Protecting Third Party Property Rights in RICO Forfeitures

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INTRODUCTION

In 1970, Congress enacted the Organized Crime Control Act (the Act), which allows the government to seize property belonging to criminal defendants as a penalty under its Racketeer Influenced and Corrupt Organizations (RICO) section. While this new type of property forfeiture provides the government with a much needed weapon for its fight against organized crime, it also violates the rights of third party property owners and challenges traditional concepts of property law and due process.


2. RICO, Title IX of the Act, has as its purpose “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.” S. REP. No. 617, 91st Cong., 1st Sess., at 76 (1969). 18 U.S.C. § 1962 makes it unlawful for any person to invest any income derived from a pattern of racketeering activity or the collection of an unlawful debt in any enterprise engaged in interstate or foreign commerce, to maintain any interest in such an enterprise, or to participate in operating it. Section 1963(a) provides for forfeiture of any interest affording a source of influence over any enterprise in violation of § 1962.

Similar forfeiture provisions were enacted under Title II of the Controlled Substance Act of 1970, also known as the Continuing Criminal Enterprise section, P.L. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 848 et seq.).

3. Criminal forfeiture must be distinguished from civil forfeiture in the context of the RICO statute. Criminal forfeiture functions as a penalty on the criminal defendant and depends upon a determination of guilt. Civil forfeiture, on the other hand, functions as a damage remedy, allowing for treble damages under 18 U.S. C. § 1964. (The treble damage provision for civil RICO has led to a flood of litigation and commentary. S. REP. No. 617, supra note 2, at 80-81). While there were only 19 civil RICO suits filed in 1981, there were 959 suits filed in the first six months of 1988. Mansnerus, As Racketeering Law Expands, So Does Pressure To Rein It In, N.Y. Times, March 12, 1989, at E4, col.1 [hereinafter As Racketeering Law Expands].

4. For example, the Act allows for temporary restraint of property belonging to bona fide purchasers, who are traditionally afforded special protection from such invasions. It can also be argued that restraint and forfeiture of property held by an uncharged third party is a compensable taking. See Tribe, American Constitutional Law § 9-3 (2d ed. 1988). Even temporary takings for public benefit are compensable. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

5. The due process clause of the United States Constitution provides that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private
As amended in 1984, the Act provides for post-indictment, ex parte restraining orders in an effort to prevent defendants who anticipate forfeiture from transferring or concealing their assets while awaiting trial. Under the Act the government may restrain property belonging to a person or entity who acquired the property from the criminal defendant, even those who obtained the property without knowledge of the underlying crime or the government’s interest. By allowing the government to restrain property of innocent third par-

property be taken for public use, without just compensation.” U.S. Const. amend. V.


RICO has received wide coverage in the media in connection with several celebrated cases where forfeiture was obtained against drug king pins, racketeers, and white collar criminals. As Racketeering Law Expands, supra note 3; Crovitz, RICO’s Broken Commandments, Wall St. J., Jan. 26, 1989, at 14, col. 2; Lynch, RICO Law Is Too Much of a “Good Thing,” Newsday, Jan. 11, 1989, at 57, col. 1; Sontag, New RICO Use: A Step Too Far? Nat’l L.J., Nov. 28, 1988, at 1, Col. 4.


(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(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 section 1962; and

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

(c) All right, title, and interest in property described in subsection (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 subsection (1) 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.


ties without prior notice and an opportunity to be heard, the statute violates the due process clause of the fifth amendment to the United States Constitution.

After a brief discussion of the history and purposes of the Organized Crime Control Act, this note will analyze how the Act violates the due process clause of the Constitution. It will conclude that the Act should be amended to provide third parties whose property is subject to RICO forfeiture notice and an opportunity to be heard within “a meaningful time and in a meaningful manner”—no more than 90 days from the date a temporary or ex parte restraining order is issued and in a full adversarial hearing.

I. HISTORY AND PURPOSES OF THE ACT

A. Historical Background of the Organized Crime Control Act

Criminal forfeiture is a radical departure from the traditional, 200-year old statutory mandate that “[n]o conviction or judgment shall work corruption of blood or any forfeiture of estate.” That mandate was enacted in 1790 as an expansion of the constitutional prohibitions against bills of attainder and “corruption of blood” forfeiture. In passing the RICO forfeiture provision, Congress real-

10. Bills of attainder were known to feudal law and amounted to the pronouncement of legal death, taking away all rights and property of traitors and felons. The Constitution prohibits Congress from passing bills of attainder. U.S. CONST. art. I, § 9, cl. 3. In the United States, bills of attainder include any “legislative act which inflicts punishment without a judicial trial.” Cummings v. Missouri, 71 U.S. 277, 323 (1867). For an act to be unconstitutional as a bill of attainder today, it must be specifically directed at an individual or identifiable group. Id. See also Fleming v. Nestor, 363 U.S. 603 (1960) (statute allowed for confiscation of property belonging to individuals who were found to be communists).
11. “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, cl. 2. Corruption of blood refers to the ancient practice of taking the entire estate of a convicted felon; the criminal sanction would effectively disinheret the defendant’s heirs, who may have had no connection to the crime other than their blood relation. 4 W. BLACKSTONE COMMENTARIES 381-389 (1775).
ized that it impliedly repealed 18 U.S.C. § 3563. Furthermore, because the RICO forfeiture provision allows for restraint of property without a trial and also reaches persons who are not connected to the underlying crime, it bears a striking resemblance to a bill of attainder and may be contrary to the United States Constitution. Before 1970, in order to punish the criminal and confiscate any property used in the commission of the crime, the government was forced to bring two separate actions: one *in personam* action against the defendant in the district where the crime was committed and a separate *in rem* action against the property itself in the district where the property is located. Now, under the RICO statute, the government can accomplish both of these goals in one action. This was one of the objectives of Congress in passing the 1970 Act; by bringing the two actions together, Congress intended to make the prosecution of organized crime more efficient.

It is important to note the distinction between *in personam* and *in rem* jurisdiction because the two had previously been considered incompatible. In the former, the innocence of the property owner is a complete defense against any penalty, whereas in the latter his or her innocence is irrelevant. In creating criminal forfeiture, Congress has attempted to merge these two conflicting concepts. As a result, an innocent property owner may, in effect, be penalized as part of a criminal proceeding to which he is not a party.

