it
4 back without resolving the extortion issue, would you?

5 MR. OLSON: That's -- no, I --

6 QUESTION: You want us to send it back so it
7 is -- it is -- the jury is given a charge only on the
8 extortion theory that you're -- that you're delivering.
9 Then it comes back up and then we will resolve the issue.

10 MR. OLSON: Well, I -- the question presented,
11 in connection with the Hobbs Act, I think is answered this
12 way. Where unlawful -- which this Court should
13 articulate, we hope, in its opinion. Where unlawful force
14 is used to arrest sufficient control of a business to stop
15 the performance of its services, the Hobbs Act has been
16 violated because control of the business, a property right
17 has been acquired.

18 I -- I may have 1 minute left to just mention
19 one thing with respect to the -- the RICO provision.

20 Congress created a private right to damages for
21 RICO violations by intentionally copying language from the
22 antitrust laws that this Court had repeatedly held did not
23 confer a right to seek injunctive relief. This Court has
24 said that Congress was aware of the antitrust history, was
25 copying it, intended to copy it, and was presumed to know

1 the consequences of what Congress was doing.

2 QUESTION: Of course, at the time the statute
3 was enacted, a private litigant could get relief,
4 injunctive relief, under the antitrust laws, not under
5 the -- not under the section 7 of the Sherman Act, or
6 section 4 of the Clayton Act, but under whatever the other
7 number is.

8 MR. OLSON: Section 16.

9 QUESTION: But the question is really whether
10 the first section of the RICO gives us authority.

11 MR. OLSON: Well, may I answer that, Justice
12 Stevens?

13 QUESTION: Sure.

14 MR. OLSON: It seems to me that in the context
15 of the language that the -- that Congress knew would not
16 create a right, and knowing -- Congress knowing that
17 section 16 did specifically create such a right, and
18 knowing that this Court had said that when a right is
19 created and remedies specifically provided, the Court --
20 the Court will not expand. The Court will accept what
21 Congress has done. And Congress did not adopt and in fact
22 rejected the opportunities or -- or failed to accept the
23 opportunities to adopt precisely the remedy that would
24 have had that result.

25 QUESTION: Thank you, Mr. Olson.

1 Ms. Clayton.

2 ORAL ARGUMENT OF FAY CLAYTON

3 ON BEHALF OF THE RESPONDENTS

4 MS. CLAYTON: Justice Stevens, and -- and may it
5 please the Court:

6 I'd like to begin with the RICO issue, if I may,
7 and then turn to the Hobbs Act questions.

8 The stark contrasts between the antitrust law
9 and RICO prove the -- prove why private injunctions are
10 available. When it comes to damages, we agree that the
11 language is virtually the same, treble damages and so
12 forth. But when you look at the injunction provisions,
13 they are radically different.

14 In the antitrust law, Sherman IV, all the
15 injunction provisions were put in a single paragraph
16 giving the Government the exclusive duty to enforce. That
17 is not -- that was not copied in RICO. In RICO, Congress
18 took out permanent injunctions, put them in section
19 1964(a), a separate, unrestricted section. Not only did
20 it give the duty to the Government, it didn't even mention
21 the Government.

22 QUESTION: But in the next section, it did
23 mention the Government and said that the Government shall
24 have the authority to -- to use the injunctive provisions
25 mentioned in the first section. Right?

1 MS. CLAYTON: No, Your Honor.

2 QUESTION: And then in the third section, it
3 gives private individuals a right to damages, but does not
4 mention that they have the right to use the first -- first
5 section.

6 MS. CLAYTON: Justice Scalia, of course, you are
7 correct about section (c). Section (c) does give standing
8 to private parties, and gives them these extraordinary new
9 remedies, treble damages and legal fees, which they could
10 never get without a statutory grant.

11 But section (b) does not give the Government the
12 right to use permanent injunctions. It only talks about
13 preliminary relief. It takes that one section of
14 Sherman IV out, and the other part, the permanent
15 injunctions in Sherman IV, are now, under RICO, put in a
16 wholly different provision, the unrestricted section (a).

17 The natural reading of section (a), which says
18 all these permanent remedies, including the injunction
19 that our trial court granted here, went against future
20 criminal activity. Section (a) in an -- unrestricted
21 language makes that available to the court to restrain
22 violations of section 1962, the very violations that
23 section (c) --

24 QUESTION: Section (a) says what the court may
25 grant. It doesn't say who has authority to ask the court

1 to do that. And in the -- the provision (b), it empowers
2 the Government and the Government only to ask for
3 preliminary injunctive relief. It's a strange thing. Why
4 would Congress withhold the power to seek a preliminary
5 injunction and yet give that party the right to seek a
6 permanent injunction?

