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Liberal Construction and Severe Sentencing Help RICO Achieve Its Legislative Goals

Regina Kwan Peterson

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Liberal Construction and Severe Sentencing Help
RICO Achieve Its Legislative Goals

INTRODUCTION

The sentencing of an organized crime member or racketeer presents unique problems to the justice system. The most obvious problem is that traditional modes of sentencing, fine and imprisonment, have been unsuccessful in checking the growth of organized crime. The sentencing of an organized crime member is the sen-


A structural definition of organized crime was advanced by Cressey: "[Organized crime relates to] any crime committed by a person occupying, in an established division of labor, a position designed for the commission of crime, providing that such a division of labor also includes at least one position for corruptor." D. CRESSEY, CRIMINAL ORGANIZATION: ITS ELEMENTARY FORMS 27 (1972).

For a comprehensive background of the history of organized crime in the United States, see A. BEQUAI, ORGANIZED CRIME - THE FIFTH ESTATE (1979).

2. A racketeer is one who participates in rackets. A fine distinction exists between an organized crime member and a racketeer. Whereas organized crime is defined in terms of social structure, see supra note 1, racket is defined in terms of an activity. Rackets describe "those types of operational organizations dedicated solely to the production of crime, such as, a gambling enterprise, a drug distribution network, a loan sharking enterprise, a hijacking organization and a high-level 'crime holding company' like a crime syndicate type organization, which controls a number of enterprises of this nature." IIT RESEARCH INSTITUTE AND THE CHICAGO CRIME COMM'N, A STUDY OF ORGANIZED CRIME IN ILLINOIS 290 (1971). The concepts of rackets and organized crime are enmeshed and will be used interchangeably for the purpose of this note.

3. In April of 1969, President Nixon delivered his "Message on Organized Crime" to Congress. He observed that "[Although] many of the nation's most notorious racketeers have been imprisoned or deported and many local organized crime business operations have been eliminated . . . these successes have not substantially impeded the growth and power of organized crime syndicates . . . They are more firmly entrenched and more secure than ever before." H.R. Doc. No. 105, 91st Cong., 1st Sess. 2 (1969), reprinted in 116 CONG. REC. 585 (1970). During the Senate debates prior to the enactment of RICO, see infra note 7, Senator Byrd remarked that:

While prosecutions and convictions of leaders of organized crime and their confederates are increasing each year . . . it is becoming increasingly apparent that such convictions alone, which simply remove the leaders from control of syndicate-owned enterprises but do not attack the vested property interests whose control passes on to other Cosa Nostra leaders, are not adequate to demolish the structure of the surviving organizations which they run.

tencing of a mere cog in an often large and sophisticated criminal enterprise. Although members of the enterprise may be brought to justice from time to time, there are always others ready to carry on the shared illegal activities.4

During the late 1960's, Congress recognized that any remedial plan to cope with a growing organized crime problem must no longer focus on sanctioning the individual defendant but must address sanctioning the criminal enterprise as a whole.5 Such a plan was embarked upon through the passage of the Organized Crime Control Act of 1970.4 Title IX of the Act,7 popularly known as the

4. "Like any large corporation, the [criminal] organization functions regardless of personnel changes, and no individual - not even the leader - is indispensable. If he dies or goes to jail, business goes on." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 7 (1967).


5. What is needed here, the [Judiciary] Committee believes, are new approaches that will deal not only with individuals but also with the economical base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969). See also the remarks of Senator McClellan in 116 CONG. REC. 591 (1970): "Experience has shown that it is insufficient to merely remove and imprison individual mob members."


Racketeer Influenced and Corrupt Organizations Act or RICO, attempted to provide new remedies and enhanced sanctions for those convicted of racketeering.\(^8\)

One new remedy introduced by RICO is the provision requiring a defendant to forfeit "any interest he has acquired or maintained" in violation of the Act.\(^8\) The drafters of RICO hoped that this forfeiture provision would pierce the economic stronghold of organized crime by confiscating its illegally obtained capital.\(^9\) Through the forfeiture provision, RICO attempts to sanction the entire criminal enterprise rather than merely the defendants who are being prosecuted.\(^11\)

RICO also provides a prison sentence of up to twenty years for either violating or conspiring to violate the Act.\(^18\) Consecutive sentencing,\(^18\) justified under the Act as providing an enhanced sanction, is permissible where a defendant is convicted of both offenses.\(^14\) In addition, consecutive sentencing between the RICO

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8. The eight sections of RICO are: § 1961 - Definitions; § 1962 - Prohibited racketeering activities; § 1963 - Criminal penalties; § 1964 - Civil remedies; § 1965 - Venue and process; § 1966 - Expedition of action; § 1967 - Evidence; § 1968 - Civil investigative demand.

9. 18 U.S.C. § 1963(a)(1) (1976). "Under the criminal forfeiture provision of section 1963... the proceeding is in personam against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise." United States v. Brigance, 472 F. Supp. 1177, 1181 (S.D. Tex. 1979) (citations omitted).

10. See the remarks of Senator McClellan during the Senate debate on S. 30:

"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. Title IX uses three primary devices to achieve these ends - criminal forfeiture, civil remedies... and a number of civil investigative procedures." (emphasis added).


11. "[T]title IX... will deal not only with individuals but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself..." Remarks of Rep. Poff, 166 Cong. Rec. 35193 (1968).

12. See infra text accompanying note 56.

13. Consecutive sentencing is the imposition by a judge of two or more sentences which are to be served one after the other, or cumulatively. In contrast, concurrent sentencing is the imposition of two or more sentences which are to be served simultaneously; in effect, the smaller sentences merge into the largest sentence and only the latter is served. See State v. Rider, 201 La. 733, 10 So. 2d 601, 605 (1942).

offenses and the underlying state and federal offenses which generate the RICO charge is also permissible.\textsuperscript{15}

Given the severe sanctions of RICO, debate has flared over the proper scope of the Act.\textsuperscript{16} On one side are those who believe the Act is applicable only to the ferreting out of organized crime from legitimate business. On the other are those who believe RICO should be used to prosecute any and all racketeers in either legitimate or wholly illegitimate businesses. In \textit{United States v. Turkette},\textsuperscript{17} the Supreme Court agreed with the latter interpretation when it held that RICO encompassed racketeering in both legitimate and wholly illegitimate enterprises.\textsuperscript{18} The liberal construction of RICO in Turkette supports Congress' plan to use the Act as a weapon to vigorously prosecute and convict organized criminals in order to mete out the Act's enhanced and innovative sanctions.

This note will develop the theme of broad construction, as articulated in Turkette, as a backdrop to a discussion of the sanctions provided by RICO. First, the key provision of forfeiture will be examined. Specifically, two issues will be raised: 1) whether forfeiture should be mandatory or discretionary and 2) whether the proper scope of forfeiture extends to the profits of an illegal enterprise or should be limited to an interest or investment in an enterprise. Second, the ability of the sentencing court to issue consecu-


The viewpoint advocating a broadly construed statute may be found in: Blakey & Gettings, \textit{RICO: Evening Up the Odds}, TRIAL, Oct. 1980, at 58 (Prof. Blakey was on the staff of the Subcommittee on Criminal Law and Procedure which advised the Senate Judiciary Committee on the drafting of RICO); Note, RICO and the Liberal Construction Clause, 66 CORNELL L. REV. 167 (1980); Note, RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?, 55 NOTRE DAME LAW 777, 792-95 (1980).

