

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** H.J. INC., ET AL., ETC., Petitioners V.  
NORTHWESTERN BELL TELEPHONE COMPANY, ET AL.

**CASE NO:** 87-1252

**PLACE:** WASHINGTON, D.C.

**DATE:** November 8, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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H. J. INC., ET AL., ETC., :  
Petitioners :  
V. : No. 87-1252  
NORTHWESTERN BELL TELEPHONE :  
COMPANY, ET AL. :  
- - - - -x

Washington, D.C.  
Tuesday, November 8, 1988

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:38 o'clock p.m.

APPEARANCES:  
MARK REINHARDT, ESQ., St. Paul, Minnesota; on behalf of  
the Petitioners.  
JOHN D. FRENCH, ESQ., Minneapolis, Minnesota; on behalf  
of the Respondents.

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P R O C E E D I N G S

(1:38 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1252, H. J. Inc. v. Northwestern Bell Telephone Company.

Mr. Reinhardt, you may proceed whenever you're ready.

ORAL ARGUMENT OF MARK REINHARDT

ON BEHALF OF THE PETITIONERS

MR. REINHARDT: Mr. Chief Justice, and may it please the Court:

This case is a review of the dismissal of Petitioners' complaint brought under 18 U.S.C. 1961 and 1968, commonly known as RICO. The specific acts alleged in our complaint were a series of bribes carried out by Northwestern Bell Telephone Company affecting a number of different Northwestern Bell charges ranging from pay phone rates to the cost of buying home telephones.

These bribes, carried out over a period of years, involved various Bell officials, agents, passing over \$140,000 to members of the Minnesota Public Utilities Commission. The Public Utilities Commission is the rate setting, semi- or quasi-judicial body in Minnesota that sets Bell's rates.

As pointed out in footnote 1 at page 4 of our



1 brief, a later commission discovered this activity of  
2 Bell and reopened one of the many affected rates because  
3 of this undue influence. They cut that tainted rate of  
4 \$57 million by over \$10 million.

5 This discussion should be broken into three  
6 parts: first, the Eighth Circuit's multiple scheme  
7 dismissal of this case should be reversed; second, what  
8 is a pattern of racketeering activity'; and third, a  
9 brief discussion of amici's organized crime connection  
10 argument which we submit should be rejected.

11 First, this Court should reject the Eighth  
12 Circuit's multiple scheme requirement. Nowhere in the  
13 plain words of the statute, or indeed, in the  
14 legislative history, do we find the words "multiple  
15 schemes." Pattern is defined in statute 1961 as two  
16 acts of racketeering activity, not two schemes, just two  
17 acts. There's no multiplicity of schemes involved.  
18 Indeed, a reading of 1962, the operative portion of the  
19 RICO statute, shows the impossibility of the Eighth  
20 Circuit's position.

21 1962 forbids a pattern of, forbids a person of  
22 acquiring an interest in an enterprise through a pattern  
23 of racketeering activity. In other words, there is a  
24 pattern plus the goal of acquiring an interest in this  
25 enterprise. These two together form a single scheme, as

1 do all schemes. You have a pattern --

2 QUESTION: Mr. Reinhardt, at least you take  
3 the position that there have to be separate criminal  
4 transactions for the pattern.

5 MR. REINHARDT: Your Honor --

6 QUESTION: If not schemes, at least separate  
7 transactions.

8 MR. REINHARDT: There has to be separate acts,  
9 a pattern of acts is the definition. Those acts could,  
10 in certain limited situations, be part of one  
11 transaction, although the word "transaction" is hardly  
12 self-defining.

13 QUESTION: Well, I'm not sure about that.

14 How do we, how do we give meaning to the  
15 continuity requirement that Congress clearly intended to  
16 have a role in the pattern inquiry?

17 MR. REINHARDT: Your Honor, I think continuity  
18 can be thought of, of course, as a series, as you just  
19 pointed out, a number of transactions. However, I  
20 believe it also has within it the threat of being a  
21 series, and a prime example is the Watchmaker case cited  
22 in our brief where some Hell's Angels shot some police  
23 officers in one incident. There were two or perhaps  
24 three acts in that case. There was no other acts or  
25 transactions that could be pointed to, but it was clear

1 that through the Hell's Angels enterprise that these  
2 acts were committed so as to allow for the threat of  
3 continuity or for continuity.

4 So in certain very limited situations you can  
5 have two acts that do allow for a threat of continuity.

6 And if that answers your question --

7 QUESTION: Why is it that we require  
8 continuity, in your view?

9 MR. REINHARDT: The Congress continually, in  
10 its debate and as pointed out in Sedima, said that a  
11 pattern is made up of both relatedness and continuity,  
12 that that is what a pattern is.

13 QUESTION: Is not the reason that the concern  
14 of the statute is to prohibit activities that have an  
15 ongoing potential threat?

16 MR. REINHARDT: Your Honor, Your Honor. In  
17 fact, it is this criminal enterprise --

18 QUESTION: Well, isn't the Ninth -- the Eighth  
19 Circuit's scheme at least consistent with that? It's  
20 not inconsistent with that, is it?

21 MR. REINHARDT: It is consistent with that,  
22 Your Honor, but it is unduly restrictive in --

23 QUESTION: But it's consistent with that.

24 MR. REINHARDT: Correct. However, as I  
25 pointed out, it would write out of the law or -- well,

1 let me point out, 1962(b) forbids always only a single  
2 scheme. If we need multiple schemes, we would have  
3 written out of the law 1962(b), if we follow this  
4 multiple scheme restriction placed upon the word  
5 "pattern" by the Eighth Circuit.

