

ASSETS HELD HOSTAGE: PRETRIAL RESTRAINT OF THIRD-PARTY PROPERTY UNDER CRIMINAL RICO

Federal prosecutors who pursue convictions under the Racketeer Influenced and Corrupt Organizations statute¹ (RICO) may deserve hefty raises. Not only have they discovered an effective law enforcement tool in criminal forfeiture,² but they also have found a means to reduce the federal deficit.³ In addition to possible forfeiture, a racketeering⁴ indictment carries with it the threat of a pretrial restraint of a wide range of assets.⁵ Armed with such a weapon against Wall Street investors, federal

1. Organized Crime Control Act of 1970, tit. IX, Pub. L. No. 91-452, 84 Stat. 922, *amended by* Comprehensive Crime Control Act of 1984, tit. II, Pub. L. No. 98-473, § 302, 98 Stat. 2040 (1970), (codified as amended at 18 U.S.C.S. §§ 1961-1968 (Law. Co-op. 1979 & Supp. 1989)).

2. Section 1963 of the RICO statute authorizes a fine of up to \$25,000 and imprisonment of up to 20 years, as well as the forfeiture of specific interests for a criminal RICO offense. *See infra* notes 9-11 and accompanying text.

3. Under § 1963(f), the Attorney General must deposit in the Treasury any proceeds from the sale of forfeited assets in excess of the U.S. government's expenses of carrying out the forfeiture and sale and any legitimate third-party claims. 18 U.S.C.S. § 1963(f) (Law. Co-op. Supp. 1989).

4. Any person who acquires an interest in or conducts the affairs of an enterprise through a pattern of racketeering activity commits an offense under the RICO statute. *See* 18 U.S.C.S. §§ 1961-1963 (Law. Co-op. 1979 & Supp. 1989); Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57, 59 (1983).

"Racketeering activity" means any of a number of acts (or threats) under federal (and state) law, including securities fraud, mail and wire fraud, bankruptcy fraud, and embezzlement from pension, welfare and union funds. 18 U.S.C.S. § 1961(1) (Law. Co-op. Supp. 1989). A "pattern of racketeering activity" requires at least two acts of racketeering. 18 U.S.C. § 1961(5) (1982). *See also* H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989) (construing § 1961(5)).

An "enterprise" includes "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) (1982). "Enterprise" encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 452 U.S. 576 (1981).

See generally 1 K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* §§ 7:01-:30 (1984 & Supp. 1988).

5. Section 1963(d) authorizes the restraint of any forfeitable property, which § 1963(a)(2) defines as the defendant's "(A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of [in violation of RICO's substantive provisions]." 18 U.S.C.S. § 1963(a)(2) (Law. Co-op. Supp. 1989).

prosecutors have begun "milken"⁶ capital-rich securities firms,⁷ which hope to avoid the restraint or ultimate forfeiture of their assets under RICO.

RICO's criminal forfeiture provision, section 1963, empowers a district court to enter a pretrial restraining order or injunction, to require the posting of a bond, or to "take any other action" to prevent a defendant from dissipating potentially forfeitable property prior to conviction.⁸ Among the types of property subject to forfeiture⁹ is a defendant's proprietary interest¹⁰ in a legitimate business such as a corporation or partnership.¹¹ To the extent that unindicted third parties hold similar property interests in the defendant's business,¹² a restraint on the business' underlying assets can deprive these third parties of their property interests,¹³ effectively allowing the government to hold the assets hostage

6. This reference is to Michael Milken, the former head of the high-yield "junk bond" department of Drexel Burnham Lambert, Inc. The federal government has indicted Mr. Milken and two associates on 98 counts, including racketeering and securities and tax fraud, and is seeking forfeiture of \$1.8 billion, most of which consists of salaries and bonuses paid to Milken. 21 SEC. REG. & L. REP. 483 (1989). Drexel itself is a Wall Street investment firm that avoided criminal RICO charges when it agreed to plead guilty to lesser federal offenses and pay \$650 million to the government. *See* Wall St. J., Jan. 25, 1989, at A1, col. 6; Wall St. J., Dec. 23, 1988, at A6, col. 2. Drexel also agreed to a settlement of SEC civil charges, under which it will pay additional penalties and undergo personnel and structural changes. *See* Wall St. J., Apr. 14, 1989, at A3, col. 1.

7. On August 5, 1988, federal prosecutors indicted several officials of Princeton/Newport Partners, L.P., an investment partnership, marking the first time the U.S. government has charged officials of a securities firm under criminal RICO. *See infra* notes 146-83 and accompanying text. Federal prosecutors have indicated that they will continue to use RICO to fight securities crime, much to the dismay of investment bankers and broker-dealers. *New RICO Use: A Step Too Far?*, NAT'L L.J., Nov. 28, 1988, at 27. Federal prosecutors also have recently extended RICO to Chicago's futures markets, where the government has charged a number of traders with criminal RICO violations following an FBI undercover operation lasting over two years. *See* Chi. Tribune, Aug. 3, 1989, at 1, col. 6; Wall St. J., Aug. 3, 1989, at A1, col. 6.

8. 18 U.S.C.S. § 1963(d)(1) (Law. Co-op. Supp. 1989).

9. Property subject to criminal forfeiture under RICO includes "(1) real property . . . ; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." *Id.* § 1963(b).

10. *See supra* note 5.

11. *See* United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *reh'g denied*, 714 F.2d 137, *cert. denied*, 465 U.S. 1005 (1984) (defendant's one-third interest in partnership subject to forfeiture); United States v. Spilotro, 680 F.2d 612 (9th Cir. 1982) (defendant sole shareholder of corporation); Comment, *RICO Forfeitures and the Rights of Innocent Third Parties*, 18 CAL. W.L. REV. 345, 353 (1982). *See also* Reed & Gill, *supra* note 4, at 71.

12. The scope of this Note encompasses third parties in general and does not deal specifically with legal distinctions among shareholders, limited and general partners, secured and unsecured creditors, spouses, or other third parties who may dispute a RICO defendant's legal ownership of potentially forfeitable property.

13. Two commentators note that the attempt to forfeit assets of a legitimate enterprise impli-

to its prosecutorial demands.¹⁴

In *United States v. Regan*,¹⁵ the Second Circuit interpreted section 1963 as authorizing restraining orders against unindicted third parties. The court rejected the third parties' argument that common-law principles preclude the court from imposing a restraining order on parties who are not before the court.¹⁶ The Second Circuit's decision may extend the scope of pretrial restraints to encompass ultimately nonforfeitable property.¹⁷

This Note examines the extent to which Congress intended to authorize district courts to bind unindicted third parties with pretrial restraining orders under criminal RICO. Part I discusses the distinction between criminal and civil forfeiture and the Supreme Court's recognition of the due process implications of forfeiture with respect to innocent

ates the valid proprietary rights of third parties more significantly than an attempt to forfeit the assets of an illegitimate enterprise. See Reed & Gill, *supra* note 4, at 58 n.6.

This Note focuses on third-party property interests in legitimate enterprises in which a RICO defendant also has an interest. While it does address procedural due process concerns with respect to third parties, see *infra* notes 42-57, this Note more narrowly focuses on the extent to which a district court has the statutory authority to restrain unindicted third-party property.

14 Some commentators believe that federal prosecutors utilized the threat of asset restraints to coerce Drexel, Burnham, Lambert to avoid racketeering charges and agree to a plea bargain. See Appleson, *Racketeering Controversy Rages as Drexel Awaits Charges*, The Reuter Bus. Rep., Dec. 1, 1988 ("RICO is like the birth control pill was to the sexual revolution in the 1960s. It could result in prosecutorial promiscuity," quoting Stanley Arkin, a prominent white-collar criminal defense lawyer and lecturer on RICO); Orland, *Business Forum: The Drexel Case; When Pressure Forces Guilty Pleas*, N.Y. Times, Jan. 1, 1989, at C3, col. 1 (Drexel case gives pause to reexamine "the fundamental fairness of this staggering imbalance of power"); *supra* note 6. *But cf.* Grady, *Some Would Indict RICO*, Chi. Tribune, Aug. 3, 1989, at 22, col. 1 ("[RICO] should apply if your collar is blue or if your collar is white or if you don't wear a collar at all. A person's name doesn't have to end in a vowel to be prosecuted under this statute.") (quoting Professor G. Robert Blakey, one of the original drafters of RICO). For the Supreme Court's most recent view regarding the scope of RICO, see *infra* note 69.

While this Note was in the publication process, the United States Justice Department publicly announced new guidelines for criminal RICO prosecutions. See Wall St. J., Oct. 25, 1989, at B5, col. 4. The new guidelines provide that "the government will not seek to disrupt the normal, legitimate business activities of the defendant" when attempting to freeze assets before trial, and that the government "will not seek . . . to take from third parties assets legitimately transferred to them." *Id.* The impact of these guidelines, however, is unclear. David Runkel, the Justice Department's chief spokesman, described the new guidelines as "a codification and a clarification far more than a new direction." *Id.* The guidelines themselves were not publicly available before publication of this Note. Telephone interview with Kathy Schroeder, U.S. Attorney's Office, St. Louis, Missouri (October 31, 1989).

15 858 F.2d 115 (2d Cir. 1988)

16 *Id.* at 120.

17 *Id.* at 120-22. See *infra* notes 163-65 and accompanying text.

third parties. Part II provides a perspective on the use of RICO's criminal forfeiture sanction as it affects third-party interests. Part III analyzes the Second Circuit's decision in *Regan* and the potential ramifications for third-party property owners. Finally, Part IV proposes legislation to delimit clearly a district court's power to preserve potentially forfeitable property prior to a RICO defendant's conviction.

I. THE DISTINCTION BETWEEN CRIMINAL AND CIVIL FORFEITURE AND ITS IMPLICATIONS WITH RESPECT TO THIRD-PARTY RIGHTS

A. *Origins and Development of Forfeiture*

The basic distinction between criminal forfeiture and civil forfeiture is that the former proceeds in personam,¹⁸ while the latter typically proceeds in rem.¹⁹ Until Congress passed RICO in 1970,²⁰ criminal forfeiture was a rarity in American jurisprudence.²¹ On the other hand, courts have widely applied civil forfeiture to further punitive, deterrent and remedial purposes²² and to remove prohibited property that Congress specifically identified as injurious to the public.²³ While the liberal application of civil forfeiture arguably could translate to the criminal context,²⁴ the history of the two proceedings belies this easy comparison.

18. An "in personam" action seeks judgment "against the person," involving personal rights and requiring jurisdiction over the person. BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

19. An "in rem" action is a proceeding "against the thing" or directly against property and requires jurisdiction over the property. *Id.* at 713.

