Crime Must Not Pay: RICO Criminal Forfeiture in Perspective

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Mr. Weiner examines the history of criminal forfeiture, the legislative history, judicial interpretation, and the procedural steps leading to forfeiture under RICO in order to provide a clearer understanding of this novel statute.

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Statute¹ (RICO) has been the law of the land for a little more than ten years. It is a powerful federal statute passed by Congress to provide strong remedies intended to deal with the national problem of corrupt criminal organizations and the infiltration of organized crime into legitimate businesses. It appears as Title IX of the Organized Crime Control Act of 1970.² In addition to the sanctions of a $25,000 fine and a maximum of twenty years imprisonment, RICO includes the remedy of criminal forfeiture, an in personam device to bring about the transfer of the defendant's property in-

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terest to the United States government following conviction. This unique sanction was rarely used in American jurisprudence prior to RICO's enactment.

Because of the absence of a statutory definition of "organized crime" in the Organized Crime Control Act and the inclusion in the RICO definitional section of "racketeering activity" of such traditional white collar crimes as bribery, mail fraud, wire fraud, bankruptcy fraud and securities fraud, a broadened approach to RICO has been successfully used by the government in criminal prosecutions of white collar offenders. RICO is viewed not only as an effective tool to halt the infiltration of organized crime into legitimate business, but also as a powerful tool to wage war on white

4. A good working definition of organized crime is the one formulated by the National Organized Crime Planning Council, an advisory group of agencies chaired by the United States Department of Justice. Its definition: "Organized Crime" refers to those self-perpetuating, structured and disciplined associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption.

Organized crime groups possess certain characteristics which include but are not limited to the following:
A) Their illegal activities are conspiratorial;
B) In at least part of their activities, they commit or threaten to commit acts of violence or other acts which are likely to intimidate;
C) They conduct their activities in a methodical, systematic, or highly disciplined and secret fashion;
D) They insulate their leadership from direct involvement in illegal activities by their intricate organizational structure;
E) They attempt to gain influence in Government, politics, and commerce through corruption, graft, and legitimate means;
F) They have economic gain as their primary goal not only from patently illegal enterprises such as drugs, gambling and loansharking, but also from such activities as laundering illegal money through and investment in legitimate business.

6. One of the statute's principal proponents, Representative Poff of the House Judiciary Committee, seemed to blur any real distinction between organized crime and white collar crime. He stated:

[O]rganized crime within the intendment of the bill . . . is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

collar crime. In *United States v. Elliott*, the Fifth Circuit favored this plain language approach to statutory interpretation:

[W]e do not believe that it is normally a proper judicial function to try to cabin in the plain language of a statute, even a criminal statute, by limiting its coverage to the primary activity Congress had in mind when it acted. (Emphasis in original).

Although RICO was passed in 1970, the criminal forfeiture provisions of the statute were not utilized extensively and were not examined by the federal courts until quite recently. The Supreme Court has heard and decided a RICO case after denying many petitions for certiorari. Although there have been few forfeitures under the statute, criminal forfeiture has come under attack by at


12. Some RICO indictments have resulted in plea bargains where criminal forfeiture was bargained out of the case. Some cases have alleged forfeiture, but after the passage of time between investigation and trial, there were simply no assets left to forfeit. Many RICO cases have been corruption cases or cases where an illegitimate “group of individuals associated in fact” enterprise would not trigger criminal forfeiture. A few cases where forfeiture was viable were not followed to their logical conclusion because of a reluctant judge or unwilling prosecutor.
least one commentator. The prosecutorial view is that forfeiture


1) Definitional Differences

Mr. Tarlow states, "Most defendants charged with violating RICO could not conceivably be included in the traditional or newly expanded definitions of organized crime." 49 FORDHAM L. REV. 165, 170. Since individuals cannot be convicted of a status crime, i.e., membership in an organized crime syndicate, RICO's definitional sections of the substantive offense require commission of two or more crimes which form a pattern of racketeering activity. The crimes themselves include white collar crimes, with the result that the RICO net may indeed catch the ordinary white collar criminal who has no connection to an organized crime syndicate. It is necessary, however, that the RICO definitions be that broad because RICO is concerned with the infiltration and commission of crime into the corporate arena with the resultant harm on the American economy. It would be impossible to attack the infiltration of organized crime into legitimate businesses and the commission of economic crime without also attacking the white collar crimes used as a means of infiltration and control. See notes 4-9 and accompanying text infra.

2) Mandatory Forfeitures

The position of the court in United States v. L'Hoste, 609 F.2d 796, 809-14 (5th Cir.), cert. denied, 101 S. Ct. 104 (1980) that a trial court has no discretion to overturn the jury's determination on criminal forfeiture and to grant remission or mitigation is correct. Section 1963(c) states that all provisions of the customs laws dealing with forfeitures are applicable to RICO forfeitures "insofar as applicable and not inconsistent." Under the customs law, a decision as to remission or mitigation of forfeiture is solely within the power of the Executive Branch. See notes 106-108 and accompanying text infra.

3) Procedural Due Process Considerations

In his concern for the rights of innocent parties in the property ordered forfeited, Mr. Tarlow minimizes the importance of specific procedural changes in the Federal Rules of Criminal Procedure. These changes were promulgated in 1972 to alleviate any due process problems in the criminal forfeiture area. The changes include Rule 7(c)(2), giving specific notice, Rule 31(e), which provides that the jury shall return a special verdict on the extent of the interest subject to forfeiture, and Rule 32(b)(2), which states that a judgment of criminal forfeiture authorizes the Attorney General to seize the property and fix "such terms and conditions as the court shall deem proper." See notes 86-89 and 103-08 and accompanying text infra. There will be no effect on innocent persons if the forfeiture paragraph of the indictment is directed only against the defendant's interest. See notes 122-127 and accompanying text infra.
RICO CRIMINAL FORFEITURE is a proper and well-aimed tool to undertake a widespread attack on the criminal element which corrupts our economic system. A thorough comprehension of the history of criminal forfeiture, its intended function as seen in the legislative history, judicial interpretation of the forfeiture language, and the procedural steps leading to forfeiture will assist in the better understanding and utilization of this novel statute.

I. HISTORICAL AND CONSTITUTIONAL BACKGROUND

A. British Practices

Under the English common law, criminal forfeiture was a typical punishment for those convicted of felonies or treason. The convicted felon forfeited his goods and chattels to the Crown, while his lands escheated to his lord. The convicted traitor forfeited all of his property, both personal and real, to the Crown.14 The British legal scholar, Blackstone, offered the following rationale for criminal forfeiture:

[H]e who hath thus violated the fundamental principles of government, and broke his part of the original contract between king and people, hath abandoned his connection with society; and hath no longer any right to those advantages, which before belong to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.16

Slightly different rules and procedures were applicable to personal property vis-à-vis real property. The forfeiture of personality did not date back to the time of the offense, while forfeiture of realty did.16 This was primarily because of the ease with which per-

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4) Forfeiture of Profits

Income derived from violations of Section 1962 is properly subject to forfeiture under the express statutory language and its legislative history. See notes 58-65 and related text infra.


15. 4 W. BLACKSTONE, COMMENTARIES* 349 (New ed. 1813). See also, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974): "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."