6 Furthermore, even if multiple schemes were not  
7 a legal impossibility under 1962(b), there is little  
8 merit in the concept as, well, Respondent would argue it  
9 is a bright line test. Rather, it becomes a semantical  
10 game: do we in this case have a series of bribes  
11 committed by different Bell employees against different  
12 commissioners affecting different rates, involving  
13 different methods, or do we have one scheme to fix rats?

14 It's really all in the way that you look at  
15 it. The Eighth Circuit, in fact, in the criminal case,  
16 Kragness, found multiple schemes where somebody sold two  
17 different drugs. I submit that that easily could have  
18 been a scheme to sell drugs, and this is consequently of  
19 no real assistance in trying to find out what "pattern"  
20 means.

21 If pattern is --

22 QUESTION: Are there certain crimes that are  
23 more susceptible of an inference of continuity and  
24 ongoing threat than others?

25 MR. REINHARDT: Yes, Your Honor.



1 QUESTION: Say, extortion, blackmail, drug  
2 dealing?

3 MR. REINHARDT: Your Honor, the, I believe  
4 acts listed, the 40 or 45 acts listed by Congress are  
5 those that they in fact believed carried with it that  
6 threat.

7 QUESTION: Well, I'm not sure. When we're  
8 talking about pattern, would it be feasible, do you  
9 think, for this Court to say that you have to show for a  
10 RICO civil act that the criminal activity has a threat  
11 of ongoing harm?

12 MR. REINHARDT: Your Honor, I think there are  
13 two answers to that that occur to me. The first is that  
14 Congress spoke of a pattern of activity. It is that  
15 pattern of the two acts, pattern of activity, of  
16 racketeering activity, racketeering activity being the  
17 commission or two or more acts, or at least two acts, it  
18 is that pattern that we must look at to find continuity  
19 within it, not extraneous from it but within it. Is the  
20 act, does it have continuity while the pattern is being  
21 committed?

22 All patterns, or many patterns end when they  
23 are discovered. For example, a criminal enterprise, if  
24 you arrest everyone, you end the pattern. Are they  
25 going to escape RICO now because they are all in jail?

1 I don't think that was the purpose of Congress. It was  
2 to look at the pattern during the period of time. Just  
3 as the word "pattern" has that element, we must limit it  
4 to the pattern.

5 And those two elements, relatedness and  
6 continuity, can be further defined, I believe.  
7 Professor Michael Goldsmith, in a Cornell Law Review  
8 Journal to be published next month, distributed, I  
9 believe, to counsel and the Court, defined "pattern" as  
10 two or more predicate acts that are related to each  
11 other or to the enterprise, and secondly --

12 QUESTION: This is a Law Review article to be  
13 published next month?

14 MR. REINHARDT: Yes, Your Honor. We received  
15 it in the mail and --

16 QUESTION: Well, what value is that to us?

17 MR. REINHARDT: Your Honor, the value I see in  
18 it is that it was a definition that is --

19 QUESTION: Well, I'm not going to wait two  
20 months for it.

21 MR. REINHARDT: Excuse me?

22 QUESTION: I'm not going to wait two months  
23 for it. So what's the value of it?

24 MR. REINHARDT: Well, Your Honor, that was my  
25 information. It was supplied to me.

1           At any rate, the definition is a useful one,  
2 and I did want to give credit and not be accused of  
3 plagiarism, yes, Your Honor, thank you.

4           He said it was two or more predicate acts that  
5 are related to each other or the enterprise, and,  
6 Justice O'Connor, constitute the series, a threat of  
7 series of acts or a series of acts, and that is the  
8 continuity aspect.

9           This, by the way, would be, I believe,  
10 excellent jury instructions, a simple definition, one  
11 that is capable of being understood easily. If the  
12 court wanted, it could toss in the -- the charging court  
13 could use the illustration from Title X, which this  
14 Court used in Footnote 14 of Sedima, the illustration of  
15 various relationships and the fact that they can't be  
16 isolated.

17           This definition of Professor Goldsmith's has  
18 the dual purpose of being limiting, but it does not  
19 distort the clear, broad language of Congress and the  
20 instructions that the Act be interpreted liberally.

21           QUESTION: Excuse me.

22           How does that definition or your proposal  
23 apply to a situation where, let's say, there is a  
24 kidnapping, and the kidnapper makes a number of phone  
25 calls offering to return the captive in exchange for

1 money? Is each one of those phone calls a separate act,  
2 and is that a pattern of racketeering activity?

3 MR. REINHARDT: Your Honor, given those facts  
4 alone, I would answer no, that they do not. There is  
5 no, within that, the facts that you gave me, I do not  
6 see a threat of seriality or a threat of continuity.  
7 However, if the kidnapper was part of an enterprise that  
8 in the past had kidnapped other individuals, then  
9 perhaps it would. You have to look not only at the  
10 relationship between the acts, but also to the  
11 relationship to the enterprise.

12 QUESTION: Would each phone call in that  
13 situation be prosecutable and punishable by imprisonment  
14 for more than one year, each individual phone call?

15 MR. REINHARDT: It perhaps would, Your Honor,  
16 yes, but pattern, Your Honor, carries with it not only  
17 the acts and the relatedness of those racketeering acts,  
18 but also the continuity, and I don't know if the  
19 continuity there would be present.

20 QUESTION: Are you sure about, are you sure  
21 about the answer to that question? I thought you would  
22 just prosecute somebody for the one kidnapping. You  
23 mean every time they make a separate phone call you can  
24 get a different sentence for each?

25 MR. REINHARDT: Your Honor, I am sorry, I was



1 thinking if you were involved in mail fraud or  
2 attempting to get monies falsely through the --

3 QUESTION: Right.

4 MR. REINHARDT: -- phone, is that your  
5 predicate?

6 QUESTION: Well, you could change it to that  
7 situation, fraud through phone calls. Is each phone  
8 call a separate offense?