7 MS. CLAYTON: That's a question that we have
8 pondered for a long time, and -- and I think the Motorola
9 brief, which explains -- a very important brief -- why
10 preliminary injunctions should be available to everybody,
11 makes a good argument for that. But we don't have to
12 address that question here.

13 My own thinking is that section (b) gives the
14 Government something that it wouldn't have had without the
15 statutory grant because preliminary injunctions require
16 one -- one element that permanent ones don't, the
17 irreparable harm to the victim. And the Government, suing
18 as sovereign, doesn't have property that's harmed. And if
19 you look at the Wollersheim case, they recognize that was
20 a plausible reason for why section (b) is there.

21 QUESTION: But you're just addressing the second
22 sentence of section (b). There is a first sentence which
23 says, the Attorney General may institute proceedings under
24 this section.

25 MS. CLAYTON: That's right.

1 QUESTION: Now --

2 MS. CLAYTON: That's right.

3 QUESTION: -- that -- that gives the Attorney
4 General the power to institute proceedings under (a).

5 MS. CLAYTON: Your Honor, it doesn't -- excuse
6 me, Justice Scalia. Section (b) does not say the Attorney
7 General may institute proceedings under section 1964(a).
8 It says under this section which is section --

9 QUESTION: What else could it mean?

10 QUESTION: What else could it mean?

11 MS. CLAYTON: It means section 1964 as a whole,
12 Your Honor, and in section (c) private parties are given
13 the right to sue, which is another way of saying the very
14 same thing. In fact --

15 QUESTION: As I -- sorry.

16 MS. CLAYTON: I was going to say in the American
17 Stores case, this Court construed the very same language
18 in the Clayton Act, sections 15 and 16. Institute
19 proceedings, sue for in the other. And the Court said
20 both of them mean both the Government and private parties
21 may go and get injunctive relief including divestiture.
22 It's just two ways of saying the same thing. The
23 Government is thought to institute proceedings. It's
24 bringing them as a sovereign. Private parties are suing
25 for. It's just the traditional language. Certainly those

1 phrases don't bear the weight of the argument that
2 institute proceedings means this party and only this party
3 has access to those unrestricted remedies of section
4 1964(a).

5 QUESTION: And I looked -- I mean, I couldn't
6 make too much out of the fact that you take the language
7 from the Clayton Act which says the Attorney General may
8 institute proceedings in equity, and you move it to
9 section (b) and just change it to say, he may institute
10 proceedings under this section. That's the only
11 difference with the Clayton Act that I could find.

12 So I looked up the history. In the history, it
13 looks as if there were five different bills floating
14 around, and things didn't -- weren't all that
15 straightforward. It got a little mixed up. And you have
16 in the House several Congressmen getting up and saying
17 they made a mistake in the Senate. They didn't include
18 this. They should have. And then there were four more
19 bills floating around, and the ones who wanted to include
20 it said, send it all to the Judiciary Committee, let them
21 work it out, and they never worked it out. I mean,
22 that's -- that's the thrust of it that I -- that I got out
23 of that.

24 Maybe it was just a mistake. Well, if it was a
25 mistake, you're the -- you have another law. You can

1 bring it under the -- you could get an injunction I guess
2 under the Abortion Act, the Abortion Clinics Act, or -- it
3 seemed to me this one -- they made a mistake. Well, they
4 made it.

5 MS. CLAYTON: Well, Justice Breyer, even if
6 someone made a mistake, the bill, as it stands, is what
7 Congress voted on, and what the President signed. It is
8 that bill that we interpret. And we all agree -- this
9 Court has said on many occasions that --

10 QUESTION: I'm with you on that.

11 MS. CLAYTON: I know you are, Justice Scalia.

12 (Laughter.)

13 MS. CLAYTON: Perhaps the only thing. And
14 you've often commented on how there are probably as many
15 reasons for congressional action or inaction as there are
16 Members of Congress.

17 But the fact is the bill makes a very -- it's a
18 very radically different structure from the antitrust law.
19 Private -- I mean, permanent injunctions are unrestricted,
20 and under the traditional jurisprudence, Califano -- when
21 we -- we assume all traditional remedies are available
22 unless -- unless there's the clearest command. There's
23 not even a hint here. Maybe it was a mistake. It was
24 certainly not a clear command to do the opposite.

25 And as my -- petitioners have pointed out, the

1 only time private injunctions were voted on, they passed
2 unanimously. Why didn't they put it in there? I think it
3 would have been redundant, and the Court doesn't like
4 surplusage. If they had said in section (c), and private
5 parties can get permanent injunctions, then the courts
6 would have been trying to figure out, well, what did they
7 mean in section (a). That has to mean something
8 different.