16. 4 W. BLACKSTONE at 354. See generally, GOEBEL, LAW ENFORCEMENT IN COLONIAL NEW YORK 711-12 (1944).
sonalty could be transferred to innocent buyers. In the area of personalty, a sheriff, armed with an arrest warrant issued after indictment, often would seize the goods of the accused even though the law allowed such seizure of chattels only after conviction. Prior to conviction, the defendant could have access to his property for maintenance. The collection of personal forfeitures depended on administrative action. An excerpt of the jury verdict was forwarded to the Exchequer where process of collection would issue. Except in treason cases where the wealth of the offender made forfeiture profitable, collection was handled very casually.

In the area of realty, a man charged with treason could have all his real property interests which he held at the time of the offense forfeited to the Crown. The legal term for this procedure was "attainer". Attainer was a declaration of a person's legal death which ordinarily occurred as a consequence of a sentence to death for high treason or outlawry. A man had to be "attainted". Mere conviction was insufficient because if for some reason such as a pardon or an error in the indictment, a man was not attainted after conviction, there could be no forfeiture of his lands. Once attainted, his property was forfeited and his heirs could not inherit the real property. Forfeiture of realty was accomplished by a right of entry without a formal proceeding undertaken by the sheriff.

Common law criminal forfeiture described above was merely an added penalty imposed in personam against a defendant convicted of a felony. The nature of the property subject to the forfeiture was immaterial. The sanction did not require that the property itself be used in the crime or be otherwise "tainted". The imposition of forfeiture was automatic upon a finding of guilt, but the extent of the sanction depended on conviction of the crime.

17. 4 W. BLACKSTONE, at 326. See also, 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 363 (1778); 4 HAWKINS, A TREATISE ON PLEAS OF THE CROWN 480 (1795); Fleetwood's Case 8 Coke Rep. 171 (1611).
18. 4 W. BLACKSTONE at 353-54.
19. Outlawry is the offense of flight while accused of an offense; it was declared in absentia in cases where treason had originally been charged. 4 W. BLACKSTONE at 353.
20. 1 E. COKE, INSTITUTES at 37 (1817).
21. J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 724. Later statutes exempted a wife's right of dower and a husband's right of curtesy from the strictures of forfeiture.
22. A right of entry was the right of taking possession of land by entering on it in a peaceable manner, BLACK'S LAW DICTIONARY, 1190 (5th ed. 1979).
The most severe loss was the forfeiture of real property and "corruption of blood"—whereby a convicted person could not inherit lands from his ancestors, nor retain those he was already in possession of, nor transmit property to any heir.23

B. Forfeiture in Early America

In contrast to the English tradition, criminal forfeiture never enjoyed widespread use in the American colonies. It is suggested that the colonial governments did not wish to see American property forfeited to the Crown in Great Britain. In addition, most felons in America were too poor to forfeit anything of value. Imprisonment for felony offenses became widespread in the American colonies as opposed to the British sanctions of forfeiture and death. However, after the outbreak of the Revolutionary War, most American colonies enacted provisions forfeiting the land and personal property of British loyalists. When American independence had been won, the trend toward forfeiture of property lessened. Concern that innocent heirs would be deprived of their inheritances or the desire to break away from the English forfeiture tradition are possible explanations for America's refusal to follow the English tradition.

Article III, section 3, clause 2 of the United States Constitution reflects some of these concerns and states:

The Congress shall have Power to declare the Punishment of Treason, but no Attainter of Treason shall work corruption of Blood, or Forfeiture except during the Life of the Person attainted.24

In addition to the constitutional provision, the first Congress enacted a statutory provision declaring that no conviction shall work a corruption of blood or any forfeiture of estate.25 This statutory provision was subsequently contradicted by another statute even before the Racketeer Influenced and Corrupt Organizations

23. 4 W. Blackstone 381.
24. Once attainted, a person could not act as a witness in court, make a will, convey property, or bring a legal action. 4 Blackstone at 347. Article I, § 9 of the U.S. Const. specifically prohibits Congress from passing bills of attainder. These provisions apparently provoked little debate among the framers of our Constitution. See 3 J. Story, Commentaries of the Constitution of the United States 171-73 (DaCapo ed. 1970).
Statute was enacted in 1970. The Confiscation Act of 1862 authorized the President to seize the property of those who had joined the Confederacy in the Civil War. Two Supreme Court decisions upheld the validity of the forfeiture of lifetime interests of Confederate sympathizers, but recognized the reversionary interests of the offenders' heirs.

Although there was little experience with criminal forfeiture in early America, there was an acceptance of civil forfeiture actions that had been common in the admiralty courts of Great Britain. The American courts recognized the authority of the federal government to subject ships which were engaged in violations of the Embargo Acts or in piracy to forfeiture in an in rem proceeding against the "offending" goods. In such an action the owner of the goods bore the burden of showing why they should not be forfeited and if the owner did not answer, summary forfeiture ensued.

Civil forfeiture, however, makes little provision for the rights of innocent third parties. The action is directed against the res and when the object (such as a ship, airplane, or automobile) is forfeited to the government, the rights of these third persons are extinguished. However, responsible officials of the government can decide to remit or mitigate the forfeiture at their discretion.

29. In United States v. Brig Malek Adhel, 43 U.S. 91 (1844), the Supreme Court upheld the forfeiture of the vessel, saying:
   In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he implicitly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.
C. Constitutional Considerations

The Racketeer Influenced and Corrupt Organizations Statute (RICO) relies on common law heritage and reintroduces the sanction of criminal forfeiture into American law. As the Senate Report touching on criminal forfeiture under RICO noted:

While there is some indication that this concept of criminal forfeiture was in usage in the Colonies, the First Congress by Act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. § 3563 . . . From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. § 3563 by implication.81

If 18 U.S.C. section 3563 has been repealed by implication by the passage of RICO,82 there is no Constitutional problem because Article III, section 3, clause 2 prohibits forfeiture of all of one's worldly property and goods, as opposed to RICO forfeitures which only call for limited forfeiture of the property of a convicted criminal defendant which is related to the conduct of the affairs of a criminal enterprise.83

Constitutional attacks on the forfeiture provisions of RICO have focused on claims that the statute is unconstitutionally vague84 or that its effect is cruel and unusual punishment.85 These


32. United States v. Grande, 620 F.2d 1026 (4th Cir. 1980) hints that the statute may not have been repealed by implication.

33. 18 U.S.C. § 1963(a), “any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.”

34. See United States v. Grande, supra note 32, (in which an equal protection attack is also rejected); United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (limited forfeiture of property utilized to violate criminal law is not constitutionally or statutorily barred).

35. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1980) (RICO forfeiture is not a violation of the Eighth Amendment because punishment is roughly proportional to the magnitude of the defendant's crime). See also United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (RICO forfeiture is not cruel in that there is no general forfeiture of estate nor unusual in light of other forfeiture
attacks have been rejected by the courts. The combination of prosecutorial discretion, trial court supervision of the evidence, and special jury verdict decision-making should continue to guard against disproportionate forfeitures. In assessing Eighth Amendment cruel and unusual punishment claims, courts have emphasized that a mode of punishment adopted by an elected legislature initially must be presumed valid.

Criminal forfeiture under 18 U.S.C. section 1963 will always be the direct result of the defendant’s deliberate violation of extremely serious statutes. It bears the indelibly clear stamp of Congressional intent that such a penalty should be applied, but only after a criminal trial conducted in full accord with the defendant’s due process rights. It provides for a punishment carefully tailored in proportion to the offenses to which it is applicable, resorted to by Congress after lengthy consideration leading to the conclusion that sanctions previously available to the government to fight organized crime were limited, and that the widespread growth of racketeering activity and organized crime so pervaded our economic system that criminal forfeiture was not merely justified, but was required as an appropriate sanction.