20. *See* United States v. Busher, 817 F.2d 1409, 1412 n.4 (9th Cir. 1987) (RICO is the first modern statute "to impose forfeiture as a criminal sanction directly upon an individual defendant rather than through a separate in rem proceeding against property involved in a criminal context," (citing United States v. Huber, 603 F.2d 387 (2d Cir. 1979)); S. REP. NO. 225, 98th Cong., 1st Sess. 193, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3376 [hereinafter S. REP. NO. 225]. *See also* Reed & Gill, *supra* note 4, at 69 n.29.

In 1970 Congress also provided for criminal forfeiture in § 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C.S. §§ 848, 853 (Law. Co-op. Supp. 1989)) (also known as the Continuing Criminal Enterprise Act (CCE)). *See generally* Markus, *Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 TEMP. L.Q. 1097 (1986).

21. *See* Reed & Gill, *supra* note 4, at 60-61.

22. *See infra* notes 48-50 and accompanying text.

23. *See* Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976) (Supreme Court looks at whether or not legislature labels forfeiture "criminal" when determining extent of constitutional protections available to property owners).

24. In specific instances, the Supreme Court effectively has disregarded or blurred the distinc-

1. *Criminal Forfeiture*

Criminal forfeiture arose under English common law as a punishment for the commission of specific crimes, but it fell into disfavor in this country.²⁵ In 1790, Congress proscribed criminal forfeiture for any conviction.²⁶ With one exception,²⁷ Congress abstained from such in personam forfeiture until 1970 when it enacted RICO's criminal forfeiture provision.²⁸

The critical characteristic of criminal forfeiture is that it follows and depends upon the property owner's conviction.²⁹ A court, therefore, must establish personal jurisdiction over the defendant to render the defendant's property forfeitable upon conviction.³⁰ By definition, an in personam forfeiture is a form of punishment, the scope of which the legislature determines when it defines the associated criminal conduct.³¹ The disassociation of the defendant from her property, therefore, supple-

tion between civil and criminal forfeiture. Dictum in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) suggests forfeiture could be used to punish the defendant himself. See *infra* notes 49-51 and accompanying text.

25 See Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 380-82 (1979). At common law, a convicted criminal forfeited all of her estate. The framers of the Constitution, however, specifically mentioned forfeiture only as punishment for treason and restricted its scope to the forfeiture of a traitor's life estate: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." U.S. CONST. art. III, § 3, col. 2

26. See Markus, *supra* note 20, at 1103 & n.34; Taylor, *supra* note 25, at 382 & n.26.

27. See Markus, *supra* note 20, at 1103 & n.35 (seizure of life estate of rebels and their sympathizers).

28. See *supra* note 20. Unlike common-law criminal forfeiture, RICO does not require the forfeiture of the defendant's entire estate, but instead requires the forfeiture of specifically enumerated property interests. See Reed & Gill, *supra* note 4, at 60; *supra* note 2.

29. See Reed & Gill, *supra* note 4, at 60. See, e.g., 18 U.S.C.S. § 1963(e) (Law. Co-op. Supp. 1989) ("Upon conviction . . . the court shall enter a judgment of forfeiture . . .") (emphasis added); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1036 (1980) ("Criminal forfeiture is based on personal guilt; the rights of the government in the property derive from an in personam judgment against the offender.").

30. "It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)).

31. At common law, there was no question as to the scope of a criminal forfeiture because the defendant forfeited her entire estate. See *supra* note 25. Under RICO, however, the scope of a defendant's criminal conduct determines the scope of the in personam forfeiture. See Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1985). The problem of defining the scope of a statutory in personam forfeiture, therefore,

ments the traditional criminal sanctions of fines and imprisonment.³²

2. *Civil Forfeiture*

As compared to criminal forfeiture, civil forfeiture has a relatively lengthy history³³ and has been much more widely accepted in this country.³⁴ A civil, or in rem, forfeiture is based on the legal fiction that the property itself is the offender.³⁵ The court thus exercises its jurisdiction solely over the potentially forfeitable property irrespective of any personal jurisdiction over the property owner.³⁶ In addition, title to property subject to civil forfeiture vests in the government at the time the property is in violation of the law.³⁷ Under this "relation back" doctrine, the government may void all transactions involving the forfeitable property that occur subsequent to the violation.³⁸

An in rem forfeiture proceeds independently of any criminal proceed-

is particularly complex when forfeitable property includes proprietary interests, and not just tangible real or personal property that the legislature defines as the instrument or reward of the crime.

32. See S. REP. NO. 225, *supra* note 20, at 191.

33. Civil forfeiture dates back to Biblical times and developed through medieval and modern England. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974); Markus, *supra* note 20, at 1105; Reed & Gill, *supra* note 4, at 63-65.

34. *Calero-Toledo*, 416 U.S. at 680-88.

35. *United States v. United States Coin & Currency*, 401 U.S. 715 (1971). See Reed & Gill, *supra* note 4, at 62.

36. Unlike an in personam forfeiture, the scope of an in rem forfeiture is clear and narrowly defined because the court's jurisdiction extends to the forfeitable property itself. See Reed, *supra* note 31, at 748, 758.

37. See Reed, *supra* note 31, at 756.

38. The relation back doctrine also allows the government to seize the property under civil forfeiture immediately and, under some circumstances, without prior notice or hearing. See *Calero-Toledo*, 416 U.S. at 678-79, 680 (1974) (no prior notice or hearing necessary under "limited circumstances" or in an "extraordinary situation"); cf. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (state statute permitting garnishment without early hearing violated due process clause of fourteenth amendment); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (state replevin provisions invalid under fourteenth amendment because result is deprivation of property without prior hearing). See also S. REP. NO. 225, *supra* note 20, at 193 ("A civil forfeiture is commenced by the government's seizure of the asset"). The Supreme Court has recently recognized the legitimate use of the relation back doctrine in the criminal forfeiture context. See *Caplin & Drysdale v. United States*, 109 S. Ct. 2646, 2653 (1989) (§ 853(c), relation back provision of Continuing Criminal Enterprise statute, "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture"); *United States v. Monsanto*, 109 S. Ct. 2657, 2665 (1989) (Congress did not "intend[] to permit the effectiveness of the powerful 'relation back' provision of § 853(c) . . . to be nullified by" district court's discretion to exempt from forfeiture or pretrial restraint assets that defendant intends to use to retain attorney). See also *infra* note 43; notes 109-22 and accompanying text.

ing against a defendant;³⁹ the owner's guilt or innocence of any related crime does not affect the outcome of an *in rem* proceeding.⁴⁰ In rem forfeiture, therefore, legitimately can impinge upon property rights of innocent third parties.⁴¹

B. Due Process Analysis

The Supreme Court has not determined whether due process protections⁴² apply to innocent third parties in criminal forfeiture cases.⁴³ There is a long line of precedent, however, that supports broad governmental power in civil forfeiture proceedings.⁴⁴

39. See *Calero-Toledo*, 416 U.S. at 684 ("proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*") (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972) (holding that fifth amendment double jeopardy clause does not bar forfeiture action subsequent to acquittal of smuggling charges because forfeiture did not involve two criminal trials or punishments). Conviction of an underlying offense is not a condition precedent to forfeiture of the property in an *in rem* proceeding. See 1 K. BRICKEY, *supra* note 4, at 322-23 n.434.

40. See *infra* notes 45-53 and accompanying text.

41. See *Reed*, *supra* note 31, at 756 & n.51.

42. The fifth amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The fourteenth amendment similarly reads: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

43. The Supreme Court recently has rejected several due process challenges to the forfeiture and pretrial restraint provisions of the Continuing Criminal Enterprise statute (CCE), 21 U.S.C. §§ 848, 853, as they apply to criminal defendants. In *Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989), the Court held that § 853 of the CCE, which requires the forfeiture of a criminal defendant's illegally acquired property and provides no exception for property used to pay attorney's fees, did not impermissibly burden defendant's sixth amendment right to retain counsel of his choice. Writing for the five-member majority, Justice White refused to invalidate the forfeiture provision despite the argument that it "upset the 'balance of forces between the accuser and the accused'" contrary to the due process clause of the fifth amendment. *Id.* at 2656. The Court stated that "due process claims alleging [abuses of forfeiture provisions] are cognizable only in specific cases of prosecutorial misconduct . . . or when directed to a rule that is inherently unconstitutional." *Id.* at 2657.

In a companion case, *United States v. Monsanto*, 109 S. Ct. 2657 (1989), the Court held that the CCE authorizes a district court to freeze assets in a defendant's possession, even when the defendant seeks to use such assets to pay his attorney. Justice White, writing for the same five-member majority, noted that the Court's holding in *Caplin & Drysdale* supported a finding that "a pretrial restraining order does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel," and that the criminal forfeiture statute, therefore, did not offend the fifth or sixth amendments. *Id.* at 2666-67 (citation omitted). The Court, however, expressly refrained from deciding whether the due process clause requires a hearing before a court may impose a pretrial restraining order. *Id.* at 2666 n 10.

44. See *United States v. Von Neumann*, 474 U.S. 242 (1986) (property owner had no due process right to speedy disposition of petition for remission or mitigation of forfeiture where postseizure

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁴⁵ the Supreme Court held that a civil forfeiture scheme is not unconstitutional merely because it interferes with the property interests of innocent property owners. The Court reaffirmed its prior decisions⁴⁶ that rejected the innocence of the property owner as a defense to forfeiture.⁴⁷ The Court, however, placed some emphasis on its finding that the particular forfeiture statutes at issue⁴⁸ furthered the "punitive and deterrent" purposes of similar forfeiture statutes.⁴⁹ The Court's reasoning suggests that legislative use of civil forfeiture does not necessarily conflict with punishing an individual for

hearing was provided); *United States v. Eight Thousand Eight Hundred & Fifty Dollars*, 461 U.S. 555 (1983) (due process does not require federal customs officials to conduct hearing before seizing forfeitable items); *Calero-Toledo*, 416 U.S. 663. *But cf.* *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971) (fifth amendment privilege against self-incrimination available in forfeiture proceeding); *Boyd v. United States*, 116 U.S. 616 (1886) (privilege against self-incrimination).

45. 416 U.S. 663 (1974). In *Calero-Toledo*, the police seized a yacht, on which they discovered marijuana, pursuant to a Puerto Rican statute that made vessels used to transport controlled substances subject to seizure and forfeiture to the Commonwealth of Puerto Rico. The police seized the yacht without providing notice or a hearing to the owner, who was neither involved in, nor aware of, the violation. *Id.* at 665-69.