\textsuperscript{17} 452 U.S. 576 (1981). In anticipation of Turkette, the Justice Department regarded a Supreme Court reversal as critical to the future effective use of the RICO statute. See Mitchell, \textit{The Trouble with RICO}, POLICE, May 1981, at 42 [hereinafter cited as Mitchell]. See also \textit{infra} notes 47-52 and accompanying text for a more detailed discussion of Turkette.

\textsuperscript{18} 452 U.S. at 593.
tive sentences will be examined. Finally, this note will discuss the necessity of a broad RICO statute equipped with severe sanctions, notwithstanding some of the problems such a scheme might engender.

BACKGROUND

The RICO Promise

RICO prohibits a person from conducting interstate commercial transactions which are tainted by racketeering activity. Specifically, the Act outlaws: 1) investing in enterprises with income derived from a pattern of racketeering activity; 2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity; and 3) working within an enterprise whose affairs are conducted through a pattern of racketeering activity. Furthermore, the statute prohibits a conspiracy to engage in any of these activities. The drafters of RICO regarded this scheme as "a novel, . . . most promising and ingenious proposal for crippling organized crime's . . . emergence in the field of legitimate businesses

19. From the legislative history of the Organized Crime Control Act of 1970, it is clear that RICO was enacted to curtail organized crime. Thus, it is interesting to note that the language of the Act does not outlaw organized crime per se. Instead, RICO takes a functional approach by prohibiting the activity (racketeering) on which organized crime thrives. The reason for this approach may have been the avoidance of constitutional attacks on the statute. Had Congress named organized crime as the target of RICO, RICO may have been challenged on equal protection and vagueness grounds, or as a status crime. For a discussion of the problems involved with attempting to define organized crime in the statute, see Note, United States v. Sutton: The Sixth Circuit Curbs Abuse of RICO, the Federal Racketeering Enterprise Statute, 28 Cleve. St. L. Rev. 629, 654 (1979).


(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

and unions."\(^{23}\)  

An unusual feature of RICO is that it defines "racketeering activity"\(^{23}\) as the commission of pre-existing state and federal crimes. Thus, if a defendant engages in a "pattern of racketeering activity,"\(^{24}\) comprised of the commission of two or more of the pertinent state or federal crimes, he is subject to sanction under RICO.\(^{25}\) RICO, in essence, is a "super-statute"; it permits the government to mete out additional sanctions to racketeers for crimes already punishable under other laws. Given the difficulties the government already encounters in prosecuting organized crime members, RICO provides federal prosecutors with a means by which they can stiffen criminal penalties without having to gather new evidence to prove the commission of a new offense.

Initially, however, the promise of RICO remained unfulfilled when the statute lay virtually dormant in the first few years following its enactment. Prior to 1975, only a handful of defendants were prosecuted under the Act.\(^{26}\) Then, in late 1974, the Seventh Circuit

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22. 116 Cong. Rec. 602 (1970). See the remarks of Senator Hruska who proposed the initial RICO bill as S. 1861. S. 1861 was later incorporated into S. 30. Id.
23. 18 U.S.C. § 1961(1) (1976) defines "racketeering activity" as:
   (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: ... [34 sections are listed]; (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); or (D) any offense involving bankruptcy, fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

Compare this definition with the one offered in note 2 supra.
24. 18 U.S.C. § 1961(5) (1976) defines "pattern of racketeering activity" as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

26. See Atkinson, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, 69 J. Crim. Law & Criminology 1, 3 n.21 (1978) [hereinafter cited as Atkinson]. The following number of RICO cases were reported for each year:

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
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<tbody>
<tr>
<td>1970</td>
<td>0</td>
</tr>
<tr>
<td>1972</td>
<td>1</td>
</tr>
<tr>
<td>1974</td>
<td>3</td>
</tr>
</tbody>
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decided *United States v. Cappetto,*\(^27\) which marked the beginning of a steady increase in RICO litigation.\(^28\) The *Cappetto* court was the first to face what was to become a hotly disputed issue: whether the term "enterprise,"\(^29\) as defined in section 1961(4) of RICO, encompassed both legitimate and illegitimate entities or was restricted solely to the former.\(^30\) The defendants in *Cappetto* asserted that RICO had a singular purpose, which was to halt the influence of racketeering in legitimate business. Consequently, the defendants claimed that their wholly illegal gambling operation was not within the reach of the Act. The court sitting in *Cappetto*, however, disagreed with the defendants and, citing the broad legislative purpose of RICO, held that an "enterprise" under the Act encompassed both legitimate and illegitimate entities.\(^31\) Although *Cappetto* was a civil remedies action under section 1964(c) of RICO, its broad reading of the Act's scope influenced both future civil and criminal cases.

*The Battle over Liberal Construction*

Since 1975, the majority of courts that have construed the term
"enterprise" have followed Cappetto in defining the term broadly to include legitimate and illegitimate entities.\textsuperscript{33} The scope of "enterprise" was further broadened by subsequent holdings that the term encompassed both public and private entities.\textsuperscript{34} Finally, the Fifth Circuit offered what is probably the broadest definition when it referred to an enterprise as "an amoeba-like infra-structure that controls a secret criminal network."\textsuperscript{35}

The judiciary's liberal interpretation of "enterprise" helped to transform RICO into a very broad statute. As a result, prosecutors routinely began to include RICO counts in any case involving the violation of two or more of the state and federal laws encompassed by RICO. By the late 1970's, over 200 RICO prosecutions had been initiated by the Department of Justice.\textsuperscript{36} The defendants in these actions, however, often had nothing to do with what was traditionally thought of as organized crime, the activity RICO was enacted


36. See Mitchell, supra note 17, at 41.
to remedy. The broad scope of the statute had enabled the government to prosecute defendants ranging from a stockbroker who defrauded his clients, to a Japanese cable manufacturing corporation that obtained supply contracts through bribery, and to a Pennsylvania state representative who arranged bribes between medical school applicants and school officials. Even in cases involving organized crime, the racketeering often was not linked to any tangible enterprise.

Provoked by what was perceived to be abuse and overreach of the statute, critics of RICO characterized the statute as "a loose carronade which threatens to hull entities never contemplated in its enactment." In 1979, this controversy escalated when the Sixth Circuit held, contrary to precedent, that an enterprise within the meaning of RICO is an entity organized and acting solely for a

38. United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980).
Although the Sixth Circuit eventually reversed itself, its initial position was later adopted by the First and Eighth Circuits and garnered support from various dissenting judges. Adherents to this more restrictive reading of RICO emphasize that the legislative history of the Act speaks primarily of eradicating the infiltration of organized crime in legitimate business. Therefore, even though the express language of the Act is silent on the legality of the enterprise, the Act should be construed so as to carry out this limited legislative intent. Furthermore, the argument was advanced by one court that where a criminal statute is ambiguous, the ambiguity is historically resolved in favor of lenity toward the defendant.