II. LEGISLATIVE HISTORY

Congress passed the Racketeer Influenced and Corrupt Organizations Statute (RICO) as Title IX of the Organized Crime Control Act of 1970 in order to fashion an effective new weapon in the nation’s fight against large-scale economic crime and organized crime. After a lengthy examination of the problem, Congress found that the sanctions and remedies available to the government under existing laws were “unnecessarily limited in scope and impact.” Recognizing the need for a statute that would hit criminals


36. Id.
37. Gregg v. Georgia, 428 U.S. 153, 175 (1976): [A court] may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhuman or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

See also Carmona v. Ward, 576 F.2d 405, 409-10 (2d Cir. 1978).
40. Id. For discussion of the legislative history of RICO as a whole, see gener-
squarely in the pocketbook, the lawmakers declared that "an attack must be made upon their source of economic power itself, and the attack must take place on all available fronts."41

To accomplish this legislative purpose, Congress created a powerful new criminal forfeiture penalty, broadly applicable to all types of "property or other interests" and to all persons convicted of engaging in a pattern of racketeering activity.

The operative forfeiture language in 18 U.S.C. section 1963(a) states:

Whoever [violates any provision of section 1962 of this chapter] 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.

Section 1963(a)(1) is designed to reach the criminal's "ill-gotten gains" acquired in violation of the prohibited activities found in section 1962.42 Section 1963(a)(2) provides for the forfeiture of any other property interests in an enterprise and the removal of RICO
violators from any source of influence over any enterprise which has been established, operated or controlled in violation of the statute. The criminal forfeiture provision of section 1963(a) thus launches a two-pronged attack upon the economic base of organized crime and white collar crime offenders who engage in a pattern of racketeering activity by mandating both seizure of money and removal from power upon conviction for a section 1962 violation.

Any analysis of the legislative history of RICO must begin with the express Congressional command that the RICO statute "shall be liberally construed to effectuate its remedial purposes." Congress, in this "remedial purposes" clause, assured that strained and narrow interpretations of the statutory language would not be read in to defeat its broad intent, which was to authorize the forfeiture of "any interest which has been attained in violation of the criminal provision."

43. Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. IX § 901(a), 84 Stat. 941. An interesting argument against the broad reading of the "remedial purposes" clause is put forward in United States v. Turkette, 632 F.2d 896, 905 (1st Cir. 1980), (reversed by the Supreme Court Docket No. 80-808, Decided June 17, 1981) where the court of appeals asserts that only the RICO civil remedies, not the criminal sanctions, should be liberally construed. It could be argued that criminal forfeiture is in most respects "remedial." However, most courts have blurred the distinction and applied the liberal construction command generally to the criminal provisions of RICO. United States v. Elliott, 571 F.2d 889, 899 (5th Cir. 1978), cert. denied, sub nom., Delph v. United States, 439 U.S. 953 (1978); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Kaye, 556 F.2d 855, 860 n.7 (7th Cir.), cert. denied, 434 U.S. 921 (1977); United States v. Brown, 555 F.2d 407, 416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, sub nom., Napoli v. United States, 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 n.12 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

44. 116 Cong. Rec. 35,196, 91st Cong., 2d Sess. (1970) (remarks of Rep. Celular). It is an ancient and oft-repeated rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to exact statutory penalties. See 3 Sands, Statutes and Statutory Construction 2 (1974) (hereinafter cited Sands) (Revision of 3d ed. of Sutherland's Statutory Construction). The public policy rationale favoring strict construction of penal statutes is founded on a balancing of due process interests of the individual charged with the crime against the interests of society in enforcing the penalty. Id. at 16. However, it has been recognized repeatedly that strict construction should not be allowed to defeat the policy and purposes of the statute. See United States v. Betteridge, 43 F. Supp. 53, 56 (N.D. Ohio 1942).

The strict construction of a criminal statute does not mean such construction of it as to deprive it of the meaning intended. Penal statutes
A. Purpose of the Criminal Forfeiture Remedy

The preamble to RICO states:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. (Emphasis added).

The Statement of Findings and Purpose also emphasizes the need for stronger measures in the economic crime field indicating that:

(1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption. . . . (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce . . . . and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact. (Emphasis added)

The Senate Judiciary Committee's Report on the legislation similarly focused on the need to attack the economic base of criminal activity and to make the effect lasting:

What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a se-

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must be construed in a sense which best harmonizes with their intent and purpose.


rious threat to the economic well-being of the Nation.  

B. Congressional Dynamics

In accordance with the declared Congressional purpose, the legislative history contains both specific and general signs of the broad reach of the RICO forfeiture remedy. An important specific indication was the substantial change made in the language of the forfeiture provision after the legislation was initially introduced. The original bill containing this provision was S. 1861. With respect to forfeitures, it provided:

§ 1963. Criminal Penalties
(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $10,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States all interest in the enterprise engaged in, or the activities of which affect interstate or foreign commerce. (Emphasis added)

After some study of the original bill, Congress added another forfeiture clause—the present section 1963(a)(1). This subsection did not confine the remedy to a convicted defendant's interest in the RICO enterprise, but was drafted in much broader language to cover "any interest . . . acquired or maintained in violation of section 1962." The clear inference is that this expansion of the scope of the statutory forfeiture provision was deliberate, reflecting a legislative intention to extend the applicability of the forfeiture remedy.

Congress' addition of what is now section 1963(a)(1) made the RICO forfeiture provision broader than the restricted original of the bill. In addition, the following statement by Senator McClellan

47. Supra, note 41.
49. This change was not made until after the Department of Justice had specifically called the original limitation to Congress' attention, by describing the forfeiture provision in the initial bill, S. 1861, as "limited to one's interest in the enterprise . . . and not extending to any other property of the convicted offender." S. Rpt. No. 91-617, 91st Cong., 1st Sess. 1251. Thus, the Department of Justice's comment letter was submitted to the Senate Judiciary Committee on August 11, 1969, but the Committee did not begin its mark-up and revision of the bill until mid-October, 1969. See 115 Cong. Rec. 29,638 (1969) (remarks of Senator McClellan).
in the Senate debate indicates that the statute was to apply to "interests" other than those in the criminal enterprise itself:

The concept of criminal forfeiture is an old one in our common law. It was extensively used in England and had some limited use in the Colonies. Title IX, drawing on this early history, would forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity.50

Senator McClellan further explained that this remedy was intended both to root racketeers out of the business community and to take away the fruits of their crimes, stating that:

Mr. President, Title IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains.51 (Emphasis added)

The House of Representatives also believed that the scope of criminal forfeiture was broad. Thus, the House Judiciary Committee’s “Section Analysis” of the legislation stated:

Section 1963 provides criminal penalties—including criminal forfeiture—for violation of section 1962. The maximum penalty authorized under subsection (a) is a $25,000 fine and imprisonment for 20 years. But, in addition, violations shall be punished by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations.52 (Emphasis added)

The Chairman of the House Judiciary Committee summarized

51. 116 CONG. REC. 591 (1970) (remarks of Senator McClellan). Another member of the Senate Judiciary Committee, Senator Byrd, described the criminal forfeiture sanctions in the following terms:

By removing its leaders from positions of ownership, by preventing them and their associates from regaining control, and by visiting heavy economic sanctions on their predatory business practices this legislation should prove to be a mighty deterrent to any further expansion of organized crime's economic power. (Emphasis added).

the forfeiture provision as authorizing "forfeiture of any interest which has been attained in violation of the criminal provision." The House floor manager described the penalty provisions:

The maximum penalty provided is a $25,000 fine and imprisonment for 20 years, and there is also provision for criminal forfeiture of the property interests involved in the violations. (Emphasis added)

The general concerns which led to the passage of the RICO statute also indicate that Congress meant the forfeiture remedy to apply to the monetary proceeds of racketeering activity. The legislative record is replete with references to Congress' determination to take the profit out of large-scale crime. Among the crimes that Congress intended to penalize in this manner were many crimes whose proceeds almost always consist of money—loansharking, "bankruptcy bust-outs," insurance fraud, extortion, gambling, and prostitution.