The district court, relying on *Fuentes v. Shevin*, 407 U.S. 67 (1972), held that the failure to provide pre-seizure notice and hearing rendered the statute unconstitutional. The Supreme Court reversed, holding that the postponement of notice and hearing until after seizure did not violate due process because this case was an "extraordinary situation" justifying immediate seizure under *Fuentes*. 416 U.S. at 677. The Court found this case extraordinary because (1) the statutes served "a significant governmental purpose" by creating an in rem forfeiture proceeding; (2) pre-seizure notice and hearing might allow the owner to remove the property to another jurisdiction and thereby frustrate the purpose of the statutes; and (3) government officials, and not self-interested private parties, initiated the seizure. *Id.* at 676-80.

46. *See id.* at 683-86. *See, e.g.*, *Van Oster v. Kansas*, 272 U.S. 465 (1926) (forfeiture of innocent owner's automobile under state law did not violate fourteenth amendment); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (federal tax fraud forfeiture statute did not deprive innocent owner of property in violation of fifth amendment); *Dobbins Distillery v. United States*, 96 U.S. 395 (1878) (owner's innocence no defense to seizure of property used in connection with distillery); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (piracy conviction not a prerequisite to forfeiture of ship used in violation of federal admiralty statute).

47. 416 U.S. at 680, 683-86. The Court also reviewed the development of in rem forfeiture at common law and under federal customs and revenue laws, noting the proliferation of federal and state forfeiture statutes. *Id.* at 680-83.

48. P.R. LAWS ANN. tit. 24, § 2512 (a)(4), (b) (Supp. 1973) provided for the government seizure of "[a]ll conveyances . . . which are used, or intended for use, to transport [controlled substances]." P.R. LAWS ANN. tit. 34, § 1722 (1971) described the procedure for implementing the forfeiture of illegal conveyances, a procedure that included immediate seizure, subsequent notice and hearing, right to post bond, and ultimate sale at auction. *See* 416 U.S. at 665-67 nn.1-2.

49. *Id.* at 686. The Court suggested that forfeiture statutes, in addition, might induce innocent third parties, such as lessors, bailors, or secured creditors, "to exercise greater care in transferring possession of their property." *Id.* at 687-88.

the underlying criminal activity.⁵⁰ In this respect, the decision somewhat blurs the distinction between civil and criminal forfeiture.⁵¹

In *Calero-Toledo*, the Supreme Court did not rule out the possibility that forfeiture statutes can have constitutional implications in other circumstances.⁵² The Court recognized that when a third-party owner is not involved in, and lacks awareness of, the wrongful activity and does all he reasonably can do to prevent the wrongful use of his property, forfeiture may not serve a legitimate purpose and may be unduly oppressive.⁵³ The Court thus did not foreclose the innocence of third-party property owners as a defense in civil forfeiture proceedings.

Despite the Supreme Court's almost uniform approval of civil forfeiture statutes regarding their effect on third-party property interests,⁵⁴ it is unclear whether the Court would apply the same standard of due process review to criminal forfeiture statutes such as RICO. The Court at least partially has justified its approval of civil forfeiture on the in rem nature of the contested forfeiture statutes.⁵⁵ On the other hand, the Court has recognized the "quasi-criminal" nature of forfeiture statutes that relate to the property owner's wrongdoing.⁵⁶ The Supreme Court has not addressed directly the hazy distinction between criminal and civil forfeiture. Until it does, lower courts should consider the historical and legal differences between in personam and in rem forfeitures before con-

50 See *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971) (forfeiture proceedings, though civil in form, are criminal in nature when instituted because of owner's illegal use of property); *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (forfeiture proceeding is "quasi-criminal" in character).

One commentator suggests that the Supreme Court applies greater constitutional protection to punishments that the legislature labels as "criminal" even in the context of forfeiture statutes. He concludes that the Court will consider property forfeitures as criminal only if they carry that legislative label. Clark, *supra* note 23, at 382-83, 397. See also 1 K. BRICKEY, *supra* note 4, at 322 (forfeiture proceedings are typically "in rem civil actions with quasi-criminal characteristics").

Other forms of civil forfeiture, garnishment and attachment, are generally governed by state law. Both are provisional remedies, typically for actions by individuals or entities seeking money judgments and are governed by the Federal Rules of Civil Procedure. 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 2931-36 (1973).

51 See *supra* notes 25-41 and accompanying text.

52 *Calero-Toledo*, 416 U.S. at 688-90. The Court clarified that *Coin & Currency*, 401 U.S. 715, did not overrule its prior decisions upholding the forfeiture of innocent parties' property. The Court distinguished *Coin & Currency* as applicable to statutes that apply only to persons "significantly involved in a criminal enterprise." 416 U.S. at 688 (quoting *Coin & Currency*, 401 U.S. at 721).

53 *Calero-Toledo*, 416 U.S. at 689-90.

54 See *supra* note 46 and accompanying text.

55 See *supra* note 47.

56 See *supra* note 50 and accompanying text.

cluding that the relatively large body of in rem forfeiture case law applies with equal force to an in personam setting such as RICO.⁵⁷

II. RICO—THE RESURRECTION OF CRIMINAL FORFEITURE

RICO represents the first modern statute⁵⁸ to impose forfeiture as a punishment directly upon an individual, rather than as a separate proceeding against property involved in criminal conduct.⁵⁹ However, various components of RICO's criminal forfeiture provision, section 1963,⁶⁰ indicate that Congress incorporated some of the concepts of an in rem forfeiture to facilitate punishment of the wrongdoer.⁶¹ Because RICO also contemplates the forfeiture of third-party property, this apparent conceptual conflict permits the inadvertent punishment of innocent third parties under the guise of an in personam forfeiture statute. An analysis of RICO's purpose, broad judicial construction, and procedurally complex forfeiture provision suggests that Congress correctly labeled RICO's criminal forfeiture sanction as an in personam punishment.

A. Racketeering Influenced and Corrupt Organizations Act of 1970

1. Statutory Framework and Judicial Construction

Congress enacted RICO to eliminate organized crime's infiltration of legitimate businesses.⁶² Section 1963 of the statute requires that the convicted defendant forfeit "any interest in . . . or property or contractual

57. For decisions that recognize this distinction, see *United States Coin & Currency*, 401 U.S. 715 (1974); *United States v. Reckmeyer*, 628 F. Supp. 616, 619 (E.D. Va.) (in rem is legal fiction "constitutionally infirm in the punitive context of an in personam forfeiture"), *cert. denied*, 479 U.S. 850 (1986); *United States v. Veon*, 538 F. Supp. 237, 242 (E.D. Cal. 1982) (distinctions between proceedings in rem and in personam "make resort to civil forfeiture cases as guidance in criminal forfeiture cases" questionable); Reed & Gill, *supra* note 4, at 68 (concluding that *United States Coin & Currency* held "in personam procedures provide greater due process protections than in rem procedures"). *But cf.* *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("no substantial difference between an in rem forfeiture proceeding and a forfeiture proceeding brought directly against the owner" with respect to severity of punishment under eighth amendment).

58. The Continuing Criminal Enterprise statute, 21 U.S.C. § 848 (1982), which also provided for criminal forfeiture of a defendant's illicit profits and interest in an enterprise, was enacted in 1970. See *Controlled Substances Act of 1970*, Pub. L. 91-513, 84 Stat. 1242 (1970).

59. Congress specifically labeled RICO criminal forfeiture an "in personam" punishment. See S. REP. NO. 225, *supra* note 20, at 193.

60. 18 U.S.C.S. § 1963(a)-(m) (Law. Co-op. Supp. 1989).

61. See *infra* notes 109-22 and accompanying text.

62. *Russello v. United States*, 464 U.S. 16, 28 (1983); *United States v. Turkette*, 452 U.S. 576, 591-93 (1981) (citing House and Senate hearings).

right affording a source of influence over" any enterprise "which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of [s]ection 1962."⁶³ Congress reinstated in personam forfeiture under section 1963 to separate the racketeer from the corrupted organization and to prevent his continued control of the enterprise from prison.⁶⁴

Although Congress enacted RICO to fight organized crime, it has not precluded RICO from reaching white collar crime in general.⁶⁵ Congress broadly defined the term "racketeering activity" to include a wide range of predicate offenses that are not unique to organized crime.⁶⁶ By giving RICO such a broad scope, Congress gave prosecutors a potent law enforcement tool, leaving courts the difficult task of applying a substantively and procedurally complicated statute.

Recognizing Congress' purpose behind RICO's criminal forfeiture provision, the Supreme Court has favored a broad reading of the criminal RICO statute.⁶⁷ In *Russello v. United States*,⁶⁸ the Supreme Court stated

63 18 U.S.C.S. § 1963(a). See *supra* note 4.

Section 1962 makes it unlawful for any person

- (a) . . . who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . , 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
- (b) . . . through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise
- (c) . . . employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity
- (d) . . . to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C.S. § 1962 (Law. Co-op 1979 & Supp. 1989).

64 See *Russello*, 464 U.S. at 27-28 (forfeiture represents "attack on . . . [racketeer's] source of economic power itself") (quoting S. REP. NO. 617, 91st Cong., 1st Sess. 76, 79 (1969)); *Huber*, 603 F.2d at 392 (forfeiture designed not only to punish, but also to separate racketeer from enterprise); 1 K. BRICKEY, *supra* note 4, at 319

65 1 K. BRICKEY, *supra* note 4, at 233 See also Lynch, *RICO: The Crime of Being a Criminal. Parts I & II*, 87 COLUM. L. REV. 661 (1987). See *supra* notes 6-7.

66 18 U.S.C.S. § 1961(1) (Law Co-op Supp. 1989). See *supra* note 4.

67 See generally *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989) (refusing to read narrowly RICO's "pattern of racketeering" element as requiring allegation and proof of "organized crime" nexus); *United States v. Turkette*, 452 U.S. 576 (1981) (holding in favor of broad definition of "enterprise"); *supra* note 4. See also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) ("RICO is to be read broadly" not only because of its "expansive language and overall approach" but also because of express admonition that RICO must "be liberally construed to effectuate its remedial purposes") (citations omitted).

68 464 U.S. 16 (1983).

that RICO's legislative history demonstrates Congress' intent "to provide new weapons of unprecedented scope" for its fight against organized crime.⁶⁹ The Court held that interests subject to forfeiture under section 1963 include profits and proceeds that the defendant derived from racketeering and not merely his interest in the enterprise.⁷⁰

In *Russello*, the Supreme Court refused to uphold a narrow reading of the term "interest" in section 1963, partially because such a reading would contradict legislative intent.⁷¹ The Court suggested that Congress did not intend to limit section 1963 forfeiture with "rigid and technical definitions," but selected a more general term in keeping with the statute's policy of broad coverage.⁷² The Court reasoned that restricting section 1963 to forfeiture of interest in the enterprise would provide the racketeer an incentive to loot the infiltrated enterprise and thereby defeat Congress' goal of separating the racketeer from his illegal profit.⁷³

Lower federal courts have implemented Congress' desire to remove the criminal RICO defendant from the corrupted enterprise by identifying a wide array of forfeitable interests.⁷⁴ Courts have found that a defendant's entire proprietary interest in the enterprise is subject to forfeiture, whether or not the defendant has used underlying assets in connection

69. *Id.* at 26-27. The Court recognized the uniqueness of Congress' purpose to create new remedies to "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." *Id.* at 27 (emphasis added) (quoting S. REP. NO. 617, 91st Cong., 1st Sess. 76, 79 (1969)).