9 They didn't say again the Government could get
10 permanent injunctions in section (b). That would have
11 been redundant too. But everybody agrees the Government
12 can get permanent injunctions.

13 In any event, this Court's jurisprudence teaches
14 us --

15 QUESTION: Don't you think it's --

16 QUESTION: We don't agree on whether they get it
17 pursuant to section (a) or section (b), though.

18 MS. CLAYTON: The Scheidler brief, the opening
19 brief, says that section (b) gives the Government
20 unrestricted access to the remedies in section (a).
21 That's the way they've put it. I don't read -- if -- if
22 that's the case for the Government, the same applies to
23 private parties. By parity of reasoning, anyone with
24 standing -- and it's strict standing for private parties.
25 You've got to be injured in your business or property.

1 QUESTION: But -- so you say private parties
2 have the power to require -- to ask the court to order a
3 person to divest himself of any interest, direct or
4 indirect? Do you know of any other situation in which a
5 private party can -- can cause the -- the divestiture of a
6 business?

7 MS. CLAYTON: Justice Scalia, it's not
8 automatic. The court in its discretion might do it or
9 might not, but it must --

10 QUESTION: I understand that, but to put that
11 power and -- and to request it in the hands of a power --
12 of a private party seems to me extraordinary.

13 MS. CLAYTON: It's been in the hands of private
14 parties under the antitrust law for more than a half
15 century before RICO was passed, and the courts have had no
16 problem exercising their discretion to my knowledge.

17 In fact, in the American Stores case, this Court
18 pointed out how the very same remedy sought by the
19 Government and sought by private parties, the Government
20 might get it, and the private party might not.

21 Furthermore, any -- any injunctive relief --

22 QUESTION: You can understand it in the context
23 of the antitrust laws where the divestiture is the only
24 way to prevent the -- the monopolization, but to use that
25 as a punishment for -- for extortion is, it seems to me,

1 quite -- quite bizarre.

2 MS. CLAYTON: And then I think the court
3 wouldn't grant it to the private party, and they certainly
4 wouldn't grant it unless it was designed to remedy the
5 particular injury that the private party suffered to their
6 business and property by virtue of a 1962 violation. It
7 would be very strange, indeed, Your Honor, to remove from
8 private parties who are deputized to be a -- private
9 attorneys general, supplement the Government resources, to
10 take away this powerful core injunctive remedy and instead
11 make them sue for treble --

12 QUESTION: But the divestiture -- you say the
13 divestiture should never be -- should never be used by the
14 courts.

15 MS. CLAYTON: No, I don't, Your Honor. I think
16 that the district courts are --

17 QUESTION: It could -- could simply destroy an
18 organization as the punishment for -- for extortion as
19 you --

20 MS. CLAYTON: The court would only do that in an
21 extreme case, I am sure. Maybe they would never give it
22 to a private party, but it would be up to the -- but the
23 private party may seek it. Section (a) doesn't say they
24 automatically get it.

25 QUESTION: Then it's even odder that they

1 don't -- the private party can't seek that preliminary
2 injunction even if they can show irreparable injury. To
3 give the extraordinary power of ordering divestiture and
4 not giving a party who is irreparably injured the
5 authority to go into court and say, stop now --
6 temporarily --

7 MS. CLAYTON: I -- I agree, Your Honor, and even
8 though that's not an issue that the Court has to resolve
9 in this case, I think the Motorola brief makes an
10 excellent case for why -- since this is a very special
11 remedy, it's not an exclusive list. Congress didn't mean
12 to deprive private parties or anyone else of any of the
13 traditional remedies. The Califano rule is clear. Unless
14 there's a clear command to deny it, it's available. I
15 don't think section (b) -- remember, it doesn't even have
16 that duty language.

17 One other point I'd like to make is when the
18 antitrust laws were written, there was no merger of law in
19 equity. To go in -- when someone had a right to get
20 damages, they had to go into the law court which could
21 only give money damages. It couldn't give injunctions.
22 That had changed by the time RICO passed. And Congress
23 knew that. Congress knew the Federal courts had the
24 ability to design any appropriate remedy to fix the wrong,
25 barring the clearest command. There's no clearest

1 command.

2 QUESTION: Well, you do agree, though, I guess
3 that were efforts to include language authorizing the
4 obtaining of injunctions by private petitioners, and that
5 was not adopted by Congress.

6 MS. CLAYTON: But they were passed unanimously.
7 They didn't get in I believe because it would have been
8 surplusage. It would have been redundant, and we don't
9 like that in statutes.