Although there are statements in the legislative history that indicate that forfeiture applies to a defendant's interest in the RICO enterprise itself, there is no statement that precludes the forfeiture of other types of "interests," including money. Given the plain language of the statute and the foregoing statements from the legislative debates, it would strain credulity to conclude that Congress intended to limit criminal forfeiture to interests in an enterprise by prohibiting forfeitures of other types of interests.

56. See, e.g., 115 CONG. REC. 5874, 5885 (1969) (remarks of Senator McClellan); 116 CONG. REC. 585, 587, 593, 586 (1970) (remarks of Senator McClellan); 601 (remarks of Senator Hruska); 606 (remarks of Senator Byrd); 953 (remarks of Senator Thurmond); 962 (remarks of Senator Murphy); 970 (remarks of Senator Bible); 18,939 (remarks of Senator McClellan); 35, 199-200 (remarks of Rep. St. Germain); 35,206 (remarks of Rep. Clancy); 35,300 (remarks of Rep. Schadeberg); 35,327 (remarks of Rep. Rarick).
III. Judicial Interpretation of the Interests Subject to Forfeiture

A. Money Forfeitures

Until the opinion of United States v. Marubeni America Corp., it was believed that section 1963(a)(1) clearly provided for the forfeiture of money as well as other forms of ill-gotten gains. In Marubeni, two major corporations and several individuals were charged with wire fraud, mail fraud, interstate travel to commit bribery, and conspiracy in a scheme to regulate the competitive bidding for over $8 million worth of telephone cables. The government appealed a ruling by the district court that the criminal forfeiture of “any interests” under section 1963(a)(1) did not include the $8 million profit on the telephone cable contract. The Ninth Circuit Court of Appeals agreed with the defendants that criminal forfeiture was limited to “an interest in the enterprise” and upheld the district court’s striking the forfeiture paragraph from the indictment. The court of appeals justified its conclusion by reading statements in the legislative history of RICO concerning the scope of criminal forfeiture that focused on the phrase “interest in an enterprise” as being exhaustive of the meaning of the forfeiture statute, rather than illustrative of one aspect of its application.

As noted in the legislative history discussed above, RICO forfeiture is not limited to “interests in” an enterprise, but includes all forms of ill-gotten gains. Section 1963(a)(1) provides that a defendant shall forfeit “any interest he has acquired or maintained in violation of section 1962.” The term “any interest” is more than broad enough to cover pecuniary interests and should obviously extend to money forfeitures. In interpreting the statutory phrase “any interest,” the Marubeni court should have focused on the “remedial purposes” clause which commands that RICO should be “liberally

58. 611 F.2d 763 (9th Cir. 1980).

59. A district court in the Fifth Circuit has reached the same conclusion as Marubeni in deciding that Congress did not intend money or ill-gotten gains to be subject to forfeiture. See United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979). However, there is another decision presently awaiting appellate review in that circuit on this issue, see United States v. Holt, No. 78-5260 (5th Cir.). The Ninth Circuit’s restrictive reading in Marubeni, which focuses only on a violation of § 1962(a) as the means of obtaining ill-gotten gains, rather than any violation of § 1962, has been criticized as being based on narrow, subjective interpretation of the legislative history rather than an open-minded reading of the statute itself. See Note, RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself, supra, note 1, 783-89.
construed to effectuate its remedial purposes" and the Statement of Findings and Purpose that reveals Congressional intent to halt the illegitimate draining of money from our economy, which occurs through perpetration of economic crimes, by broadening the available sanctions.

Contrary to the holding of the Marubeni court, the words “in any enterprise” used to limit “interest” in section 1963(a)(2) were not used in section 1963(a)(1). The statutory phrase, “any interest” in section 1963(a)(1) is, however, limited by the requirement that the government establish a nexus between the properties it wishes to seize and a violation of section 1962. It would be illogical for Congress to prohibit the forfeiture of money simply because a criminal offender happened to convert a stock ownership or real property interest into cash. Tracing of the defendant’s property into bank accounts and other places should be permitted so long as the required nexus to the criminal violation in section 1962 is proven beyond a reasonable doubt. Unlike common law forfeiture, section 1963(a)(1) forfeiture does not reach all of the defendant’s personal and real property upon his conviction. It is carefully designed to reach only those interests which are related to the RICO violation.

Arguably, since Congress did not use the word “profits” in the RICO forfeiture provisions, as it did in the Comprehensive Drug Abuse Prevention and Control Act of 1970, it did not mean to include pecuniary forfeiture under RICO. Such an argument is not compelling. The drug abuse statute was not enacted as part of the Organized Crime Control Act of 1970. It was the product of different hearings, testimony, reports, and debates. More importantly, it deals with a different substantive evil, narcotics, not economic crime. Its language must, therefore, be read in this dissimilar context.

The different subject matter of the drug abuse statute not only explains the language of its particular forfeiture provision, but indicates that Congress did intend to authorize pecuniary forfei-

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60. See notes 43 and 44 and accompanying text, supra.
61. See note 46 and accompanying text, supra.
tution under RICO. The profits from narcotic activity almost always consist of money and so the “profits” forfeiture clause of that statute refers specifically to money. On the other hand, the profits of economic crime may take on as many different forms as there are types of criminal activity. Therefore, Congress built the necessary flexibility into the RICO forfeiture clause to reach a wide range of ill-gotten gains through operation of section 1963(a)(1) by providing for the forfeiture of any illegally acquired interests. In short, the language of section 1963(a)(1) is broader than that of the comparable clause in the Comprehensive Drug Abuse Prevention and Control Act of 1970 and was intended to have a greater, not a lesser, reach.

Congress may provide a solution to the Marubeni problem. Section 2004(a)(3) of the Criminal Code Reform Act of 1979, S. 1722, would make all proceeds from a “racketeering syndicate or enterprise” and all property derived from such proceeds subject to forfeiture. In addition, section 2004(a)(4) provides that if such proceeds cannot be located or identified “any other property of the defendant to the extent of the value of such unlocated or unidentified property shall be forfeited instead.” If this provision is enacted or the present statute is amended, there will be absolutely no doubt as to money forfeitures.

64. See Subsection B, Property Forfeitures, infra for examples of interests in addition to money which are derived through economic crime.
65. Section 2004. ORDER OF CRIMINAL FORFEITURE (a) Forfeiture—The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds), shall order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant forfeit to the United States any property—
(1) constituting his interest in the racketeering syndicate or enterprise involved;
(2) constituting a means by which he has exerted influence over the racketeering syndicate or enterprise involved;
(3) constituting, or derived from, his proceeds from the racketeering syndicate or enterprise involved; and
(4) if all of the property constituting, or derived from, the interest, means, or proceeds described in paragraphs (1), (2), and (3) cannot be located or identified, any other property of the defendant to the extent of the value of such unlocated or unidentified property.
B. Property Forfeitures

Section 1963(a)(2) contains a list of variables directed toward the forfeiture of the objects of power other than capital or money. One part of section 1963(a)(2) relates specifically to any interests "in" an enterprise. Thus, a personal stock ownership interest in a corporation or a real property interest in an enterprise, either a legitimate corporation or an illegitimate group of individuals associated in fact, may be subject to forfeiture under section 1963(a)(2). In addition, a "security of" or "claim against" or "any contractual right affording a source of influence over any enterprise" may be subject to forfeiture. These types of interests have included a wide range of matters, including the right to hold union office.