**B. Purpose of the Act: Hitting Organized Crime Where It Hurts**

By 1969, it was the consensus that the existing mechanisms for combating organized crime were hopelessly ineffective. Organized crime had become highly sophisticated and diversified; racketeering enterprises increasingly used their money and power to infiltrate and

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15. The RICO statute allows the government to confiscate the defendant's property in any court where there is *in personam* jurisdiction over the defendant — in a court that may not otherwise have jurisdiction over the third party or his property. S. Rep. No. 617, *supra* note 2, at 79-80. The expanded notion of *in personam* jurisdiction imposes an extra burden on the third party, who now may be forced to appear in a foreign jurisdiction to defend his right to property purchased from a criminal defendant.
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corrupt legitimate businesses, unions and the political system:20

What is needed here, the [Senate Judiciary] committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.21

The legislative attack on organized crime began with the creation of a new criminal offense: the Act made it unlawful to invest funds derived from a “pattern of racketeering activity” or to maintain or acquire an interest in any enterprise operated through such a pattern.22 In order to establish a pattern of racketeering, the Act requires at least two predicate acts which may include murder, arson, gambling, extortion and mail fraud, *inter alia.*23

The 91st Congress created criminal forfeiture specifically to address racketeering and organized drug dealing.24 It accomplished this by, among other things, providing the federal courts with jurisdiction to enter restraining orders “in connection with any property or other interest subject to forfeiture. . . .”25 Congress felt that the prosecution could be defeated in its attempt to preserve the defendant’s forfeitable assets unless restraint was quickly available. For example, a defendant could have transferred title and possession of his airplane to a confederate in order to avoid eventual forfeiture. The availability of a temporary restraining order without notice to the defendant or third party means that the confederate could be barred from further transferring the plane yet another time, perhaps even to a bona fide purchaser. In *United States v. Long,*26 the defendant turned over title to his airplane to his attorneys, who then attempted to sell it in South America. The issuance of a restraining order allowed the gov-

20. *Id.*
21. *Id.* at 79.
23. 18 U.S.C. § 1961(1)(A) (Supp. V 1988) defines “racketeering activity” as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . .” The remainder of section 1961(1) adds various federal offenses, including mail and wire fraud, securities fraud and narcotics offenses.
ernment to preserve the airplane for eventual forfeiture.

However, the Act provided no guidelines for the issuance of restraining orders. Courts, without explicit guidelines, inevitably and overwhelmingly required the government to meet the same standards that they had used for decades — those governing civil preliminary injunctions and temporary restraining orders. Courts have consistently held in RICO cases that due process required post-restraint, pre-trial hearings. Moreover, a prosecutor seeking to restrain property was not permitted to rely solely on the indictment and often bore the burden of demonstrating that it was likely to prevail at the criminal trial, i.e., that it was likely to convince a jury beyond a reasonable doubt that (a) the defendant was guilty and (b) the property was subject to forfeiture. Even if the government could establish these factors to a judge's satisfaction at an ex parte proceeding, the courts did not generally allow the temporary orders to continue past the ten-day period allowed by the Federal Rules of Civil Proce-


30. S. Rep. No. 225, supra note 16, at 196. Congress did not intend that the courts should look beyond the indictment or require the prosecution to produce additional evidence regarding the merits of the case. The theory was if an indictment was sufficient to restrain a defendant's liberty, it should be sufficient to support restraint of his property. Id. at 202-203. See also United States v. Musson, 802 F.2d 384 (10th Cir. 1986). In order for the government to request restraint or forfeiture, the specific property must be identified in the indictment and there must have been a finding of probable cause that the property is, in fact, forfeitable in the event of conviction. "No judgement of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." Fed. R. Crim. P. 7(e)(2). Notwithstanding the implications in the legislative history, courts refused to defer to the findings of the grand jury, holding that, while the indictment may serve as notice to the defendant, the opportunity for a prompt hearing was still necessary. Crozier I, 674 F.2d at 1298; Spilotro, 680 F.2d at 618; See Long, 654 F.2d at 915. Some courts insisted that Congress must have intended such a hearing. See, e.g., Veon, 538 F. Supp. at 244-45, where the court found itself "obligated to construe the statute so as to avoid resolution of those [constitutional] issues. . . . This can readily be accomplished by finding that implicit in the statutory scheme is a requirement for a timely adversary hearing."

31. Spilotro, 680 F.2d at 618; Long, 654 F.2d at 915; Crozier I, 674 F.2d at 1298.
dure unless a full adversarial hearing was held. Prosecutors were also concerned about the imposition of the Federal Rules of Evidence on the pre-trial hearings.

C. The Comprehensive Forfeiture Act of 1984

The Comprehensive Forfeiture Act of 1984 amended the RICO statutes and was designed to ease the court-imposed limitations on pre-trial restraint by making the forfeiture law tougher and more explicit. First, the definition of assets subject to forfeiture was expanded to include all proceeds of the illegal conduct, in addition to property used in the crime itself. Second, a provision for forfeiture of "substitute" assets was added, allowing a penalty to be imposed on the defendant even when the original forfeitable property had been placed beyond the reach of the law. Third, a provision al-

32. See Spilotro, 680 F.2d at 617; Long, 654 F.2d at 915; Crozier I, 674 F.2d at 1298; Veon, 538 F. Supp. at 245.
33. Evidentiary rules can pose debilitating hurdles for the prosecution. In Veon, 538 F. Supp. 237, the federal district court ordered that a full adversarial hearing was required by due process. By also directing that the Federal Rules of Evidence applied to such a hearing, the court forced the government to expose its evidence and strategy prior to the trial if it wanted to preserve the defendant's property for eventual forfeiture. Unable to present hearsay evidence, the prosecutor was faced with a "Catch 22" situation: risk premature exposure of his trial strategy and possibly the lives of his witnesses, or allow the defendant to dissipate or conceal his forfeitable assets.