The controversy in the courts over the scope of RICO was recently resolved by the Supreme Court's decision in United States v. Turkette. In Turkette, the Court held that the language of the statute was unambiguous and provided for both legitimate and illegitimate entities within the definition of "enterprise." Justice White, speaking for a majority of eight, noted that the eradication of organized crime from legitimate business was but one aspect of the legislative intent to rid the entire American economy of

42. United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), rev'd in part, 642 F.2d 1001 (6th Cir. 1980).
43. 642 F.2d 1001 (6th Cir. 1980).
48. The defendants in Turkette were a loose confederation of criminals engaging in wholly illegitimate activities such as narcotics trafficking and arson. The court of appeals held that the defendants, although associated in fact, were not an enterprise within the meaning of RICO. 632 F.2d at 905-06.
49. Mr. Justice Stewart agreed with the reasoning and conclusion of the court of appeals and filed a statement, dissenting. 452 U.S. at 593.
the influence of organized crime.\textsuperscript{50} He reasoned that a liberal construction of the statute was more congruous with legislative intent because, under a restrictive interpretation, "[w]hole areas of organized criminal activity would be placed beyond the substantive reach of the enactment."\textsuperscript{51} Moreover, even "[a]ccepting that the primary purpose of RICO is to cope with the infiltration of legitimate businesses, applying the statute in accordance with its terms, so as to reach criminal enterprises, would seek to deal with the problem at its very source."\textsuperscript{52}

The Supreme Court’s strong support of RICO in Turkette may be perceived as both a vote of confidence and a renewed opportunity to utilize the statute as intended. Whereas confusion may once have existed regarding the purpose and scope of RICO, the Supreme Court made clear in Turkette that the purpose of the Act is to wage war on organized crime operating under the aegis of both legitimate and illegitimate entities. The legislative purpose behind RICO, however, is not fulfilled merely upon prosecution and conviction of the individual organized crime defendant. Indeed, it is not until the defendant is sanctioned that RICO ultimately achieves its goal, which is to curtail effectively the growth of organized crime.

\textbf{THE IMPOSITION OF STRICT CRIMINAL SANCTIONS}

During the congressional debates prior to the enactment of RICO, the drafters of the bill emphasized the woeful inadequacy of traditional criminal sanctions in reducing the level of organized crime.\textsuperscript{53} In response, Congress designed strict and innovative penalties\textsuperscript{54} for RICO in an attempt to meet "the special challenge that

\begin{footnotes}
\item[50.] Id. at 587.
\item[51.] Id. at 589.
\item[52.] Id. at 591.
\item[53.] See supra notes 3-4 and accompanying text.
\item[54.] The sanctions under RICO provide both criminal penalties (18 U.S.C. § 1963) and civil remedies (18 U.S.C. § 1964) (1976). The civil remedies, which are not discussed in the text of this note, were patterned after the antitrust civil remedies of injunction, divestiture, dissolution and reorganization. These remedies, having been effective in trade regulation, would hopefully "forge a powerful new weapon for putting the syndicate out of business." 116 Cong. Rec. 607 (1970). But see Note, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity," 124 U. Pa. L. Rev. 192, 198 (1975) for a critical analysis of the civil remedies provision. The author observes that a due process problem arises in a civil action where the defendants are not afforded the constitutional safeguards granted to defendants in a criminal prosecution for the commission of the same illegal acts.
\end{footnotes}
organized crime poses to the well-being of our Nation.\textsuperscript{55} Section 1963(a) of RICO specifies the criminal penalties, which include a fine, imprisonment, and a provision for forfeiture of property illegally obtained as the result of criminal activity.\textsuperscript{56} The sanction requiring forfeiture of the defendant's illegally acquired interests was considered the most controversial\textsuperscript{57} and potentially the most effective penalty within the provision.

\textbf{The Forfeiture Provision}

Congress enacted the RICO forfeiture provision as an innovative means of stopping the growth of organized crime through confiscation of the organization's ill-gotten gains.\textsuperscript{58} The provision revived \textit{in personam} forfeiture in American law, a concept based on the premise that a convicted criminal should not be permitted to own property.\textsuperscript{59} Under this common law doctrine, all property, upon

\begin{itemize}
  \item \textsuperscript{56} Section 1963(a) provides:
    \begin{quote}
    Whoever violates any provision of section 1962 of this chapter [18 U.S.C. § 1962] 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 [18 U.S.C. § 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 [18 U.S.C. § 1962].
    \end{quote}
  \item \textsuperscript{58} [W]hat is innovative about RICO is not that it imposes forfeiture as a consequence of criminal activity, but rather that it imposes it directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture. Statutes providing for in rem forfeiture of property related to criminal activity are relatively common. United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).
  \item \textsuperscript{59} Forfeitures have been categorized as either \textit{in personam} or \textit{in rem}. An \textit{in personam} forfeiture is an action directly against the defendant whereby forfeiture occurs as a consequence of the defendant's conviction. In contrast, an \textit{in rem} forfeiture is a proceeding directly against the property itself and is independent of the owner's crime. For a discussion of \textit{in personam} and \textit{in rem} actions, see generally, Overby v. Gordon, 177 U.S. 214 (1900); Freeman v. Alderson, 119 U.S. 185 (1886); and Fennoyer v. Neff, 95 U.S. 714 (1878).
\end{itemize}
conviction, was surrendered to the Crown. Until RICO, Congress had regarded *in personam* forfeiture as a harsh and undesirable penalty and had prohibited its use by statute. Given the necessity of a special campaign against organized crime, however, Congress tempered its position and acceded to the revival of the penalty in RICO.

At the government's prodding, federal prosecutors have attempted to maximize the effectiveness of the forfeiture provision. In so doing, two issues have arisen regarding its use. The first is whether the issuance of a forfeiture order is mandatory or discretionary; the second is whether the proper scope of forfeiture extends to the profits of an illegal enterprise or is limited to an interest or investment in an enterprise.

**Mandatory Forfeiture**

Upon conviction, the *in personam* forfeiture provision of RICO requires that the defendant automatically forfeit his illegally obtained interest to the government. The decree of forfeiture is issued by a judge who, in turn, may also sentence the defendant to a fine and imprisonment as prescribed in section 1963(a) of the RICO statute. In determining the amount of the fine and the length of the imprisonment, a judge, by tradition, may exercise broad discretion. Based on this tradition, it might be reasonable to assume that a judge may also exercise discretion in ordering a

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60. For a historical treatment of the forfeiture provision, see United States v. Grande, 620 F.2d 1026, 1037-39 (4th Cir. 1980). See also United States v. L'Hoste, 609 F.2d 796, 813 n.15 (5th Cir. 1980). For a complete discussion of the constitutional dimensions of *in personam* forfeiture, see Taylor, *supra* note 57, at 380-82.