10 QUESTION: Well, we don't know.

11 MS. CLAYTON: We don't know, Your Honor, and we
12 can -- and as the Court has said in Central Bank and Solid
13 Waste, one never -- it's a thin reed to rest an
14 interpretation on what Congress might have had --

15 QUESTION: And they have a long, long discussion
16 of the battle, and everybody says, without any opposition,
17 that this isn't there. You would have thought if it was
18 surplusage, somebody would have gotten up and said, well,
19 it is.

20 MS. CLAYTON: Well, I think that's what
21 Representative Steiger said. The -- in fact, we quoted
22 him. It's ambiguous.

23 QUESTION: I don't know.

24 MS. CLAYTON: But it's certainly not the clear
25 command to the contrary.

1 QUESTION: Well, you have two -- two difficult
2 and major arguments here.

3 MS. CLAYTON: I'd like to turn to it. Thank
4 you, Justice Kennedy.

5 QUESTION: I -- I would like to hear your
6 comments on obtaining property.

7 MS. CLAYTON: I would like to turn to those.

8 I think we all agree that property includes both
9 tangible things and intangible things. Of course, in this
10 information age, some of our most important property is
11 intangible. So the question, of course, is how does one
12 obtain it. One obtains it by obtaining control over it or
13 dominion over it, as this Court explained in the Carpenter
14 and Green case.

15 Remember in Carpenter -- now, this is a mail
16 fraud case that had the same phrase, obtain property.
17 Mr. Winans, the Wall Street Journal reporter, the On the
18 Street column, was held to have wrongfully obtained
19 property. Now, he had already received the information.

20 QUESTION: Do you think that it includes liberty
21 interest deprivation?

22 MS. CLAYTON: No. No, Your Honor, I don't. We
23 do not believe -- but sometimes they --

24 QUESTION: Then what happens to a generalized
25 verdict no matter how you define this --

1 MS. CLAYTON: Your Honor, the verdict here is
2 based only on property. If you look at the Hobbs Act
3 instruction, it required that the respondents be made to
4 part with property, not part with liberty interests. If a
5 newspaper publishes an editorial, it has a liberty
6 interest, a First Amendment right, to do it, but it also
7 has a property right.

8 QUESTION: Yes, but it defined property. It
9 says you can find a violation, other things -- all the
10 other -- all the other requirements being met. You have
11 to say that the doctors, nurses, or other staff or clinics
12 themselves give up a property right. The term property
13 right means anything of value --

14 MS. CLAYTON: Right.

15 QUESTION: -- including a woman's right to seek
16 services from the clinic, the right of doctors or nurses
17 to perform their jobs, the right of the clinic to provide
18 medical services free from wrongful threats.

19 MS. CLAYTON: Right.

20 QUESTION: Now, your brief I think, more or
21 less, seemed to concede that -- that at least two out of
22 those three parts were certainly wrong.

23 MS. CLAYTON: Oh, no.

24 QUESTION: You don't. I mean, then -- then do
25 we have to decide -- is this -- is --

1 MS. CLAYTON: No, no. No, Your Honor. What we
2 believe is that to find property in any one of those
3 aspects of property -- there are three aspects of
4 property: the clinic's right to control its equipment and
5 buildings and so forth, the women's right to spend their
6 money, and the contract among -- between the two parties.
7 Extortion of any one of them proximately injures all of
8 them because it's two sides of the same coin. If the
9 clinic is forcibly -- through threats of violence, the
10 clinic is forcibly closed, now the women who have
11 appointments, which are contracts, bilateral contracts,
12 they can't get in. It's a -- it's two sides of the same
13 coin. So to extort the property of the clinic is to
14 proximately injure the women in her business or property,
15 which is -- the standing comes under RICO. This is
16 something that petitioners have never even challenged at
17 the trial court --

18 QUESTION: All right. So -- so in other words,
19 this instruction is correct that it's -- it's --

20 MS. CLAYTON: It is, Your Honor.

21 QUESTION: So a -- a woman's right to seek
22 services is property which, if they say, I don't want you,
23 the clinic, to serve the woman so the woman can't get the
24 services, that is obtaining property?

25 MS. CLAYTON: It is under these circumstances

1 where she has an actual agreement with the -- the clinic.
2 She's not just going shopping. Each woman who went to
3 these clinics had an actual appointment for a particular
4 service at a particular time. When I have an appointment
5 with my doctor for a biopsy, I have a property right in
6 seeing my doctor at that time.

7 QUESTION: What have you obtained control of?
8 What have you obtained control of?

9 MS. CLAYTON: Just as in the Carpenter case,
10 you've obtained control of the right to do business and
11 the intangible rights that come out of business, the
12 exclusive rights.