9 MR. REINHARDT: Yes, Your Honor.

10 QUESTION: When only you are asking for -- all  
11 that you're asking for is one payment?

12 MR. REINHARDT: I believe that each phone call  
13 could be prosecuted separately, Your Honor.

14 QUESTION: Does the government generally do  
15 that, do you know?

16 MR. REINHARDT: No, they do not, Your Honor,  
17 and perhaps that's because there is no threat of  
18 continuity there, although --

19 QUESTION: And you think that what the act  
20 refers to, it seems to read that way, is what the  
21 government could bring, not what the government normally  
22 does bring.

23 MR. REINHARDT: Well, Your Honor, that is what  
24 they speak of when they speak of racketeering acts, but  
25 we must -- we are speaking of a pattern of racketeering

1 acts, and it's the pattern that places the limitation on  
2 the misuse of the statute. You must have the  
3 continuity, as pointed out by Justice O'Connor.

4 QUESTION: Well, why isn't that continuity? I  
5 made a series of phone calls? I don't --

6 MR. REINHARDT: It's all surrounding one act.  
7 There's no series, in my mind, Your Honor, there's no  
8 series of activity.

9 QUESTION: It depends on what you consider the  
10 act. If you consider the act the phone call, there's a  
11 series of them. If you consider the act the kidnapping,  
12 there's only one.

13 MR. REINHARDT: Your Honor, I am considering  
14 the act the kidnapping, I guess, and the surrounding  
15 elements of it.

16 Where the --

17 QUESTION: But where you are, I take it, is  
18 that you concede or you propose that there has to be  
19 under the statute by its own terms the existence of  
20 repeated criminal activity, not just repeated acts.

21 MR. REINHARDT: Your Honor, yes --

22 QUESTION: Because the statute uses the terms  
23 differently.

24 MR. REINHARDT: If you consider that  
25 Watchmaker example as if two officers were slain, that

1 that was two activities. You have to remember that  
2 there's also the threat of continuity in certain limited  
3 situations. Continuity has with it not only seeing the  
4 repetition but the knowledge that there would be a  
5 repetition or the belief that there would be a  
6 repetition.

7 QUESTION: Does there have to be, then, some  
8 sort of different criminal episodes or transactions  
9 rather than just isolated acts?

10 MR. REINHARDT: Your Honor, again that turns  
11 to if there is no separate continuity that one can find  
12 through the enterprise, then I would say yes, you need  
13 separate criminal activity. I hesitate to use the word  
14 "episode" because it's been used in many different cases  
15 in different ways. But generally speaking you would  
16 have separate activity. You would have, in our case, we  
17 don't have one bribe with different payments, we have  
18 different people affected by different bribes, et  
19 cetera. Those would be different activities.

20 Whether because of lower court desire to --

21 QUESTION: Hasn't the American Bar Association  
22 endorsed the separate criminal episode or transaction  
23 approach?

24 MR. REINHARDT: Your Honor, I believe the  
25 American Bar Association has accepted or proposed a

1 separate activity -- I'm not sure whether they call it a  
2 transaction or not -- or the threat of that activity. I  
3 would include the threat of that activity. Otherwise we  
4 would be eliminating situations such as Watchmaker which  
5 clearly should be within the statute.

6           whether because of lower court desire to  
7 judicially amend the statute or confusion, some courts,  
8 including the Eighth Circuit, have ignored the fact  
9 recognized by this Court in Sedima that Congress used  
10 plain, broad and clear language to express its intent.  
11 Footnote 14 was a simple and clear direction on two  
12 elements, the two elements of pattern: continuity and  
13 relationship. There is no wording in there if multiple  
14 schemes test or schemes test, even.

15           Sedima followed the plain words of the  
16 statute, and I submit that this Court has an opportunity  
17 to direct lower courts to do likewise.

18           Thirdly, there was argument presented by the  
19 amici in this case attempting to support an organized  
20 crime connection requirement, that you have to be  
21 typical of organized crime, or the person has to be  
22 characteristic of organized crime in order to violate  
23 the statute. 1961 defines the defendant in this case as  
24 the person, and that person is any individual or entity  
25 capable of holding a legal or beneficial interest in



1 property. There is no additional limitation to be a  
2 member of organized crime. There is no additional  
3 limitation to having earned most of his income from  
4 crime. It is a simple statute without those limitations.

5 QUESTION: Excuse me. What about the word  
6 "racketeering activity?" Is it your position that the  
7 definition in 1961(5) of pattern of racketeering  
8 activity is exclusive? It says pattern of racketeering  
9 activity requires. Now, that means you need at least  
10 two acts. It doesn't say that that alone is enough.

11 MR. REINHARDT: That is correct, Your Honor.

12 QUESTION: Couldn't one say that what you need  
13 in addition is activity that can reasonably be  
14 characterized as racketeering activity; that is to say,  
15 the kind of activity that would normally be conducted by  
16 organized crime?

17 MR. REINHARDT: Well, Your Honor, in a way  
18 that is what Congress said. They defined racketeering  
19 activity in (1), and they did not add, though, when  
20 committed by organized crime. They said these acts. It  
21 is defined here. There's no further definitional  
22 requirement needed.

23 The person likewise is define, and throughout  
24 this statute you will see no limitation to organized  
25 crime. This -- and in fact, the person -- this

1 argument, trying to limit the person defendant has been  
2 rejected, and now the amici are trying to work it in  
3 through the word "pattern," through the action word in  
4 the statute, not though the subject word.

5 But Footnote 14 in Sedima has already  
6 recognized that Congress, and indeed this Court, finds  
7 two elements in pattern: relationship, relatedness and  
8 continuity. There was no discussion of and being a  
9 member of organized crime or earning your money through  
10 organized crime.

