

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES Petitioners v. JUAN PAUL
ROBERTSON
CASE NO: No. 94-251
PLACE: Washington, D.C.
DATE: Monday, February 27, 1995
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 94-251
JUAN PAUL ROBERTSON :
- - - - -X

Washington, D.C.
Monday, February 27, 1995

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:01 a.m.

APPEARANCES:

MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Petitioner.
GLENN S. WARREN, ESQ., San Diego, California; on behalf of
the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	MIGUEL A. ESTRADA, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	GLENN S. WARREN, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	MIGUEL A. ESTRADA, ESQ.	
10	On behalf of the Petitioner	44
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-251, the United States v. Juan Paul
5 Robertson.

6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL A. ESTRADA

8 ON BEHALF OF THE PETITIONER

9 MR. ESTRADA: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The respondent was a California lawyer who
12 became involved in drug dealing and other crimes. With
13 money obtained from his crimes, he invested in a venture
14 to mine gold in Alaska. He was eventually convicted of
15 narcotics offenses and of violating the Racketeering
16 Influenced and Corrupt Organizations Act, known as RICO.
17 RICO makes it a crime for any person to use income derived
18 from a pattern of racketeering activity to acquire an
19 interest in any enterprise "which is engaged in, or the
20 activities of which affect interstate or foreign
21 commerce."

22 The Ninth Circuit affirmed the narcotics
23 conviction, but it reversed the RICO conviction for lack
24 of proof that the activities of the gold mining venture
25 affected interstate commerce. The court held that a

1 minimal effect on interstate commerce would be sufficient
2 to satisfy RICO, but that an incidental effect on that
3 commerce would not.

4 The court then found that the Government's
5 evidence, including the fact that the gold mining venture
6 had hired employees outside of Alaska and purchased
7 equipment outside of Alaska, showed, at most, an
8 incidental effect on interstate commerce. The Ninth
9 Circuit emphasized that Alaska's geographical isolation
10 means that most supplies and equipment must get there via
11 interstate commerce, and it believed that Alaska's
12 dependence on interstate commerce should not mean that
13 local businesses in Alaska are covered by RICO.

14 We brought the case here because the Ninth
15 Circuit decision conflicts with the view of every other
16 court of appeals that has considered what sort of a
17 jurisdictional proof satisfies the requirements of RICO.

18 QUESTION: I think it's we rather than you who
19 brought the case here.

20 MR. ESTRADA: Well, I stand corrected, Mr. Chief
21 Justice.

22 Our argument in the case, now that it is here,
23 Mr. Chief Justice, starts with the language of RICO, and
24 that language reaches all enterprises the activities of
25 which affect interstate or foreign commerce. This Court's

1 cases made clear that the phrase, affect commerce, is a
2 term of art that Congress uses to exercise all commerce
3 power it has under the Constitution, and that Congress
4 intended to exercise all of its constitutional power in
5 RICO is confirmed not only by its use of that term of art,
6 but also by the fact that one of its principal goals in
7 enacting RICO, which was to safeguard small businesses
8 from infiltration by organized crime, could likely not be
9 achieved under any narrower view of the jurisdictional
10 requirement.

11 Under RICO, then, in our view, the question is
12 whether the activities of the enterprise, here the gold
13 mining venture, affect commerce when measured by the full
14 constitutional authority of Congress and, under that
15 standard, the evidence in this case was sufficient to meet
16 the Government's burden.

17 The Ninth Circuit conceded that respondent and
18 his employees traveled between Alaska and the Lower 48
19 States in connection with the work in the mine, that the
20 mine obtained supplies and equipment from the Lower 48
21 States, and the respondent mortgaged a home he owned in
22 Arizona to finance the second mining season in 1986.

23 In addition, the evidence showed that the mine
24 sold a substantial amount of gold in Alaska worth at least
25 \$200,000, that the purchasers of the gold were part of a

1 broader market in precious metals that reached beyond
2 Alaska, and that therefore the mine's output was part of a
3 class of activities that in the aggregate substantially
4 affects interstate commerce.

5 In addition, the evidence showed that respondent
6 and his associates used the instrumentalities of
7 interstate commerce repeatedly, the mail and the
8 telephones, as part of the business of the mine.

9 In our view, all of that evidence was clearly
10 sufficient to satisfy the Government's burden under --

11 QUESTION: Mr. Estrada, in your view, is there
12 any business enterprise in America that wouldn't be
13 covered by RICO? What are the limits?

14 MR. ESTRADA: As a factual matter, Justice
15 O'Connor, I cannot think of any business in the country
16 that could not be covered by RICO, given that what is at
17 issue is the full constitutional authority of Congress. I
18 understand that the Commerce principle is a limited one,
19 and we do agree with that.

20 However, the facts on which it operates are not
21 limited, and in our economy on this day, I cannot think of
22 anything that is likely to actually happen in the real
23 world that would not be covered by this Court's cases
24 construing the extent of Congress' power under the
25 Commerce Clause.

1 QUESTION: How do you distinguish the situation
2 here from the situation which was argued recently here in
3 the Lopez case?

4 MR. ESTRADA: Well, this case is significantly
5 different from Lopez. As I understand the claim of the
6 respondent in Lopez and the view that was followed by the
7 Fifth Circuit in that case, Congress is required to make
8 findings and to set forth some sort of an explanation as
9 to why it views the activities that it is trying to reach
10 as affecting commerce. We do not think that that is the
11 case, but even if it were in this case, I think Congress
12 did that and more.

13 Congress in this case considered the statute
14 very carefully. It was dealing with a broad national
15 problem that it thought the old laws, both State and
16 Federal, had been entirely inadequate to deal with.