The inherent unfairness of *in personam* forfeiture was repugnant to the framers of the United States Constitution; the prohibition against such forfeiture was incorporated into American law in 1790. "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) [of RICO], therefore, would repeal 18 U.S.C. § 3563 by implication." United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979) (citations omitted).

62. In describing the proposed racketeering legislation to the House, Rep. Pott (Virginia) remarked, "As the need, so the remedy must be new. . . . After conviction, the ill-gotten gains must be forfeited to the Government. This sanction is not only poetic justice but a strong deterrent as well." 115 CONG. REC. 9951 (1969).


64. For the procedural aspects of forfeiture, see infra note 71 and accompanying text.

forfeiture decree, but another penalty imposed by the court. Section 1963(a) of RICO, however, stipulates that "whoever violates [the statute] . . . shall forfeit . . . any interest [in the illegal enterprise]." The unequivocal use of the word "shall" has justified one court’s determination that the statute intended RICO forfeitures as mandatory penalties.

In United States v. L’Hoste, the defendants were convicted of racketeering in a public bribery scheme involving the procurement of sewer construction contracts. The government sought forfeiture of defendant L’Hoste’s stock interest in his construction company. After the jury determined the extent of the forfeitable interest, the district court exercised its discretion in refusing to order the forfeiture. The court of appeals issued a writ of mandamus directing the lower court to order the forfeiture. In noting that “[f]orfeiture was viewed as an innovative measure that was necessary to undermine the economic base of those convicted of racketeering activity,” the Fifth Circuit relied on the meaning of the plain language of the statute in holding that forfeiture was mandatory. The court reasoned that as long as federal prosecutors comply with the Federal Rules of Criminal Procedure, which require notice of forfeiture and a special verdict as to the extent of the illegal interest, the judge may not, in his discretion, refuse to

67. 609 F.2d 796 (5th Cir. 1980).
68. In a criminal forfeiture proceeding, under the common law, the defendant was apparently entitled to notice, trial and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. A special verdict for criminal forfeiture is provided in rule 31(e) of the Federal Rules of Criminal Procedure. See infra note 71.
69. United States v. L’Hoste, 609 F.2d 796, 809-10 (5th Cir. 1980).
70. Id. at 812.
71. After the enactment of the RICO statute in 1970, the Federal Rules of Criminal Procedure were amended to accommodate the new criminal forfeiture laws by providing the defendant with common law procedural rights.

Rule 7(c)(2) provides the defendant with notice:

Criminal Forfeiture - 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.

FED. R. CRIM. P. 7(c)(2).

Rule 31(e) provides for a special jury finding:

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

FED. R. CRIM. P. 31(e).

In addition, rule 32(b)(2) provides for a judgment authorizing the Attorney General to seize the interest or property forfeited:
issue a forfeiture order.

*L'Hoste* suggests that a judge is simply a conduit through which a forfeiture is ordered, thereby leaving little, if any, room for discretion. The wide latitude usually accorded judges in sentencing is based on the premise that sentences should be tailored to the individual and the facts and circumstances surrounding a case, and judges are understandably reluctant to give up their discretionary prerogative. As a result, one court, reacting to the *L'Hoste* decision, has voiced a refusal to relinquish all powers of discretion in executing the forfeiture clause.

Judicial discretion in RICO forfeiture orders is somewhat illusory because, although forfeiture is a part of the penalty imposed upon a convicted RICO defendant along with fine and imprisonment, forfeiture is technically outside the sentencing function of the court. This is so because *in personam* forfeitures are automatically activated upon conviction. If the defendant is convicted under RICO, therefore, the imposition of the penalty of *in personam* forfeiture becomes mandatory.

The *L'Hoste* court's limitation on judicial discretion in the forfeiture provision is essential to effectuating the legislative purpose of RICO: an attack on the economic base of organized crime by forcing convicted racketeers to forfeit their illegally acquired for-

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Criminal Forfeiture - 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 deem proper.


72. The Supreme Court suggested the desirability of individualized sentences when it stated:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.


73. See United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981), where the court stated "this Court is unable to accept an interpretation of RICO which would preclude any possibility of the exercise of judicial discretion with regard to a forfeiture under that statutory scheme."

74. See supra notes 9 & 59. The court in United States v. L'Hoste, 609 F.2d 796, 813 (5th Cir. 1980) stated, "The . . . court's sentencing function only relates to fines and imprisonment, and this function is in no way impaired or impeded by the presence of the mandatory forfeiture provision.

75. See supra note 59.

76. Id.
tunes. Because of the self-perpetuating nature of organized crime, Congress believed that forfeiture would more successfully achieve this purpose than the fines or prison terms often imposed on a defendant.\(^7\) To this end, Congress deliberately crafted the forfeiture provision to convey a mandatory penalty. To ignore the plain language of the statute in deference to the traditional policies of sentencing discretion would therefore subvert the legislative intent of RICO.

The Second Circuit has noted that, under RICO, the forfeiture penalty is keyed to the size of the criminal enterprise, and therefore the extent of the forfeiture is roughly proportionate to the defendant's crime.\(^7\)\(^8\) It correctly pointed out, however, that in some situations, a forfeiture order may be so harsh as to violate the eighth amendment's ban on cruel and unusual punishment.\(^7\)\(^9\)

Where unconscionable results would occur, the court indicated that a court must have the power to grant the defendant relief.\(^8\)\(^0\)

The difficulties which arise from enforcing a mandatory forfeiture provision in deference to legislative intent, while simultaneously protecting a defendant from draconian forfeiture, may be resolved by reserving to the court the power to modify disproportionately large forfeitures. Contrary to the trial court's ruling in L'Hoste, this power would not include the discretion to set aside entirely a forfeiture order. If the goal of the forfeiture provision is to be realized, a convicted RICO defendant with forfeitable interests should always be required to forfeit some portion of his holdings. Under the statute, the forfeitable interest in a

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77. See supra notes 9-10 and accompanying text. See also the mandatory language in the legislative history of the RICO Act: "[RICO] violations shall be punished by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations." (emphasis added). P.L. 91-452, § 901 (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4033, 4033.

78. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979). In Huber, a New Jersey attorney and his father ran a hospital supply house. During the course of their business, the Hubers fraudulently overcharged various hospitals by falsifying invoices. The overcharges totalled close to one-half million dollars. The Hubers challenged the government's attempt to compel them to forfeit their interest in their business on both procedural and constitutional grounds. The Second Circuit, however, upheld the forfeiture as proper. Id. at 390-91.

79. Id. at 397.

80. Where the forfeiture threatens disproportionately to reach untainted property of a defendant, for example, if the criminal and legitimate aspects of the "enterprise" have been commingled over time, section 1963 permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision.

Id.
racketeering enterprise is inherently scaled to the magnitude of the defendant's crime; thus, the initial presumption should be that the forfeiture is proportionate to the crime. Where a court determines that this presumption has been rebutted, it may modify the forfeiture order accordingly. By adopting this approach toward mandatory forfeiture, the government may continue to vigorously pursue criminal forfeitures in a manner which affords the defendant a measure of protection from inequitable confiscations of his property.

United States v. Marubeni America Corp.

