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RICO, PAST AND FUTURE: SOME OBSERVATIONS AND CONCLUSIONS

*Ilene H. Nagel**
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Racketeer Influenced and Corrupt Organizations Act—RICO—the name, pretentious as it is, conveys the message.¹ As the Act itself says in its statement of findings and purpose:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity . . . ; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property . . . ; (3) this money and power are increasingly used to infiltrate and to subvert and corrupt our democratic processes²

To the casual reader, images of the Godfather, Mafia meetings in the hills of New Jersey, and Sicilian “families” corrupting and killing might naturally come to mind. The less casual reader interested in the legislative and pre-legislative history of RICO finds strong support for the same images.

The pre-legislative history goes back to the Kefauver Committee of 1951, the American Bar Association’s Commission on Organized Crime, the McClellan Committee’s hearings in the 1950’s and early 1960’s, and the Katzenbach Commission’s comprehensive report in 1967.³ These hearings and reports focused the nation’s attention on the activities of organized crime; gave substance to the terms “Mafia,” “the syndicate,” and “racketeer”; exposed criminal infiltration of labor unions, business and government; and probably helped spawn the plethora of gangbuster shows so popular in the early years of television.

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1. There is some question whether the words used in the name were intended to describe the contents of the Act or a character in an early Edward G. Robinson movie. See Blakey, *The Rico Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 237 n.3 (1982).

2. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

3. For a review of this history, see, e.g., Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts*, 53 TEMP. L.Q. 1009, 1014 (1980).

The legislative history of RICO amply demonstrates its parentage, and the preoccupation of its sponsors with the syndicate, Mafia-sponsored criminal collusion, and the problem of the infiltration of legitimate businesses by organized crime.⁴ The act that emerged from this concern was broad and sweeping. Its congressional sponsors were well aware that, as drafted, the act could be construed as applying to individuals and activities not associated with any criminal organization. They felt, however, that there was no way to draw an effective statute that would reach the array of commercial activity of organized crime without also inadvertently including crimes commonly committed by persons outside organized crime. They felt that Congress had done all it could.⁵ The Justice Department also recognized the problem, and had reassured Congress and the public that RICO would not be used indiscriminately—"We're not going to power rape nickel and dime cases."⁶

As Webb and Turow indicate in their article,⁷ federal prosecutors were slow to invoke the various provisions of RICO. The novelty of some of it, uncertainty about its scope, and perhaps doubts about its validity, were no doubt factors. The breadth of the 1978 decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Elliott*,⁸ as described by Holderman,⁹ probably both cheered and unnerved prosecutors. The rash of journal articles concerned with RICO that have appeared in the last several years almost uniformly reflects a central concern—how to channel and constrain the broad sweep of RICO to bring it into line with traditional notions of fairness and due process, while at the same time maintaining its vitality as an effective weapon against organized crime.

That the prosecutors have not lived up to the Justice Department's assurances regarding "nickel and dime cases" seems agreed by the commentators, and is well-illustrated by Holderman's discussion of

4. See *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

5. See McClellan, *The Organized Crime Act (S.30) or Its Critics: What Threatens Civil Liberties*, 46 NOTRE DAME LAW. 55 (1970) (expansion of Senator McClellan's remarks on Senate floor, see 116 CONG. REC. 18,939 (1970)).

6. Chief of the Justice Department task force in charge of RICO cases, quoted in Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C §§ 1961-68: *Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 16 (1978).

7. Webb & Turow, *RICO Forfeiture in Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404 (1983).

8. 571 F.2d 880 (5th Cir.), cert. denied sub nom. Delph v. United States, 439 U.S. 953 (1978).