17 QUESTION: Well, this case, I mean, Lopez
18 involved a -- this case involves a commercial
19 enterprise --

20 MR. ESTRADA: Well, that's right.

21 QUESTION: -- doesn't it? The only question is
22 whether it's interstate or not.

23 MR. ESTRADA: Well, the --

24 QUESTION: Lopez didn't involve a commercial
25 enterprise at all. It was a gun in a schoolyard.

1 MR. ESTRADA: Well, that is true, Justice
2 Scalia. I'm not sure that it makes a great deal of
3 difference for purposes of the --

4 QUESTION: Whether it's commerce doesn't make
5 any difference for purposes of the Commerce Clause?

6 MR. ESTRADA: It does make a difference for
7 purposes of the Commerce Clause, Justice Scalia. It may
8 not make a difference for purposes of whether, under the
9 Necessary and Proper Clause, Congress can reach something
10 that is not in itself commerce in order to safeguard --

11 QUESTION: The Necessary and Proper Clause
12 expands the Commerce Clause to cover things that the
13 Commerce Clause wouldn't otherwise cover?

14 MR. ESTRADA: In effect, yes --

15 QUESTION: That's wonderful.

16 MR. ESTRADA: -- Justice Scalia, but --

17 QUESTION: When was the last time since
18 McCulloch v. Maryland that we held to that effect?

19 MR. ESTRADA: Oh, Mr. Justice Rehnquist -- I'm
20 sorry, Mr. Chief Justice, I think my reading of Wickard v.
21 Filburn would be to that effect.

22 QUESTION: That case would you say relied on the
23 Necessary and Proper Clause?

24 MR. ESTRADA: That is my recollection. I must
25 say that I'm not entirely sure. There are several cases

1 which unfortunately I can't think of in the 1930's and
2 '40's, and especially in the '40's, in which the Court
3 restated the view of Gibbons v. Ogden and pointed out that
4 that was merely an application of --

5 QUESTION: I don't think Gibbons v. Ogden relied
6 on the Necessary and Proper Clause the way McCulloch did.
7 Gibbons v. Ogden was just a broad definition of the
8 commerce power.

9 MR. ESTRADA: That's right, although in later
10 cases in the 1940's this Court expressed the view that --
11 the broad view that Mr. Chief Justice Marshall had
12 expounded in the Ogden case was in fact merely an
13 exposition, even though he didn't himself say so, of the
14 power of Congress because of the combination of the
15 Necessary and Proper Clause --

16 QUESTION: In the Darby case, which was the Fair
17 Labor Standards Act, and in the Perez case, which was
18 loan-sharking --

19 MR. ESTRADA: Mm-hmm.

20 QUESTION: I don't think we used the Necessary
21 and Proper Clause, although I'll refresh my recollection
22 on that to make sure.

23 MR. ESTRADA: My understanding, Justice Kennedy,
24 is that there are cases in the 1940's, and I'm fairly sure
25 of it, because understand that we have read them recently,

1 I just can't cite you one. Maybe when I rise again I will
2 be able to.

3 QUESTION: But you're not relying on Necessary
4 and Proper here, are you, Mr. Estrada?

5 MR. ESTRADA: Well, in effect -- I will answer
6 that question in two steps, Justice Ginsburg. We don't
7 need to in the sense that I think the evidence in this
8 case, inasmuch as the enterprise engaged in interstate
9 transactions, doesn't call upon us to do so.

10 QUESTION: Doesn't our recent decision in the
11 Allied Bruce case have some relevance to this problem of
12 what affects commerce?

13 MR. ESTRADA: Yes, I -- but the only reason that
14 it is necessary to point to the Necessary and Proper
15 Clause, Justice Ginsburg, is that the Commerce Clause in
16 itself, as Justice Scalia pointed out, authorizes Congress
17 to regulate only commerce, and the so-called affectation
18 doctrine that allows Congress to deal with other matters
19 that are not in themselves commerce, but they have an
20 effect on commerce, is usually justified by reference to
21 the Necessary and Proper Clause even though the cases talk
22 about it as the commerce power.

23 It is not in itself the commerce power in the
24 sense that that term is used in the Constitution. It is a
25 statement of how far Congress can go when it combines the

1 commerce power and the Necessary and Proper Clause.

2 QUESTION: Well, you say the power is justified.
3 It's justified by whom?

4 MR. ESTRADA: By -- this Court's cases have made
5 reference in explaining why Congress has been held to have
6 authority to reach matters that are not in themselves
7 commerce to the Necessary and Proper Clause.

8 QUESTION: These are the cases that you can't
9 remember from the thirties and forties?

10 MR. ESTRADA: Yes, Mr. Chief Justice, but in
11 fact, and the Court has explained on occasion, that even
12 though the cases speak of Congress' power to reach
13 anything that affects commerce, some of the more cases --
14 some of the Court's cases have been more specific, and
15 have pointed out that Congress under the Commerce Clause
16 can reach only commerce in itself, but that under the
17 Necessary and Proper Clause, Congress can then reach other
18 things that are not in themselves commerce, but that
19 affect commerce, and this Court's cases dealing with
20 whether something affects commerce and saying that
21 Congress has power to reach those matters are usually --
22 are logically traceable to reasoning based ultimately on
23 the Necessary and Proper Clause.

24 I was going to turn to the justifications given
25 by the court of appeals. The court of appeals though that

1 despite all of the evidence of interstate conduct in this
2 case, the fact that the enterprise hired employees and
3 purchased equipment outside of Alaska, that a different
4 result was warranted by its description of the effects on
5 commerce as incidental rather than minimal.

6 And that was wrong, because this Court stated in
7 Wickard v. Filburn that questions as to the constitutional
8 power of Congress really should not be solved by reference
9 to any formula that gives controlling weight to
10 nomenclature, and that the real question is whether actual
11 effects can be identified on commerce, and in this case,
12 they surely could.

13 The second reason that the Ninth Circuit gave
14 was based on the isolation of the State of Alaska, and we
15 do not think that that isolation should count against our
16 case. It is certainly true that many of the businesses in
17 Alaska have to obtain supplies and equipment from
18 interstate commerce, but that State is hardly unique in
19 that respect, and much the same could be said about Rhode
20 Island or Wyoming.

21 No State of the Union is entirely self-
22 sufficient, and in our view it makes little sense to say
23 that the greater a State's dependence on interstate
24 commerce, the less likely it will be that the activities
25 within that State will be deemed to affect interstate

1 commerce.