The Court recently has also rejected the argument that RICO's scope extends only to organized crime in the traditional or functional sense. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2894, 2903 (1989). The Court stated, "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *Id.* at 2905.

70. 464 U.S. at 29 n.3. The district court convicted the defendant under criminal RICO for his involvement in an arson ring and ordered the forfeiture of his fraudulent insurance proceeds. *Id.* at 17-18. The Supreme Court affirmed, resolving a split among the circuits as to the forfeitability of profits or proceeds from the racketeering activity. *Id.* at 18, 29. Congress incorporated the *Russello* decision in its 1984 amendments to § 1963. See B. GEORGE, *THE COMPREHENSIVE CRIME CONTROL ACT OF 1984*, 585, 593-95 (1986).

71. 464 U.S. at 26-29.

72. *Id.* at 21.

73. *Id.* at 28.

74. See, e.g., *United States v. Busher*, 817 F.2d 1409, 1410, 1412 (9th Cir. 1987) (92% interest in corporation and real estate); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983) (one-third interest in partnership); *United States v. Spilotro*, 680 F.2d 612, 614 (9th Cir. 1982) (100% of corporate stock); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982) (motel); *United States v. Horak*, 633 F. Supp. 190 (N.D. Ill. 1986) (job, salary, bonus, pension and profit share).

with the racketeering activity.⁷⁵ Because forfeiture completely removes a defendant from the enterprise, the defendant may be forced to forfeit more than illicit gains and tainted assets upon conviction.⁷⁶ With the financial stakes so high, the RICO defendant has a great incentive to dissipate her assets prior to conviction.⁷⁷

2. Pretrial Restraint of Assets

a. The Development of Procedures

Under RICO, Congress authorized district courts to enter pretrial restraining orders or to take other actions "in connection with any property or other interest subject to forfeiture."⁷⁸ Although the legislative history of the 1970 Act is silent on this point, Congress presumably intended the pretrial restraining order to prevent a defendant's transfer of potentially forfeitable property after the indictment but before conviction.⁷⁹ RICO's original restraining order provision, however, did not distinguish between defendant and third-party property interests.⁸⁰

75. See, e.g., *United States v. Anderson*, 782 F.2d 908 (11th Cir. 1986); *Cauble*, 706 F.2d at 1349-50 (RICO criminal forfeiture does not require identification of specific assets of an enterprise but only requires forfeiture of a defendant's proprietary interest in enterprise).

76. The following hypothetical illustrates this point. Assume a RICO defendant owns 100% of a small hotel and restaurant that have a total net worth of \$1 million and that she made a profit of \$500,000 through her racketeering activity. Assume also that her racketeering activity required solely the use of one of the hotel's suites and none of the hotel's or restaurant's other services or facilities. Upon conviction of racketeering charges, the defendant would forfeit her entire business and proceeds. This is true even though she used only a small portion of the business to facilitate her racketeering activity (for a total forfeiture of \$1.5 million).

77. In the legislative history of the Comprehensive Forfeiture Act of 1984, see *infra* notes 96-145 and accompanying text, Congress recognized that "a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity" to transfer his assets or otherwise escape forfeiture. S. REP. NO. 225, *supra* note 20, at 195.

78. 18 U.S.C. § 1963(b) (1982), amended by 18 U.S.C.S. § 1963(d) (Law. Co-op. Supp. 1989).

79. Commentators note that the legislative history of the 1970 Act provides no guidance as to the procedures that apply to RICO's pretrial restraining order provision and indicates no concern on behalf of Congress as to the potential restraint of third-party interests. See Reed & Gill, *supra* note 4, at 73-74 & n.139. See also Reed, *supra* note 31, at 761 & n.84 (postindictment, pretrial restraining order to prevent defendant from dissipating assets prior to verdict) (citing H.R. REP. NO. 1549, 91st Cong., 2d Sess. 57 (1970) and S. REP. NO. 617, 91st Cong., 1st Sess. 160 (1969)).

80. RICO's original restraining order provision simply read:

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 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.

18 U.S.C. § 1963(b) (1982).

Before 1984, no legislatively mandated procedures existed to protect property interests of the defendant or third parties prior to trial.⁸¹ The Federal Rules of Criminal Procedure provided the only pretrial procedural guidelines for criminal forfeiture under RICO.⁸² Rule 7(c)(2), added in 1972 to implement criminal forfeiture, provides that “[w]hen an offense charged may result in a criminal forfeiture, the indictment or information shall allege *the extent of the interest or property subject to forfeiture.*”⁸³ On its face, Rule 7(c)(2) pertains only to the content of the indictment or information and, therefore, provides no specific guidance concerning the appropriate pretrial restraints a district court may impose.

In the absence of more specific procedures in section 1963, or any explicit reference to the use of the Federal Rules of Civil Procedure,⁸⁴ federal courts employed restraining orders and injunctions,⁸⁵ typically civil remedies, in a criminal context.⁸⁶ District courts thus had to rely solely on their discretion to formulate pretrial orders to prevent defendants and third parties from dissipating forfeitable assets.⁸⁷ The absence of proce-

81. The only reference to third-party interests appeared in § 1963(c), which provided that the government would make “due provision for the rights of innocent persons” upon disposition of the forfeited property after conviction. The remainder of § 1963(c) dealt with the Attorney General’s administrative procedures for seizure and the remission or mitigation of forfeiture. Section 1963(c) explicitly required reference to customs laws for postconviction procedural guidance. *See* 18 U.S.C. § 1963(c) (1982).

Some commentators regarded former § 1963’s reliance on customs laws, which proceeded in rem, as misplaced. *See* Reed & Gill, *supra* note 4, at 73 (“In rem procedures cannot be applied to effectuate an in personam forfeiture.”)

82. *See generally* 1 K. BRICKEY, *supra* note 4, at 335.

83. FED. R. CRIM. P. 7(c)(2) (emphasis added).

Rule 7(c)(2) was “intended to provide procedural implementation” of the 1970 Act. FED. R. CRIM. P. 7(c)(2) advisory committee’s note. *See also* FED. R. CRIM. P. 31(e) (special verdict of criminal forfeiture where indictment alleges extent of interest); FED. R. CRIM. P. 32(b)(2) (judgment of criminal forfeiture authorizes Attorney General to seize interest or property).

The indictment or information thus provides the *defendant* notice of what property is potentially forfeitable. *See* Markus, *supra* note 20, at 1098.

84. FED. R. CIV. P. 65(d) might provide a source of further procedures courts must follow in fashioning pretrial restraints. *See infra* note 87.

85. *See generally* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2941-62 (1973).

86. FED. R. CRIM. P. 54(b)(5) provides that the criminal rules do *not* apply to federal *civil* forfeitures. The 1972 advisory committee’s note indicates that the word “civil” was added to clarify that the criminal rules apply only to criminal forfeitures, consistent with Congress’ intent. FED. R. CRIM. P. 54(b)(5) advisory committee’s note, *citing* S. REP. NO. 617, 91st Cong., 1st Sess. 160 (1969).

87. *See, e.g.,* United States v. L’Hoste, 609 F.2d 796, *reh’g denied*, 615 F.2d 383 (5th Cir. 1980) (district court has discretion relating to *collateral* measures to preserve property rather than to for-

dural guidelines raised concern that pretrial restraining orders effectively deprived defendants and third parties of their property interests without adequate notice or an opportunity for a hearing.⁸⁸

b. Potential Harm to Third Parties

Pretrial restraints of potentially forfeitable property restrict the traditional property rights of alienability and enjoyment.⁸⁹ Not only can property restraints deprive third parties of the "continued possession and use of" property,⁹⁰ but these restraints can cause significant economic damage to legitimate enterprises that possess an interest in the restricted property.⁹¹ A corporation, for example, whose shareholder is indicted

feiture itself), *cert. denied*, 449 U.S. 833 (1980); *United States v. Veon*, 538 F. Supp. 237, 240 (E.D. Cal. 1982) (RICO and Continuing Criminal Enterprise statutes provide "little guidance as to how and under what circumstances" district court may grant restraining orders). *Cf.* *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981) (indictment alone not enough to allow restraining order under Continuing Criminal Enterprise statute). *But cf.* *United States v. Beckham*, 562 F. Supp. 488 (E.D. Mich. 1983) (refusing to apply standard that court determine whether jury is likely to find RICO defendants guilty beyond reasonable doubt before it may issue pretrial restraining order).

Some courts have applied the Federal Rules of Civil Procedure in the criminal forfeiture context. *See, e.g.*, *United States v. Thier*, 801 F.2d 1463, 1468, *reh'g denied*, 809 F.2d 249 (5th Cir. 1986) (because Rule 65 applies "to the issuance of all restraining orders and injunctions by the courts of the United States" and because statutory language does not negate the application of Rule 65, the Rule applies to criminal forfeiture under Comprehensive Drug Abuse Prevention and Control Act); *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (recognizing Rule 65 requirement of immediate hearing after *ex parte* restraining order under RICO). *But cf. Beckham*, 562 F. Supp. at 489 (refusing to adopt *Spilotro* standard).

Under the Federal Rules of Civil Procedure,

[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

F.R.D. R. CIV. P. 65(d) (emphasis added). The language of Rule 65(d) suggests that, where a federal court chooses to apply this rule of procedure in the context of a criminal RICO restraining order, certain third parties would be bound not to assist defendants in dissipating property prior to conviction. It is unlikely, however, that the prospect of contempt sanctions alone sufficiently will deter third parties from violating the order. *See infra* note 107.

88. *See Reed & Gill, supra* note 4, at 72-73 (no statutorily mandated procedures to protect defendant and third-party property interests prior to trial).

89. *Reed & Gill, supra* note 4, at 76.

90. *See id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972)) (citations omitted).