11 Indeed, Justice Scalia, the Congress did know  
12 well the principle of including substantial income from  
13 crime or expert criminality because they did it in Title  
14 X, the next title of this act, where they said if you  
15 have a pattern and you have substantial income and you  
16 are an expert criminal, then you get enhanced  
17 punishment. Clearly those were not included within  
18 pattern, at least as they saw pattern.

19 Congress well knew that the purview of RICO  
20 was beyond organized crime. The Sedima decision is  
21 replete with examples from the congressional debate, and  
22 it's well laid out there. The New York City Bar  
23 strenuously objected to the statute. The two sponsors,  
24 Congressman Poff and Senator McClellan, both explicitly  
25 stated that it extends beyond organized crime.

1           The predicate acts, as pointed out in Sedima,  
2 give the breadth to the statute because they include  
3 acts that are not normally committed by organized  
4 crime. The organized crime connection requirement has  
5 been virtually uniformly rejected by lower courts.  
6 Respondent did not argue this to the Eighth Circuit. It  
7 was first raised here by amici, and of course, this is  
8 because, ironically, the Eighth Circuit was one of the  
9 first circuits in the country to reject the organized  
10 crime connection in the case of Bennett v. Berg.

11           I submit that Respondent and amici miss the  
12 point when they argue that legitimate businesses are  
13 being pulled within the purview of RICO. Only those who  
14 commit not one but a pattern of racketeering activity  
15 are within RICO. Such businesses forfeit the right to  
16 call themselves legitimate.

17           The Eighth Circuit's attempt to restrict the  
18 statute should be reversed, this case should be  
19 remanded, and amici's attempt to rewrite RICO to include  
20 an organized crime connection requirement should be  
21 rejected.

22           As this Court said in Sedima, legitimate  
23 business enjoys no immunity from the consequences of  
24 criminal activity.

25           I would like to reserve the remainder of my

1 time for rebuttal.

2 QUESTION: Thank you, Mr. Reinhardt.

3 Mr. French, we'll hear now from you.

4 ORAL ARGUMENT OF JOHN D. FRENCH

5 ON BEHALF OF RESPONDENTS

6 MR. FRENCH: Mr. Chief Justice, may it please  
7 the Court:

8 I think in order for this argument to make any  
9 sense, it has to be put into a context, and I think the  
10 context is this Court's decision in *Sedima v. Imrex*. I  
11 know there are three opinions written in that case, and  
12 the three opinions come to quite different conclusions  
13 about the issues of the case, but there is a single  
14 theme running through all three opinions, and that is  
15 concern about the disquieting problem that civil RICO is  
16 running far beyond the intent of the Congress to attack  
17 organized crime and to prevent its infiltration into  
18 legitimate business.

19 Justice Powell in his opinion observed that if  
20 Congress had intended to provide a federal forum for  
21 plaintiffs for so many common law wrongs, it would at  
22 least have discussed it.

23 Justice Marshall's dissenting opinion for  
24 himself and Justices Brennan, Blackmun and Powell,  
25 observed that in criminal application, prosecutorial



1 discretion has had a desirable restraining influence in  
2 bringing RICO actions, but in the civil application,  
3 that desirable restraining influence is absence, and  
4 indeed, the reverse is true, the lure of treble damages  
5 and reasonable attorneys' fees is bringing about a  
6 situation in which we are on the verge of federalizing  
7 what has heretofore been state criminal and state common  
8 law problem.

9 Justice White's opinion for the Court  
10 expressly raised the need for imposing reasonable limits  
11 on the scope of RICO by reference to the definition of  
12 pattern of racketeering activity. In what has now  
13 become certainly one of the most celebrated footnotes in  
14 recent judicial history, Footnote 14, Justice White  
15 pointed out that a pattern --

16 QUESTION: And that was a Court ruling there.

17 MR. FRENCH: Justice White for the Court  
18 pointed out that a pattern requires at least two acts of  
19 racketeering activity but does not mean two acts, and  
20 also that there are two factors, continuity and  
21 relationship, that have to combine to produce a pattern.

22 In a somewhat less celebrated footnote,  
23 Footnote 10, that I think is important here, the Court  
24 also observed that while the remedial provisions of  
25 Section 1964 of the statute may be liberally construed,

1 at the same time the substantive provisions of 1961 and  
2 1962 may legitimately be strictly construed.

3 The opinion for the Court observed that we  
4 have come to a point in which private civil RICO actions  
5 are being brought almost solely against legitimate  
6 businesses rather than organized crime operations, and  
7 it concluded this way. We nonetheless recognize that in  
8 its private, civil version, RICO is evolving into  
9 something quite different from the original conception  
10 of its enactors. The extraordinary wishes -- pardon me  
11 -- the extraordinary uses to which civil RICO has been  
12 put appear to be primarily the result of the breadth of  
13 the predicate offenses, in particular, the inclusion of  
14 wire, mail and securities fraud, and the --

15 QUESTION: [Inaudible] problem with the law  
16 that Congress passed.

17 MR. FRENCH: I think there's a serious problem  
18 with it, Your Honor, but I can't do anything about that  
19 here.

20 The remainder, the remainder of the Court's  
21 remarks relate to something that I think can be dealt  
22 with here, and that is the failure of the courts to  
23 develop a meaningful concept of pattern.

24 Now, that is what has happened. Following  
25 Sedima, the courts have tried, most of the courts have

1 tried to react to the opinions, all three opinions  
2 written in Sedima, and what they have done is take the  
3 invitation in the opinion of the Court to try to develop  
4 a meaningful concept of pattern. As Footnote 14  
5 remarks, in common parlance, two of anything do not  
6 generally form a pattern.