2 QUESTION: Now, does the Sherman Antitrust Act
3 have a lesser scope of coverage?

4 MR. ESTRADA: No. We think that the Sherman
5 Act, the Hobbs Act, and RICO, all go to the limits of the
6 Commerce Clause, and therefore if --

7 QUESTION: But the language in each is somewhat
8 different, is it not?

9 MR. ESTRADA: That is right. The language in
10 each of them is somewhat different. Some of them use the
11 word "obstruct" commerce, some of them use "impede"
12 commerce, and some of them use "affect" commerce, and as
13 this Court has made clear in the NLRB cases, particularly
14 the Polish case versus the NLRB, all of those are terms of
15 art that are used to invoke the full authority of Congress
16 under the Commerce Clause, and therefore all of those
17 terms have been interpreted by this Court, when Congress
18 uses them, as going to the limits of the Commerce Clause.

19 QUESTION: Do I have to agree with that to agree
20 with the Government in this case? Because I don't agree
21 with it as to the Sherman Act, as you know.

22 MR. ESTRADA: Yes, I do know, Justice Scalia.
23 In this case, no, because in our view the evidence in this
24 case, and this is how we tried to prove most of these
25 cases, was actually sufficient to show that the enterprise

1 was engaged in interstate commerce. It hired its
2 employees outside of Alaska, and it purchased equipment
3 and supplies --

4 QUESTION: The Sherman Act doesn't use
5 "affecting interstate commerce" at all, does it?

6 MR. ESTRADA: No, it does not. It is --

7 QUESTION: It's language is "in restraint of
8 trade between the States," isn't it?

9 MR. ESTRADA: That's right, and I know the view
10 that you expressed in Summit Health. As I understand your
11 view in that case, the view was that the activity in that
12 case could be reached by Congress, but that in passing the
13 Sherman Act, Congress did not exercise its full authority.

14 In this case, it seems fairly plain to us at
15 least that Congress in using the words, "affecting
16 commerce," did what you thought it had not done in the
17 Sherman Act, because by the time RICO was passed, Congress
18 had been told again and again by this Court that if it
19 wished to invoke its full power under the Commerce Clause,
20 these were the words it had to use, and therefore, no,
21 even if you continue to hold your view as to the Sherman
22 Act, Justice Scalia, that should not keep you from sort
23 of -- from taking our view of this case under this
24 statute.

25 QUESTION: Mr. Estrada, your opponent relies, in

1 part at least, on Gulf Oil v. Copp Paving. How do you
2 distinguish that case from this?

3 MR. ESTRADA: That case stated that when
4 Congress engages, or defines a class of activities, the
5 Court's role in effect is significantly different, but
6 from the examples that the Court cited in that
7 footnote 12, especially the Perez case, it is evident that
8 what the Court was getting at is that when Congress itself
9 does what it did in the Perez case, that no further proof
10 of interstate commerce at all is called for in any given
11 case.

12 That doesn't really answer the question here,
13 because Congress exercised its full power under the
14 Commerce Clause, and that full power could be met by a
15 class of activities analysis, or any other way in which
16 Congress could lawfully exercise its power, and the
17 significant difference that the Court was talking to in
18 that case was the difference between having to prove the
19 fact in every case and having to have no evidence
20 whatsoever of the fact in any one case.

21 QUESTION: In this case, Mr. Estrada, was there
22 an argument before the jury that interstate commerce was
23 not affected?

24 MR. ESTRADA: No.

25 QUESTION: And was there any objection to the

1 instruction that the court gave?

2 MR. ESTRADA: No. The instruction given by the
3 court is basically the Ninth Circuit pattern jury
4 instruction. I think it's 8.34, and it doesn't really go
5 into detail as to interstate commerce.

6 The -- that was not objected to, and as can be
7 expected in most of these cases, when the case was tried
8 to the jury, this wasn't really what the case was turning
9 on. I mean, the main contention on the other side was
10 that he had not in fact been involved in drug trafficking.

11 QUESTION: So the Ninth Circuit's view was that
12 this case should not have been submitted to the jury as a
13 matter of law, I take it?

14 MR. ESTRADA: That's right. That's right, and we
15 think that that's clearly wrong under this Court's cases.
16 The Ninth Circuit's view is that the evidence in this case
17 was so insufficient that the respondent was entitled to a
18 judgment of acquittal on the RICO count, and that that's
19 the end of that count. Obviously, we cannot go back to
20 the jury and try it again.

21 QUESTION: Would it have been improper for the
22 trial court to tell the jury, if you find that there were
23 trips between Arizona and Alaska, and if you find that any
24 of the gold over a 3-year period was sold in interstate
25 commerce, then I instruct you as a matter of law that

1 interstate commerce was involved? Would that --

2 MR. ESTRADA: Yes.

3 QUESTION: -- have been --

4 MR. ESTRADA: Yes, because --

5 QUESTION: -- an appropriate instruction?

6 MR. ESTRADA: Yes. That would be an instruction
7 that is tailored to the facts, and it is all right for a
8 court to instruct the jury on the legal significance of
9 facts so long as it makes clear that the question as to
10 whether the facts exist is for the jury.

11 QUESTION: Mr. Estrada, would the following
12 argument be sound? It would go like this, that if
13 Congress wanted to make it unequivocally clear that it was
14 legislating to the fullest extent of its powers, it would
15 have described the activity of the enterprise in this way:
16 it would have spoken of an enterprise which engages in
17 activities that affect interstate commerce.

18 That would have made it clear that the
19 enterprise was simply one participant in a broader
20 activity, or congeries of activities that have, in the
21 aggregate, this substantial effect, but that what Congress
22 in fact did was to speak of an enterprise, the activities
23 of which affect commerce, which suggests that we are
24 speaking or looking not to an aggregate, but to the
25 particular activities of that enterprise, and to them

1 alone.