66. 18 U.S.C. § 1963(a)(2) (1970): Violators shall forfeit any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise he has established, operated, controlled, conducted, or participated in . . . in violation of section 1962.

In United States v. Thevis, 474 F. Supp. 134, 143 (N.D. Ga. 1979), the court interpreted the phrase "affording a source of influence over" as modifying only the immediately antecedent words, "property or contractual right of any kind." Thus, "any interest in, security of, [or] claim against" the enterprise is forfeitable whether or not it affords the defendant a source of influence over the enterprise. The court also stated that the property or contractual rights affording a source of influence over the enterprise need not be rights in the enterprise. Id. at 144-45.

67. "Enterprise" is broadly defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1970). RICO's enterprise concept has recently been challenged by a commentator on the grounds that the "enterprise" concept has supplanted the traditional "wheel" and "chain" limitations on conspiracy. These limitations require evidence of a connection between the defendants; "enterprise" does not. See Note, Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO, 65 VA. L. REV. 109, 113 (1979). The Supreme Court will be reviewing the "enterprise" concept in United States v. Turkette, supra, note 11.

68. United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978) on remand, 591 F.2d 278 (5th Cir. 1978). The phrase, "contractual right of any kind affording a source of influence over" may include the right to hold government office. Certainly the decision in Rubin, holding that present labor union offices are subject to forfeiture, could easily be extended to government office holders who have engaged in a pattern of bribery and corruption. No case has yet attempted such a forfeiture probably because a conviction for a felony offense would usually disqualify the office-holder from continuing to hold that office.
In *United States v. Huber*, the defendant's companies, which were engaged in providing medical supplies and services, were forfeited because of a wide-spread scheme to defraud certain hospitals and insurance companies. The Second Circuit Court of Appeals noted that the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise and the punishment under the criminal forfeiture statute did not violate the eighth amendment's proscription against cruel and unusual punishment. In *United States v. McNary*, the Seventh Circuit Court of Appeals held that evidence of indirect investment of the proceeds of racketeering activity into two legitimate companies could trigger the forfeiture of the defendant's interests in these two companies, a window manufacturing company and a travel agency.

In *United States v. Meyers*, the district court focused on forfeiture involving an interest in a bail bond agency. Although the interest was clearly one under section 1963(a)(2), the court in dicta commented that it would be a strained construction of the statute to regard profits or fruits received from an enterprise as being subject to forfeiture. However, the court did seem to agree that "interest" is akin to a continuing proprietary right in the nature of a partnership or stock ownership which would obviously be subject to forfeiture under section 1963(a)(2). Shortly after the district court opinion in *Meyers*, the Third Circuit Court of Appeals reversed the district court's decision in *United States v. Forsythe*.

A number of other cases have been prosecuted or are awaiting trial that involve allegations of criminal forfeiture directed at restaurants, an office building, a group of massage parlors, a seafood processing company, a jukebox distribution company, a record and tape distributor, stevedoring companies, a taxicab company, a stamp and coin shop, expensive automobiles, airplanes, and laboratory equipment (mainly involved in narcotic RICO cases), significant parcels of real estate, and several different labor union positions.

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69. 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).
70. 603 F.2d at 397.
71. Id. at 396-97.
72. 620 F.2d 621 (7th Cir. 1980).
74. Id. at 461.
75. Id.
76. 560 F.2d 1127 (3d Cir. 1977).
C. Forfeitable Interests in an Association in Fact

A question may be raised as to what forfeitable interests exist when the enterprise is defined in the indictment as a group of individuals associated in fact.77 The statute allows such a formulation and many RICO cases have been successfully prosecuted on this theory. Narcotics trafficking operations, or a pornography empire, arson-for-profit rings, and many other "groups of individuals" cases have been prosecuted and many of them have alleged forfeitable interests under section 1963(a)(1) (money) or section 1963(a)(2) (corporate holdings in real property). There is no barrier to forfeiture in these instances, but there is sometimes nothing to forfeit.

United States v. Huber78 and United States v. Thevis79 are examples of cases in which corporations made up part of the illegal association-in-fact enterprise. "Person"80 is defined in the statute as "any individual or entity capable of holding a legal or beneficial interest in property". A corporation, as a legal entity capable of holding an interest in property, is therefore a "person" and can violate the substantive RICO provision. In United States v. Marubeni America Corp.,81 the illegal enterprise consisted of two corporations (Marubeni America Corp. and Hitachi Cable, Ltd.) associated in a joint venture.

A corporation can be a part of the association-in-fact because it is employed by, associated with or constitutes an illegal entity in criminal conduct. The Huber court upheld the charging of a group of corporations as one enterprise as follows:

To view "enterprise" as excluding groups of corporations would make it too easy to avoid RICO's forfeiture sanction. One could simply transfer assets from the corporation whose affairs had been conducted through a pattern of racketeering activity to another corporation whose affairs had up to that point not been so conducted.82

In United States v. Hawes,83 the enterprise was a group of individuals who controlled several jukebox supply companies. In

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77. See note 67 supra, definition of "enterprise".
78. Supra, note 69.
81. 611 F.2d 763 (9th Cir. 1980).
82. United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979).
83. 529 F.2d 472 (5th Cir. 1976).
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United States v. Thevis, the enterprise was an association of certain individuals and corporations formed for the purpose of conducting a pornography business through illegal methods, including murder and arson. The court held that although the enterprise, that is, the association-in-fact, was incapable of holding property in its own right, the defendants, including several corporations, could have forfeitable interests in it. The court stated:

Like an investment in the stock of a corporation . . . a person’s informal contribution of property to an association is an interest in that association subject to forfeiture under 18 U.S.C. § 1963(a)(2), since the contributed property has been put at the risk of the association’s success.

IV. PROCEDURAL STEPS LEADING TO FORFEITURE

Since 18 U.S.C. section 1963 was a distinct change from in rem forfeitures and placed in personam forfeitures into the context of the criminal case, some thought was given to implementing the statute. There was some concern over due process requirements. In 1972, a revision of the Federal Rules of Criminal Procedure added to and clarified the procedures in 18 U.S.C. section 1963 and established a set of steps to be followed in carrying out criminal forfeitures. The rules and procedures will be discussed below.

A. Giving Specific Notice

Rule 7(c)(2) of the Federal Rules of Criminal Procedure states: “No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.” Compliance with Rule 7(c)(2) mandates specificity concerning the interests

85. Id. at 143.
86. See note 30, supra.
87. The present version of the rule was the result of a 1979 amendment designed to clear up the confusion created by a poorly reasoned decision in United States v. Hall, 521 F.2d 406 (9th Cir. 1975) that applied the rule to forfeiture under a smuggling statute, 18 U.S.C. § 545 (1955). In that case, the court held that failure to meet the requirements of Rule 7(c)(2) was fatal to the indictment. A subsequent Ninth Circuit case cast doubt upon the validity of Hall even within that circuit. See United States v. Bolar, 569 F.2d 1071 (9th Cir. 1978). The 1979 amendment made it clear that Rule 7(c)(2) applies to criminal forfeitures sought under RICO or 21 U.S.C. § 848 (1970) and not in rem forfeitures.
subject to forfeiture. If the indictment charges more than one defendant with a RICO violation, there must be a separate forfeiture paragraph for each defendant specifically alleging his forfeitable interest. If the specific interest is not determinable, Rule 7(c)(2) should still be complied with by the best description possible of the assets the government seeks to forfeit.