A Restrictive Approach to Forfeiture

Perhaps a more difficult question facing the courts than that of mandatory forfeiture concerns the scope of the forfeiture provision. Litigation on this question centers on the definition of “interest” as it is used in sections 1963(a)(1) and (2).

In 1980, the Ninth Circuit decided United States v. Marubeni America Corp., which presented the issue of whether amounts paid or payable for performance of a contract procured through a pattern of racketeering activity were forfeitable interests under RICO. Marubeni Corporation and co-defendant Hitachi Corporation were engaged in the production and sale of electrical cable. By bribing a telephone utility official, the defendants were able to underbid on and obtain three telephone cable supply contracts. A grand jury indicted the defendants for numerous offenses including, inter alia, racketeering pursuant to RICO. In the indictment, the government requested the defendants to forfeit all the amounts paid or payable to them for performance of the supply contracts. Section 1963(a)(1) of RICO provides that the defendant shall forfeit “any interest he has acquired or maintained in violation of section 1962 [prohibited activities].” The government asserted that “interest” meant “any form of income or proceeds from a ‘pattern of racketeering activity’.”

The court of appeals disagreed with this interpretation, holding...
instead that the forfeiture provision “applies to interests ‘in an enterprise’ illegally acquired or maintained.” Hence, the proceeds of the contracts were not subject to forfeiture. The court based its holding on three rationales. First, it examined the language of section 1962, the prohibitory section of RICO, for internal consistency. At the heart of 1962(a) and 1962(b) is language prohibiting the procurement of “any interest in . . . any enterprise.”

Section 1962(a) provides, however, for certain exceptions to the general prohibitory language. For example, the use of illegal income to make small purchases of securities on the open market where no control of the issuer is sought is not prohibited by the statute.

Thus, the court reasoned that the forfeiture provision could not encompass all illegal profits, proceeds, or other income because section 1962 clearly states that certain uses of illegal income are not prohibited.

Second, the court examined the language of the forfeiture provision itself. The court noted that the forfeiture language does not mention profits, proceeds, or illegal income, whereas another federal statute, passed by Congress in the same month as RICO, contained a forfeiture provision which expressly provides for the for-


90. The statute provides:

A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issues, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issues held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.


91. 611 F.2d at 787. But see a criticism of this “one percent investment exception” rationale in Note, RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?, 55 Notre Dame Law, 777, 784-86 (1980). The author contends that the one percent investment exception was not intended as a “safe harbor” rule for racketeers, but was meant to protect the “unnecessary disruption of publicly held legitimate enterprises.” Id. at 786. See also United States v. Martino, 681 F.2d at 960.
feiture of profits.\textsuperscript{92} Certainly, the court posited, Congress would have provided similar language in the RICO statute had it intended RICO forfeitures to encompass profits and proceeds.

Finally, the \textit{Marubeni} court construed the legislative history of RICO and cited numerous examples where Congress has spoken of “forfeiture of an interest in an enterprise.”\textsuperscript{93} The court concluded that, although the language of the statute is silent on the forfeitability of profits, Congress intended that forfeiture apply only to interests in a racketeering enterprise.

An “interest in an enterprise” has been defined as akin to a proprietary right or a stock ownership in an enterprise.\textsuperscript{94} Finding this interest, however, has been a difficult task for courts subsequent to \textit{Marubeni}.\textsuperscript{95} Although a RICO enterprise may be defined as an in-

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\item \textsuperscript{92} 611 F.2d at 766. \textit{See also infra} note 141.
\item \textsuperscript{93} 611 F.2d at 767-68, 769 n.11.
\item \textsuperscript{94} \textit{See, e.g.}, United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977). In \textit{Meyers}, the court indicated that it would be a “strained construction of Section 1963” to classify “profits or fruits received from the enterprise” as “interest” in the enterprise. The court reasoned that “the more natural interpretation is that an ‘interest’ is akin to a continuing proprietary right in the nature of partnership or stock ownership (or holding a debt or claim, as distinguished from ‘equity’ investment) rather than mere dividends or distributed profits.” \textit{Id.}
\item \textsuperscript{95} The following year, the Fifth Circuit confronted the same question in a different factual setting: whether insurance proceeds reaped from arson for profit are an interest subject to forfeiture under RICO. In United States v. Martino, 648 F.2d 367 (5th Cir. 1981), \textit{cert. denied}, 102 S. Ct. 2020, \textit{rev’d}, 681 F.2d 952 (en banc) (5th Cir. 1982), the defendants were a group of individuals associated for the purpose of committing arson. During a three year period, the group, composed of homeowners, arsonists, an insurance adjuster, promoters and investors, destroyed at least eighteen residential and commercial properties. Insurance proceeds were successfully collected subsequent to each burning and divided among the co-defendants. 631 F.2d at 953. Following a jury trial, sixteen of the twenty-three defendants were found guilty of RICO violations. The jury then returned a special verdict on the extent of the property subject to forfeiture under section 1963(a)(1). \textit{See supra} note 56. Four defendants were ordered to forfeit the insurance proceeds they received pursuant to the burning of their properties. On appeal, a panel of the Fifth Circuit Court of Appeals reversed these monetary forfeitures. Finding the reasoning of \textit{Marubeni} persuasive, the panel held that the RICO forfeiture provision was intended to reach only interests in an enterprise and not the profits and proceeds from the racketeering activity.

On August 2, 1982, as this article was going to press, the Fifth Circuit Courts of Appeals, sitting en banc, reversed the panel, reinstating the district court’s order of forfeiture. The court noted that its decision “squarely conflicts with that of the Ninth Circuit.” 681 F.2d at 959. The court en banc reached its holding by looking first at the plain language of the statute. On its face, the forfeiture clause refers to “\textit{any} interest . . . acquired or maintained in violation of section 1962.” 18 U.S.C. 1963(a)(1) (1976) (emphasis added). The court stated that the language itself does not limit forfeitable interests to those in an enterprise, and that if a limitation had been the intent of Congress, such limiting language would have been expressly provided. 681 F.2d at 954. In addressing the \textit{Marubeni} court’s posture that a restrictive definition of “interest” is supported by the language in section 1962(a) and (b),
dividual partnership, corporation, association or other legal entity in which a defendant may have an interest or investment, a RICO enterprise may also be defined as any union or group of individuals associated in fact, although not a legal entity.66 However, groups of individuals associated in fact but not legal entities are not structurally amenable to the concepts of ownership or investment. One cannot have a requisite proprietary interest in a crime ring sufficient for a court to find a forfeitable interest. Consequently, the profits derived from the racketeering activities of such illegal entities are immune from forfeiture for want of the requisite "interest in an enterprise."67

Although it is unclear whether there were underlying reasons for

which refers to acquiring or maintaining an interest in an enterprise, the Fifth Circuit asserted that these references do not define the type of forfeitable interests, but "merely identify the illegal activities which trigger the forfeiture penalty, supplying the nexus between the RICO violation and the forfeiture property." Id. at 955.