2 Is that sort of contrast in language the basis
3 for a sound argument that Congress was taking a narrower
4 view here?

5 MR. ESTRADA: I don't think so, Justice Souter.
6 Congress usually will write the words, "affect commerce"
7 at the end of the language that otherwise makes conduct a
8 crime on the understanding that that goes to the full
9 power of its commerce --

10 QUESTION: So that whenever you see it, it's
11 basically a signal for the shorthand, whatever we can do
12 we're doing?

13 MR. ESTRADA: Yes, and I would give as an
14 example to you the Scarborough case, which dealt with
15 coming into possession of a firearm in commerce, or in
16 affecting commerce.

17 This Court held in that case, in the Scarborough
18 case, that even though the language said, possession
19 affecting commerce, that that requirement would be
20 satisfied by proof that the firearm had traveled in
21 interstate commerce at some point in human history, even
22 if it had nothing whatsoever to do with the conduct of the
23 defendant, and if that had happened before the defendant
24 came to have the firearm, and I think cases like that
25 properly give Congress an understanding --

1 QUESTION: Well, that argument in effect I guess
2 is -- and I'm not saying it's an illegitimate argument,
3 but I guess that argument in effect is that wherever
4 Congress uses the term, "affecting commerce," by using the
5 broadest, most umbrella kind of term, it therefore is
6 including any of the kind of more restrictive tests, like
7 involving the instrumentalities, or involving goods that
8 have moved, and so on.

9 MR. ESTRADA: That is exactly our argument,
10 Justice Souter, and I think that that's --

11 QUESTION: No matter how the rest of the
12 sentence reads, so long as the word "affecting" is in it,
13 that's it, it's sort of a -- it does everything.

14 MR. ESTRADA: Well, yes, and I understand
15 that --

16 QUESTION: Yes.

17 MR. ESTRADA: Yes, and I understand that that
18 may not be the best way to write the statute, but if the
19 Court's cases --

20 QUESTION: Not the best way to read it either, I
21 don't think.

22 MR. ESTRADA: Well, I would respectfully
23 disagree, Justice Scalia, because once phrases have
24 acquired the status of terms of art, and Congress has been
25 told that it can go to the very limit by using them,

1 they --

2 QUESTION: How would it have expressed the
3 thought that a normal, English-speaking person would
4 express by saying, any enterprise the activities of which
5 affect interstate or foreign commerce?

6 Suppose I wanted to really require that the
7 activities of that enterprise affect interstate commerce,
8 rather than the activities that that enterprise engages in
9 when engaged in by others in the aggregate affect
10 commerce?

11 MR. ESTRADA: You could say --

12 QUESTION: How would I express the thought that
13 I would normally express by saying, any enterprise, the
14 activities of which affect interstate commerce?

15 MR. ESTRADA: Well, you could say --

16 QUESTION: We cannot say it any more in English?

17 MR. ESTRADA: Well, if that is what one means,
18 one could say, the activities of which considered in
19 isolation affect interstate commerce.

20 I mean, all we're talking about is how do we
21 determine congressional intent, and in a world in which
22 the Court's cases have told Congress that these words have
23 independent legal significance, while it may make more
24 sense in an alternative world to sort of write the statute
25 differently, Congress in effect --

1 QUESTION: And you really think that that's what
2 our cases now, that whenever Congress uses the word
3 "affecting" the rest of the sentence doesn't matter?

4 MR. ESTRADA: Well, I think that it matters in
5 the sense that the activities of the enterprise of course
6 have to affect commerce, but one of the tests that may
7 make that true under this Court's cases, and especially
8 the NLRB cases, is that they may affect commerce because,
9 considered with other like activities throughout the
10 country, the effect on commerce is substantial.

11 QUESTION: If that's what we've said, maybe we
12 should unsay it, because it certainly is a trap for the
13 unwary legislator who thinks that he's speaking English,
14 and it turns out that if he uses the word "affecting" all
15 sorts of unreal things happen.

16 MR. ESTRADA: But it isn't, because one of the
17 canons of this Court's cases is that Congress is presumed
18 to know what this Court's cases say and, in effect, if you
19 had a case that told Congress that --

20 QUESTION: Because our cases are presumed to say
21 reasonable things.

22 MR. ESTRADA: Well, but even --

23 QUESTION: And maybe we should adhere to that
24 presumption.

25 MR. ESTRADA: Justice Scalia, if you had a case

1 that told Congress that it could reach to the full limits
2 of the Commerce Clause by affixing to the statute the
3 score of "Suwannee River," and Congress did that, it
4 should be taken to have reached to the limits of the
5 Commerce Clause, and that's basically all that we're
6 arguing here.

7 QUESTION: Of course, what we've come with in
8 your answers to me and to Justice Scalia are a kind of
9 three variants, one of which would make it expressly clear
10 that we were talking about an enterprise whose activities,
11 when aggregated with others, affected. At the other end
12 of the spectrum, the answer that you gave to Justice
13 Scalia, something to the effect like, the activities of
14 which alone affect interstate commerce, and what we've got
15 in the statute is something in between.

16 And I suppose you could, simply on the basis of
17 these answers, argue that we have an ambiguous statute
18 here, even though each of those three variants uses the
19 word "affect," and I suppose if we get to that point, the
20 thing to do is to look to legislative history. You don't
21 want to say that to Justice Scalia, but you could say that
22 to me.

23 (Laughter.)

24 MR. ESTRADA: I have said it to Justice Scalia
25 before, Justice Souter, and it didn't do me much good at

1 the time, but yes, if that were necessary to ascertain the
2 meaning of Congress, our view is that the use of the term
3 of art itself makes it clear.

4 QUESTION: Of course, the Government's view is
5 so expansive, it really doesn't even matter if you use
6 "affecting" does it, because it's not used in the Sherman
7 Act, and you take the same "it covers everything" view of
8 the Sherman Act, right?

9 MR. ESTRADA: There are several --

10 QUESTION: So if you use "affecting," or,
11 alternatively, do not use "affecting," it covers
12 everything.

13 (Laughter.)