88. Criminal forfeiture requires that financial matters be investigated thoroughly prior to return of the indictment in order that the property sought to be forfeited may be specified clearly. Some techniques used in such a financial investigation are:

(1) The examination of public records including corporate records in the state of incorporation. If the entity is not incorporated, records of county offices registering local businesses are examined.

(2) The assistance of the Internal Revenue Service in disclosure of corporate and personal tax returns is sought.

(3) The use of a grand jury subpoena directed at the corporate records of the RICO target is essential. Corporate records are not subject to a claim under the fifth amendment's self-incrimination clause, although individual records are subject to such privilege. See Fisher v. United States, 425 U.S. 391 (1976). Bank statements, signature cards, cancelled checks, and credit information are important. These documents give an overall picture of the size, financial history, cash flow, and assets and liabilities of a business allegedly conducted illegally or in which illegal investments were made.

(4) The grantee/grantor index should be examined if it is suspected that large parcels of real estate have been purchased by the targets of the investigation.

(5) Evidence relative to criminal forfeiture may be discovered by electronic surveillance. In addition, physical surveillance may disclose a person making trips to a business location not previously known. The possibility of the use of a mail cover to yield a daily report of the mail showing postmark date and addressor (possible victim) may prove fruitful.

(6) The subpoenaing of telephone toll records is a potential aid. If it is determined that all or most of the telephone contact of a "front" business is connected to illegal operations, the entire business would be subject to criminal forfeiture.

(7) The development of a cooperating individual is often a good way to prove a case and also a possible inroad to a view of both money flow and business transactions. A low-level partner or secretary may fit this bill. See, Magarity, RICO Investigations: A Case Study, 17 Am. Crim. L. Rev. 367 (1980).

89. In United States v. Smaldone, 583 F.2d 1129 (10th Cir. 1978), it was held that alleging the name and address of the restaurant the government sought to seize was sufficient. See also, United States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976), in which the court upheld an indictment seeking the forfeiture of "all profits, interest in, claims against or property or contract and rights" obtained
A problem may arise in identifying the property subject to forfeiture when it has not remained in its original form throughout the investigation and subsequent proceedings. The court should order forfeiture of an interest specified in the indictment pursuant to Rule 7(c)(2) even if the property has changed its form or even has changed hands. The government is obliged, however, to clearly trace the property into such new forms. Otherwise questions of excessive variance from the indictment, given the specific mandate of Rule 7(c)(2), will be raised.

An additional problem involves the characterization of the enterprise and its determination of the scope of the forfeiture permitted by the court. In United States v. Thevis,90 which involved a huge pornography empire operating through several corporate entities controlled by Thevis, the government characterized the “enterprise” as “a group of persons associated-in-fact with various corporations to operate a pornography business through unlawful means”. The district court adopted a restrictive view of the scope of the enterprise based on a literal reading of the indictment. In an unpublished decision,91 the court held that the “enterprise” was not the defendant’s pornography business, but rather a conspiracy formed for the purpose of operating that business “through unlawful means”. Based on this reading, the court concluded that only those business assets that could be directly linked to specific acts of racketeering (murder, extortion, and arson) were subject to forfeiture. While the Thevis court’s interpretation is unlikely to be followed elsewhere, it is a warning that the formulation of “enterprise” and the specific notice of forfeitable interests may be examined carefully.92

B. Restraining Orders and Performance Bonds

18 U.S.C. section 1963(b) provides:

In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such

from the defendant’s participation in a continuing criminal enterprise under 21 U.S.C. § 848 (1970). A “catch-all” forfeiture paragraph under either RICO or § 848 will therefore suffice.

92. See note 67, supra.
other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

The restraining order or performance bond is an important step which will guarantee the existence of the interest subject to forfeiture during the pendency of the criminal case. It should be stressed that an indictment charging a RICO offense must have been returned before the government can apply for an order under section 1963(b).

Although the statutory language is clear, some courts have refused the government's request for restraining orders. In United States v. Mandel, the court erroneously held that the standards for preliminary injunctions in civil cases should be considered in weighing a motion for a restraining order under RICO. The Mandel court, at a minimum, would require the government to show: (1) that it had a high probability of success on the merits; (2) that irreparable harm would occur in the absence of such relief; (3) that the issuance of such an order would not harm other parties interested in the proceedings; and (4) that the public interest favored issuing such an order.

The Mandel court did not strike section 1963(b) down on presumption-of-innocence grounds, but left very little room for its application.

The court is of the opinion that on the facts of this case, the order the government seeks would be incompatible with the presumption of innocence defendants enjoy until such time, if ever, as a jury finds them guilty beyond a reasonable doubt. A finding that the government would be likely to prevail on the merits at trial... [is] a determination that defendants are likely to lose at

93. Section 1963(b) may be viewed as a temporary device to prevent post-indictment, pre-conviction transfers of property; it is somewhat analogous to the provision for a temporary restraining order which is an ex parte device, in which notice and participation in a hearing by affected persons is not required.

94. No cases have been reported in which a performance bond was accepted in addition to, or in place of, a restraining order. In many instances, a performance bond would appear to be a practical and effective substitute for a restraining order. 18 U.S.C. § 3617(d) (1948) explains its operation.


96. In United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), it was held that the entry of a restraining order did not deprive the defendant of the presumption of innocence.
The rationale of the Mandel court (which would render the restraining order provision virtually useless) was rejected in United States v. Bello. The district court issued a restraining order enjoining the defendant from selling, transferring, or otherwise disposing of certain assets alleged to be subject to forfeiture. The defendant claimed that the entry of the order would deprive him of due process of law in that the order would constitute a pre-trial determination of guilt. The court analogized a restraining order to a bail bond and concluded that the entry of the order did not strip the defendant of the presumption of innocence, saying: "The restraining order does not make a determination that the defendant is a racketeer, but only freezes those assets to prevent dissipation pending a determination of guilt or innocence". If the government can incarcerate a person prior to trial to insure his appearance, it surely may restrain that individual from alienating property subject to forfeiture in order to insure that the property remains available to be forfeited.

Section 1963(b) gives the court broad authority to take "such other actions . . . it shall deem proper" in addition to issuing a restraining order and/or requiring a performance bond. In United States v. Rubin, this authority was used to place a labor union and a district labor council in trusteeship pending the outcome of the trial. Such an extreme measure may sometimes be warranted in the corporate context as well, for example, to prevent the defendant from continuing to use the corporation for criminal purposes or from bleeding the corporate treasury dry prior to the jury's verdict. Placing a corporation in receivership pending the outcome of the trial would be analogous to placing a labor union in trusteeship.

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97. 602 F.2d at 682-83.
99. Id. at 725.
101. 559 F.2d 975 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978).
102. Rubin ultimately forfeited his offices in the various unions and employee welfare benefit plans. Although the Rubin decision does not mention the labor union trusteeship, it does contain a good discussion of the issues surrounding the forfeiture of Rubin's official positions. While the court upheld the forfeiture, it ruled that Rubin had the right to seek re-election.
C. Special Jury Verdict and Role of the Court

Rule 31(e)\(^{103}\) of the Federal Rules of Criminal Procedure mandates that the jury, or the court as trier of fact in a non-jury case, shall make a determination of the extent of the interest subject to forfeiture. In the normal jury case, this is done in the form of a special verdict.