9. Holderman, *Reconciling RICO's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. CIN. L. REV. 385 (1983).

United States v. Sutherland,¹⁰ a 1981 case involving a RICO prosecution of a municipal court judge who fixed traffic tickets. The commentators' concerns have focused on the construction of the Act's language by the courts, and the implications of applying the Act to the various fact patterns selected by prosecutors for RICO treatment.¹¹

The dialogue concerning RICO, the courts and the criminal law has been substantially advanced by the three papers included in this symposium. Holderman focuses on what is one of the most central and troubling facets of RICO, its expansion of traditional conspiracy doctrine through the new statutory concept of the enterprise. Traditional conspiracy doctrine required some linkages among conspirators; these linkages were often described by reference to images of physically connected objects, such as the chain and the wheel. The enterprise, on the other hand, had no such reification; indeed, the statutory definition indicates it can be an individual or a group, a legal or a non-legal entity. When viewed in the context of an overarching criminal syndicate controlled by the secret ties of a Mafia "family," the notion of assuming an enterprise of which certain criminal conduct is a part seems appropriate enough. When, however, such enterprise concepts are applied to a man and his brother who were involved in arson and the theft and sale of meat, dairy products, some drugs, an occasional auto, or whatever else came along, and who dealt with a lot of different people in the process, the idea that there was a metaphoric corporate structure that justified the government in invoking RICO and avoiding traditional multiple conspiracy doctrine seems more questionable and suspect.¹² Holderman's concern for the consequences of such a broad reading of RICO is consistent with the views expressed by Professor Craig Bradley, writing in the *Iowa Law Review*, who similarly noted that this expansionist view created problems under the double jeopardy clause, and extended RICO to cover offenses in which Congress specifically disclaimed any interest.¹³ Holderman takes comfort in the post-*Elliott* cases, and particularly the United States Supreme Court's first RICO decision in 1981,¹⁴ as they evidence

10. 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); Holderman, *supra* note 9, at 401-02.

11. For two carefully analyzed discussions of the Act and its language, see Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

12. *United States v. Elliott*, 571 F.2d 880, 898, 902-03 (5th Cir.), *cert. denied sub nom. Delph v. United States*, 439 U.S. 953 (1978).

13. Bradley, *supra* note 11, at 854-58.

14. *United States v. Turkette*, 452 U.S. 576 (1981).

a trend of judicial thinking in the direction of applying to RICO cases a narrower reading of enterprise conspiracy that more closely resembles traditional conspiracy principles. He applauds this trend.¹⁵

In addition to the problem posed by Holderman as to the proper interpretation of the enterprise concept and with whom and under what conditions persons alleged to conspire are rightfully subjected to RICO prosecutions, there are the further problems of forfeiture as penalty raised by Webb and Turow.¹⁶ The criminal penalties attaching to a RICO violation are specified in section 1963(a).¹⁷ What is special about these penalties is their provision for in personam forfeiture, a concept that, while not new,¹⁸ had long since been out of favor as a criminal sanction.¹⁹ The motivation for bringing back forfeiture as a criminal penalty stemmed from heightened congressional concern about the seemingly unchecked spread of organized crime,²⁰ and the concomitant desire to punish and deter offenders. Simultaneously, Congress wanted to break the economic stranglehold in legitimate businesses that could be gained by organized crime through the use of illegitimate means to influence or take over such businesses.²¹

There is little doubt that the forfeiture provision provided prosecutors with an unusually attractive sanction to combat the problem of organized crime infiltrating legitimate business. Yet the relative uniqueness of forfeiture as a criminal penalty coupled with the lack of clarity in the statute as to its potential reach resulted, until very recently, in disuse of the provision.²² With its increased use, however,

15. Holderman, *supra* note 9, at 393-403.

16. Webb & Turow, *supra* note 7.

17. 18 U.S.C. § 1963(a) (1976). This section provides that

[w]hoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Id.

18. In the common law of England,

[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all his property, real and personal, to the Crown. . . . The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

19. See Tarlow, *supra* note 11, at 278.

20. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (statement of findings and purpose).