91. *See id.* at 72. "Partners may not welcome the United States as a new partner; secured parties will not particularly appreciate forfeiture of their secured interests; and shareholders cannot be said to happily suffer economic loss when a substantial part or all of their corporation is forfeited upon a defendant/co-owner's conviction." *Id.*

under RICO may incur damage such as depreciation of asset value, lost investment opportunities, and impairment of both goodwill and credit rating if a district court restrains property in which the corporation has an interest.⁹²

As originally enacted, section 1963 provided no pretrial standard for distinguishing defendant and third-party property interests.⁹³ This absence of pretrial procedural guidelines did not prevent district courts from restraining third-party property,⁹⁴ but it did lead to inconsistent treatment of third-party interests.⁹⁵

B. *Comprehensive Crime Control Act of 1984*

Section 302 of the Comprehensive Crime Control Act of 1984⁹⁶ (the 1984 Act) substantially overhauled RICO's criminal forfeiture provisions.⁹⁷ The 1984 Act expanded the scope of forfeitable property and provided more detailed procedures applicable to criminal forfeiture proceedings.⁹⁸ Although section 1963 now recognizes third-party interests,⁹⁹ it does not guarantee third-party property immunity from pretrial restraints or forfeiture.¹⁰⁰

Congress amended section 1963 because it believed that federal law enforcement agencies were not actively pursuing criminal forfeiture

92. See *id.* (adding that "in a complex RICO prosecution the period between indictment and conviction may well exceed a year; following appeal, two years"). Economic damage may be particularly extensive when RICO is used to freeze the assets of investment firms, which rely heavily on the liquidity of their assets.

93. See *supra* note 80 and accompanying text.

94. See, e.g., *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980). In *L'Hoste*, the Fifth Circuit rejected the district court's conclusion that criminal RICO forfeiture was a discretionary sanction. The Fifth Circuit upheld the forfeiture of defendant's interest in stock despite the fact that his wife had a community property interest in the stock. The court concluded that Congress' provision of postconviction relief "plainly addressed the possible hardship that forfeiture could cause to innocent parties . . ." *Id.* at 812. See also Comment, *supra* note 11, at 356 (suggesting holding in *L'Hoste* constitutional because in personam forfeiture no greater deprivation of innocent spouse's community property interests than any other criminal penalty against guilty spouse).

95. Compare *L'Hoste*, 609 F.2d at 796 with *United States v. Ambrosio*, 575 F. Supp. 546, 552 (E.D.N.Y. 1983) (distinguishing *L'Hoste* and holding that innocence of third party in an in personam forfeiture proceeding is valid defense).

96. Comprehensive Crime Control Act of 1984, tit. III, Pub. L. No. 98-473, § 302, 98 Stat. 2040 (1984) (current version at 18 U.S.C.S. § 1963 (Law. Co-op. Supp. 1989)) (Title III also known as the Comprehensive Forfeiture Act of 1984).

97. See generally B. GEORGE, *supra* note 70, at 585; Reed, *supra* note 31, at 748.

98. See S. REP. NO. 225, *supra* note 20, at 193.

99. See *infra* notes 111-12, 134-45 and accompanying text.

100. See *infra* notes 112-13, 131, 138-39 and accompanying text.

under the RICO statute¹⁰¹ and that courts were unduly restricting the scope and effectiveness of the forfeiture sanction.¹⁰² In Congress' view, the government's failure to realize forfeiture's full potential as an economic weapon against racketeering¹⁰³ resulted from numerous statutory limitations and ambiguities.¹⁰⁴ The new law thus relaxed the limits on potentially forfeitable property and provided more extensive procedural guidance for pretrial restraints and postconviction forfeiture.¹⁰⁵

One of the most significant impediments to the effectiveness of criminal forfeiture was section 1963's failure adequately to prevent a defendant from escaping forfeiture by transferring or otherwise concealing forfeitable assets prior to conviction.¹⁰⁶ In amending section 1963, Congress intended to make it more difficult for a defendant to escape the economic impact of forfeiture.¹⁰⁷ The 1984 Act amendments and legislative history, however, strongly suggest that Congress did not intend to make criminal forfeiture more effective wholly at the expense of innocent third-party interests.¹⁰⁸

1. *Relation Back Doctrine*

The 1984 Act broadened the scope of property subject to forfeiture by extending the relation back doctrine¹⁰⁹ to criminal forfeiture.¹¹⁰ Section

101. S. REP. NO. 225, *supra* note 20, at 191-92, 194. See Reed, *supra* note 31, at 761.

102. S. REP. NO. 225, *supra* note 20, at 194-97 & nn.18, 20, 21 (citations omitted).

103. Title III of the 1984 Act also amended the Continuing Criminal Enterprise statute, 21 U.S.C. § 848 (1982), because of similar concerns with drug trafficking. 21 U.S.C.S. § 853 (Law. Coop. Supp. 1989) provides for criminal forfeiture of property of a defendant who violates § 848.

104. S. REP. NO. 225, *supra* note 20, at 191-92.

105. *Id.* at 192. See Reed, *supra* note 31, at 760-61.

106. S. REP. NO. 225, *supra* note 20, at 195. Congress recognized that, unlike civil forfeiture in which the government immediately seizes the asset, in criminal forfeiture the defendant retains the potentially forfeitable property until convicted of the substantive offense. A defendant who anticipates RICO charges, therefore, has ample opportunity to conceal assets and thereby escape forfeiture. See *id.* at 197; B. GEORGE, *supra* note 70, at 593.

107. See S. REP. NO. 225, *supra* note 20, at 195. Congress found that postindictment, pretrial restraining orders and contempt sanctions were insufficient mechanisms with which to preserve the economic impact of forfeiture.

108. See *id.* at 201 & n.29, 206 n.42.

109. See *supra* notes 37-38 and accompanying text. Congress referred to the relation back doctrine as the "taint" theory. See S. REP. NO. 225, *supra* note 20, at 200.

110. See Reed, *supra* note 31, at 756-59. Section 1963(c) provides that:

All right, title, and interest in property described in [section 1963(a)] vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to [section 1963(1)]

1963(c) provides that title to forfeitable property vests in the United States when the defendant commits the acts that constitute the RICO offense.¹¹¹ The government, however, cannot void a subsequent transfer if the transferee establishes at a postconviction hearing¹¹² that she is a "bona fide purchaser for value . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture" ¹¹³

Until the 1984 Act, the relation back doctrine had been confined to civil forfeitures.¹¹⁴ Although Congress admitted its uncertainty as to whether this concept applied to criminal forfeiture,¹¹⁵ it incorporated the relation back doctrine into RICO criminal forfeiture as a means to prevent a defendant from avoiding forfeiture altogether.¹¹⁶ Under the current version of section 1963, title to forfeitable property vests with the United States upon the commission of the underlying racketeering offense.¹¹⁷ By adding the relation back doctrine to section 1963, Congress has further blurred the distinction between in rem and in personam forfeitures.¹¹⁸

Nevertheless, section 1963 preserves the important distinction that criminal forfeiture depends upon the guilt of the defendant. Because property is not forfeited unless the defendant is convicted,¹¹⁹ the government cannot divest a truly innocent transferee¹²⁰ of her interest in prop-

that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

18 U.S.C.S. § 1963(c) (Law. Co-op. Supp. 1989). See also 21 U.S.C.S. § 853(c) (Law. Co-op. Supp. 1989) (criminal forfeiture under Continuing Criminal Enterprise statute); *supra* note 37 and accompanying text.

111. 18 U.S.C.S. § 1963(c) (Law. Co-op. Supp. 1989). See *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (government interest vests at time of violation and government can recover illicit proceeds despite subsequent transfer).

112. See 18 U.S.C.S. § 1963(l) (Law. Co-op. Supp. 1989) (describing the judicial proceeding).

113. *Id.* § 1963(c).

114. See *Reed*, *supra* note 31, at 756.

115. S. REP. NO. 225, *supra* note 20, at 196. Congress did recognize certain conceptual differences between civil and criminal forfeitures and presumably intended to preserve the distinction when it explicitly reaffirmed RICO criminal forfeiture as an in personam proceeding. *Id.* at 193.

116. *Id.* at 200-01. Congress thus expected to close a "potential loophole" by preventing a defendant from avoiding forfeiture through a transfer that was not an arm's length transaction. *Id.*

117. 18 U.S.C.S. § 1963(c) (Law. Co-op. Supp. 1989). See *supra* notes 110-11 and accompanying text.

118. See *supra* notes 55-57 and accompanying text.

119. See 18 U.S.C.S. § 1963(e) (Law. Co-op. Supp. 1989) (district court judgment of forfeiture "[u]pon conviction").

120. A truly innocent transferee under section 1963(c) is "a bona fide purchaser for value . . .

erty that the defendant transferred to her prior to conviction.¹²¹ Consequently, the relation back doctrine under section 1963 broadens the scope of forfeitable property only to the extent that a third person knowingly, or in bad faith, assists a defendant in attempting to escape forfeiture.¹²²

2. *Pretrial Procedural Guidelines*

In the 1984 Act amendments, Congress replaced an ambiguous and general pretrial restraining order provision¹²³ with a more detailed set of procedures designed both to preserve the availability of forfeitable property and to provide some constitutional safeguards against the erroneous deprivation of property.¹²⁴ Section 1963(d) now provides that a district court may enter a restraining order or injunction, require the execution of a bond, or take other action to prevent the dissipation of assets prior to

who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture" *Id.* § 1963(c).

121 In contrast to criminal forfeiture, the bona fide nature of a subsequent transaction in the civil forfeiture context is both (a) not dispositive, because the property owner's innocence does not preclude forfeiture, and (b) less likely, because the government can seize property immediately. *See supra* notes 36-40 and accompanying text.

122 In 1986 Congress further broadened the scope of forfeitable property when it gave district courts the authority to order the forfeiture of a defendant's otherwise nonforfeitable assets whenever the defendant has made forfeitable assets unavailable. Section 1963(m) authorizes the forfeiture of substitute assets equivalent in value to a forfeitable asset that:

- (1) cannot be located upon the exercise of due diligence;
- (2) has been *transferred or sold to, or deposited with, a third party*;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been *commingled with other property* which cannot be divided without difficulty.

18 U.S.C.S. § 1963(m) (Law. Co-op. Supp. 1989) (emphasis added). Congress originally included this amendment in the 1984 Act as a new section 1963(d) but withheld it from the final bill. *See* S. REP. NO. 225, *supra* note 20, at 201

Congress intended that district courts exercise this authority as a counterpart to the relation back doctrine under section 1963(c). When the government, under the relation back doctrine, cannot recover assets that the defendant has transferred to a bona fide third party, district courts must order the forfeiture of substitute assets. *See* 18 U.S.C.S. § 1963(m) (Law. Co-op. Supp. 1989); S. REP. NO. 225, *supra* note 20, at 201 n.30. Likewise, the district court can order the forfeiture of substitute assets in order to avoid the difficulty of dividing commingled property. *See* 18 U.S.C.S. § 1963(m)(5) (Law. Co-op. Supp. 1989). District courts may find this alternative particularly attractive when a defendant's proprietary interest in a corporation, partnership or other legitimate enterprise is subject to forfeiture and other unindicted third parties own similar proprietary interests.