The return of the special jury verdict creates the actual forfeiture.\(^{104}\) The decision on criminal forfeiture is appropriately made by the jury and its decision is analogous to a decision on guilt or innocence—that is, the jury must be convinced beyond a reasonable doubt of the relationship of the property interest to be forfeited to the RICO violation.\(^{105}\)

In *United States v. L’Hoste*,\(^{106}\) the Fifth Circuit Court of Appeals held that once the jury makes a determination on forfeiture, the judge shall issue an order forfeiting the property.\(^{107}\) The first sentence of 18 U.S.C. section 1963(c) states:

> Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Rule 32(b)(2) of the Federal Rules of Criminal Procedure states:

> When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall

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103. Rule 31(e), Fed. R. Crim. P. states:

If the indictment or the information alleges that an interest or property is subject to forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

104. The special verdict of forfeiture is submitted to the jury after they have returned the general verdict. There is little guidance currently as to whether the trial should be bifurcated by first requiring a jury to decide the issue of guilt on the RICO offense and then holding another trial to decide the extent of the interest or property subject to criminal forfeiture. In most cases a single trial is preferable.

105. Proper jury instruction by the court should insure that the decision on criminal forfeiture made by the jury is based on the facts presented during the trial of the case. Such jury instructions will include language that suggests that a jury may find an interest or contractual right forfeitable if there is evidence linking the defendant’s conduct to the property interest and the government has proven such a nexus beyond a reasonable doubt.

106. 609 F.2d 796 (5th Cir. 1980), cert. denied, 100 S. Ct. 104 (1980).

107. Id. at 809-13.
deem proper.

Reading these two provisions together, it is clear that Congress decided that the jury would make a judgment on the relationship of the property or interest to the criminal violation and that once made by means of a special jury verdict, the court cannot preempt the jury's decision.

As the L'Hoste court noted, the discretion given to the district court by section 1963(c) to determine the "terms and conditions" of the forfeiture merely encompasses "such administrative details as the time and place that the property declared forfeited is to be seized by the Attorney General." Even with regard to determining the "terms and conditions" of the forfeitures, however, the district court's discretion is limited by section 1963(c)’s incorporation of the relevant provisions of the customs laws dealing with forfeitures. As the court noted, under the customs laws, the decision whether to grant a remission or mitigation of a forfeiture is solely in the hands of Executive Branch officials.

D. The Special Problem of Disproportionate Forfeiture

It may be argued that Congress did not wish to give the government essentially unreviewable power to seek disproportionate forfeitures and that 18 U.S.C. section 1963(c) should be used to give district courts discretion to deny forfeitures. This argument must fail in light of the specific statutory language and the procedural safeguards which include giving specific notice of the defendant's interest, a relationship or nexus to the RICO violation, proof beyond a reasonable doubt, and jury determination. Thus, the sound exercise of prosecutorial discretion will also be tempered by the safeguards of the statute. However, it is extremely difficult to set boundaries and to know when forfeiture of an entire business is proper when only a small amount of the defendant's activities in connection with that business are illegal. In some cases a proportionately small, but still significant amount of illegal activity should trigger forfeiture of the defendant's entire business. In narcotics cases in which legitimate "fronts" are often used the per-

108. Id. at 811.
109. In United States v. Marubeni America Corp., 611 F.2d 763, 769 n.12 (9th Cir. 1980), the court noted the problem:
For example, a shopkeeper who over many years and with much honest labor establishes a valuable business could forfeit it all if, in the course of his business, he is mixed up in a single fraudulent scheme.
centage basis is irrelevant so long as the narcotics activity seems to be of a continuing character.\(^{110}\) In *United States v. Huber*,\(^ {111}\) the Second Circuit Court of Appeals refused to lay down any general rules but cautioned against “undue prosecutorial zeal in invoking RICO for situations where it was not primarily intended”\(^ {112}\).

The government may argue that if the criminal activity is serious enough to warrant using the RICO statute in the first place it is *ipso facto* serious enough to justify forfeiture of the defendant’s interest in the entire business. The intent of the statute is to remove the criminal element from legitimate enterprises and, since Congress did not contemplate half-way measures in this regard, there is no reason to attempt to make precise calculations concerning the percentage of business profits attributable to legitimate activities rather than illegitimate activities.

If specific notice is given as to the defendant’s interest, if there is proof of a relationship or nexus of the property interest to the affairs of the enterprise\(^ {113}\) and if there are appropriate jury instructions and a special jury verdict, there should be no danger of disproportionate forfeitures.\(^ {114}\)

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111. 603 F.2d 387 (2d Cir. 1979).
112. *Id.* at 396.
113. There is some confusion as to whether the nexus is required to be to the enterprise or to the acts of racketeering activity. It is suggested here that the appropriate test is a relationship to the affairs of the enterprise which often in “association-in-fact” cases is similar to the acts of racketeering. *Cf.* The inappropriate standard employed in *United States v. Thevis*:

> As there is no evidence in the record from which the court could find that the success of Global’s adult businesses were attributable to the acts of racketeering or that the adult properties as a group were an interest in the enterprise, to require the forfeiture of its entire adult business would constitute cruel and unusual punishment since the penalty would be disproportionate to the crime.

114. The problem of the rights of innocent third parties does not appear in a consideration of whether a forfeiture is disproportionate to the defendant, but only whether the property ought to be forfeited to the government or whether possession or title ought to be safeguarded for third parties such as creditors, unindicted and innocent partners, or family members who have a stake in the property. Some third party problems are considered herein. *See notes* 122-127 and accompanying text, *infra*. 
V. Disposition of Property Ordered Forfeited

The disposition of property ordered forfeited by the court should normally await an affirmance of the conviction since criminal forfeiture is viewed as part of the sentence. Section 1963(c) states:

All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof.

In drafting the RICO statute, Congress did not specifically address the issue of obtaining control of the property, taking care of it, settling the rights of third parties, and selling the property. Congress simply provided that the well-established procedures of the customs laws should be followed “insofar as applicable and not inconsistent with the provisions” of the RICO statute. The basic purpose of forfeiture is to remove the defendant from the enterprise and not necessarily to enhance the government treasury. The major difference between RICO and civil in rem forfeitures under other statutes revolves around the rights of innocent parties.115

Property may be disposed of by sale, retention for public use, destruction, or donation. The type of property interest involved and the requirements that disposition take place as soon as “commercially feasible” will affect the choice of method of disposition. Where property is to be sold, advertisement and notice of sale are required. Under customs laws, the government receives bids and sells the property to the highest bidder on a cash basis, with no guarantees.

A. The Tracing Problem

In determining the interest to allege, pursuant to Rule 7(c)(2)
of the Federal Rules of Criminal Procedure, some tracing or following of property into other forms is necessary. In disposing of property ordered forfeited, the tracing problem sometimes becomes even more difficult.

Tracing money is a particularly difficult problem as cash is always fungible and sometimes intangible. Rules have been developed to determine the ownership of money which has been commingled in mixed bank accounts and in other situations where the identity of the money has been lost.\textsuperscript{116}

In many cases the government will be successful only if it can trace the forfeited property into other forms. The remedies of constructive trusts\textsuperscript{117} and equitable liens\textsuperscript{118} allow for such tracing or following of property into diverse forms.