21. S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969).

22. See Webb & Turow, *supra* note 7, at 406.

have come more questions about legislative intent and proper statutory interpretation. It is to these issues that Webb and Turow address their insightful and provocative remarks.²³ In lay terms, the authors identify the central issues as concerning what is forfeitable, when, and what does the government have to do to obtain it. In legal terms, the controversies center on the reach of the forfeiture provision, the time at which it attaches, and the extent of government responsibility to trace the forfeited property from the agreed-upon time of forfeiture to the date that judgment enters.²⁴

In assessing the reach of the forfeiture provision, Webb and Turow point to their investigation of corruption at the Cook County Board of Appeals as exemplifying the problem of discerning whether the fruits and profits of racketeering are properly included in the forfeiture.²⁵ In the authors' view, the extent of the bribery and mail fraud violations constituted a pattern of racketeering appropriate for a RICO prosecution. The problem of reach followed from the fact that some of the defendants were lawyers whose interests from the racketeering activities were intertwined with the corporate interests of law firms. Divesting a defendant of his interest in the law firm did not clearly preclude him from either recovering the profits of his racketeering or continuing to enjoy the fruits of those profits, directly or indirectly, should the remaining corporate shareholders decide to distribute those fruits and profits to the defendant. If the defendant profited from his racketeering, now or in the future, the intention of the forfeiture provision to punish and deter would be clearly thwarted. Moreover, the potential of the racketeer to influence and benefit the activities of the legitimate business would not be precluded. Despite the successful RICO prosecution, the intended consequences of the Act would not ensue.

In search of support for what Webb and Turow believe to be the logical statutory interpretation consistent with legislative intent—that the forfeiture provision does reach the fruits and profits of the racketeering activities—the extant case law, legislative history and Justice Department policy statements are reviewed.²⁶ Despite the thoughtful review, it is clear that the vague language of the statute has allowed for a variety of interpretations. The authors look to the pending Supreme Court case of *Russello v. United States* to provide guidance, while holding fast to their conviction that the forfeiture provision is

23. *Id.* at 407-409.

24. *Id.*

25. *Id.* at 409-11.

26. *Id.* at 410-18.

meant to reach the monetary proceeds of racketeering activity.²⁷ It makes little sense to believe otherwise.

Congress has not been deaf to the need for clarification. Perhaps in an attempt to anticipate the Supreme Court, or to make certain that the right result is reached, regardless of the Supreme Court's holding in *Russello*,²⁸ Title IV of the Comprehensive Crime Control Act of 1983²⁹ proposes to amend the RICO forfeiture provision. The significant proposed change relevant to the question of reach is that the proposed language makes it clear that property which constitutes, or is derived from the proceeds of racketeering activity punishable under 18 U.S.C. § 1962, is subject to an order of criminal forfeiture.³⁰ The Supreme Court's decision in *Russello*, or congressional action on the

27. See 681 F.2d 952 (5th Cir. 1982), *cert. granted*, 103 S.Ct. 721 (1983). Webb & Turow, *supra* note 7, at 416-18.

28. *Russello v. United States*, 681 F.2d 952 (5th Cir. 1982), *cert. granted*, 103 S.Ct. 721 (1983).

29. S. 829, 98th Cong., 1st Sess. (1983); H.R. 2151, 98th Cong., 1st Sess. (1983) (submitted to Congress on March 16, 1983).

30. *Id.* § 402. Part A of Title IV of the proposed Comprehensive Crime Control Act of 1983 states in relevant part:

Sec. 402. Section 1963 of title 18 of the United States Code is amended to read as follows:

§ 1963. Criminal penalties

“(a) Whoever violates any provision of section 1962 of this chapter—

“(1) shall be fined not more than \$25,000 or imprisoned for not more than twenty years, or both; and

“(2) shall forfeit to the United States any property, irrespective of any provision of State law—

“(A) constituting, or derived from, any interest in or contribution to an enterprise the person has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;

“(B) constituting a means by which the person has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of section 1962 of this chapter; and

“(C) constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in paragraph (2).