13 QUESTION: Obtaining control means -- means
14 nothing at all if -- if whenever you deprive somebody
15 of -- of a right, you say you obtain control of the right
16 that -- that you've deprived them of. I mean, everything
17 becomes an obtaining of property.

18 MS. CLAYTON: When one uses a demand to make one
19 cede their control over property -- this is my pen. This
20 is my property. It has ink and plastic. But I also have
21 a right to use it for writing. And if someone puts a gun
22 to my head and says, if you use that pen, I'll shoot you,
23 they have taken my property. They've taken my control.

24 QUESTION: If I -- if I say to you, don't --
25 don't use that pen, or I'll do something unlawful and you

1 don't use the pen, I have obtained the pen.

2 MS. CLAYTON: You have obtained control.

3 QUESTION: In -- in ordinary parlance, I have
4 obtained the pen.

5 MS. CLAYTON: Your Honor, in the Florida Prepaid
6 case, in the Craft case, in the Drye case, this Court made
7 crystal clear the essence of intangible -- and, for that
8 matter, tangible property is the rights that come out of
9 it, especially the right of control. The right to control
10 my pen, the right of the clinics to control their --

11 QUESTION: Or what about the right to perform a
12 job? Let's think of a labor strike.

13 MS. CLAYTON: Absolutely.

14 QUESTION: And -- and think of the strike, my
15 goodness, where people can't get into the factory. And --
16 and somebody comes out and says, you've -- you've
17 interfered under the Hobbs Act and have obtained property;
18 namely, my right to perform my job is interfered with.

19 The person at the soda fountain -- you've heard
20 the litany.

21 MS. CLAYTON: Right.

22 QUESTION: There are the soda fountain -- the
23 sit-ins. The soda jerk who wouldn't serve the black
24 customers. Well, this -- this is interfering with my
25 right to perform my job.

1 I mean, this seems -- you have another statute
2 that you can sue under. But a lot of -- a lot of people
3 who don't like these various demonstrations don't, and
4 they'll all be in under the Hobbs Act and -- and RICO and
5 so forth. I'm rather concerned about this problem. I'd
6 like you to address it.

7 MS. CLAYTON: I'd like to address those,
8 Justice Breyer. Let's start with the soda joke -- jerk
9 example.

10 Martin Luther King didn't tell his followers to
11 go into the Woolworth's and bash the people around and
12 forcibly prevent the white people from getting service.

13 QUESTION: No, but just obstructing -- just
14 obstructing -- you've used the term violence several
15 times. That's not what the instruction required.

16 MS. CLAYTON: It --

17 QUESTION: As -- as your argument to the jury
18 itself indicated, it was enough if they obstructed the
19 entrance and failed to part like the Red Sea --

20 MS. CLAYTON: Not true.

21 QUESTION: -- if somebody wanted to go in.

22 MS. CLAYTON: Justice Scalia, that is not
23 correct. We -- the instruction required that the
24 respondents be made to give up property. We -- and -- and
25 question 12 ensured that a mere blockade or sit-in --

1 question 6 on the jury form asked the jury if any of the
2 predicate acts they found was based on a mere blockade and
3 sit-in. The jury said no. I told the jury don't include
4 in your predicate acts -- I told them -- anything that was
5 based on mere speech, or mere presence, or the message.
6 It had to be something that involved force or violence,
7 the wrongful use of fear --

8 QUESTION: I -- I am reading the closing
9 argument on behalf of the clinic plaintiffs at the trial,
10 and it says, in every issue we've shown you the property
11 rights of the clinics and the women were extorted under
12 RICO. Even a few hours of deprivation of legal rights
13 will satisfy the RICO act of extortion.

14 There is one way, I guess, in which you don't
15 have the element of force in a blockade, and that would be
16 if the blockaders did something that they were
17 specifically instructed that they should never do, that
18 is, politely move aside, part like the Red Sea, and let a
19 woman through.

20 But you know that never happened. No witness
21 ever testified to that. No witness -- not defense, not
22 plaintiff -- ever said that any of the blockaders were
23 instructed to let women through.

24 In other words, you told the jury that you could
25 find an offense here under the Hobbs Act by the mere

1 blockade. It wasn't smacking people around. It was just
2 not letting people in.

3 MS. CLAYTON: No, Your Honor. If the jury had
4 found a mere -- first of all, that was argument. The jury
5 follows instructions not argument, as the Weeks case from
6 this Court has held. But the evidence supported --

7 QUESTION: So you're -- you're changing your
8 position here.

9 MS. CLAYTON: No, Your Honor.

10 QUESTION: I see.

11 MS. CLAYTON: When we made -- we made that
12 argument, but we also told the jury that if they were
13 basing any predicate acts on the mere presence and a mere
14 blockade, mere sit-in, they had to put yes to question 6.
15 They put no because we showed them that they had to find
16 that any predicate act needed an element of force or
17 violence. And that's what PLAN did. It used these --

18 QUESTION: Well -- well, but still -- still it
19 seems to me that your -- your theory doesn't depend on
20 violence. Your theory is that you're obtaining -- or that
21 the defendants here were obtaining property because they
22 prohibited its use. That's your theory.