7 Reaction to Footnote 14 in Sedima and the text  
8 of Sedima is plainly what led the Eighth Circuit to the  
9 test that it is now using. The Eighth Circuit has said  
10 that on three or four occasions, including in this  
11 particular case, and the test that the Eighth Circuit  
12 has adopted is that in order to deal with both  
13 relationship and continuity, which have to mean two  
14 separate things or you wouldn't use two separate words,  
15 there has to be evidence or allegations that the  
16 defendant has engaged in like activities in the past or  
17 other criminal activities elsewhere.

18 I think this is a reasonable attempt to fathom  
19 what "pattern" means under RICO, particularly in the  
20 light of Sedima.

21 QUESTION: Well, but, the Eighth Circuit has  
22 focused on separate schemes, and that -- it seems to be  
23 almost alone in doing that. Other circuits have talked  
24 about separate criminal transactions but not schemes.

25 I think it's a little hard to justify the

1 Eighth Circuit's separate schemes approach, and are you  
2 going to address that?

3 MR. FRENCH: I am, Your Honor, and I will do  
4 that now.

5 Let me divide your question in half, if I may,  
6 Justice O'Connor. Contrary to the argument put forward  
7 by the Petitioners, the Eighth Circuit is not alone.  
8 The Tenth Circuit and the Fourth Circuits each expressly  
9 use the word "schemes." Also, even though the Second  
10 and Seventh Circuits do not use the word "schemes," in  
11 their recent decisions they are using reasoning and  
12 reaching results comparable to the Eighth Circuit.

13 So the Eighth Circuit is not off on a frolic  
14 of its own, and it is not true that this case would have  
15 been decided differently in any other circuit in America.

16 QUESTION: You don't think that this, the  
17 facts in this case would meet the Seventh Circuit test  
18 for separate transactions on the allegations?

19 MR. FRENCH: I think, Your Honor, that they  
20 would not.

21 The Seventh Circuit talks about continuity  
22 plus relationship and talks about the predicate acts --  
23 I'm reading from page 26 of Respondents' brief, Your  
24 Honor, and I'm reading from Medical Emergency Service  
25 Associates v. Foulke, which we quote -- "in order for



1 the predicate acts to be sufficiently continuous to  
2 amount to a pattern of racketeering activity, 'the  
3 predicate acts must be ongoing over an identified period  
4 of time so that they can fairly be viewed as  
5 constituting separate transactions, i.e., "transactions  
6 somewhat separated in time and place."'"

7 And I believe "transaction," as used by that  
8 court, is the same as "scheme" in the Eighth Circuit or  
9 "episode" as used by some other court.

10 I agree with Mr. Reinhardt that we oughtn't to  
11 get bogged down in the semantics of the particular word,  
12 but separate in time and separate in space seems to be  
13 what most of the circuits are trying to comprehend here.

14 QUESTION: Well, doesn't the Eighth Circuit  
15 two-scheme rule run headlong into 1962 subpart (b) which  
16 says it shall be unlawful for any person through a  
17 pattern of racketeering to acquire any interest in the  
18 control of an enterprise? That sounds to me like one  
19 scheme, and it's right there in the statute.

20 MR. FRENCH: I keep reading commentators  
21 saying that, Your Honor, but I disagree, and I think  
22 it's wrong. I think it's wrong for two reasons.

23 Let me take an example, Your Honor. Here I  
24 am, John French, age 55, no prior criminal record. I  
25 decide instead of continuing to practice law as I have

1 been in Minneapolis, I see an opportunity to steal money  
2 from a client or to take over a business. I commit one  
3 act of mail fraud, one act of wire fraud, one act of  
4 securities fraud, and I have accomplished my objective.  
5 I then retreat once again into the quiet practice of law  
6 in Minneapolis.

7 I don't believe that the Congress meant to get  
8 at me with RICO if that's all I've done. I mean, after  
9 all, I can be prosecuted under the mail fraud statute,  
10 under the wire fraud statute, under the securities fraud  
11 statute, and the person whom I have cheated can sue me  
12 civilly for fraud and for unjust enrichment.

13 QUESTION: Well, that may be, and your example  
14 happens to fit the two-scheme rationale, but that  
15 doesn't answer the question that the two-scheme  
16 rationale doesn't fit the statute. It seems to me that  
17 if we agree with you that in the hypothetical you pose  
18 there should be no liability, we need something other  
19 than the two-scheme rationale to do it.

20 MR. FRENCH: Well, I don't think you do, Your  
21 Honor. I can continue my hypothetical.

22 Supposed instead of sitting back happily with  
23 my ill-gotten gains and resuming honest activity in  
24 Minneapolis, I say that worked pretty well. I'm going  
25 to try it again. And I do. I'm going to try it again,

1 and I do. I have now committed three separate clusters  
2 of illegal activities, and I believe I can be prosecuted  
3 for all three, going all the way back to the first one,  
4 because it is now evident that it is part of a pattern  
5 of racketeering activity.

6           Moreover, Your Honor, I think if I can deal  
7 with your specific, if you're still concerned about that  
8 one opportunity that I took to commit illegal acts, it  
9 seems to me that if I could do it with one act of mail  
10 fraud, one of wire fraud and one of securities fraud,  
11 it's not under RICO for the reasons I stated. But if I  
12 have to get complicated about it, if I have to commit  
13 and illegal set of acts in Nebraska and another set of  
14 illegal acts in Iowa and another set of illegal acts in  
15 Minnesota, all of which have to come together in order  
16 to produce the illegal result, I may very well, as this  
17 Court might conclude, have engaged in a pattern of  
18 racketeering activity.