The court also found support for its broad construction of the forfeiture clause in the RICO legislative history, which it found "replete with references to this broad 'hit them where they hurt' philosophy." Id. at 957 n.17. The court acknowledged the existence of other references in the legislative history which support limiting forfeiture to interests in an enterprise, but suggested that these references have diminished import because Congress, while initially debating the inclusion of this express limitation in the statutory language itself, ultimately decided to enact the statute without this restriction. Id. at 958-59.

Seven judges dissented from the majority opinion. In an opinion filed by Politz, Circuit Judge, the dissents built their case for a more restrictive forfeiture clause on the basic premise that, historically, the law abhors a forfeiture. Id. at 962 (Politz, J., dissenting). The dissent maintained that the objective of RICO was "to place a protective mantle of the federal criminal law around legitimate businesses, guarding them from the corruption inherent in soiled funds." Id. at 963. Flowing from this objective, the dissenters reasoned that forfeiture would logically apply to interests in businesses or enterprises. The dissenters also examined RICO legislative history and unlike the majority, found the references to limiting forfeitures to interests in an enterprise more persuasive. Finally, the opinion raised the question of whether a pure monetary forfeiture was essentially a latent fine with a potential for exceeding the maximum statutorily stated limit of $25,000. Id. at 965.

The conflict over the scope of forfeiture is currently ripe for resolution by either legislative amendment to the statute itself or Supreme Court interpretation of the statute. Because Congress is aware of the ambiguity posed by the existing statute, see infra note 140, and a writ of certiorari has not been filed by any of the parties in Martino to date, the issue will most likely be resolved by legislative rather than judicial mandate.

96. See supra note 29.

97. But see Taylor, supra note 57, at 391-92, where the author discussed the problem of defining an interest in an enterprise which is described as an association in fact. "One cannot own a legal interest in an association in fact." Id. Mr. Taylor noted, however, that Congress was aware of this problem when the RICO statute was drafted. He concluded, therefore, that enterprises which are associations in fact were not meant by Congress to be subject to forfeiture. In addition, he commented that some courts might attempt to avoid this obstacle by calling the assets a defendant contributes to the association an "interest," but criticized this approach as "not what Congress had in mind." Id.
the decision in *Marubeni* to limit forfeitures to interests in an enterprise,\(^9^8\) it is clear that the decision has fostered results inconsistent with the broad legislative purpose of RICO. Given the recent Supreme Court decision in *United States v. Turkette*,\(^9^9\) where Justice White expressed concern that a narrow construction of RICO would place whole areas of organized criminal activity beyond the reach of the statute,\(^1^0^0\) the outcome dictated by the *Marubeni* construction of the forfeiture provision appears wholly inapposite to the Court's policy of liberal construction. Borrowing the Court's reasoning in *Turkette*, a limitation of the forfeiture provision to "interests in an enterprise" would place whole areas of organized criminal activity beyond the reach of the provision. Congress undoubtedly did not intend to enact a forfeiture provision which could not reach some of the most insidious organized crime activities. These activities include narcotics trafficking, arson, prostitution and murder-for-hire, all of which would operate in enterprises of persons associated in fact and all of which would not contain conventional channels for maintaining an interest.

*Consecutive Sentencing*

Although the key penalty under RICO is forfeiture, the statute also provides for imposition of a fine not to exceed $25,000 and/or a term of imprisonment not to exceed twenty years for the violation of each of its provisions.\(^1^0^1\) The issuance of consecutive prison sentences upon conviction for RICO and other state and federal crimes has been attacked as violative of both the fifth amendment guarantee against double jeopardy\(^1^0^2\) and the eighth amendment ban on cruel and unusual punishment.\(^1^0^3\)

*Double Jeopardy*

The double jeopardy clause "protects against multiple punishments for the same offense."\(^1^0^4\) Racketeering defendants have

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98. See infra text accompanying notes 138 & 139.
100. See supra note 51 and accompanying text.
102. U.S. Const. amend. V states in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .".
103. U.S. Const. amend. VIII states in part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
raised the argument that the imposition of consecutive sentences under RICO constitutes multiple punishments in violation of this clause. The double jeopardy argument has been raised in three ways. First, where a defendant is convicted of the RICO substantive offense of racketeering and two or more state and/or federal crimes, the defendant may assert that the imposition of consecutive sentences constitutes multiple punishment. The gist of this argument is that, under RICO, conviction and sentencing are predicated upon a finding of guilt in at least two prior offenses; hence, the defendant, upon receiving the subsequent consecutive RICO penalty, has received multiple punishment for the same crimes.

Second, where a defendant is convicted of the RICO substantive offenses of racketeering and of conspiring to racketeer, the defendant may again claim that the imposition of consecutive sentences constitutes multiple punishment. This assertion is based on the prosecution's use of the same evidence to prove both the conspiracy and the commission of the substantive offense. Under this argument, the defendant asserts that two crimes undifferentiated by two distinct burdens of proof should not result in two separate punishments.

Finally, where a defendant is convicted of conspiring to racketeer and is convicted of conspiring under the general federal conspiracy statute, the defendant may contend that the imposition of consecutive sentences constitutes multiple punishment. This contention is supported by the fact that there is often only one agreement between the co-conspirators and, therefore, only one

105. See supra note 20.
106. See supra note 23.
108. Id. at 360.
109. See supra note 20.
111. 18 U.S.C. § 371 (1976). The statute provides in pertinent part:
If two or more persons conspire . . . to commit any offense against the United States . . . and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
112. See United States v. Barton, 647 F.2d 224, 234-38 (2d Cir. 1981). See also United States v. Amato, 367 F. Supp. 547, 549 (S.D.N.Y. 1973) (where the court held that if an indictment does not mention whether the defendant is charged with conspiracy under the general conspiracy statute or with conspiracy under RICO, then the court will be required to impose a sentence under the statute providing the least severe punishment).
conspiracy.

The courts facing these arguments have held that consecutive sentences under the RICO statute are permissible and do not violate the double jeopardy clause.113 The determinative factor in the courts' decisions has been that the punishments imposed are not for the same offense. In reaching their decisions, the courts have relied heavily on Supreme Court precedent in analogous double jeopardy cases.

In *Blockburger v. United States*,114 the Supreme Court developed the seminal test used by the lower courts in determining when multiple proof is necessary. The Court declared that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."115

Applying this test, the lower courts have found that the RICO substantive offense requires proof of a fact which the predicate offenses and the RICO conspiracy offense do not. That is, the proof of a RICO substantive offense requires the showing of a "pattern of racketeering."116 Neither the predicate offenses nor the RICO conspiracy offense require such a showing. Thus, consecutive sentences between the RICO conspiracy offense, the RICO substantive offense and the predicate offenses which form the RICO offense are not multiple punishments for the same offense in violation of the fifth amendment protection against double jeopardy.