23 MS. CLAYTON: Yes, Your Honor, by -- by wrongful
24 means. That's correct.

25 QUESTION: And -- and so -- so long as the means

1 were wrongful, the obtaining definitional problem still
2 remains, and I think you should address that.

3 MS. CLAYTON: I'd like -- yes, I'd like to go
4 back to the Carpenter case. Mr. Winans had the
5 information, but then he wrongfully obtained it. How did
6 he wrongfully obtain it? When he exercised dominion or
7 control over it. This Court said he -- he wrongfully
8 obtained it when he deprived -- that was this Court's
9 word -- deprived the Journal of its right to control that
10 property.

11 In the Green case, the same way. The --

12 QUESTION: How about Carry Nation? I -- you
13 would concede, I take it, based on your argument that if
14 RICO had been around then and the Hobbs Act, that she
15 would have been in violation.

16 MS. CLAYTON: I would, Your Honor, if she had
17 been doing it to get consent, to get the business to
18 change its ways, which I guess she was. Yes, that's not
19 the lawful way. If my client, the National Organization
20 for Women, organized people to go to Augusta Golf Course
21 and tear up the greens until they let women members, that
22 would be extortion.

23 QUESTION: But it is -- it is strange to think
24 of Carry Nation, that notorious extortionist. I mean, you
25 know, that's just not the crime involved. There --

1 there's a crime there, but is it extortion?

2 MS. CLAYTON: Your Honor, the Hobbs Act doesn't
3 give exemptions for motives, as this Court has repeatedly
4 held. There's no more a motive requirement there than
5 there is under RICO.

6 QUESTION: What's the difference between --

7 QUESTION: Ms. Clayton, may I ask you one
8 question? I just -- I -- I want to be sure I heard you
9 correctly. There's a definition of property in the
10 instructions, a three-part definition, at page 158. Did
11 you tell us that that instruction was not objected to?

12 MS. CLAYTON: Oh, no, I don't believe I said
13 that.

14 QUESTION: I just misunderstood you.

15 MS. CLAYTON: The -- the petitioners had offered
16 a definition of -- of extortion that was part with
17 property, and they didn't define it. So at the trial --
18 at the pretrial stage, that was all they offered. They
19 didn't object then.

20 During the course of trial, they made numerous
21 objections. I can't say they never objected. They didn't
22 timely object.

23 And their original view of what extortion meant
24 was part with property, which is the same I think as give
25 up property.

1 QUESTION: What is the difference between
2 coercion and extortion?

3 MS. CLAYTON: The difference is whether property
4 is being attacked. When you coerce somebody to give up
5 their First Amendment right, that might be coercion, but
6 since it's not focused on property, it's not extortion.

7 QUESTION: What would you coerce them to do that
8 is not the giving up of property? Give me an example.

9 MS. CLAYTON: To stop speaking. You don't have
10 property in your speech. Liberty interests are not the
11 subject of extortion, but -- but property interests are.
12 Every extortion is a coercion.

13 QUESTION: Shouldn't we draw the line this way?
14 Instead of speaking as, for example, the Solicitor General
15 did and some of the cases do about obtaining control,
16 isn't the way to -- to adhere to the line between the
17 liberty and property distinction to say that you extort if
18 you gain control in a way which prevents them from doing
19 business, i.e., engaging in a property exercise, but you
20 do not extort if you gain control simply in the way they
21 do business, i.e., their choice of whom to serve?

22 If we draw that distinction, then the old
23 sit-ins in the lunch counter weren't there to stop them
24 from doing business. They wanted them to do business.
25 They wanted them to do business with them. Whereas, the

1 case which I think you have is a case that could be argued
2 that the point of it was to stop the business, period, and
3 that gets into property and crosses the line from liberty
4 to property. Would you accept that distinction?

5 MS. CLAYTON: Not quite, Justice Souter.
6 I certainly agree that the -- that the sit-in protesters
7 were not extorting anybody because they were trying to
8 change people's mind by persuasion, not by intimidation.
9 But I believe if you look at the old --

10 QUESTION: Well, they wanted a -- I mean, but
11 they -- the --

12 MS. CLAYTON: They --

13 QUESTION: -- their immediate object was to get
14 the sandwich or the Coke. So that was easy.

15 MS. CLAYTON: But -- okay, that -- that may be
16 right.

17 But when we look at the old organized crime, the
18 classic organized crime extortion cases that the Hobbs Act
19 was based on, we see organized crime going in saying, let
20 these people run your pension fund. Don't do business
21 with these people. Fire these people. Hire those. Any
22 attempt to control a lawful business decision I believe is
23 extortion, whether it's positive or negative.