123. *See supra* notes 81-88 and accompanying text.

124. *See* S. REP. NO. 225, *supra* note 20, at 203 ("sole purpose" of restraining order provision "to preserve the status quo"); Reed, *supra* note 31, at 762-69.

conviction.¹²⁵ A district court can take such action upon or prior to the filing of an indictment or information,¹²⁶ but only after notice to "persons appearing to have an interest in the property" and opportunity for a hearing.¹²⁷

Congress clarified that a district court's authority to enter a postindictment restraining order under section 1963(d)(1)(A) rests solely on the indictment or information,¹²⁸ and not on any additional evidentiary prerequisite.¹²⁹ Section 1963(d)(1)(A) does not require notice or opportunity for a hearing before the court can issue a restraining order.¹³⁰ Indeed, Congress prohibited any party who claims an interest in potentially forfeitable property from intervening in the criminal trial or appeal or initiating any postindictment action until after conviction.¹³¹ The legislative history of the 1984 Act, however, indicates that Congress did not intend to preclude a third party from contesting the propriety of a restraining order at a postorder hearing.¹³²

125. 18 U.S.C.S. § 1963(d)(1) (Law. Co-op. Supp. 1989).

126. Section 1963(d)(1)(A) provides that the district court may take such action "upon the filing of an indictment or information charging a violation of section 1962 . . . and alleging that the property *with respect to which the order is sought* would, in the event of conviction, be subject to forfeiture under this section." *Id.* § 1963(d)(1)(A) (emphasis added).

127. Section 1963(d)(1)(B) requires that, before issuing a preindictment order, the court determine that:

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship *on any party against whom the order is to be entered*

....

Id. § 1963(d)(1)(B) (emphasis added).

Section 1963(d)(2) authorizes a temporary restraining order prior to indictment *without* notice or opportunity for a hearing. *See id.* § 1963(d)(2). The analysis of this Note and the concerns that it raises presumably apply equally to pretrial restraining orders issued under § 1963(d)(2). While § 1963(d)(2) may pose problems independent of § 1963(d)(1), this Note does not purport to resolve them.

128. *See supra* note 83 and accompanying text.

129. Congress emphasized that the indictment or information alone provided a sufficient basis for issuance of a pretrial restraining order. *See S. REP. NO. 225, supra* note 20, at 202. Congress was concerned with preventing the court from looking behind the indictment or requiring the government to present evidence prematurely regarding the merits of the criminal case. *Id.*

130. Congress concluded that the indictment itself provides notice of the government's intent to seek forfeiture. *SEN. REP. NO. 225, supra* note 20, at 203. *See Reed, supra* note 31, at 763; *supra* note 83.

131. *See* 18 U.S.C.S. § 1963(e), (j), (l) (Law. Co-op. Supp. 1989).

132. Congress clarified that the postindictment restraining order provision does not preclude any postorder hearing at which the court may modify or vacate "an order that was clearly improper"

Congress authorized a district court to enter a preindictment restraining order under section 1963(d)(1)(B) because it recognized that a defendant might anticipate criminal RICO charges and dissipate her assets before the return of an indictment.¹³³ Congress, however, provided defendants and other “persons”¹³⁴ some due process safeguards.¹³⁵ Unlike postindictment restraints, section 1963(d)(1)(B) requires notice and opportunity for a hearing before the court may enter a preindictment permanent restraining order.¹³⁶ Congress thus balanced the need to prevent a defendant’s preindictment dissipation of forfeitable assets with minimum standards of fairness toward the defendant and interested third parties.¹³⁷

The language of section 1963(d)(1)(B) suggests Congress contemplated that a district court might enter a preindictment restraining order against an unindicted third party. Specifically, subsection 1963(d)(1)(B)(i) requires notice to interested third parties.¹³⁸ Subsection (d)(1)(B)(ii) also requires that the court find the need to preserve the property under the restraining order outweighs “the hardship *on any party against whom the order is to be entered . . .*”¹³⁹ While this language clearly implicates third-party property interests during the preindictment phase of a RICO criminal forfeiture case, it provides no special procedures for handling defendant and third-party property claims differently.¹⁴⁰

By contrast, the 1984 Act did establish procedures for a district court

(e.g., when information presented at the hearing shows that the property restrained was not among the property named in the indictment). S. REP. NO. 225, *supra* note 20, at 203. *See also id.* at 206 n 42 (third party with interest in potentially forfeitable property can participate in hearing regarding restraining order). Even if the indictment accurately named property subject to forfeiture, a third party may argue that hardship on the third party outweighs the government’s need to preserve the availability of the property. *See supra* note 127. It is unclear, however, exactly what type of harm to third-party interests the court would consider a “hardship” outweighing the government’s interest.

133 S. REP. NO. 225, *supra* note 20, at 202.

134. *See supra* note 127 and accompanying text.

135 *See supra* notes 42-57.

136 18 U.S.C.S. § 1963(d)(1)(B) (Law. Co-op. Supp. 1989). For temporary restraining orders prior to indictment, § 1963 requires only a subsequent hearing. *See id.* § 1963(d)(2); *supra* note 127.

137 *See* S. REP. NO. 225, *supra* note 20, at 203-04 (extending the rationale of *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), *supra* notes 45-57 and accompanying text, to postponement of notice and hearing in context of criminal forfeiture). Congress, however, stopped short of directing district courts whether and how to modify restraining orders that impose undue hardships on third-party property owners. *See supra* note 132 and accompanying text.

138 18 U.S.C.S. § 1963(d)(1)(B) *See supra* note 127.

139 18 U.S.C.S. § 1963(d)(1)(B)(ii) (emphasis added). *See supra* note 127; *Reed, supra* note 31, at 767.

140 *See Reed, supra* note 31, at 767 (third-party interests in limbo until after forfeiture).

to handle third-party property claims during the postconviction phase.¹⁴¹ The 1984 Act granted third parties the right to judicial review of their property claims in the event the court enters a forfeiture judgment.¹⁴² A district court will grant relief to a third party who has established at a post-trial hearing either that she is a bona fide purchaser¹⁴³ or that she has a legal property interest that vested in her or was superior to the defendant's interest "at the time of the commission of the acts which gave rise to the forfeiture"¹⁴⁴ The postconviction provisions of section 1963 thus reflect Congress' intent to preserve criminal forfeiture as an *in personam* proceeding; forfeiture of third-party property can occur only when the third party holds property subject to the government's interest under section 1963's limited relation back doctrine.¹⁴⁵

III. *UNITED STATES V. REGAN*: THE SECOND CIRCUIT WIELDS QUESTIONABLE POWER OVER UNINDICTED THIRD PARTIES

A. Analysis

In *United States v. Regan*,¹⁴⁶ the Court of Appeals for the Second Circuit held that section 1963 authorizes the pretrial restraint of potentially forfeitable property in the possession of an unindicted third party. The court upheld a pretrial restraining order against a consortium of unindicted investment partnerships, prohibiting transfers of *any* of the partnerships' assets, other than in the ordinary course of business, without prior government approval.¹⁴⁷ The court, however, required the removal of restraints on the partnerships if restraints on individual assets of the RICO defendants could preserve sufficiently the full value of potentially forfeitable property.¹⁴⁸

141. See *Reed*, *supra* note 31, at 770-71. Section 1963 also authorizes the Attorney General to protect the rights of innocent persons upon seizure and disposition of the forfeited property or upon a third party's petition for mitigation or remission of forfeiture. See 18 U.S.C.S. § 1963(e), (f), (g), (h) (Law. Co-op. Supp. 1989).

142. See *id.* § 1963(l); S. REP. NO. 225, *supra* note 20, at 207 (no need to exhaust administrative remedies first); *Reed*, *supra* note 31, at 770.

143. 18 U.S.C.S. § 1963(l)(6)(B) (Law. Co-op. Supp. 1989). See S. REP. NO. 225, *supra* note 20, at 209 & n.47. See also *supra* notes 112-13 and accompanying text.

144. 18 U.S.C.S. § 1963(l)(6)(A). See S. REP. NO. 225, *supra* note 20, at 208 ("Criminal forfeiture is an *in personam* proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a *transfer* to a third party is voidable.") (emphasis added).

145. See *supra* notes 109-22.

146. 858 F.2d 115 (2d Cir. 1988).

147. *Id.* at 121.

148. *Id.*

In *Regan*, the government alleged that the individual defendants used Princeton/Newport Partners, L.P. and 19 other associated business ventures (collectively, the Princeton/Newport Group)¹⁴⁹ to engage in illegal stock transactions in violation of federal tax and securities laws.¹⁵⁰ The RICO indictment sought forfeiture of the defendants' illicit proceeds and their twelve percent interest in the Princeton/Newport Group.¹⁵¹ In addition to a restraint on the defendants' personal assets,¹⁵² the district court entered an order directly against the Princeton/Newport Group, a nondefendant. The order required government approval of dispositions

149. Five of the six defendants held various equity and managerial positions in the Princeton/Newport Group. One was a managing general partner of Princeton/Newport Partners. Another was a general partner responsible for managing the financial operations of the Group. A third was a general partner who directed the Group's trading activity. *Id.* at 117.

150. The government alleged that the defendants used the Princeton/Newport Group (1) to engage in sham transactions to create fictitious losses in violation of revenue laws, and (2) to "park" stock for Drexel, Burnham, Lambert, Inc., in violation of securities laws. *Id.* "Parking" involves undisclosed arrangements to conceal the ownership of securities. Orland, *supra* note 14, at C3, col. 1. The grand jury returned an indictment charging the defendants with

(i) conspiring to commit securities fraud, mail fraud, wire fraud, tax fraud, and to create and maintain false books and records in violation of the securities laws; (ii) conspiring to conduct and participate in the affairs of a racketeering enterprise consisting of the Princeton/Newport Group; (iii) conducting and participating in that racketeering enterprise; and (iv) committing mail and wire fraud.

858 F.2d at 117. For a more detailed description of the RICO charges and the defendants' alleged conduct, see *United States v. Regan*, 713 F. Supp. 629 (S.D.N.Y. 1989). On July 31, 1989, a federal jury convicted defendants on 63 of 64 counts, including racketeering charges. See *Wall St. J.*, Aug. 1, 1989, at A3, col. 1 (unreported opinion).

151. 858 F.2d at 117. As of December 9, 1988, Princeton/Newport Group had total assets worth \$270 million. *L.A. Times*, Dec. 9, 1988, § 4, at 4, col. 1.