14 MR. ESTRADA: If you use "affecting" or
15 "obstructing," or several of the other words that this
16 Court has identified --

17 QUESTION: Well, is that really true that the
18 Government's position is that if two pizza parlors in
19 downtown Anchorage fix their prices, the Sherman Act
20 applies?

21 MR. ESTRADA: Yes, it is, and I see that my time
22 is running low --

23 QUESTION: If you didn't accept that, would it
24 be --

25 (Laughter.)

1 QUESTION: Just in case one didn't go that far,
2 is this distinguishable?

3 MR. ESTRADA: Yes.

4 QUESTION: I mean, is it possible? Because --

5 MR. ESTRADA: Yes, because as Justice Scalia
6 pointed out, it is possible to make good arguments, as he
7 did in Summit Health, that the Sherman Act, because of its
8 different language, doesn't go so far, that would not
9 really be there for RICO, which has much more expansive
10 language.

11 QUESTION: You mean, one could look to see
12 whether or not Congress intended each individual farmer,
13 the class of which affects the price of wheat, also to
14 fall within the statute, and sometimes the answer would be
15 yes, and sometimes no, depending on what the statute's
16 about?

17 MR. ESTRADA: We would -- no. We would look to
18 see whether the language uses -- used by Congress reaches
19 to the full limit of the Commerce Clause, and if it does,
20 then that class-of-activities analysis would be available
21 in every case.

22 If I may reserve the remainder of my time --

23 QUESTION: Very well, Mr. Estrada.

24 MR. ESTRADA: Thank you.

25 QUESTION: Mr. Warren, we'll hear from you.

1 ORAL ARGUMENT OF GLENN S. WARREN

2 ON BEHALF OF THE RESPONDENT

3 MR. WARREN: Mr. Chief Justice, and may it
4 please the Court:

5 The question before the Court is whether the
6 Commerce Clause has any limitations. Does the term,
7 "interstate commerce" mean anything, or is it a
8 jurisdictional fiction?

9 This Court's precedents require that the phrase,
10 "affects interstate commerce," which has been referred to
11 and is used as a part of the RICO statute, require that
12 there be a substantial effect on interstate commerce. The
13 Government effectively urges upon this Court a standard of
14 identifiable and perceptible. That is, if there is an
15 activity, whether it be a pizza parlor or the buying of
16 tissue paper, that activity is identifiable, it has a
17 potential effect on interstate commerce, and under the
18 Government's theory would be cognizable under the RICO
19 statute.

20 QUESTION: Is it open for you to argue this when
21 you did not object to the instruction? The instruction
22 referred to activities of financial institutions that have
23 an effect, however small, on interstate or foreign
24 commerce. That was what the --

25 MR. WARREN: Justice Kennedy, that instruction

1 was applied to section 1956, which was one of the
2 racketeering acts which was a part of count 6, which was
3 the general RICO count.

4 The general RICO count used the language,
5 "affects interstate commerce." It did not use the
6 language, "in any way affects interstate commerce." It
7 would be our position that this is a jurisdictional
8 question which was not waived, in any event, by the
9 failure to object.

10 Furthermore, there was a request by trial
11 counsel to submit a special instruction on the RICO count.
12 That request was denied by the trial court.

13 QUESTION: Mr. Warren, you use the word, has to
14 have a substantial effect, so does it turn on the success
15 of the mine? That is, we look to the reality and not the
16 expectation?

17 MR. WARREN: The RICO statute talks about, and
18 the statute that Mr. Robertson, the respondent, was
19 prosecuted under, talks about actual effects. It does
20 not, as in the Sherman Act, talk about an agreement which
21 has potential consequences.

22 QUESTION: So if Mr. Robinson's dream had come
23 true, then he would be covered, but it's just because his
24 mine was not successful that he's not. Is that --

25 MR. WARREN: That is my position, because I

1 believe that the clear language of the statute talks about
2 effects of the enterprise on interstate commerce and not
3 potential effects.

4 QUESTION: Now --

5 QUESTION: So if --

6 QUESTION: -- counsel, are you arguing that this
7 gold mine operation doesn't even come within Congress'
8 power to regulate, or is it your position that Congress
9 had intended to exercise less than its full power under
10 the RICO statute? It wasn't clear to me.

11 MR. WARREN: I believe that Congress does have
12 the power in different ways to regulate gold mines such as
13 the one that existed in this case.

14 QUESTION: Even ones that aren't successful?

15 MR. WARREN: Even ones that are not successful
16 under Congress' different powers that Congress has, but
17 it's my position that RICO statute, which refers to the
18 gold mine as the enterprise, does not cover the gold mine
19 in this particular case.

20 QUESTION: Not the different powers that
21 Congress has, the commerce power. Does it have power to
22 regulate even this mine under the commerce power if it
23 wanted to?

24 MR. WARREN: I believe that it would have that
25 power if it wanted to, but I do not believe that the RICO

1 statute in this instance reached this gold mine.

2 QUESTION: So if you invest and strike it rich,
3 you're covered by RICO, but if you invest and it turns out
4 to be a bust, you're not covered?

5 MR. WARREN: That may be the possible
6 consequence of the statute the way it is written.

7 QUESTION: I suppose that a lemonade stand that
8 doesn't go anywhere doesn't affect interstate commerce,
9 and if it turns into McDonald's, it does.

10 MR. WARREN: Well, under the Government's
11 theory, I believe that the lemonade stand would affect
12 interstate commerce, because any activity has some effect
13 on interstate commerce. My position is that there must be
14 a substantial effect on interstate commerce, and therefore
15 the lemonade stand would not, but a McDonald's franchise
16 might, depending on the particular activities. The --

17 QUESTION: Mr. Warren what do you have to say
18 about the Russell case?

19 MR. WARREN: The Russell case is -- the Russell
20 case looked at title VIII of the Organized Crime Control
21 Act of 1970, and uses language which is different than the
22 RICO statute. Russell, or section 844(i) of title XVIII,
23 talks about buildings, vehicles, and property that are
24 used in activities which affect interstate commerce.