B. Cash in Lieu of Forfeited Property

On several occasions, agreements were reached that permitted the convicted defendants to substitute cash forfeiture in lieu of the forfeiture of a specific property interest.\textsuperscript{119} In \textit{United States v. Huber,}\textsuperscript{120} the court permitted the defendant to redeem his interest in seven corporations, the business of which had been conducted through a pattern of mail fraud, for the sum of $100,000.\textsuperscript{121} Allowing a convicted defendant to repurchase property which has been ordered forfeited is often inappropriate and does not comport

\begin{footnotes}
\footnote{116. \textit{Restatement of Restitution}, §§ 211-15 (1937).}
\footnote{117. A constructive trust is created “where the person holding title to property is subject to an equitable duty to convey it to another on the ground he would be unjustly enriched if he were permitted to return it.” \textit{Restatement of Restitution} § 160 (1937). A constructive trust reaches the property itself rather than its value.}
\footnote{118. An equitable lien is created “where the property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched.” \textit{Id.} at § 202.}
\footnote{119. \textit{See United States v. Hawes}, 529 F.2d 472 (5th Cir. 1976), where there was a compromise cash forfeiture of $246,000 in lieu of four vending machine companies, and \textit{United States v. White}, 386 F. Supp. 882 (E.D. Wis. 1974), where there was a compromise cash forfeiture of $10,000 in lieu of an automobile agency.}
\footnote{120. 603 F.2d 387 (2d Cir. 1979).}
\footnote{121. A similar repurchase method was followed in \textit{United States v. Barone}, No. 78-185-CR-WMH (S.D. Fla., October 17, 1979), where the court permitted the defendants to redeem their interest in a corporation, but reserved ruling on the amount of the retention payment required. Under the customs laws, specifically 19 U.S.C. \textsection 1614 (1970), cash may be substituted for property ordered forfeited, but this may be an instance where the language of \textsection 1963(c), “insofar as applicable and not inconsistent with the provisions hereof” might come into play.}
\end{footnotes}
with the goal of breaking up the economic power which has been utilized by RICO defendants. It flies in the face of what Congress intended and permits the economic criminal with sufficient resources to regain control of the entity he corrupted, thus turning a criminal forfeiture into a fine. Only when the government is satisfied that the business is totally bankrupt would a cash settlement in lieu of forfeiture serve the Congressional purpose of breaking up criminal enterprises and hitting criminal wrongdoers in the pocketbook.

C. The Rights of Innocent Persons

Both section 1963(c) and Rule 32(b)(2) imply that the rights of innocent third parties should be safeguarded in forfeiture proceedings. The term "innocent persons" is not defined by the statute. Common sense would dictate that innocent persons should include those who do not have knowledge of the illegal activity, or who do not voluntarily consent to a relationship to the crime, such as victimized partners. The classification of someone as "innocent" or "not innocent" operates not to determine whose property the government can take, but only whose rights the government must protect in the disposition of that property.

A difficult legal issue arises when the government seeks forfeiture of property to which a third party holds legal title, but the government contends that the third party holds the property as the defendant’s nominee. In United States v. Mandel, the government argued that one of the co-defendants was a secret owner of certain racetrack stock held in the name of a third person. The jury agreed, returning a special verdict finding that the defendant owned all the stock and that it was subject to forfeiture.

Under traditional civil forfeiture proceedings, innocent persons could not assert any claims and were out of pocket if the government forfeited their property. Under the customs laws, Congress desired, as a matter of discretion rather than one of constitutional dimension, to permit a person with an interest in the seized property to petition for a cancellation of all or part of

123. Rule 32(b)(2), Fed. R. Crim. P.: “fixing such terms and conditions as the court shall deem proper.”
124. Supra, note 95.
125. 408 F. Supp. at 681.
the forfeiture.126

Generally, there will be no effect on innocent persons if the forfeiture paragraph in the indictment127 is directed only against the defendant's interest. The following hypothetical is illustrative. A RICO defendant owns 20% of the stock of Ajax Corporation that he has either acquired or used in a complex fraud scheme. In the RICO indictment against the defendant and in the subsequent forfeiture action, only the 20% stock interest is sought and ordered forfeited to the government. The other stockholders would continue to maintain their 80% stockholders' interests.

D. Remission and Mitigation of Forfeitures

Under the customs laws, customs officials have the discretionary power to remit or mitigate forfeiture.128 Where property is judicially forfeited, as in RICO, the same function is performed by the Attorney General.129 Prior to a forfeiture sale, a party may file a petition for remission or mitigation after notice has been mailed to him.130 Notice may be accomplished by writing to each party of record indicating that he has an interest in the property declared forfeited.131 In addition to personal written notice, notice should also be given by publication.132 For the process of remission or mitigation to operate, it must be found either that the violation occurred without the intent or willful negligence of the petitioner or that mitigating circumstances exist.133

Assuming that no petition for remission or mitigation has been filed, or that these petitions have been disposed of, the property may be sold at public auction.134 If it appears that the proceeds of

127. See Rule 7(c)(2), FED. R. CRIM. P. and notes 86-114 and accompanying text, supra.
130. 19 C.F.R. § 171.12.
131. The notice should describe the property in detail and advise the party of his right to apply for relief. It should also advise that failure to apply for relief within 60 days of notice will result in the disposition of the property.
133. The Attorney General reaches a determination on whether mitigating circumstances exist and this determination is usually not reviewable by a court. See United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964) and United States v. One Buick Riviera, 463 F.2d 1168 (5th Cir. 1972). See also discussion of United States v. L'Hoste, text accompanying notes 106-08, supra.
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sale will not be sufficient to pay the costs of sale, an order for de-
struction of the property may be obtained or the property may be re-manufactured into another article.\textsuperscript{138}

Property may also be transferred to the General Services Ad-
ministration for disposition. It may be screened by that agency to
determine if any other government agency wants the property.\textsuperscript{136} After the expenses of maintenance and sale and the claims of inno-
cent third parties have been satisfied, the proceeds of sale are de-
posited with the United States Treasury as a criminal fine.\textsuperscript{137}

A petition for the award of compensation to an informer will
be acted upon by the Attorney General or his designee. This award
to an informer is specifically made a part of RICO.\textsuperscript{138}

VI. Conclusion

Similar to the concepts in other portions of the Racketeer
Influenced and Corrupt Organizations Statute (RICO), criminal
forfeiture is somewhat complicated and requires rather lengthy ex-
planation. It was aimed at attacking the national problem of orga-
nizational crime through the revitalized technique of \textit{in personam}
forfeiture. A widespread economic attack on the criminal element
that corrupts our system is significantly enhanced by the device of
criminal forfeiture. The provisions of 18 U.S.C. section 1963 offer
some ammunition to break up criminal enterprises and take the
profit out of criminal activity. Combining this process with a full
utilization of the RICO statute in significant and appropriate cases
enables the government to make headway in attacking and elimi-
nating corrupt entities from our society.

\textsuperscript{135} 19 U.S.C. § 1611 (1930).

\textsuperscript{136} After a prescribed period, usually 60 to 120 days, if no other agency
claims the property, it is declared surplus and may be disposed of by the General
Services Administration. 40 U.S.C. § 304(a)(1) (1940) (Real Property) and 41

\textsuperscript{137} 19 U.S.C. § 1613 (1978) and 19 C.F.R. § 162.51.

\textsuperscript{138} 18 U.S.C. § 1963(c) (1970), "... and the award of compensation to in-
formers in respect to such forfeitures ..." See also 19 U.S.C. § 1619 (1948).