Interestingly, the attorney for the government, in a "simple but creative maneuver," filed a notice of lis pendens in an attempt to circumvent the court's dissolution of the restraining order. The defendant moved to expunge the lis pendens, and the court agreed. Veon, 538 F. Supp. at 276.
34. § 301 of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 stat. 1837, provides that Title III of the Act may be cited as the "Comprehensive Forfeiture Act."
36. Id. at 199. "First, the scope of property subject to forfeiture is, in two important respects, too limited. The RICO statute, which was designed to deprive racketeers of the economic power generated by and used to sustain organized criminal activity has been interpreted by several courts so as to prevent the criminal forfeiture of a defendant's ill-gotten profits, even though other of his interests used or acquired in violation of the RICO statute would be forfeitable." Id. at 194 (referring to the results in United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980).
37. Subsection (n) of the Comprehensive Forfeiture Act provides:

If any of the property described in subsection (a), as a result of any act or omission of the defendant —
(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 courts;
(4) has been substantially diminished in value; or
(5) has been commingled with other property which cannot be divided without difficulty;
ollowed for pre-indictment restraining orders, subject to a prompt adversarial hearing.\(^8\) This meant that the government could obtain a freeze on assets in the hands of third parties even before an indictment was handed down, but only after the third party had been given notice and an opportunity to be heard.

Despite the generally negative impact of the amendments on third parties,\(^9\) the 1984 legislation did enact a provision that adds important protection for third party due process rights.\(^4\) The original procedure embodied in the 1970 Act provided only one remedy for a bona fide purchaser or other third party with an interest in the property subject to forfeiture: a petition to the Attorney General for remission or mitigation subsequent to the conviction and order of forfeiture.\(^4\) In 1984 Congress added a provision for judicial resolution of third party claims.\(^2\) As of 1984, an aggrieved party may petition for a hearing after conviction and recover his property if he can establish by a preponderance of the evidence that he qualifies as a bona fide purchaser under the statute.\(^4\) Nowhere, however, does the law provide for a prompt hearing after entry of a pre-trial restraining order. In fact, a third party is not only barred from intervening in the criminal proceeding, but is explicitly prohibited from

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\(^8\) U.S.C. § 1963(n).

\(^9\) 18 U.S.C. § 1963(d)(1)(B), (d)(2). The pre-indictment order or injunction pursuant to subsection (d)(1)(B) is only granted after notice to third parties have been given notice and opportunity to be heard, and is limited to no more than 90 days, unless extended by the court for good cause. The temporary restraining order under subsection (d)(2) is without notice or hearing, but limited to 10 days, and provides for a hearing at the earliest possible time.

\(^2\) For example, the expansion of forfeitable assets to include proceeds derived from the illegal conduct increased the likelihood that assets belonging to third parties would be brought within the sweep of the statute.


\(^3\) 18 U.S.C. § 1963(c) (1982). The remedy of petition for remission or mitigation was previously a part of the customs law (19 U.S.C. § 5297). Section 1963(c) transferred certain functions under that law to the Attorney General, including the authority to decide mitigation and remission of forfeiture. The Department of Justice had opposed judicial resolution of third party claims, but, prior to the enactment of the Comprehensive Forfeiture Act, changed its position and supported the addition of a hearing procedure subsequent to the order of forfeiture. S. REP. No. 225, supra note 16, at 207. A.B.A. Report, supra note 9, app. D at 43.


\(^5\) As amended, section 1963(l) provides that, following the entry of an order of forfeiture, the government must publish notice or provide direct notice to any person "known to have alleged an interest" in the property in question. Third parties alleging an interest may, within thirty days, petition for a hearing before the court alone, to be held within (if practicable) thirty days of the petition. Petitioner must establish by a preponderance of the evidence that his title was superior to the defendant's, or that petitioner was a bona fide purchaser.
instituting any civil action to clear his title during the pendency of the criminal case. Thus, although third parties now have an opportunity for a judicial resolution of their claims, that opportunity comes only after their property has been restrained. The due process rights of third party property owners are still threatened.

D. The Criminal Forfeiture Problem

The 1984 amendments to the RICO statute provide that title to forfeitable property vests in the United States at the time the defendant commits the predicate acts; i.e., vesting of title relates back to the date the underlying crime was committed and the property owner is deemed to have lost title to that property as of that date. This relation-back concept suggests the same “taint” theory that was at the root of historical in rem forfeiture. Taint means that the property itself is somehow tainted, or guilty, and may be seized, regardless of the guilt or innocence of its owner. It is a legal fiction used to justify the forfeiture of property that has been used in the commission of a crime. However, it belies Congress' stated intention that the forfeiture be a criminal penalty against the defendant. Restraint and forfeiture can effectively penalize any third party with an interest in the forfeitable property, innocent or not. Despite the unfairness of in rem forfeiture, one of the justifications given for its continued use was the theory that “confiscation may have the desirable effect of inducing [lessors, bailors or secured creditors] to exercise greater care in transferring possession of their property.” This rationale only makes sense when applied to the illegal use of property by one who is not the owner, but to whom the owner has entrusted his property. It cannot reasonably be applied to a purchaser or legitimate transferee when the illegal use of the property was by the prior owner. There is no deterrent in a penalty imposed on an owner after the fact, unless it is to deter innocent purchasers from buying property without conducting a complete investigation of the seller, which is unreasonable.