19           But there has to be some way --

20           QUESTION: But how does that fit the  
21 two-scheme rule?

22           MR. FRENCH: Well, I think it would --

23           QUESTION: That you're defending.

24           MR. FRENCH: Well, I think it would probably  
25 be three schemes, Your Honor.

1           Moreover, I want to say again, I am perfectly  
2 happy to take the words used by other courts, I am  
3 perfectly happy to talk about transactions or episodes  
4 or to get entirely out of the commentators and the cases  
5 and talk about groups or clusters of activity.

6 "Relationship" means a few predicate acts leading to a  
7 result. "Continuity" has to mean something else, and I  
8 say it has to mean transactions or episodes or clusters  
9 of activity.

10           And there is no pleaded in this particular  
11 complaint, and the Plaintiff, alas for the Plaintiff, is  
12 stuck with this complaint just as I am as the  
13 Defendant. It is the only record here. All that's pled  
14 here in Paragraphs 32 to 41 is a series of alleged  
15 bribes, culminating in one and only one allegedly  
16 illegal outcome. That appears in paragraph 75, page 81  
17 of the Joint Appendix. As a result of this series of  
18 what I call predicate acts and what Judge MacLaughlin  
19 thought were predicate acts, the compensation that  
20 Northwestern Bell was allowed to receive by the PUC was  
21 in excess of what would be fair and reasonable charges  
22 to Plaintiffs and members of the class.

23           QUESTION: Several people were bribed, weren't  
24 they?

25           MR. FRENCH: It says several people were



1 bribed. I take that to be not any different from my  
2 hypothetical which included one act of mail fraud, one  
3 act of wire fraud and one act of securities fraud.  
4 Several people were bribed. I committed several frauds  
5 in my hypothetical.

6 QUESTION: But may I ask you, if there were  
7 two, a series of bribes and a rate increase, another  
8 series of bribes and a second rate increase, if that  
9 would satisfy your test?

10 MR. FRENCH: I believe that my test would be  
11 -- I will give you a hypothetical that I think would  
12 satisfy my test, but it is not pleaded here. If I  
13 committed a series of bribes in 1980 and obtained a rate  
14 increase, and I did it again in 1983 and obtained a  
15 different kind of rate increase or other benefit from  
16 the commission, and I did it in 1986, and I obtained  
17 another rate increase or benefit from the commission, I  
18 think it is possible within a scheme test or a  
19 transaction or episode test that I would have brought  
20 myself under civil RICO.

21 QUESTION: Not just possible; that would  
22 clearly come within it under your explanation as I  
23 understand it.

24 MR. FRENCH: I believe it would, Your Honor.

25 QUESTION: Yes. Why -- you say it's a minimum

1 of three?

2 MR. FRENCH: I don't -- I can't say at a  
3 minimum three because the Congress said two, and we're  
4 stuck with that also.

5 QUESTION: Then we'll have two.

6 MR. FRENCH: But as the opinion for the Court  
7 said, two in common parlance don't ordinarily add up to  
8 any kind of a pattern. So I would think it would be the  
9 very rare case.

10 Perhaps two coupled with the threat of  
11 continuing illegal activity which you might infer if you  
12 were dealing with an illegal enterprise like La Costa  
13 Nostra instead of a public utility that's been serving  
14 customers in Minnesota for 75 years, perhaps in that  
15 limited situation two would be enough. I would think it  
16 would be rare.

17 Your Honor, I --

18 QUESTION: Suppose that four or five members  
19 of the Costa Nostra take over a very legitimate company  
20 and over three or four years engage in a series of acts  
21 of bribes to achieve one rate increase. I submit that  
22 that's precisely what Congress sought to avoid.

23 MR. FRENCH: I submit that that is, too, Your  
24 Honor. I agree.

25 QUESTION: But it doesn't fit your test.

1           MR. FRENCH: I think it fits my test because I  
2 can -- what I see as La Cosa Nostra engaging in illegal  
3 conduct, which allows them to take over Northwestern  
4 Bell Telephone Company, for example, and then once  
5 they've got control of Northwestern Bell Telephone  
6 Company, engaging in a series of bribes or other corrupt  
7 acts which allows them to obtain more money than they  
8 should have received from the Public Utilities  
9 Commission, and then moving on to other criminal  
10 activity.

11           As I was preparing for this argument, Your  
12 Honor, a question such as yours was put to me by one of  
13 my co-counsel, and I think the answer is that your  
14 hypothetical doesn't reflect the real world. I know I  
15 am not supposed to fight a judge's hypothetical, but I  
16 have to fight it a little here.

17           I know what can be pleaded in a criminal  
18 indictment against real criminals. Yesterday while I  
19 was preparing to come here, I read the indictment in  
20 United States v. Ferdinand and Imelda Marcos. The  
21 charge having to do with pattern of racketeering  
22 activities runs for 32 pages and sets forth ten clusters  
23 of activities that would satisfy any judge on the Eighth  
24 Circuit that each of them was a separate scheme or  
25 transaction or episode.

1           Now, that is what I believe the United States  
2 Justice Department is capable of doing any time it is  
3 confronted with true organized crime, and it is not  
4 remotely what these Plaintiffs have done in this private  
5 civil litigation.

6           Our view is that there's nothing wrong with  
7 the Eighth --

8           QUESTION: The people in -- Mr. French.

9           MR. FRENCH: Yes, Mr. Chief Justice.

10          QUESTION: The people in Sedima weren't  
11 connected with organized crime either, were they?

12          MR. FRENCH: They were not, Mr. Chief Justice,  
13 and the Court -- several of the opinions expressly  
14 recognized the Court wasn't faced with pattern of  
15 racketeering activity in Sedima. It was faced with two  
16 other questions: do we have to find prior convictions,  
17 and do we have to find something special called  
18 racketeering injury?

19          The issue was not before the Court. I can  
20 remember Justice Powell's opinion saying I have to agree  
21 with the Court that the issue is not here. I wish it  
22 were.