25 The RICO statute, on the other hand, talks about

1 enterprises which affect interstate commerce. The RICO
2 statute does not address enterprises which are used in
3 activities which affect interstate commerce. Therefore, I
4 believe that there is a significant difference, and that
5 Congress was aware of that difference when it passed both
6 of those statutes, since they were both parts of the
7 Organized Crime Control Act of 1970.

8 Furthermore, in the Organized Crime Control Act
9 of 1970, Congress in -- I'm sorry, the arson statute is
10 title XI. Title VIII was the gambling statute, which says
11 that if certain requirements are met, a certain number of
12 people gamble and so on, then there is a per se effect on
13 interstate commerce, so I believe that in passing the
14 Organized Crime Control Act Congress was well aware of the
15 different approaches it could take to interstate commerce.

16 With the arson statute, it used language,
17 buildings and so on engaged in activities which affect
18 interstate commerce, RICO it used language, enterprises
19 which affect interstate commerce, and in the gambling
20 statute, it defined a class of activities.

21 QUESTION: If Congress has the power to regulate
22 the output of gold mines, or gold mines, even local mines,
23 because like wheat they affect, what reason is there in
24 this statute to believe that Congress would not have
25 wanted to bring within the statute every single enterprise

1 that is a member of this class?

2 Here, the reason -- the language is
3 jurisdictional, I take it, in the statute. In the Sherman
4 Act, for example, they're interested in going after only
5 certain kinds of price-fixing agreements, but here the
6 language is jurisdictional. They'd like every pizza
7 parlor to fall within it if they could, wouldn't they?

8 MR. WARREN: I agree, Justice Breyer, Congress
9 may have wanted to bring every enterprise under its
10 jurisdiction, but I would submit that is beyond the
11 commerce power of Congress.

12 QUESTION: Is this now beyond the power of
13 commerce -- Congress to say, this gold -- in other words,
14 you're saying now, Congress doesn't have the
15 constitutional power to penalize investment in this kind
16 of gold mine, this kind of investment?

17 MR. WARREN: That is my position with the
18 approach that Congress used in this particular case. It
19 has defined --

20 QUESTION: Well, I just asked you that same
21 question. You said, no, Congress could reach it, but it
22 didn't. Now, what is your position? It has just shifted
23 dramatically.

24 MR. WARREN: With all respect, Justice O'Connor,
25 I believe that if Congress had defined a class of gold

1 mines that it wished to regulate, then the individual
2 mines within that class could be aggregated to establish a
3 substantial effect on interstate commerce, but when
4 Congress uses the generic term, "enterprise," which covers
5 virtually every activity within the United States, it's a
6 class that is so broad that it is tantamount to trying to
7 exercise the commerce power itself over every activity.

8 The rationale, I would submit, of the class
9 analysis, is that classes are subsets of the whole, and
10 that Congress can properly pick out particular classes and
11 regulate those classes.

12 QUESTION: Well, it can, but why does it follow
13 from that that Congress may not do it otherwise? In other
14 words, why does it have to make that subclass
15 identification? I don't see your basis for assuming that.

16 MR. WARREN: If Congress did not make the
17 subclass classification, then effectively it would be
18 regulating every enterprise from the lemonade stand to
19 General Motors.

20 QUESTION: Well, I mean, that doesn't follow. I
21 mean, there still are the substantially affecting commerce
22 tests. It doesn't mean that it takes over every activity
23 in the country. It simply means it goes as far as it can
24 go, and what reason is there to assume, textually or
25 constitutionally, that it can only go as far as it can go

1 if it does it by the specific identification of what you
2 call subclasses to be regulated?

3 MR. WARREN: Well, the statute itself, in
4 addition the two -- the class which would be enterprises
5 which have elicited funds invested in them, has words of
6 limitation, which --

7 QUESTION: That's a different argument. I mean,
8 you're now making a textual argument, and I understood you
9 before to be saying that if Congress wants to legislate to
10 its limit, it must do so as a constitutional matter, I
11 suppose, by identifying each so-called subclass which it
12 wishes to regulate to the extent of its power, and I
13 didn't understand that to be an argument based on the text
14 of this statute. I understood that to be an argument
15 based on the way Congress has to exercise its
16 constitutional power. Maybe I misunderstood you.

17 MR. WARREN: I would agree with that position,
18 that it's not a textual question.

19 QUESTION: Okay. If it's not a textual
20 question, what, then, is the constitutional basis for your
21 imposition of this, identify the subclass requirement,
22 before Congress can legislate to the extent of its powers?
23 Where do you get that?

24 MR. WARREN: Well, I believe as a matter of
25 logic, if nothing else, that if Congress can define a

1 class as including all enterprises in the United States,
2 then effectively the commerce power has no limitation, and
3 as even the Government concedes --

4 QUESTION: Well, it has no limitation beyond the
5 substantially affecting commerce limitation, and Congress
6 would say, that's absolutely right. That's just what we
7 intend to do.

8 MR. WARREN: Well, I think the Government's
9 position is that Congress could legislate over all
10 enterprises in the United States, and then could use
11 those, could aggregate those and declare, or ask the court
12 to interpret that aggregation as having the substantial
13 effect on commerce, and therefore there would be no
14 distinction between interstate and intrastate commerce.
15 Every type of commerce would be subject to congressional
16 legislation.

17 QUESTION: I thought that was your position,
18 too. I thought you were just saying Congress could do
19 that, but didn't do it here. I thought it was essentially
20 an interpretive argument you were making, rather than a
21 constitutional argument.

22 MR. WARREN: I'm making two arguments, Justice
23 Scalia. I do not believe, as a matter of constitutional
24 law, that Congress can with this kind of class approach
25 exercise jurisdiction over every class. I am also making

1 a statutory argument that it did not do so in this case.

2 QUESTION: But your constitutional argument is
3 based on the assumption they define everything that go
4 into the class, but how does that respond to the argument
5 that here the only class is gold mines?