44. 18 U.S.C. § 1963(i) sets forth the “recognized principle” that third parties may not intervene in the criminal case. S. REP. No. 225, supra note 16, at 206.
47. Calero-Toledo, 416 U.S. at 684.
48. Id. at 693 (Douglas, J., dissenting).
50. Calero-Toledo, 416 U.S. at 688.
51. In large commercial transactions, it is reasonable to expect that a purchaser would
tion-back concept reflects the unjust nature of *ex post facto* laws, which are constitutionally barred.\(^5\)

The legislative history of the 1984 amendments to the Organized Crime Control Act acknowledge that section 1963(c), which vests title to forfeited property in the United States at the time the underlying offense is committed, is a codification of the "taint" theory heretofore attached to *in rem* forfeiture.\(^6\) The statute therefore gives prosecutors the best of both worlds — *in personam* jurisdiction and *in rem* forfeiture. The "relation back" concept, virtually preempts an otherwise legitimate transfer of property unless the buyer can prove that he had no reason to know that the property might be subject to forfeiture.\(^6\)

Courts have widely disagreed over the nature of criminal forfeiture. The District Court in *United States v. Ambrosio*\(^5\) held "the innocence of a third party in an *in personam* forfeiture proceeding is a valid defense."\(^6\) Compare the language in *Ambrosio* to that of *Calero-Toledo v. Pearson Yacht Leasing Co.*,\(^7\) a seminal case on *in rem* forfeiture in which the Supreme Court held that "the innocence of the owner of the property subject to forfeiture has almost uniformly been rejected as a defense."\(^6\) The decision in *United States v. Thevis*\(^9\) is illustrative: the Court assumed that "the forfeiture authorized by RICO is, like traditional *in rem* action, limited to interest or property rights put to an illegal use under 18 U.S.C. § 1962.\(^6\) However, the *Thevis* decision was rendered in 1979, before Congress expanded the definition of assets to include all fruits of the illegal conduct. Since profits derived from illegal activity are not the same as property used in the illegal activity, this comparison to *in rem* conduct a costly investigation of the seller. However, for the average individual or small commercial enterprise, the cost of such an investigation would not always be feasible. The threat of eventual forfeiture may thus have a chilling effect on commerce. People will be deterred from purchasing property or interests in property by the high cost of adequately investigating the background of the sellers.

\(^5\) U.S. CONST. art. I, § 9, cl. 3. It is generally agreed that the relation back concept of section 1963(c), as it applies to the defendant, does not constitute an *ex post facto* enactment. *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985) [hereinafter *Crozier II*]. See also *United States v. Rogers*, 602 F. Supp. 1332, 1341 (D. Colo. 1985).

\(^6\) Compare the language in *Ambrosio* to that of *Calero-Toledo v. Pearson Yacht Leasing Co.*, a seminal case on *in rem* forfeiture in which the Supreme Court held that "the innocence of the owner of the property subject to forfeiture has almost uniformly been rejected as a defense." The decision in *United States v. Thevis* is illustrative: the Court assumed that "the forfeiture authorized by RICO is, like traditional *in rem* action, limited to interest or property rights put to an illegal use under 18 U.S.C. § 1962. However, the *Thevis* decision was rendered in 1979, before Congress expanded the definition of assets to include all fruits of the illegal conduct. Since profits derived from illegal activity are not the same as property used in the illegal activity, this comparison to *in rem*...
forfeiture is no longer valid.

Like the court in *Thevis*, other courts have found little or no difference between criminal and civil forfeiture.61 These Courts are disregarding the unique nature of criminal forfeitures. Criminal forfeiture gives the government jurisdiction wherever the defendant may be tried,62 not necessarily where the property is located, as in the case of civil forfeiture.63 Also in criminal forfeiture, no third party may intervene or institute a separate action to assert his property rights during the criminal prosecution.64 Traditional *in rem* proceedings impose none of these limitations on property owners.

E. RICO Forfeiture Procedure

While federal prosecutors enjoy much discretion in their use of the RICO statutes, they are subject to some limitations. First, a United States Attorney is not free to file a RICO case without first obtaining approval from the Department of Justice Organized Crime and Racketeering Section.65 In order to obtain forfeiture of any property, the property must be described in the indictment.66 This means that a grand jury must have determined that there was probable cause to believe that the property will be forfeitable upon the conviction of the defendant. The prosecutor's motion for a restraining order may be made immediately after the indictment is returned by the grand jury.67 The statute does not require notice of the motion to either the defendant or any third party with an interest in the property. The motion is argued in an *ex parte* proceeding before a judge, much like the proceeding for a civil temporary restraining order.68 When it is made known to the court that a third party holds title to or is in possession of certain of the forfeitable assets, the judge should fully question the prosecutor regarding the burdens be-

61. The Fourth Circuit, in United States v. Grande, 620 F.2d 1026 (4th Cir. 1980), held "*in rem* forfeitures, though nominally against inanimate objects, impose penalties upon persons [citations omitted], and the fact that the proceeding is *in personam* rather than *in rem* seems of little significance." *Id.* at 1039. In United States v. Huber, 603 F.2d 387 (2d Cir. 1979), the court dismissed any variation between the types of action, stating "[A]t least for this purpose, there is no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *Id.* at 397.
66. FED. R. CRIM. P. 7(c)(2).
68. See FED. R. CIV. P. 65.
ing placed on that third party. The ex parte nature of the proceeding, however, gives the prosecutor full responsibility for accurately presenting the facts to the judge and to the grand jury. This situation creates a potential conflict of interest for the prosecutor: in a RICO forfeiture action, it is the goal of the prosecution to obtain restraint and eventual forfeiture; but, at the same time, the prosecutor will recognize that full disclosure of third party interests in the property to be forfeited is contrary to his goals.

Congress was aware of the prosecutor's conflict of interest in RICO forfeiture proceedings:

Where it is clear that a forfeitable asset has been sold for value to an innocent purchaser, the Committee expects that the government would seek forfeiture of substitute assets of the defendant, as provided in § 1963(d), at the conclusion of trial and avoid the necessity of the purchaser petitioning for a post-trial hearing. Regrettably, this caveat is buried in a footnote in the Senate Report. Congress may have expected the prosecutor not to abuse his discretion in seeking forfeiture of property known to be in the hands of a bona fide purchaser or other legitimate assets. From this statement in the Senate Report, it is clear that Congress would not have wanted the prosecutor to waste government resources and court time pursuing ends that are not clearly within the scope of the statute. The prosecutor's ethical duty as an officer of the court must also weigh heavily in his decision whether or not to seek forfeiture.

