Supreme Court backs RICO use against political groups

by Leo Scanlon

On Oct. 9, the U.S. Supreme Court opened its new term by upholding the use of the the infamous Racketeering Influenced and Corrupt Organizations (RICO) statute against an anti-abortion group, for conducting a political protest against an abortion clinic. This law, which was supposedly originally passed in order to combat organized crime, has now, like Dr. Frankenstein's monster, been set loose to destroy the Constitution's First and Fourth Amendment guarantees of free speech and political association.

The decision of the court to deny *a certiorari* (review) of the case of *McMonagle et al. v. Northeast Women's Center, Inc.*, lets stand a lower court ruling that federalized an entire category of political protest activity by allowing a sit-in to be considered an act of extortion, and prosecuted under the provisions of RICO. The immediate victims of the ruling will be the anti-abortion protesters associated with Operation Rescue and related organizations, who face multiple suits of a similar nature. The ultimate victim will be constitutional freedoms of association, the exercise of which will be treated as acts of civil or criminal fraud or extortion.

Ironically, it was the author of the RICO statute himself, Notre Dame's Prof. Robert Blakey, who submitted the appeal on behalf of the protesters, explaining to the court the chilling effect that the lower court ruling will have on free speech. Despite his protests, the court has decided to allow the statute to do its work.

Background of the case

The case involves a RICO suit filed by an abortion clinic in Pennsylvania, which alleged that a group of protesters had committed Hobbs Act (extortion) violations during a series of sit-ins organized over a several-year period. The plaintiffs argued that the sit-ins had disrupted the business of the clinic and frightened away patients, employees, and vendors, thus causing them to break contracts relating to employment or delivery of services. Since these actions resulted from the "intimidation" caused by the protesters, the loss of business represented an interference with interstate commerce (the clinic is a franchise of an abortuary chain) and thus meets the test for extortion.

The suit argued that the multiple acts of "extortion" conducted by the "enterprise" justified the award of monetary damages, under RICO, of three times the amount of lost business suffered by the clinic. The "enterprise" was defined as the organizers of the protests, participants in the sit-ins, the newsletter which reported on the movement's progress, and even an editorialist from a local paper who wrote in support of (thus "encouraging") the actions. The jury in the local court found the defendants guilty and awarded damages which will break the back of the organization, exactly as the initiators of the suit intended.

The Appeals Court upheld the jury ruling and the charge, thus interpreting the statute in a way that conflicts with legal precedent on several fundamental points, particularly the use of a criminal statute, the Hobbs Act, by a private plaintiff, and the broader matter of the use of a lawsuit to suppress conduct that is clearly defined as a protected form of free speech.

RICO devours the Constitution

A review of the RICO statute helps clarify the magnitude of the decision. RICO punishes a person who commits a "pattern" of violations of a specified list of crimes, in furtherance of a scheme to take over or operate an "enterprise" (any

association, in fact). Some of the predicate crimes are civil (mail fraud and wire fraud); others, such as murder or extortion, can only be alleged by a government prosecutor. In either case, the remedies provided include triple damages, and are awarded if the "preponderance of the evidence" (civil standard of proof) leads to a guilty verdict.

The courts heretofore have been careful to allow private plaintiffs to use only the civil powers of RICO. The case here was unique, in that the Hobbs Act violations were cited as the predicate crimes in the civil RICO pleading. Thus, this case establishes the right of private plaintiffs to usurp the authority of the prosecutor in a criminal case—one of the many constitutional flaws of the RICO theory.

The decision also sets precedent by ignoring previous rulings which have said that an "enterprise" must have a profit-making purpose to meet the test of RICO. The Operation Rescue movement clearly had no commercial purpose, and neither does any other political or religious institution. This distinction is the essence of the protections established by the Constitution. The court has ruled that Operation Rescue is an "enterprise" as defined by RICO, since it was the vehicle for denying the "freedom of commerce" of the abortion clinic. From this point on, if this precedent is allowed to stand, the First and Fourth Amendments have no meaningful existence.

The trial itself was characterized by many of the horrors which have become commonplace in American courts. The judge ruled *in limine* (a "limiting" ruling in advance of trial) that the protesters could not present a political explanation of their actions; the plaintiffs alleged, but never had to prove, exactly what constituted their business losses. They claimed that they lost their lease because of the protests, for example, but the landlord was not required to testify, and the protesters have been assessed for a wide variety of "damages" which were never proven to have actually occurred. "Interested" witnesses were allowed to present unsubstantiated statements as proven facts, and inflammatory hearsay allegations accusing the protesters of "anti-Semitism" were allowed into the record. The jury indicated confusion on several points of the charge, and there is legitimate dispute over the instructions given to them by the trial judge.

It was, in short, a railroad.

More prosecutions to come

This ruling will now unleash a flood of similar suits which have been filed by abortion clinics and municipalities around the country. In the most outrageous instance of these suits, the town of West Hartford, Connecticut deployed its police against peaceful protesters, arrested, tortured, and brutalized them, and then filed a RICO suit demanding damage awards three times the amount it cost the city to administer the beatings. Other suits are pending in North Carolina, Tennessee, Illinois, Alabama, and numerous locations on the West Coast, and are being contemplated in other jurisdictions.

RICO reaches out to every "conspirator" involved in the "enterprise" and holds him or her liable for the damages awarded in the settlement. Ed Tiryak, the architect of the nationwide barrage of lawsuits filed by the abortion clinics, has stated that the specific purpose of the suit is to frighten "fringe elements" away from the leaders of the protest, by threatening them with draconian sanctions. He argues that this is necessary in this case because the leaders of the protests are unafraid of jail sentences, and must be punished in a way that will hurt not only them, but their followers and supporters.

This is the logical extension of the thinking expressed by Blakey and other fanatic defenders of the RICO statute. The heavy penalties and unusual legal techniques associated with the statute are justified on the grounds that "group crime" is a phenomenon which can only be controlled with legal mechanisms that have the capability to strike at the structure of the targeted group. When the government begins prosecuting a trade union or political group on fraud or racketeering charges, the *coup de grace* is the use of RICO provisions which mandate the forfeiture of the assests of the tainted "enterprise." This allows the prosecutors to either reorganize or destroy the entity, as has been done in the cases of the Teamsters Union or the Fulton Fish Market in New York City.

The Supreme Court has implicitly accepted this logic, and this is exactly what RICO was designed to do. In designing the statute, Dr. Blakey and his assistants aimed at undermining freedom of association in precisely the way the court has approved. They also attempted to breach the divide between civil and criminal law by the trick of allowing criminal actions to be prosecuted under the more liberal rules governing civil procedures. The court has granted his wish. Blakey's protest that this was supposed to apply to "economic crimes" and not First Amendment activity, is merely an attempt to put the genie back in the bottle.

RICO 'reform' a dead letter

Only one Justice on the Supreme Court dissented from the majority decision and argued that the case should be heard. Justice Byron White acknowledged that there are conflicting rulings among the courts on the question of whether RICO liability may be imposed where neither the "enterprise" nor the "pattern of racketeering activity" had any profit-making element. He would grant *certiorari* to resolve the conflict, but makes no mention of how it would be resolved.

As for Blakey's arguments on behalf of the wronged protesters, they are motivated primarily by a desire to protect the integrity of his statute. He had no compunction about subverting the Constitution when it suited his purpose. The court has ruled, perversely, that he thus has no valid complaint now. Blakey's concern is that the RICO law will now be seen for what it is, an unreformable abomination which must be destroyed—the sooner, the better.