6 MR. WARREN: Well, gold mines are not defined
7 either by Congress in the statute or in the legislative
8 history. Unlike the Russell case, for example, where the
9 legislative history reflected that there was a
10 congressional concern about buildings, and this Court was
11 then able to interpret the class of activities as being
12 commercial real estate, there's nothing in this statute or
13 its legislative history to indicate any concern about gold
14 mines, so --

15 QUESTION: No, but may I go back to Russell for
16 a second? Your distinction, if I understand it, is that
17 there it talked about the whole class of activities, and
18 here it talks about the activities of the particular
19 enterprise, in this statute.

20 MR. WARREN: Right, the -- and --

21 QUESTION: So that if this statute had read --
22 instead of, any enterprise which is engaged in or the
23 activities of which affect interstate commerce, if it had
24 said, any enterprise which is engaged in activities which
25 affect interstate commerce, then you would agree you would

1 lose.

2 MR. WARREN: Yes.

3 QUESTION: Yes.

4 MR. WARREN: I disagree with the position of the
5 Government that the words, "affect interstate commerce"
6 have a general meaning which we can look at and take into
7 every statute. I believe that those words have been used
8 in different ways, and that we have to take a close look
9 at the way the words are used in a particular statute, and
10 it's my position that those words reflect an intent that
11 only substantial effects on interstate commerce be
12 cognizable under the RICO statute.

13 QUESTION: To what extent do you rely on the
14 Ninth Circuit point about the distance of Alaska?
15 Wouldn't the same thing apply to two States that are very
16 close to each other, just as --

17 MR. WARREN: I agree with you, Justice Ginsburg.
18 I do not rely on the Ninth Circuit to that extent, because
19 I think that almost any activity in the United States or
20 in any given State draws supplies and purchases supplies
21 from another State, whether we're talking about Alaska, or
22 California, or New York, or Wyoming, so I do not rely on
23 the Ninth Circuit distinction in that regard.

24 As far as the activities of the enterprise, the
25 Government would lump anything that happened in connection

1 with the gold mine and call it interstate commerce. The
2 activities of the gold mine, in our view, were those
3 activities which were ongoing and which were unique to
4 this particular mine, and that would be the extraction of
5 minerals from the ground, and the sale of minerals in
6 Alaska.

7 QUESTION: How about hiring employees to come to
8 Alaska from somewhere else?

9 MR. WARREN: Well, that is, I would argue first,
10 Chief Justice Rehnquist, is not technically an activity of
11 the mine. It's --

12 QUESTION: You don't think finding people to run
13 the operation is an activity of the mine?

14 MR. WARREN: Well, to the extent that it is an
15 activity, and can be viewed as an activity, I would argue
16 that it did not constitute any kind of substantial effect
17 in this case.

18 It's a -- it's the type of activity, if you
19 will, that is a part of every business. There are
20 probably few businesses that do not have people who come
21 from other States to work at one time or another. It's
22 not a significant part of the activity of the mine, if it
23 is considered an activity of the mine.

24 QUESTION: Mr. Warren, what's your best case?
25 What case displays an interpretation by this Court of the

1 word, "affecting" that would make you win this case?

2 MR. WARREN: I believe the analogy to the
3 Sherman Act, some of the Sherman Act cases.

4 QUESTION: It doesn't involve the word,
5 "affecting." I mean, I agree, that's a wonderful line of
6 cases. Unfortunately, it doesn't have anything to do with
7 this. It's --

8 MR. WARREN: Well, I don't know that I agree
9 that the Sherman Act doesn't have anything to do with
10 RICO, because the Sherman Act does talk about the -- about
11 effects on interstate commerce, or at least the Court's
12 interpretation of the Sherman Act in various cases talks
13 about that.

14 QUESTION: Restraint of trade between the States
15 is what you're talking about, and the Court said, you
16 know, that that seems to focus on the individual activity,
17 or at least we used to say that, but you don't have a
18 single case in which "affecting" has been interpreted by
19 this Court as you urge us to interpret it here.

20 MR. WARREN: "Affecting" has been interpreted by
21 this Court in class of activities cases, and the Court has
22 indicated that when there is a class, there must be a
23 substantial effect on interstate commerce. I do not have
24 a case which discusses this issue in terms of a nonclass
25 analysis and addresses an individual activity, but it's my

1 position that the jurisprudence of this Court requires
2 that there be a substantial effect on interstate commerce,
3 otherwise the distinction between interstate and
4 intrastate commerce is lost, and there is no limit to the
5 commerce power.

6 QUESTION: Mr. Warren, in connection with
7 employees, perhaps the Alaska distance doesn't make a
8 distinction that cuts against you. There was a whole line
9 of cases about people who go up to Alaska to work and then
10 come back to California sick and lame and are a burden on
11 the California Workers Compensation system, so wouldn't
12 the effect of getting employees to come to Alaska,
13 wouldn't that have an amplified effect on interstate
14 commerce --

15 MR. WARREN: Looking --

16 QUESTION: -- than the distance between, say,
17 New York and New Jersey?

18 MR. WARREN: Looking at any particular activity,
19 there might be a heightened effect if there are a number
20 of employees coming from one State to another.

21 I would point out that in this case there were a
22 total of only five or six employees who worked at this
23 particular mine over the span of 3 years, so even if these
24 employees did travel in interstate commerce, it was -- as
25 the Ninth Circuit pointed out, it was certainly not of any

1 importance.

2 In fact, I would almost refer to some of these
3 incidents such as the travel of employees, the driving of
4 a Cadillac, which the Government refers to, as incidental
5 effects, a term which this Court used in Oregon State
6 Medical Society to describe sporadic and few contacts with
7 interstate commerce, and I would submit that the same is
8 true in this situation.

9 QUESTION: May I ask another question? Just
10 looking at the general purpose of the statute to reach
11 competitive -- the use of, in competitive markets, of
12 funds that are the product of income derived from a
13 pattern of racketeering activity, basically organized
14 crime, and I understand it's been given broader
15 construction than perhaps Congress intended, but looking
16 at the heart of the statute and wanting to police
17 investments of this kind of money, why would Congress want
18 to do anything less than its full power to reach all of
19 the use of proceeds of this kind of activity? What would
20 the reason be for the -- I mean, what sense does your
21 distinction make in terms of the overall purpose of the
22 statute?