II. THE DUE PROCESS PROBLEM

It is fundamental to our system of justice that the government should not be allowed to seize a person's property without giving him an opportunity to contest the seizure. Existing RICO legislation fails to provide for the due process rights of third parties and the

69. A.B.A. Report, supra note 9, app. D. at 43.
70. S. REP. No. 225, supra note 16, at 201 n.29.
71. But cf: United States v. Reckmeyer, 627 F. Supp. 412 (E.D. Va. 1986) [hereinafter Reckmeyer I] and United States v. Reckmeyer, 628 F. Supp. 616 (E.D. Va. 1986) [hereinafter Reckmeyer II]. In Reckmeyer I, a third party had sold cattle to the defendant and was still owed a large balance on them. The prosecutor sought forfeiture of the cattle despite the obvious claim of the third party. Barry Tarlow, in IV RICO Law Reporter at 497 (1986), comments that "[t]he third party in Reckmeyer I presented such a strong case that it is difficult to understand why the prosecution contested the issue."
The courts have had to grapple with due process problems throughout the history of RICO legislation. Prior to the 1984 amendments to the statute, many courts assumed that a prompt post-restraint hearing was necessary in RICO forfeitures, although such a restriction was not explicitly included in the legislation. Courts viewed restraining orders in RICO criminal actions as similar to civil restraining orders and, because they had always required prompt post-restraint hearings for civil restraining orders, they required the same in criminal forfeitures under RICO. During this period, more than one court read into the statute a requirement for a prompt post-restraint hearing rather than be forced to decide on the statute's constitutionality. Since the 1984 amendments, and in the face of the clear intent of Congress to omit post-indictment, pre-trial restraint hearings, courts still require such hearings for both defendants and third party property owners. As a further indication of the judiciary's concern with the statute, third parties have even been allowed to file interlocutory appeals on restraining orders affecting them, which is in direct contrast to the purpose of the

74. U.S. CONST., amend V.
75. See supra note 30.
76. Veon, 538 F. Supp. at 246 ("It may well be that the courts have looked to the familiar rules of civil procedure because no other standards have been suggested.").
77. Id. at 244-45; see supra note 30.

In United States v. Thier, the Fifth Circuit insisted that the literal language of the statute does not preclude hearings for "preliminary injunctions," as it does for "restraining orders," and that the application of the Federal Rules of Civil Procedure was still appropriate. 801 F.2d 1463, 1469 (5th Cir. 1986). The court in Rogers strained as hard as the Fifth Circuit in Thier to construe the statute in a way to allow for a post-deprivation hearing without finding the statute unconstitutional. Rogers, 602 F. Supp. at 1343.

80. United States v. Regan, 858 F.2d 115 (2d Cir. 1988). The case involves a RICO action against various individuals and entities that are partners in Princeton/Newport Partners, L.P. (the first RICO action taken against an investment partnership). The limited partnership was the third party in possession of property being restrained as a part of the criminal action. The government initially obtained restraint of all of the assets of the limited partnership, the third party appealed, and the case was remanded to limit restraint to the defendant's
A. What Constitutes a Deprivation

The due process analysis can be divided into two parts: (1) what constitutes a deprivation, and (2) what is required to satisfy due process.

It is well settled that actual seizure of property without notice or an opportunity to be heard is unconstitutional. Deprivation that is either temporary or partial is also prohibited by the fifth amendment. It logically follows that restraint of property is a deprivation in this context.

The nature of the property being restrained, the severity of the restraining order, and the length of delay between restraint and the opportunity to be heard are factors which should be considered in any RICO due process analysis. Restraint under RICO refers to the temporary freezing of assets. Assets that may be restrained include cash, stocks, real estate, personal property or partnership interests.

A restraining order may bar the transfer of property without court permission; it may also include a bar to any use of the property, including the income generated from it. Further, it may result in government control of a business or labor union during the pendency of the criminal action. A restriction against the sale of one's property may mean the inability to obtain funds for payment of taxes as well as living expenses. Furthermore, the specter of forfeiture of attorney's fees may deter defense attorneys from taking on cases for RICO defendants. As a result of this, RICO defendants

interests in the partnership or, alternatively, to direct the posting of a bond, if that would be less burdensome on the partnership.

83. See Spilotro, 680 F.2d at 617; Veon, 549 F.2d at 244-45.
84. In Veliotis, 586 F. Supp. 1512, a portion of the restrained assets were shares in General Dynamics Corporation; real property was restrained in Monsanto, 836 F.2d 74; in Regan, 858 F.2d 115, the property was the defendant's interest in a limited partnership.
85. See, e.g., Musson, 802 F.2d at 386.
86. See, e.g., Crozier I, 674 F.2d at 1297. Restraint of virtually all of the defendant's property left them with no income with which to pay living expenses or the cost of litigation, and resulted in foreclosure of at least part of their real property.
88. Crozier I, 674 F.2d at 1297.
may be denied their sixth amendment rights. Restrainment of a defendant's sole source of income has been denied as unreasonable as well as unconstitutional.

The severity of the restraint and the nature of the property are not the only factors that should be taken into account in determining whether a due process violation exists. The length of time that the restraint will remain in effect should also be a factored into this analysis. Conviction or acquittal in a typical RICO trial may take months or even years. However, courts have held that any party asserting a lack of due process on the grounds of such a delay must show that he would be injured by the delay. RICO prosecutions are often extremely complex and may take a long time to resolve. They may involve multiple defendants, intricate securities transactions, or large corporations. The complexity of these cases often produces extraordinary delays, but a delay alone is not sufficient to assert a due process violation without proof of concomitant injuries.