After convicting defendants, the federal jury rendered a forfeiture verdict totalling \$3.8 million, much less than the \$21.7 million that the government sought. See *Wall St. J.*, Aug. 3, 1989, at B6, col. 4 (unreported opinion). One juror justified this differential by describing her belief, shared by other jurors, that the government sought an "exorbitant" amount from the defendants. *Id.*

On November 6, 1989, Judge Carter declared four of the six defendants' forfeitures unconstitutional under the eighth amendment. *Nat'l L.J.*, Nov. 20, 1989, at 3, col. 2. See *United States v. Regan*, No. 88 Cr. 517 (S.D.N.Y. Nov. 6, 1989). Before vacating the forfeitures, Judge Carter ruled that the jury had no power to diminish the forfeitures that the government had sought under the statute. *Nat'l L.J.*, Nov. 6, 1989, at 30, col. 1. The judge earlier had indicated that he might overrule the forfeiture verdict and order the forfeiture of the full amount on the basis that the defendants' interests in the enterprise are entirely forfeitable. *Wall St. J.*, Aug. 3, 1989, at B6, col. 4. While this latest ruling applies to RICO defendants' postconviction forfeiture, it might also cast further doubt on the appropriate scope of pretrial restraints. In calculating the forfeitable amount of assets to specify in the RICO indictment, prosecutors may have to reduce the figure to meet eighth amendment requirements, thereby reducing the amount that a district court might restrain prior to trial. See *supra* notes 83, 126 and accompanying text; *infra* notes 167-69 and accompanying text.

152. The district court froze the defendants' personal accounts and restrained them from withdrawing their partnership interests. *Id.* at 117-18.

not in the ordinary course of business.¹⁵³ The court also appointed a government monitor to review the Princeton/Newport Group's financial records.¹⁵⁴ The Princeton/Newport Group appealed on the ground that the district court had no authority under section 1963(d)(1)(A) to restrain the assets of unindicted third parties or affect the use of nonforfeitable assets.¹⁵⁵

The Second Circuit in *Regan* held that section 1963(d)(1)(A) authorizes restraints on unindicted third parties where restraints on the defendant would not preserve sufficiently the full value of potentially forfeitable property.¹⁵⁶ The court reasoned that, because section 1963 focuses on forfeitable property rather than the parties, the district court has broad power to preserve the availability of such property.¹⁵⁷ The court stated that a "wholesale bar" to restraints on third parties would defeat the purpose of section 1963, particularly when the defendants occupy "crucial managerial positions" within an enterprise that has power over potentially forfeitable property.¹⁵⁸

The Second Circuit also rejected the Princeton/Newport Group's argument that common-law principles preclude courts from restraining property of third parties who are not before the court.¹⁵⁹ According to

153. *Id.* The district court thus effectively froze \$270 million in defendant and third-party assets. *See supra* note 151.

154. The order guaranteed that

[e]ntities doing business with [Princeton/Newport Group] or defendants will not be deemed in violation of [the] Order for any transactions undertaken with the [Princeton/Newport Group] or defendants, and shall be fully protected in connection with any transactions with the [Princeton/Newport Group], if they receive an oral representation to them by an employee of the entities, other than the defendants, that the transaction is allowed by this Order.

The order also provided that "[e]ntities doing business with the [Princeton/Newport Group] shall be entitled to presume the authenticity of representations and instructions from any person who is identified as an employee of the [Princeton/Newport Group]." *Id.* at 118. While the court did not discuss the rationale for this guarantee, it presumably recognized that without such qualifying language, the order would have a more severe effect on the partnerships' ability to carry on their business.

155. *Id.* at 117.

156. *Id.* at 119. The potentially forfeitable property included illegal proceeds and the value of the partnership interests of the individual defendants.

157. *Id.* The court construed § 1963(d)'s "take any other action" clause as an unambiguous reflection of Congress' concern with preserving the status quo. *See supra* note 124.

158. 858 F.2d at 119-20.

159. The Princeton/Newport Group relied on *FED. R. CIV. P. 65(d)*, *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (Hand, J.) ("no court can make a decree which will bind any one but a party") and *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971) (wife, who was not party to action against husband, was not served with process, and did not appear, is subject to court's jurisdiction)

the court, a section 1963(d)(1)(A) restraining order resembles garnishment or attachment, remedies that courts routinely direct at third parties.¹⁶⁰ The court also relied on a Third Circuit decision upholding a restraining order under an analogous criminal forfeiture statute¹⁶¹ against a third party to whom the defendant had transferred an asset the third party knew was forfeitable.¹⁶²

The Second Circuit in *Regan* suggested that an order restraining all of a third party's assets, only some of which are forfeitable, is not necessarily inappropriate.¹⁶³ The court ruled that a restraint of all of Princeton/Newport Group's assets would be inappropriate *unless* restraints on the individual defendants' other assets did not sufficiently preserve the full value of forfeitable property.¹⁶⁴ Because the defendants held managerial positions in the enterprise, the court found that the restraining order against the Princeton/Newport Group was not necessarily unreasonable to prevent the dissipation of the enterprise's assets.¹⁶⁵ The court, however, was unable to measure the value of the defendants' forfeitable property and remanded to the district court for a determination of whether the restraint of Princeton/Newport Group's assets was necessary.¹⁶⁶

to argue that common-law principles precluded the district court from subjecting it to the restraining order because it was not a party before the court. 858 F.2d at 120.

160 *Id.* See *supra* note 50.

161. 21 U.S.C. §§ 848, 853 (Supp. IV 1986) (the Continuing Criminal Enterprise statute).

162. 858 F.2d at 120 (relying on *United States v. Long*, 654 F.2d 911 (3d Cir. 1981)). The Third Circuit in *Long* recognized that the Continuing Criminal Enterprise statute provided for in personam criminal forfeiture, but it upheld a restraining order against a third party to whom the defendant had transferred an allegedly forfeitable airplane. The *Long* court, however, did recognize that the defendant had transferred illegal proceeds (the airplane) to a "knowing" third party. *Long*, 654 F.2d at 916. Regarding the significance of such a third party's "knowledge," see *supra* notes 112-13 and accompanying text.

The Second Circuit in *Regan* declined to follow *United States v. Ambrosio*, 575 F. Supp. 546, 552 (E.D.N.Y. 1983), which held that the innocence of a third party in an in personam forfeiture proceeding is a valid defense to a restraining order. The Second Circuit vaguely referred to the absence of the language "or take any other action" in § 1963(d)(1)(A) at the time of the *Ambrosio* decision. 858 F.2d at 120 n.5. The difference in the restraining order provisions to which the Second Circuit referred seems trivial at best. See *supra* note 80 and accompanying text.

163. 858 F.2d at 120.

164 *Id.* at 121. The court relied on the postconviction provision that authorizes the forfeiture of substitute assets. See 18 U.S.C.S. § 1963(m)(5) (Law. Co-op. Supp. 1989); *supra* note 122.

165 858 F.2d at 121. See also *id.* at 120 (nature of business and opportunity). The court might have concluded otherwise had it known that just several months after its decision to uphold the restraining order, Princeton/Newport Partners, L.P. would be liquidated. See *N.Y. Times*, Jan. 16, 1989, at D1, col. 3.

166 858 F.2d at 121. The court stated that Princeton/Newport should have the opportunity to

B. Critique

In *United States v. Regan*, the Second Circuit failed to assess completely the scope of a district court's authority over third-party property interests under section 1963(d). While it is clear that the primary purpose of the pretrial restraining order is to preserve the availability of *forfeitable* property,¹⁶⁷ it is unclear whether the language of section 1963(d) authorizes a district court to accomplish this goal by restraining *more* than what is ultimately forfeitable.¹⁶⁸ The legislative history of the 1984 Act suggests that Congress did not intend to reach nonforfeitable property to preserve potentially forfeitable property prior to conviction.¹⁶⁹

The Second Circuit also failed to acknowledge the legal differences between in personam and in rem forfeitures.¹⁷⁰ In reasoning that section 1963(d)(1)(A) focuses on forfeitable property and not on the parties to the proceeding,¹⁷¹ the court implicitly ignored Congress' characteriza-

post a bond "to the extent that the value of a defendant's restrained nonpartnership properties exceeds that of the proceeds he receives, but not that of all his potentially forfeitable property . . ." *Id.* The court considered the posting of a bond less burdensome on third parties than a restraining order. *Id.* The court, however, did not discuss the potential financial burden that the posting of a bond might impose on firms that rely heavily on capital liquidity, such as the firms that comprised the Princeton/Newport Group. *See supra* note 92.

167. *See supra* notes 107, 124-26 and accompanying text.

168. The Second Circuit interpreted the language "take any other action" broadly to restrain unindicted third parties under § 1963(d)(1)(A). This may be consistent with the Supreme Court's sanction in *Russello v. United States*, 464 U.S. 16 (1983) and its broad reading of the statute in light of what Congress intended to achieve. *See supra* notes 69-73 and accompanying text. Conversely, the court might not justifiably have given § 1963(d) such a broad scope had it also interpreted the language that dealt with the property that the indictment alleged to be forfeitable: ". . . the property with respect to which the order is sought . . ." *See supra* note 126. Instead, the Second Circuit conclusively stated that the statute was unambiguous. 858 F.2d at 118-19. The court, however, also stated that "[u]nder the terms of [s]ection 1963(d)(1)(A), therefore, the property sought to be restrained by a restraining order *must be potentially forfeitable*." *Id.* at 118 (emphasis added). This suggests that § 1963(d) does not authorize a court to restrain *more* than what is ultimately forfeitable.

169. For limits on the relation back doctrine, *see supra* notes 112-13, 119-22 and accompanying text. By failing to recognize the ambiguity of § 1963(d) with respect to the restrainability of *nonforfeitable* assets, the Second Circuit overlooked "a clearly expressed legislative intent to the contrary." *See Russello*, 464 U.S. at 20 (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). While Congress acknowledged that the purpose of the restraining order provisions was to preserve the status quo, *see supra* note 124, it also expected that a district court might have to modify or vacate an overly broad order. *See S. REP. NO. 225, supra* note 20, at 203 (indicating that a "clearly improper" order includes one in which "property restrained was not among the property named in the indictment").

170. *See supra* notes 29-32, 35-41 and accompanying text.