24 QUESTION: Well, maybe -- maybe it is, but I --
25 I think -- among other things, I think we are, and should

1 be more concerned about the First Amendment issues which
2 arise when you cross the line into liberty than the --
3 than the cases were 40 years ago and --

4 MS. CLAYTON: But the proper -- excuse me,
5 Justice Souter. The best way to address the First
6 Amendment issue is to apply the standards of Claiborne
7 Hardware to any extortion at conduct, as was done here.
8 Make sure that the petitioners had to have specific intent
9 that the crime be done. Make sure it was done knowingly,
10 willingly, wrongfully, not just accidentally. Make sure
11 the enterprise authorized or ratified it. Those were the
12 instructions given here. There was -- nothing could be a
13 predicate act unless all those tests were met.

14 And then on top of that, they had to use
15 demands, wrongful demands, to control lawful business
16 decisions. And I do believe that decisions either to do
17 something or not to do something, as long as the business
18 owner -- say the company makes round widgets and square
19 widgets. And the -- the extortionist says, we don't like
20 round widgets. We want you to only make the other kind.
21 Or maybe they don't make round and they want them to start
22 doing it. That's as much a control of their business
23 decisions as all those classic organized crimes that were
24 the basis of the Hobbs Act. And it's just as offensive
25 here.

1 Your Honor, we ask the clock not to turn back
2 the -- ask the Court not to turn back the clock on 50
3 years of Hobbs Act jurisprudence which protected
4 businesses and their customers in making their lawful
5 business decisions.

6 We ask the Court to decline to add any
7 limitations like tangible or personal to -- to the Hobbs
8 Act. By the way, even if you did, the State law --

9 QUESTION: You want to retain the labor union
10 exception, however, I assume.

11 MS. CLAYTON: And of course. Enmons -- and it's
12 section (c), Your Honor. It's section (c) of 1951 that
13 says nothing in this law will affect -- and then they list
14 all the labor laws. That's why there's a union exception.
15 Plus the -- the New York and all the other States had not
16 only a statutory labor exception, but common law.

17 And please don't --

18 QUESTION: Thank you, Mrs. -- Ms. Clayton.

19 MS. CLAYTON: Thank you. Thank you, Your
20 Honors.

21 QUESTION: Mr. Englert, you have 6 minutes left.

22 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

23 ON BEHALF OF THE PETITIONERS

24 MR. ENGLERT: Thank you, Justice Stevens.

25 The defendants in this case objected strenuously

1 to reading the word obtain out of the Hobbs Act. They did
2 not say that giving up property is enough. If you read
3 the 1995 opinion wrongly denying the 12(b)(6) motion,
4 that's all over the place. If you look at pages 4324 to
5 4340 of the transcript at the jury colloquy, the point
6 that there needs to be obtaining was made quite
7 strenuously.

8 QUESTION: Was -- was this particular
9 instruction, the one that I read from in 1998, the
10 instruction that had the three parts to it -- was that
11 objected to?

12 MR. ENGLERT: Yes, at the -- at the pages I
13 indicated.

14 People v. Barondess. The work stoppage led to
15 obtaining \$100. Of course, it was extortion. That's the
16 property in that case. That's -- it's cited in footnote
17 16 of our opening -- of the Scheidler opening brief.

18 United States v. Cleveland Indians Baseball
19 Company. This Court reminded us members of the bar that
20 the tendency to assume that a word used in two different
21 legal rules always has the same meaning, has all the
22 tenacity of original sin, and must constantly be guarded
23 against. To think that property's definition in tax cases
24 and in Fifth Amendment takings cases is necessarily the
25 definition of the Hobbs Act is simply wrong. The Hobbs

1 Act draws its definition of property from the common law
2 and the New York law, not from takings cases and tax
3 cases.

4 The First Amendment is in this case. Yes, the
5 Court did not take the First Amendment question, but the
6 principle of constitutional avoidance always governs the
7 construction of statutes. And Ms. Clayton concedes that
8 classic protest activities that are venerated in American
9 history in retrospect would be covered as extortion by her
10 definition. That should give the Court pause.