Once the extent of the restraint being requested is known, a balancing test can be used; the courts can weigh the injury or burden on the property owner against the interest of the party requesting the restraint. Restraining the sale of one's property without court approval is enough to raise a deprivation issue. However, the deprivation might be considered minimal when weighed against the govern-

89. See generally Monsanto, 836 F.2d 74; Caplin & Drysdale, 837 F.2d 637. On March 21, 1989, the United States Supreme Court heard these cases in tandem for the purpose of ruling on the fifth and sixth amendment claims in each.
90. Crozier I, 674 F.2d at 1297. See supra note 75.
91. Crozier II, 777 F.2d 1376 (over five years since the indictment and criminal case not yet resolved). But see United States v. Draine, 637 F. Supp. 482 (S.D. Ala. 1986) (five months not too long given the facts of the case).
92. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983) (A delay of eighteen months between a seizure under customs law and the institution of forfeiture proceedings was found not to be violative of due process in the face of valid government reasons for the delay and lack of prejudice to the interested party. This case has come to stand for the requirement that a claimant assert loss or prejudice before a finding of lack of due process can be made). See also Rogers, 602 F. Supp. at 1335 ("There is no need to adjudicate the hypothetical claims of third parties which may never arise.").
94. See, e.g., Regan, 858 F.2d 115.
95. See, e.g., Veliotis, 586 F. Supp. 1512.
96. See supra note 92.
98. Spilotro, 680 F.2d at 617; Veliotis, 586 F. Supp. at 1520.
ment's interest in preserving the property for potential forfeiture. By eliminating a third party's opportunity to be heard in a RICO prosecution, section 1963 implies that the government's interest always prevails over any injury to a third party. Thus, the balancing test ordinarily employed in due process analyses is disregarded in RICO cases where third party property is forfeited.99

B. Satisfying Due Process

The notice requirement of due process should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection."100 The hearing component of procedural due process is a more complex issue. A hearing should be held prior to seizure,101 or at least in "a meaningful time and meaningful manner."102 Neither notice nor the opportunity to be heard is afforded third parties whose property is temporarily restrained under the Act.

RICO allows the government to obtain restraint of a third party's property immediately after indictment of the defendant.103 The third party's opportunity to be heard, however, is postponed until after the defendant's conviction.104 The provision for a post-conviction hearing does not satisfy the procedural requirements of the fifth amendment as far as a third party is concerned.105 Due process

99. Another factor is the risk of erroneous deprivation. Crozier II, 777 F.2d at 1383-84; Veon, 538 F. Supp. at 248. ("Complexity alone suggests a high degree of risk of error"). The risk of error is a factor in determining the standard of proof to be applied at a hearing on the matter. Santosky v. Kramer, 455 U.S. 743, 761 (1982). In RICO forfeiture, the risk is multiplied by the third party's absence from the litigation.


101. Fuentes v. Shevin, 407 U.S. 67, 82 (1982). Circumstances that constitute an exception to the requirements of procedural due process involve public interest or safety. Fuentes, 407 U.S. at 91; Boddie, 401 U.S. at 379. But see Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (Powell, J., concurring). In RICO prosecutions, it is in the public interest to prevent the defendant from disposing of or concealing the assets. United States v. Thier, 801 F.2d 1463 (5th Cir. 1986). There, the court stated:

The Government certainly has a valid interest in assuring that funds illegally obtained are not laundered or secreted between the time a defendant is indicted and the time when his criminality is determined by actual conviction. This is sufficiently important to weigh heavily in deciding what due process requires . . . . But due process must be determined on a scale whose balances weigh both sides.

Id. at 1475 (concurring opinion). The forfeiture is not only an added penalty against the defendant, but also serves to remove a portion of organized crime's power base.


104. 18 U.S.C. § 1963(i), (l).

105. The Supreme Court has not "embraced the general proposition that a wrong may
does not merely require notice and hearing at some indefinite future date. One of the requirements is that a hearing be held within "a meaningful time."\textsuperscript{106}

In accordance with the constitutional mandate of a hearing within a "meaningful time," the Federal Rules of Civil Procedure require a hearing as soon as possible, even when circumstances require restraint prior to notice and opportunity to be heard.\textsuperscript{107} In a non-RICO civil proceeding, an adversarial hearing would have to be held within ten days of the issuance of a temporary restraining order, or the order would expire.\textsuperscript{108}

In addition to its failure to satisfy the meaningful time requirements, the provision for an eventual post-conviction forfeiture proceeding\textsuperscript{109} does not withstand constitutional muster because it is not conducted in a meaningful manner. First, the hearing does not address the issue of the temporary restraint of the third party’s property; the only issue at the hearing is whether there will be a permanent forfeiture of the property.\textsuperscript{110} In addition, the burden of proof at the hearing rests upon the third party,\textsuperscript{111} who must establish, by a
preponderance of the evidence, that he is a bona fide purchaser.¹¹²

While the statute explicitly bars intervention or other action by third parties during the pendency of the criminal trial,¹¹³ one court has required a pre-trial hearing at the request of a third party.¹¹⁴ Some courts have not allowed the criminal defendant to assert the rights of the third party property owner.¹¹⁵ Even if a court were to permit a defendant to assert the rights of the third party, the defendant may not always act to protect the interests of the injured third party. Furthermore, there may be a conflict of interest between the interests of the defendant and the third party. For example, a defendant in a criminal RICO action may concede to the government's restraint of property belonging to a third party, in order to better his own position. This is conceivable where a RICO defendant knows of property that is in the hands of a third party and is reachable under the statute; here, the defendant could identify that property to the prosecution instead of losing property of his own.¹¹⁶

Due process is basically a question of fairness. In addition to the unfairness of restraining a person's property without notice and an opportunity to be heard, there is an additional element of unfairness where a court issues a temporary restraining order in sole reliance on an indictment. The third party is being penalized without ever having been charged with a crime.

225, supra note 16, at 209. The question is whether this finding is meaningful when an interested party may not ever have been heard.

112. 18 U.S.C. § 1963(l). The content of the hearing is set by statute, and the third party is limited to arguing only that he is a bona fide purchaser; he may not seek to establish that the forfeiture is improper for other reasons. But see, Caplin & Drysdale, 837 F.2d at 642-43 (attorneys for the defendant, acting on their own behalf as interested third parties, allowed to assert defendant's sixth amendment rights).


114. United States v. Regan, 858 F.2d 115 (2d Cir. 1988).

115. Rogers, 602 F. Supp. at 1335 (In the context of a RICO forfeiture, there is not "basis to presume that defendants will be more effective advocates than the third parties themselves."). Jus tertii is the general prohibition against a party to the action asserting the rights of non-parties. It does not have its basis in the constitution, but is a "prudential doctrine" created by the courts to promote judicial economy and efficiency. Where its justifications are inapplicable and there is a special relationship between the party to the action and the third party, it is not rigidly applied. Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 333 (5th Cir. 1981). The jurisdiction to hear interlocutory appeals concerning restraining orders in RICO cases was settled in Crozier I, 674 F.2d at 1296; United States v. Ferrantino, 738 F2d at 109 (6th Cir. 1983); Spilotro, 680 F.2d at 616.