23          Now, perhaps if Sedima came back, the Court  
24 would find no pattern of racketeering activity there,  
25 but I'm not able to opine on that.



1           With respect to the present case, there are, I  
2 think, two possibilities, and that is that the Court can  
3 agree that some variation of scheme or episode or  
4 transaction is a correct test, and that as a result, the  
5 judgment below should be affirmed.

6           It is also possible that the Court could  
7 conclude that one of the other circuits that has  
8 suggested a multiple factors test -- and I know I don't  
9 have to labor the Court with multiple factors. It  
10 appears in many cases. We've collected a number of them  
11 at page 23 of our memorandum, and to my delight, the  
12 Petitioner has cited an excellent multiple factors case  
13 that I would be happy to live with in its memorandum.  
14 It's the Morgan v. Bank of Waukegan case in the  
15 Petitioners' memorandum at page 28.

16           I believe the Court could say that under a  
17 multiple factors test, it can also affirm, and the  
18 reason I feel so strongly about that is that that's  
19 exactly what Judge MacLaughlin did in this case in the  
20 district court in Minnesota. When the case was first  
21 argued to Judge MacLaughlin, I argued for dismissal  
22 under the Eighth Circuit test, and Judge MacLaughlin so  
23 ruled.

24           Petitioners then asked Judge MacLaughlin on  
25 rehearing to reconsider what test he would apply, and

1 having knowledge that he was bound by the Eighth Circuit  
2 test, he went on to say, nonetheless, I recognize a  
3 multiple factors test is being applied in other  
4 circuits, and I will apply it here and see what I  
5 conclude.

6 And as Judge MacLaughlin's second opinion in  
7 the Joint Appendix notes, he looked at the duration of  
8 criminal activity, the threat of ongoing criminal  
9 activity, the presence of single or multiple victims,  
10 the independent harmful significance of the alleged  
11 predicate acts, and whether the alleged conduct is a  
12 regular part of Defendant's business.

13 And having done all of that, he nonetheless  
14 found that the complaint failed to state a claim under  
15 RICO.

16 Relating this case, if the Court please, back  
17 to the concerns expressed in Sedima, I was impressed  
18 yesterday again in my reading to read the testimony of  
19 Senator McClellan before the House when S. 30 went over  
20 for consideration there, and he talked about organized  
21 crime quietly sneaking into a business, infiltrating it,  
22 using it for corrupt purposes, bilking it of its funds,  
23 letting it fall into bankruptcy and dissolving away into  
24 the night. I believe that is the kind of criminal  
25 activity that both the House and Senate were seeking to

1 prevent

2 QUESTION: None of that would be unlawful; I  
3 mean, letting it decline into bankruptcy and all of  
4 that, I presume, if they want a business that they have  
5 acquired to go to seed, I suppose that's all right, but  
6 it was the unlawful acquiring that Congress was  
7 addressed to, and that brings us back to Judge Kennedy's  
8 question which I'm not sure you've answered very  
9 satisfactorily.

10 If you take over an enterprise in the fashion  
11 you've just described, you're saying it has to be done  
12 not by just one criminal enterprise or transaction or  
13 grouping or whatever you want to call it, but you need  
14 three different ones, or at least two different ones.

15 MR. FRENCH: I'm saying exactly that because  
16 if I don't say that --

17 QUESTION: You lose this case.

18 MR. FRENCH: -- the continuity vanishes from  
19 our lexicon here, Your Honor. The relationship is  
20 enough. If my hypothetical -- let's say that in my  
21 hypothetical, instead of cheating a client, I took  
22 control of a business. If one act of mail fraud, one  
23 act of wire fraud and one act of securities fraud which  
24 allows me to acquire a business brings what I have done  
25 under RICO, then all of the fraud committed in America

1 is under RICO. Instead of having a thousand civil cases  
2 a year under RICO, you will have 10,000 civil cases a  
3 year under RICO.

4 It simply must be that the Congress wanted to  
5 encompass something more than that via RICO, and that's  
6 what makes sense because, as I said earlier, in this  
7 particular case, for example, the Ramsey County attorney  
8 has convened a grand jury which didn't indict. The  
9 Minnesota Public Utilities Commission has reopened the  
10 rate proceeding and reconsidered the rate to be  
11 applied. The Attorney General of Minnesota has an  
12 action going against the company right now relating to  
13 past rates. It is simply not true that civil RICO is  
14 needed in the instance of a 75 year old public utility  
15 that has an office building in downtown Minneapolis that  
16 occupies a city block and that has engaged in a sequence  
17 of activities that are readily open to public scrutiny  
18 by reason of the fact that the entity is so thoroughly  
19 regulated.

20 I do not believe RICO applies in my  
21 hypothetical, Justice Scalia.

22 The Court has before it here a situation in  
23 which there is no threat of organized crime infiltrating  
24 legitimate business, and there is no threat of  
25 racketeering activity being conducted in a manner that



1 cannot be reached by officials of the state.

2 I think it is important either under the  
3 Eighth Circuit test or a multiple factors test that  
4 applies in these circumstances for the Court to affirm  
5 the judgment below. If a complaint as insubstantial as  
6 the complaint pleaded here today is allowed to stand,  
7 then everything in America in which a victim claims  
8 injury by reason of a fraud or one of the other  
9 predicate acts set forth in the statute, becomes civil  
10 RICO, and state common law has been federalized with a  
11 treble damages remedy.

12 I do not believe that is what Congress  
13 intended, and I do not believe that that is what this  
14 Court should allow.