11 Claiborne --

12 QUESTION: They wouldn't -- they wouldn't be if
13 you observed the distinction I was throwing out.

14 MR. ENGLERT: The -- the answer to that
15 distinction, if I may, Justice Souter, is Claiborne
16 Hardware and Carry Nation -- those fact patterns certainly
17 would be covered even under the distinction you suggest.
18 There were 10 acts of violence in 1966 in Claiborne
19 Hardware.

20 QUESTION: Yes, Carry Nation would be covered.
21 There's no question. The -- the lunch counter sit-ins
22 would not, as I understand it.

23 MR. ENGLERT: Well, actually I -- I don't think
24 that's historically accurate. I think there was an effort
25 to stop the lunch counters from serving other people in

1 addition to getting them to -- to serve black people. But
2 it doesn't matter.

3 QUESTION: Well, the --

4 MR. ENGLERT: It -- it -- there are -- there are
5 examples that this Court should be concerned, I
6 respectfully submit, about calling extortion under
7 Ms. Clayton's definition, and that would include the facts
8 in Claiborne Hardware. That would include the Carry
9 Nation example. The Seamless Garment Network brief goes
10 into many other examples.

11 QUESTION: If the conduct in Claiborne Hardware
12 was pretty rough. Maybe it should have been included.

13 QUESTION: You're not going to get -- you're not
14 going to get my --

15 MR. ENGLERT: Your Honor, the -- the opinion of
16 the Court in that case refers to it has having elements of
17 majesty as well as elements of violence. And the Court
18 really should be concerned about whether the classic
19 historical pattern -- and please look at the Seamless
20 Garment Network brief -- the classic historical pattern of
21 venerable leaders whose followers get out of hand is
22 really what is meant by Hobbs Act extortion and RICO.

23 QUESTION: No majesty with Carry Nation. I
24 mean, you don't get my sympathy by saying you -- you might
25 have interfered with Carry Nation on --

1 MR. ENGLERT: Well, I --

2 QUESTION: He didn't say might have. You said
3 that you would.

4 MR. ENGLERT: There's another more legalistic
5 reason.

6 QUESTION: I think both sides agree on Carry
7 Nation.

8 MR. ENGLERT: If -- if I may, there's another
9 more legalistic reason why Ms. Clayton's and the Solicitor
10 General's position has to be wrong, and Justice Breyer and
11 others have laid their finger on it, Justice Ginsburg as
12 well.

13 What they're talking about is the classic
14 example of coercion, not extortion, and for those who like
15 legislative history, the fact that organized labor got
16 coercion out of the statute should give you pause. For
17 those who don't like legislative history, the fact that
18 there's a list of predicate acts and coercion isn't one of
19 them should give you pause.

20 I think almost everyone agrees that there has to
21 be at the very least a remand in this case, and
22 Ms. Clayton hasn't quite conceded it. But if this Court's
23 decision in Griffin v. United States, a criminal case, is
24 applicable in civil cases or if this Court's decisions in
25 Yates v. United States, Maryland v. Baldwin, Sunkist

1 Growers are applicable, then this jury verdict, which
2 almost indisputably rests, at least in part, on
3 indefensible notions of property, has to be reversed.

4 QUESTION: Can I ask you one question about
5 that? Did the individuals get damages here, or was it
6 just the clinics?

7 MR. ENGLERT: Only the clinics for extraordinary
8 security costs.

9 QUESTION: Okay.

10 MR. ENGLERT: Violence. Let's talk about
11 violence for a moment. Please look at -- at special
12 interrogatory 4(e). The jury was asked to find how many
13 acts or threats of violence to persons or property were
14 there. The jury said four. Ms. Clayton argued 30 in her
15 closing argument, and the jury said 4. So actually the
16 jury rejected -- we know to a certainty the jury rejected
17 most of NOW's evidence, and there weren't even any
18 allegations that Mr. Scheidler, Mr. Scholberg, or
19 Mr. Murphy actually engaged in violence. There were
20 allegations they were connected to violence, not that they
21 engaged in violence. And I should say my clients are
22 proponents of nonviolence. Mr. Terry was not alleged to
23 engage in acts of violence either, I should add.

24 RICO. Section 4 of the Sherman Act is repeated
25 almost verbatim in 1964(a) and 1964(b). Section 7 of the

1 Sherman Act is repeated almost verbatim in 1964(c).
2 Section 4 of the Clayton Act is repeated almost verbatim
3 in 1964(c). Section 15 of the Clayton Act is repeated
4 almost verbatim in 1964(a) and (b). Section 16 of the
5 Clayton Act, the statute that authorizes injunctions,
6 nowhere in 1964.

7 And as -- as -- thank you.

8 JUSTICE STEVENS: Thank you, Mr. Englert.

9 (Whereupon, at 11:07 a.m., the case in the
10 above-entitled matter was submitted.)

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