Prior to an application for a restraining order, a grand jury must have found that there is probable cause to believe that a crime was committed, that the defendant committed it, and that the property is subject to forfeiture.\textsuperscript{117} However, the third party with an interest in the property has not been indicted; there is no finding of probable cause to believe that the third party is guilty of anything, that he is an accomplice of the defendant, or that the transfer of property by the defendant to the third party was in any way fraudulent.\textsuperscript{118} Consequently, a third party whose property is being restrained has less protection than the defendant in the underlying RICO prosecution.

Not only is a third party barred from being heard until the order of forfeiture is entered subsequent to conviction, but he is then forced to take the initiative and petition for a hearing. Furthermore, at the hearing he bears the burden of establishing, by a preponderance of the evidence, that his title was superior to the defendant's and that he had no reason to believe that the property in question might be forfeitable.\textsuperscript{119} Only then can the third party defeat the government's claim to the property. Thus, even if the court grants a timely hearing to the defendant, the third party is still denied his opportunity to be heard in a meaningful time and meaningful manner.

C. Inadequate Protection for the Bona Fide Purchaser

The clearest example of an innocent third party who may be harmed by the RICO forfeiture provisions is the bona fide purchaser. The statute defines a bona fide purchaser as one who has bought potentially forfeitable property for valid consideration, not having any reason to know that the property might be subject to forfeiture.\textsuperscript{120} Section 1963(c) vests title in the government at the time of the commission of the predicate offense,\textsuperscript{121} which can occur well before the investigation and indictment of the defendant. If the de-

\textsuperscript{117} FED. R. CRIM. P. 7.
\textsuperscript{118} One commentator has offered the opinion that "an innocent party who becomes involved in the affairs of organized crime is probably not wholly innocent and may be considered as having 'assumed the risk.'" Note, RICO Forfeiture and the Rights of Innocent Third Parties, 18 CAL. W.U.L. REV. 345, 358 (1982) [hereinafter Note, Innocent Third Parties]. It is doubtful that there are many legislators willing to go on record as supporting that opinion, but it may not be an isolated one.
\textsuperscript{120} Id. § 1963(l)(6)(B).
\textsuperscript{121} Id. § 1963(c).
fendant sells, assigns or transfers his interest in the property to a third party subsequent to the predicate act, the government can still obtain temporary restraint of that property. The innocent third party who has obtained property from the defendant may lose his rights in that property unless he can prove, at a post-conviction forfeiture hearing, that he had no reason to know of the government's interest.

Not only must the purchaser establish that he gave value for the property, but he is also required to prove that he did not know or have reason to know the seller was under investigation for a RICO violation, and that the property was therefore subject to forfeiture. At the post-conviction proceeding, in order to retain control of the forfeited property, the government does not have to prove that the third party was guilty of anything. The bona fide purchaser bears the burden of proving that he isn't guilty of participating in a fraudulent transfer, and also that he had no reason to suspect that the property he obtained might be implicated in a RICO prosecution. Given the complexity of the RICO forfeiture provisions, it is unreasonable for the government to require that all innocent purchasers, acting in good faith, be familiar with all prior owners and the rippling effect of their conduct on the property that is purchased from them.

The RICO statutes ignore any presumption that the holder of legal title might reasonably expect. It is not unreasonable for the title holder to expect that, where he has purchased the property for value and in good faith, any one who wishes to challenge his title would have the burden of going forward with such an action. For example, in a civil action to set aside a transfer as a fraudulent conveyance, the burden to initiate the action and prove the transfer fraudulent is on the party advocating the change in the status quo. Even in a civil forfeiture proceeding under 18 U.S.C. § 1964, the government bears the burden of proof. It is only in a post-convic-

122. Id. § 1963(l).
123. "To place upon the unwitting or average human being the ability to parse through that language and to prove that he parsed through the language and did not, in fact understand that it was property subject to forfeiture may be a little more bit than the Constitution can stand." A.B.A. Report, supra note 9, app. D at 43. Although ignorance of the law is generally not a defense to criminal conduct, United States v. International Minerals & Chemicals Corp., 402 U.S. 558, 563 (1971), a third party property owner in a RICO case is not charged with a crime.
124. Outside of bankruptcy, actions to set aside transfers of property are governed by state law. New York, for example, follows the Uniform Fraudulent Conveyance Act. N.Y. DEBT. & CRED. LAW §§ 270 et. seq. (McKinneys 1988); Uniform Fraudulent Conveyance Act, U.L.A. vol.7a (1985).
125. See United States v. Local 560, IBT, 581 F. Supp. 279, 327 (D.N.J. 1984), aff'd,
tion forfeiture hearing under 18 U.S.C. § 1963(l) or its drug-offense counterpart, 21 U.S.C. § 853(n) that the bona fide purchaser must be the moving party. The statutes thus create a new presumption that title to potentially forfeitable property in such cases vests in the United States, even though the owner of record has not yet been given an opportunity to be heard.126

D. Other Parties Caught Up By RICO Prosecutions

While the most blatant lack of due process attaches to the plight of the bona fide purchaser, other forms of property rights are endangered by the RICO forfeiture provisions.

Rights in community property or marital assets may be subject to RICO forfeiture. In United States v. L’Hoste,127 the court rejected the defendant’s argument that his wife’s share of community property could not be forfeited. The court found that the defendant could not argue his wife’s claim and that she was limited to the statutory remedy of petitioning the Attorney General for mitigation (the only remedy for third parties prior to the 1984 amendments to the Act).