“(b) Property subject to criminal forfeiture under this section includes—

“(1) real property, including things growing on, affixed to, and found in land, and

“(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

proposed amendment to RICO, may soon resolve this issue. As do Webb and Turow, we believe that the statute either will be construed to be consistent with its intended purpose, or will be amended to achieve the same.

The question surrounding the time at which the forfeiture takes effect was similarly raised by the Office of the United States Attorney regarding prosecutions of RICO in the Northern District of Illinois.³¹ Webb and Turow's review of forfeiture law leads them to conclude that forfeiture attaches at the time of the offense. Again, in response to pressure for clarity, Title IV of the Comprehensive Crime Control Act of 1983 proposes new language to amend the existing statute. In an attempt to address the problem of defendants defeating the purpose of forfeiture by removing, concealing, divesting or transferring forfeitable assets some time after the offense but before conviction, subsection (c) of section 1963 is proposed to be changed so as to be in accord with the "taint" theory long recognized in forfeiture cases.³² Under this theory, forfeiture attaches to the time when the illegal acts give rise to the forfeiture. "From that time forward, the property is tainted and remains subject to forfeiture regardless of any subsequent disposition."³³ Moreover, the proposed amended statute provides new language specifying that where forfeitable property has been removed, concealed, transferred, commingled with other property, or substantially depleted in value, the court is empowered to order that the defendant forfeit substitute assets.³⁴

Whether the Congress will pass the Comprehensive Crime Control Act of 1983, whether the proposed amendments and additions will be included and whether the courts will interpret this new statutory language in accordance with the new legislative history remains to be seen. What does seem clear is that Congress is aware of the limits of the present statute, in its construction and application, and is taking steps to reduce the controversies.

The above efforts notwithstanding, the application of RICO and the use of the forfeiture penalty for RICO offenders are not likely to meet with universal approval. As a derivative of conspiracy theory,

31. *See, e.g.*, *United States v. Jay Witt*, No. 81 CR 481 (N.D. Ill. filed Aug. 5, 1981); *United States v. Morton Hauslinger*, No. 81 CR 479 (N.D. Ill. filed Sept. 3, 1981).

32. Department of Justice, Section-by-Section Summary of Proposed Comprehensive Crime Control Act of 1983 130 (1983) (mimeo; summary provided by the United States Department of Justice, Office of Legislative Affairs, April 7, 1983).

33. *Id.*

34. *Id.*; *see also* proposed Comprehensive Crime Control Act of 1983, S. 829, 98th Cong., 1st Sess. § 403 (1983); H.R. 2151, 98th Cong., 1st Sess. § 403 (1983).

the Act provides for the punishment of group activity over and above individual criminal acts. As such, it is subject to the same sorts of criticism that historically have been levied against conspiracy law.³⁵ To the extent that new definitions of conspiracy groups are imposed, and new targets beyond those for whom the law was first conceived are incorporated under these new definitions, we can expect even more debate and criticism of the kind which is evidenced in the articles by Holderman,³⁶ Bradley³⁷ and Tarlow.³⁸ Furthermore, to the extent that corporate defendants are involved in these RICO conspiracies, the plethora of complicating issues discussed in detail and with great insight by Brickey³⁹ will have to be rethought and resolved. Finally, while the Supreme Court or Congress may give guidance to some of the statutory language presently lacking clarity, we can expect that the future will still hold much room for debate on questions of due process, double jeopardy, cruel and unusual punishment and selective prosecution as they relate to RICO. The full message of RICO has not yet been heard.

35. See P. MARCUS, PROSECUTION AND DEFENSE OF CONSPIRACY CASES ch. 10 (1978); Bradley, *supra* note 11, at 876; Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 197-98 (1972); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 407-09 (1959).

36. Holderman, *supra* note 9.

37. Bradley, *supra* note 11.

38. Tarlow, *supra* note 11.

39. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431 (1983).