23 MR. WARREN: There could be some concern about
24 the Federal-State balance. That could be one reason why
25 Congress would not want to cover every single enterprise.

1 QUESTION: No, but the threshold inquiry has to
2 be -- there's no doubt about the threshold of, you're
3 regulating the proceeds of activities that are clearly
4 subject to the power of Congress to regulate, the
5 organized crimes -- you know, getting the money in the
6 first place.

7 MR. WARREN: Yes.

8 QUESTION: And then we're talking about, what
9 can they do with it.

10 MR. WARREN: Yes.

11 QUESTION: And basically a full power answer
12 would say, they can't do anything with it, we want to get
13 it all, and you say that - why wouldn't that be the more
14 normal reading of the statute?

15 MR. WARREN: Well, even if it were the more
16 normal reading of the statute, and I don't know the answer
17 to your question, Justice Stevens, but there may be
18 certain types of activities that Congress wants to reach,
19 and it wants to use its full powers to reach those
20 activities, but the commerce power just does not allow it
21 to reach those activities.

22 QUESTION: Or I guess you could say the same
23 reason we think, or used to think that the Sherman Act
24 doesn't cover small businesses that don't substantially,
25 individually substantially affect interstate commerce,

1 that the Federal Government left it to State Valentine
2 acts to do that job with respect to smaller enterprises.

3 MR. WARREN: That would --

4 QUESTION: Or the National Labor Relations Act.
5 A lot of acts have been inter -- or have been limited by
6 either the statute or the regulations that implement them
7 to major interstate activities, leaving the States to do
8 the rest.

9 MR. WARREN: I would agree with that.

10 I would again refer the Court to the Sherman
11 Act, because even though the language of the Sherman Act
12 does not talk about affecting interstate commerce, I
13 believe it provides a useful analog to an analysis. This
14 Court's Sherman Act cases have historically talked about a
15 substantial effect on interstate commerce, and I would
16 submit that is what the RICO statute talks about.

17 The gold mine in Alaska sold gold intrastate to
18 refiners in Alaska. There's no evidence, although there
19 is an inference, that that gold was subsequently sold
20 outside of Alaska, but in the scheme of what probably is a
21 multitrillion-dollar market, as the court below pointed
22 out, \$200,000 over a period of 3 years is not a
23 significant amount of activity.

24 QUESTION: They also took out \$30,000, didn't
25 they?

1 MR. WARREN: I'm sorry?

2 QUESTION: Didn't they take out some nuggets or
3 something?

4 MR. WARREN: There was approximately \$30,000 --

5

6 QUESTION: So 15 percent of the output was taken
7 out of State?

8 MR. WARREN: That's correct, but that -- that
9 was not an activity of the mine. If anything, that was
10 a -- that could be looked at as one of the participants in
11 the mine, Mr. Robertson, the respondent, just taking the
12 money out of Alaska. This was not an activity of the mine
13 where it sold mine -- sold gold in Alaska, or sold gold
14 outside of Alaska. This was somebody just taking the
15 gold.

16 If that were to provide a jurisdictional basis,
17 the fact that somebody could take something from an
18 enterprise and travel to another State, then again, almost
19 any activity could have some effect on interstate
20 commerce.

21 QUESTION: Mr. Warren, the Ninth Circuit was
22 obviously concerned about the sweep of this provision, and
23 there was an issue left over. I think the -- what was the
24 issue that was left over about sentencing under this
25 count?

1 MR. WARREN: Well, this count, the RICO count
2 brings the -- brings Mr. Robertson's sentence within the
3 Sentencing Guidelines, and without the RICO count, then
4 all other counts that he was convicted on would not be
5 within the Sentencing Guidelines, because they occurred
6 prior to November 1, 1987.

7 The Government acknowledges in principle that
8 the Commerce Clause has limits. Its approach, however, is
9 to abandon what I would submit is the longstanding
10 substantial effect test of this Court, and would give
11 Congress an unbridled power to punish any kind of criminal
12 conduct.

13 This could result in the punishment of criminal
14 conduct which has really nothing to do with interstate
15 commerce. It can result in overburdening of the Federal
16 courts, an expansive use of the RICO statute in both the
17 criminal and the civil context and, I would submit, it
18 could act, will act to significantly affect the Federal-
19 State balance.

20 By upholding the language of the RICO statute in
21 this particular case, which is to view "affects interstate
22 commerce" as giving Congress the power to legislate over
23 any type of effect, Congress can simply pass a statute,
24 indicate that it is exercising its Commerce Clause
25 jurisdiction over an activity or activities which affect

1 interstate commerce, and there basically is no check.

2 I would urge the Court to affirm the ruling of
3 the court below.

4 QUESTION: Thank you, Mr. Warren.

5 Mr. Estrada, you have 1 minute remaining.

6 REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

7 ON BEHALF OF THE PETITIONER

8 MR. ESTRADA: Thank you, Mr. Chief Justice.

9 I have one case in response to the question you
10 asked earlier. It is not cited in our brief.

11 The name is U.S. v. Ferger, F-e-r-g-e-r, 250
12 U.S. 199, and the citation is at page 203, in which, after
13 stating the substance of the affectation doctrine the
14 Court stated, "It would be superfluous to refer to the
15 authorities which, from the foundation of the Government,
16 have measured the exertion by Congress of its power to
17 regulate commerce by the principle just stated, since the
18 doctrine is elementary, and is but an expression of the
19 text of the Constitution," citing the Necessary and Proper
20 clause.

21 I have nothing further.

22 CHIEF JUSTICE REHNQUIST: Very well. The case
23 is submitted.

24 (Whereupon, at 10:59 a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES Petitioners v. JUAN PAUL ROBERTSON

CASE NO.: 94-251

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BY Ann Marie Federico

(REPORTER)