The *Blockburger* test cannot be applied as easily to a situation where the defendant has been charged with violating the RICO conspiracy statute and the general federal conspiracy statute. For example, in *United States v. Barton*,117 the defendants were convicted of conspiring to racketeer under RICO, and of conspiring to possess explosives and to maliciously damage buildings under the general federal conspiracy statute.118 All the defendants had entered into one agreement in furtherance of their plan to gain control of gambling and other unlawful enterprises. On the surface, it appears that if both conspiracies were based on the same agree-

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113. *But see Bradley*, *supra* note 16, at 855-56. The author makes an argument that RICO does violate the double jeopardy clause.
115. *Id.* at 304.
116. See *United States v. Rone*, 598 F.2d 564, 572 (9th Cir. 1979).
117. 647 F.2d 224 (2d Cir. 1981).
118. *Id.* at 227. *See supra* note 23.
ment, they constituted only one offense since proof of an agreement is the essence of the crime of conspiracy. 119

The court in Barton, however, distinguished the conspiracies as separate offenses and held that consecutive sentences were permissible and not violative of the double jeopardy clause. 120 The court reached its decision by applying the reasoning of two recent Supreme Court opinions which construed the Blockburger test. In Whalen v. United States, 121 the Court held that consecutive sentences for the conviction of two statutory offenses is permissible if Congress intended to allow cumulative sentences when it enacted the statutes. In addition, the Court found that the “different fact” requirement of Blockburger must be met. Then, in Albernaz v. United States, 122 the Court held that consecutive sentences may be imposed for violations of two distinct conspiracy statutes which proscribe two different outcomes, notwithstanding that the defendants entered into only one agreement. Where the statutory provisions specify different ends as the proscribed object of the conspiracy, the Blockburger test is satisfied, according to the Albernaz Court, because the different outcomes require proof of different facts. 123

Reading Whalen and Albernaz together, the Barton court distinguished the RICO conspiracy, where the proscribed outcome was racketeering, from the conspiracy under the general conspiracy statute, where the outcome was possession of explosives and damaging buildings. One conspiracy required proof that the objective was racketeering and the other required proof that the objective was to possess explosives and to damage buildings. The court also concluded from a reading of RICO legislative history that Congress intended to permit cumulative punishments for violation of the RICO conspiracy provision in relation to all pre-existing federal statutes for the purpose of creating enhanced sanctions. 124

Cruel and Unusual Punishment

Defendants have also claimed that consecutive sentencing under RICO is excessive and therefore constitutes cruel and unusual punishment. The imposition of consecutive sentences for the RICO

120. United States v. Barton, 647 F.2d 224, 238 (2d Cir. 1981).
123. Id. at 336, 343.
sentencing under RICO serves as substantive offense and the underlying predicate offenses has been unanimously held as not violative of the eighth amendment and in keeping with Congress's scheme to create enhanced sanctions for convicted racketeers.\(^\text{125}\) On the other hand, consecutive sentences following convictions for the RICO conspiracy offense and the RICO substantive offense, while held to be constitutional, have not received universal acceptance. Although the vast majority of courts have held that consecutive sentences for the two RICO offenses is permissible, the Sixth Circuit in \textit{United States v. Sutton}\(^\text{126}\) held that the convictions for the two offenses must merge at sentencing. The \textit{Sutton} court, however, provided little explanation for its decision and has been criticized in subsequent decisions.\(^\text{127}\)

Constitutional challenges to consecutive sentencing under RICO, then, have not had great impact on the effective use of the sanction since judges have considerable latitude in deciding to sentence consecutively or concurrently. Such discretion permits a judge to order that sentences be served concurrently when he perceives the imposition of a string of consecutive sentences as unfair or counterproductive. Likewise, a judge may sentence consecutively for the purpose of enhancing sentences in appropriate situations.\(^\text{128}\)

\section*{Analysis}

The primary theme running through the cases construing the provisions of RICO is judicial deference to Congress's determined attack on organized crime.\(^\text{129}\) A secondary theme is judicial concern

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\item[125.] See \textit{United States v. Morelli}, 643 F.2d 402 (6th Cir. 1981), which held that "Congress may constitutionally make the commission of two crimes within a specified period of time and within the course of a particular type of enterprise an independent criminal offense punishable more severely [sic] than simply twice the penalty for each constituent offense." \textit{Id.} at 413.
\item[126.] \textit{See also} \textit{United States v. Whitehead}, 618 F.2d 523 (4th Cir. 1980) (eighth amendment challenge to sentence was "frivolous"); and \textit{United States v. Aleman}, 609 F.2d 298 (7th Cir. 1979) (court has discretion to impose suitable penalty).
\item[127.] \textit{See United States v. Whitehead}, 618 F.2d 523 (4th Cir. 1980) (eighth amendment challenge to sentence was "frivolous"); and \textit{United States v. Aleman}, 609 F.2d 298 (7th Cir. 1979) (court has discretion to impose suitable penalty). The defendant in \textit{United States v. Hill}, 646 F.2d 247 (6th Cir. 1980) succeeded in severing his trial from the mammoth \textit{Sutton} case. The court in \textit{Hill} adopted the \textit{Sutton} approach to sentencing and gave defendant Hill concurrent sentences.
\item[128.] Because \textit{Sutton} is one of the best known RICO cases to date, the court's decision to merge the RICO offenses for purposes of sentencing accompanied with little explanation is disconcerting.
\item[129.] \textit{See generally} \textit{United States v. Turkette}, 452 U.S. 576 (1981); \textit{United States v. Sut-}
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over permitting too much prosecutorial discretion in the use of RICO given the Act's broad reach and severe sanctions. As the two themes have intertwined, the courts, with one prominent exception, have lent wide support to the aims of RICO.

Beginning with the cases which preceded United States v. Turkette, the courts had accepted the government's assertion that a broadly construed statute was necessary to wage war on organized crime due to the increasing sophistication of the organization's activities. A more narrowly construed statute would result in members of organized crime finding new loopholes to avoid prosecution under the statute. In Turkette, the Supreme Court responded to this reasoning when it broadly construed the term "enterprise" as encompassing both legitimate and illegitimate entities.

The liberal attitude of the Court in construing the application of RICO has logically influenced the constriction of the penalty provisions of the Act as well. The resulting combination of liberal construction, mandatory forfeiture, and consecutive sentencing creates a powerful arsenal in the hands of the prosecutor. The government may now prosecute racketeers under a very broad statute, the violation of which exposes a defendant to harsh penalties. In the spirit of Turkette, courts seem to have limited their own discretion in RICO cases in exchange for greater discretion by the government in choosing prosecutions wisely and selecting defendants who clearly were the targets of the 1970 Act. Such prosecutorial discretion could easily lead to abuse where the government uses the Act

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130. See supra note 44. See also infra note 136.
131. The Ninth Circuit's narrow construction of the forfeiture provision, which permits only forfeiture of an interest in an enterprise and not of the proceeds and profits, drastically curtails the effectiveness of the provision. See United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) and text accompanying notes 83-101 supra.
132. See supra notes 38 & 128.
134. The courts also have noted that § 904 of RICO (title IX) specifically states that "the provisions of this title shall be liberally construed to effectuate its remedial purposes . . ." P.L. 91-452, § 904, 1970 U.S. CODE CONG. & ADMIN. NEWS 4036. See also United States v. Turkette, 452 U.S. 576 (1981).
135. See generally PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967). See also Mitchell, supra note 17, at 44, where the author quotes a comment of Brian Murtagh's (see supra note 28), that organized crime has become "a lot smarter with their money. They're using offshore banks, 'funny banks' within the U.S. - laundering [money] has gotten a lot more sophisticated."
to prosecute defendants who, because of the wide reach of the statute, technically fall within its ambit even though Congress had not targeted them for the special RICO sanctions.\textsuperscript{136} During the last year, however, the Justice Department has curtailed its approval of RICO prosecutions, which may indicate a trend toward greater selectivity in naming RICO defendants.\textsuperscript{137}