15 Thank you very much.

16 QUESTION: Thank you, Mr. French.

17 Mr. Reinhardt, you have ten minutes remaining.

18 REBUTTAL ARGUMENT OF MARK REINHARDT

19 ON BEHALF OF PETITIONERS

20 MR. REINHARDT: Thank you, Your Honor.

21 Your Honor, in response to Mr. French's  
22 argument that the floodgates of litigation are opened on  
23 RICO, I'd like to point out to the Court that there are  
24 but 85 RICO cases per month out of 23,000 federal cases  
25 being pled today, and that has been double for

1 approximately two years.

2 I would also like to point out that the  
3 Court's decision in Shearson American Express where they  
4 subjected RICO to arbitration surely will have a further  
5 limitation upon that. This floodgates argument is an  
6 argument that you frequently hear bantered about, but I  
7 submit that it simply hasn't come to pass.

8 Secondly, I submit that we will not have every  
9 fraud case in America being brought before the federal  
10 judiciary. This case involved bribery over a period of  
11 five years, in 1983, offering employment to a  
12 commissioner while still sitting, before a major vote;  
13 in 1985, making employment arrangements with a  
14 commissioner, passing \$30,000 after the commissioner  
15 left the court, to an attorney who then deposited it  
16 into his account. It was listed as attorneys' fees.  
17 That attorney then wrote separate checks to the  
18 commissioner. The commissioner then got back on the  
19 commission and, interestingly enough, neglected to  
20 mention when required to do so by Minnesota ethical  
21 requirements as part of his income, neglected to mention  
22 this \$30,000 he had just received.

23 I submit this is not a mere business  
24 oversight; this is, as alleged in the complaint, out and  
25 out bribery.

1           There are -- we state in our complaint that it  
2 affected Bell charges. We don't say it affected one  
3 charge. It went on for a period of years. In fact,  
4 there are probably 40 or 50 rate hearings a year. The  
5 particular activity centered around particular rates.  
6 However, Your Honor, we must remember that we have not  
7 even been allowed to conduct discovery yet in this  
8 case. The facts that we have are the mere bones of the  
9 complaint, and I allege that what we have submitted to  
10 you shows a clear, ongoing course of activity. As this  
11 Court recognized, RICO applies to illegitimate as well  
12 as legitimate businesses.

13           QUESTION: It is your contention that under  
14 paragraph 75 of the complaint, more than one rate  
15 proceeding could be referred to?

16           I think that was the section that Mr. French  
17 called our attention to.

18           MR. REINHARDT: Yes, fair and reasonable  
19 charges, yes, that there were many charges, that they  
20 received in excess of the fair and reasonable charges to  
21 which they would have been allowed.

22           QUESTION: Many different rate proceedings  
23 were involved.

24           MR. REINHARDT: Yes, there were many rate  
25 proceedings over this period of time, Your Honor, and in

1 fact, submitted with memorandum to the trial court was  
2 much material relating to different rate hearings.

3 Another instance here used by Mr. French as  
4 one of -- well, before, I believe, in response to  
5 Justice Kennedy, I mentioned that the continuity has to  
6 be within the pattern. We cannot look to whether this  
7 individual has a life of crime outside the pattern.  
8 That's not what Congress was addressing. They weren't  
9 addressing the individual, they were addressing the  
10 pattern.

11 Is there a pattern of racketeering activity,  
12 two acts, or at least two acts -- it could be more acts,  
13 many acts, but within those acts, is there a  
14 relationship and an illustration of continuity, a  
15 serialness? Surely there is in the instant case.

16 QUESTION: Seriality.

17 MR. REINHARDT: As Justice Kennedy --

18 QUESTION: Well, would this case -- this case  
19 wouldn't turn out any differently if we held there had  
20 to be continuity with reference to the criminal  
21 enterprise, would it?

22 MR. REINHARDT: Your Honor, many courts have  
23 said that where you have a legitimate enterprise you  
24 never have a problem of continuity because obviously the  
25 continuity is ongoing. I think that really addresses an



1 illegitimate enterprise.

2           However, again, even there, I think you have  
3 to look during the existence of the acts, the Barticheck  
4 case, which we cite in our brief, points this out very  
5 well. If you catch the people, they are not doing it  
6 anymore. It's senseless to look at it afterwards or  
7 elsewhere or before.

8           If we had pled, we had pled perhaps five or  
9 six acts of racketeering, if we had pled two, do we  
10 satisfy Mr. French's definition then that before or  
11 after the pattern we plead there were acts? It becomes  
12 a very semantical game. You have to look for the  
13 continuity within the actual pattern.

14           Again, as Justice Stevens stated, if racketeer  
15 -- if the Mafia had done this we would not be here  
16 today. There's little question that no court would say  
17 that this activity should be forbidden. Yet that is  
18 exactly what Congress dealt with. It dealt with  
19 activity, not with a status offense. RICO is not a  
20 person-oriented status offense. It is an offense that  
21 Congress, as Senator McClellan said, the occasion for  
22 our writing this law is being confused with the results  
23 of our investigation. They found activity repugnant,  
24 and that activity was activity which they believed was  
25 committed by organized crime, and indeed, was. But it

1 is the activity that's repugnant. If anybody commits  
2 that repugnant activity, they should be condemned. It  
3 is not a status offense to be committed only by some,  
4 only by a few. This is an offense which lays out  
5 forbidden activity, and that activity, if committed by  
6 anyone, deserves the punishment that RICO calls for.

7 And our complaint should be reinstated for  
8 those reasons.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
11 Reinhardt.

12 The case is submitted.

13 (Whereupon, at 2:21 o'clock p.m., the case in  
14 the above-entitled matter was submitted.)  
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CERTIFICATION

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No. 87-1252 - H. J. INC., ET AL., ETC., Petitioners V. \_\_\_\_\_

\_\_\_\_\_  
NORTHWESTERN BELL TELEPHONE COMPANY, ET AL. \_\_\_\_\_

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