171. *See* 858 F.2d at 119.

tion of RICO criminal forfeiture as an in personam proceeding.¹⁷² In addition, the *Regan* court cursorily analogized section 1963 restraining orders to the civil remedies of garnishment and attachment.¹⁷³ Although the court ultimately required the use of less burdensome restraints on third parties whenever available,¹⁷⁴ the court's superficial construction of section 1963(d) moves RICO criminal forfeiture closer to *Calero-Toledo* and other civil forfeiture cases, where the innocence of a property owner is virtually irrelevant.¹⁷⁵

The Second Circuit's conclusion in *Regan* that a district court may restrain nonforfeitable assets of third parties is inconsistent with Congress' limited use of the relation back doctrine in section 1963(c).¹⁷⁶ The extension of section 1963(c) to preindictment or postindictment restraining orders implies that judicial authority over third-party property is limited to property of a non-bona fide transferee who had reason to believe that the property was forfeitable.¹⁷⁷ Such a limit, however, does not address third parties who merely hold proprietary interests in the same enterprise in which a RICO defendant owns an interest. While section 1963(c)'s relation back doctrine may preserve identifiable physical assets and proceeds to the extent of forfeitability, it is unclear whether this doctrine applies equally to prevent third parties from dissipating or devaluing proprietary interests in the enterprise as a whole.

C. *Effect of Second Circuit's Decision*

The Second Circuit in *Regan* significantly enhanced the effectiveness of RICO criminal forfeiture. Federal prosecutors may now seek the restraint of nonforfeitable, third-party assets whenever a defendant's personal assets insufficiently preserve the total value of forfeitable property.¹⁷⁸ A third party's innocence remains important, but only in giving a court the option of entering a less burdensome restraint without

172. *See supra* note 59.

173. *See* 858 F.2d at 120; *supra* notes 159-60 and accompanying text.

174. 858 F.2d at 121; *supra* note 166.

175. *See supra* notes 45-47 and accompanying text.

176. *See supra* notes 109-22 and accompanying text. The Second Circuit failed to distinguish *United States v. Long*, 654 F.2d 911 (3d Cir. 1981) on the basis that the third-party transferee in *Long* had knowledge of the indictment and potential forfeiture. *See supra* note 162.

177. *See supra* note 113 and accompanying text. Such an extension of § 1963(c), however, fails to resolve the dilemma, which the Second Circuit ultimately recognized, that a third party may have the opportunity to dissipate the defendant's assets prior to trial. *See Regan*, 858 F.2d at 120-21 (defendants occupied "crucial managerial positions").

178. *See supra* notes 163-66 and accompanying text. The Justice Department's recent amend-

jeopardizing the availability of forfeitable property.¹⁷⁹

The Second Circuit's decision, however, tips the scale too heavily against innocent third parties. After *Regan*, innocent third parties are not only responsible for preserving the value of a defendant's proprietary interest in the enterprise, but they also must virtually guarantee the availability of the defendant's illicit proceeds, even if the defendant has not invested them in the enterprise.¹⁸⁰ Otherwise, third parties will face either posting a bond¹⁸¹ or suffering the negative effects of an asset freeze.¹⁸² The Second Circuit thus effectively disregarded Congress' intent to preserve the in personam nature of section 1963 while amending the criminal forfeiture provision.¹⁸³

IV. PROPOSAL

This Note proposes that Congress revise section 1963 of the RICO statute to clarify that it did not intend the effect of the Second Circuit decision in *Regan*.¹⁸⁴ Although Congress created an expansive weapon

ment of RICO prosecutorial guidelines, however, might temper such an aggressive pursuit of pretrial restraints. See *supra* note 14.

179. See *supra* notes 163-66 and accompanying text.

180. See *supra* notes 163-65 and accompanying text. Assume the defendant has a 10% share in the enterprise worth \$1 million at the time of her criminal act and that unindicted third parties own the rest (90%) of the enterprise. Assume also that the defendant personally has gained proceeds of \$500,000 through her racketeering activity and that she has shielded her proceeds from forfeiture (e.g., by placing them in a Swiss bank account). See S. REP. NO. 225, *supra* note 20, at 201 & n.31. Because the defendant's and the third parties' assets are normally commingled in a legitimate enterprise, third parties in this scenario presumably have the opportunity to dissipate the defendant's 10% share of those assets and thus prevent forfeiture. See *supra* note 177 and accompanying text. (This, of course, assumes that the defendant induced the third parties to do so or that they would otherwise benefit by doing so.)

Following the Second Circuit's criteria in *Regan*, the district court would order a restraint on *all* of the third parties' assets, that is, it would freeze \$10 million of defendant's and third parties' assets to ensure the availability of \$1.5 million. While the unindicted third parties may exert some control over the defendant's 10% interest in the enterprise by virtue of the commingling of enterprise assets, these third parties have no control over the defendant's use of the \$500,000 in proceeds. Furthermore, the third parties would not forfeit the \$500,000 under § 1963's postconviction provisions because the defendant's interest in the enterprise is worth only \$1 million. See *supra* notes 141-44 and accompanying text. The restraint, therefore, has no effect on the third parties' ability to preserve the availability of the proceeds and, thus, unfairly burdens innocent third parties without serving Congress' purpose of preserving forfeitable property.

181. See *supra* note 166.

182. See *supra* note 89-92 and accompanying text.

183. See *supra* note 145 and accompanying text.

184. 858 F.2d 115 (2d Cir. 1988). See *supra* notes 146-83 and accompanying text.

against racketeering in enacting RICO's criminal forfeiture provisions,¹⁸⁵ it established and preserved section 1963 as an in personam proceeding.¹⁸⁶ Because a third party's "innocence"¹⁸⁷ constitutes a sufficient basis for postconviction relief under section 1963,¹⁸⁸ it should also prevent a district court from restraining an innocent third party's nonforfeitable assets prior to trial.

First, Congress should explicitly limit any pretrial restraint to the extent of the property interest subject to forfeiture, as alleged in the indictment.¹⁸⁹ Such a limit would comport with Congress' presumption that the indictment provides adequate notice of the property subject to forfeiture.¹⁹⁰ Because fewer assets of the enterprise would be subject to restraint, this requirement also would reduce the likelihood that the government could pressure a defendant and associated, unindicted third parties into a premature settlement or plea bargain.¹⁹¹

Second, section 1963 should provide special procedural safeguards for a third party who is not a transferee of the defendant, but who is capable of dissipating a defendant's assets.¹⁹² A district court may face a "control party" when a defendant owns a proprietary interest in an enterprise in which the defendant and unindicted third parties hold crucial managerial positions.

When the government seeks to preserve potentially forfeitable prop-

185 See *supra* notes 59-73 and accompanying text.

186 See *supra* notes 96-145 and accompanying text.

187. An innocent third party in this context is a bona fide purchaser without reasonable cause to believe that the purchased property is subject to forfeiture, or one who owns a proprietary interest in the defendant's enterprise, but is not indicted under RICO. See *supra* note 113 and accompanying text.

188 See *supra* notes 141-45 and accompanying text.

189 This measure would make § 1963 pretrial restraining orders consistent with the Federal Rules of Criminal Procedure. See *supra* note 83 and accompanying text.

190 See *supra* note 130. With such a limit, the government could not surprise third parties by restraining assets far in excess of the amount announced in the indictment as forfeitable.

191 See *generally supra* notes 89-92, 178-80 and accompanying text.

192 This scenario would encompass third parties who do not meet the criteria of § 1963(c)'s relation back doctrine. This type of third party represents a middle ground under § 1963's existing scheme. At one end is the bona fide transferee who was reasonably without cause to believe that the property was subject to forfeiture at the time of transfer. This third party should be able to avoid any pretrial restraint and ultimate forfeiture order on the basis that the government cannot void the transfer under the relation back doctrine. See *supra* notes 112-13 and accompanying text. At the other end is the third party whose property is subject to restraint and forfeiture under the relation back doctrine because title to the property has already vested in the government, rendering the subsequent transfer void. See *supra* note 177 and accompanying text.

erty over which an unindicted third party has control, the district court should:

- (1) restrain defendant's individual assets to the extent their value is sufficient to secure the total value of forfeitable property;¹⁹³ and
- (2) if defendant's assets are not sufficient to secure the total value of forfeitable property, require an unindicted third party who exercises effective control over jointly held property to post bond *to the extent of the defendant's interest in the enterprise*.¹⁹⁴

These procedures better protect innocent third parties and more closely adhere to the principle that an in personam forfeiture should not deprive an innocent third party of property interests.

Third, Congress should explicitly extend a modified version of the relation back doctrine under section 1963(c) to "control party" transfers. A district court should have the authority to void a control party's transfer of control of the enterprise or substantially all of the enterprise's assets.¹⁹⁵ Such an extension would minimize further the possibility of a third party dissipating or devaluing a defendant's proprietary interest in the enterprise. Consequently, a district court would treat consistently the defendant and third parties who have control over the defendant's assets,¹⁹⁶ while stopping short of harming third parties by restraining their nonforfeitable property.

The proposed revisions to section 1963 are necessary to ensure that

193. This is consistent with the use of § 1963(m) in the postconviction phase of the criminal forfeiture proceeding. See *supra* note 122. This is also what the Second Circuit ultimately prescribed in *Regan*. See *United States v. Regan*, 858 F.2d 115, 121 (2d Cir. 1988); *supra* notes 164-66 and accompanying text.

194. The Second Circuit in *Regan* recognized the posting of bond as a potentially less burdensome alternative to restraining all assets of the third-party enterprise. 858 F.2d at 121. See *supra* note 166.

195. In other words, § 1963(c) should also form the basis for voiding control-party transfers. See *supra* notes 109-13 and accompanying text. While § 1963(c) arguably operates in such a fashion under the existing statutory framework, an explicit reference to transfers of proprietary interests would delimit clearly the scope of the relation back doctrine under criminal forfeiture. See *supra* text following note 177.

Under such an extension of the relation back doctrine, a district court could not void an arm's length transfer of control of the enterprise or substantially all of its assets to a bona fide purchaser. See *generally* notes 112-13 and accompanying text.

196. Thus, while a defendant may not transfer her proprietary interest in the enterprise to a non-bona fide transferee, neither may a control party effectively dissipate the same proprietary interest by merging with, or selling substantially all of its assets to, a non-bona fide transferee. The sanction of contempt, consequently, would serve as a last resort with respect to third parties as well as defendants. *But cf.* S. REP. NO. 225, *supra* note 20, at 195 (suggesting that contempt provisions may be ineffective in preventing defendant from defying restraining order); *supra* note 107.

district courts construe RICO's restraining order provision more consistently with both the limited application of the relation back doctrine¹⁹⁷ and the postconviction remedies available to third parties.¹⁹⁸ These revisions will maintain the careful balance Congress intended to strike between the war on racketeering and the interests of innocent third parties.¹⁹⁹ Without more clearly defined limits on and procedures for pretrial restraints, a section 1963 restraint may unnecessarily and unfairly deprive truly innocent third parties of their property interests by providing federal prosecutors and district courts the added leverage of nonforfeitable assets to effectuate forfeiture.

Nick H. Varsam

197. *See supra* notes 109-13 and accompanying text.

198. *See supra* notes 141-45 and accompanying text.

199. *See supra* notes 139-45 and accompanying text.