Among the cases which might be criticized as demonstrating a lack of prosecutorial discretion under RICO is \textit{United States v. Marubeni}.\textsuperscript{138} The racketeers in \textit{Marubeni} were not members of organized crime but were managers of a corporation who sought to obtain contracts by bribing a public official. In limiting forfeitures to an "interest in an enterprise" and holding that the profits and proceeds of a racketeering enterprise were not forfeitable interests under the Act, the court may have been expressing concern that the defendant cable manufacturers were not proper RICO defendants.\textsuperscript{139}

The court also may have been reacting to the government's overbroad interpretation of the RICO forfeiture provision, which had construed forfeitable interest as "any form of income or proceeds." If the court had accepted the government's definition of "interest," the defendants would have had to forfeit all the proceeds earned from the performance of the contracts. This forfeiture would seem-

\textsuperscript{136} The Second Circuit expressed its concern in observing that "the potentially broad reach of RICO poses a special danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended. Therefore, we caution against undue prosecutorial zeal in invoking RICO." \textit{United States v. Huber}, 603 F.2d 387, 395-96 (2d Cir. 1979). For a thorough discussion of the problems surrounding potential abuse of RICO, see Note, \textit{United States v. Sutton: the Sixth Circuit Curbs Abuse of RICO, the Federal Racketeering Statute}, 28 CLEV. ST. L. REV. 629, 653-65 (1979).

\textsuperscript{137} According to the Murtagh interview, \textit{supra} note 28, the Justice Department has authorized only 55-60 prosecutions during the last year.

\textsuperscript{138} 611 F.2d 763 (9th Cir. 1980). See \textit{supra} text accompanying notes 82-93.

\textsuperscript{139} This concern over having "proper" RICO defendants before the court was recently voiced in a civil RICO case. In \textit{Waterman Steamship Corp. v. Avondale Shipyards, Inc.}, 527 F. Supp. 256 (E.D. La. 1981), a products liability case, the plaintiff steamship companies charged that the defendant contractors and manufacturers of engine couplings for ocean-going vessels engaged in a pattern of racketeering activity, mail fraud and wire fraud in failing to recall or advise shippers of allegedly defective couplings. The judge dismissed the RICO counts, opining that Congress' overriding intent in drafting RICO in such broad terms was to provide an effective mechanism for eradicating organized crime from the social fabric . . . . I conclude that the history of the statute reveals a clearly expressed legislative intent that RICO should apply only to actions involving organized crime activities and not to everyday civil actions like those in this proceeding, involving private litigants with no relation to organized crime (footnote omitted).

\textit{Id.} at 260.
ingly include not only the profits from the contracts, but also the cost of performing the contracts. Sanctioning the corporations in this manner would injure innocent employees of the corporation since payments for the work performed by these employees would be included in the gross proceeds subject to forfeiture. The court may have anticipated the consequences of such a broad forfeiture order when it denied the forfeiture. Had the government been more sensitive to the commingling of the illegitimate and legitimate aspects of the performance of the contracts and asked only for the forfeiture of profits, the court may have acquiesced. Instead, the government persisted in its argument, and the court consequently set the only major precedent which serves to limit the scope of the RICO Act. The *Marubeni* decision, ironically, touches on an issue most critical to the success of RICO: the objects of forfeiture. If the government cannot demand forfeiture of the profits of organized crime, then the forfeiture provision loses its effectiveness.

The unsatisfactory results of *Marubeni* should encourage future courts to limit that case to its own facts and construe the forfeiture provision liberally, consistent with judicial interpretation of the remainder of the RICO statute.

Perhaps the most effective way to free the forfeiture provision from *Marubeni* would be to amend the forfeiture provision to specifically provide for the forfeiture of profits derived from racketeering activity. A forfeiture provision which encompasses profits of illegal activities already exists for those engaged in "continuing criminal enterprises" pursuant to 21 U.S.C. § 848(a)(2)(A). Since a wholly illegitimate enterprise under RICO is akin to the notion of a continuing criminal enterprise, such an amendment would be consistent with congressional intent to remove profits from these types of enterprises. Where the RICO enterprise is a legitimate

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140. The Criminal Justice Newsletter (a publication of the National Council on Crime & Delinquency) Vol. 12, No. 22, Nov. 9, 1981, reported that Attorney General William French Smith presented a 17-point anti-crime program at an Oct. 23, 1981 hearing before the Senate Subcommittee on Criminal Law. Point 17 proposes new legislation that will provide, inter alia, "specific authority for the forfeiture of the proceeds of an enterprise acquired or maintained in violation" of RICO. According to Attorney General Smith, the Justice Department is currently drafting the legislation.

141. The Comprehensive Drug Abuse Prevention and Control Act of 1970, passed by the same Congress in the same month as RICO, also provides for criminal forfeiture. 21 U.S.C. § 848(a)(2) (1976) states in pertinent part: "Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States - (A) the profits obtained by him in such enterprise . . . " (emphasis added).
one, the forfeiture of illegal profits distilled from the gross proceeds of the enterprise would not constitute an inequitable result.

CONCLUSION

Congress enacted RICO as part of a calculated effort to curb the growth of organized crime. Recognizing the unconventional business practices of organized crime members and desiring to bring them to an end, Congress resorted to unconventional methods. One such tactic was the creation of a substantive offense which consists of a violation of two pre-existing state or federal laws. Another was the introduction of *in personam* criminal forfeiture. In addition to forfeiture, RICO defendants were subjected to the possibility of serving consecutive sentences for all the underlying crimes.

Liberal construction and severe sanctions have made RICO a formidable weapon. Thus far, the courts have been generally sympathetic to the government's need for such a weapon and have implemented the legislative intent of the Act. Given the chameleon-like character of organized crime, the government requires a remedial statute which is wide-reaching and backed by enhanced penalty provisions. These same features, however, render RICO susceptible to misuse, since under a broad construction of the Act any two offenses can be linked to form a RICO violation. So long as the government judiciously selects and approves its RICO prosecutions, the courts will adhere to the liberal construction of the Act as provided in *Turkette*. If not, inequities will result, and the courts will turn hostile and attempt to limit the application of the RICO provision. If this occurs, an essential component in the government's fight against organized crime will have been needlessly lost.  

REGINA KWAN PETERSON

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142. As one commentator has colorfully stated, the government must exercise its prosecutorial discretion wisely or it will inadvertently "kill the goose that potentially can lay for you a golden egg." Blakey, *Materials on RICO: Criminal Overview*, in 1 Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime 33-34 (1980).