A more complex question of marital rights in forfeitable property arose in FDIC v. United States,128 where the United States Attorney, the Internal Revenue Service, and the former wife of a RICO defendant were all competing for a cash surplus from the FDIC’s sale of foreclosed property belonging to the defendant. The defendant had previously transferred the second mortgage on the property to a trust to secure alimony payments. The Internal Revenue Service (IRS) had a tax lien on the same funds, and the United States government claimed the funds pursuant to a prior order of forfeiture under the RICO statutes.129 The transfer of the second mortgage was held to be a fraudulent attempt to hide the assets. The wife’s claim was not ripe, whereas the claims of the U.S. government and the IRS were recorded judgments.130 It is not being argued here

780 F.2d 267, cert. denied, 106 S.Ct. 2247.
126. The parallel CCE statute explicitly provides for another presumption. Any assets in the defendant’s possession immediately following the criminal act are presumed to be the fruits of that conduct, unless the defendant can establish that the assets came from another source. S. Rep. No. 225, supra note 16, at 212.
127. 609 F.2d 796 (5th Cir. 1980).
129. United States v. Thevis, 665 F.2d 616 (5th Cir. 1982).
130. FDIC v. United States, 654 F. Supp. at 812-13. The wife also contended that she was a bona fide purchaser, but the court rejected that argument, noting that she was aware of
that a spouse should be able to protect her partner's illegally obtained assets from forfeiture; however, a spouse may be an unwitting victim and should be given a timely opportunity to be heard on their claims.

Other parties who may be caught up in the wake of a RICO forfeiture are those who share an interest in forfeitable property with a RICO defendant, e.g., joint tenants or tenants in common. For example, in order to divest the defendant of his interest in a jointly-held property, the property itself may have to be liquidated or subdivided, regardless of the intentions or desires of the joint tenants. This may adversely affect the value of the property by bringing a reduced price at a distress sale, thus causing harm to an innocent third party who had the misfortune to share a property interest with the RICO defendant.

Even a secured interest is not altogether secure from the reach of a RICO forfeiture. A secured creditor who makes a loan to a person who becomes involved in a RICO forfeiture may lose the collateral upon which the loan is made. Here, the vast reach of the RICO statute is apparent: anyone who holds a security interest in property may lose their interest in that property simply because the person who holds it has been caught in the broad sweep of a RICO prosecution. In view of the large number of persons and business entities holding secured interests in real and personal property, any threat to the sanctity of those interests could seriously impede the availability of credit. Where creditors fear seizure of their collateral by RICO prosecutors, they may ultimately resort to charging excessive prices for secured credit and may drive many needy borrowers out of the market.

Some claimants have been held to have no "cognizable interest"
in forfeitable property. In *United States v. Mageean*, at a post-conviction hearing to determine third party claims, air crash victims with pending suits against a corporation wholly owned by the RICO defendant were found to have no remedy as the crash occurred after the criminal act. Unsecured trade creditors, however, were found to have cognizable interests as bona fide purchasers.

Defense attorneys have discovered that their fees are no longer assured where their client's property is subject to forfeiture under RICO. Until 1987, the circuits had been consistent in holding that the sixth amendment precluded forfeiture of funds paid for defense counsel, except in cases where the defendant had made a bad faith transfer for the purpose of concealing assets or protecting them from forfeiture. In December of 1987, a panel of the Second Circuit speculated that the courts that had interpreted the statute to exempt legitimate attorney's fees from the reach of RICO forfeiture had done so in order to avoid confronting the sixth amendment right to counsel issue. The panel also found that the legislation provided no exemption for attorney's fees, but remanded for a hearing in order to satisfy the due process requirements. Although forfeiture would have rendered the defendant indigent, the trial court refused to vacate the restraining order. In a rehearing *en banc*, the court of appeals reversed, directing that funds be released to pay the defendant's attorney.

The Fourth Circuit, in *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, not only upheld the restraint placed on a fee that had been paid to the defendant's tax attorneys, but upheld the eventual forfeiture of that fee and rejected the claimant's petition for

135. *Id.* at 831.
137. *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987).
138. *Id.*
139. *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc).
140. *Id.* at 1403. The *Monsanto* decision was based upon a variety of grounds. Three Justices held that the statute was unconstitutional as applied on sixth amendment grounds. Justice Oakes wrote a separate concurring opinion also citing lack of due process in that "pre-trial forfeiture too closely resembles the Alice-in-Wonderland Queen's 'sentence first, verdict afterward' mode of justice." *Id.* at 1404. The Supreme Court granted certiorari in 109 S.Ct. 363 (1988), and the case was heard in tandem with Caplin & Drysdale, Chartered v. United States, 837 F.2d 637 (4th Cir. 1988).
141. 837 F.2d 637 (4th Cir. 1988). *See supra* note 79.
the remainder owed. The court of appeals held that an order of forfeiture is limited only by the rights of third parties as those rights are narrowly defined in 21 U.S.C. § 853(n). The Fifth and Tenth Circuits have also heard similar claims and both have upheld the constitutionality of the RICO forfeiture statute and its application to attorney's fees. The thrust of the controversy over attorney's fees, however, is not the rights of a third party but the defendant's sixth amendment right to counsel. This note is primarily concerned with third party property rights in RICO forfeiture.

Given the nature of RICO cases, other potential third party claimants might include parties with interests in the same enterprise as the defendant; e.g., a partner in the defendant's business or shareholders in a corporation that is involved in a RICO suit. If organized crime has reached into the fabric of our economy as extensively as the proponents of the statutes claim, then it is conceivable that, without proper limitations, zealous enforcement of section 1963 could affect national defense, communications, health care, and transportation industries by the threat of restraint or forfeiture of large blocks or stock.

An entirely new development is the use of the RICO statute in the securities industry. The first securities brokers indicted under RICO were members of the firm Princeton/Newport Partners. In Regan, the government had sought to monitor the dealings of the Princeton/Newport investment partnership and to restrain all of its assets. The Second Circuit allowed the defendants to retain control among themselves by posting a bond equal to the potential forfeiture liability. While the bond kept the government out of management,

142. Id. at 642. However, the court agreed that the attorneys had standing to argue the defendant's right to counsel as opposed to being bound by the statutory limitations upon a third party in a post-conviction hearing.
143. Id. at 649.
144. United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988); United States v. Jones, 837 F.2d 1332 (5th Cir. 1988).
145. A.B.A. Report, supra note 9, app. D at 45.
146. In United States v. Veliotis, 586 F. Supp. at 1512 (S.D.N.Y. 1984, defendant Veliotis was on the Board of Directors of General Dynamics Corp., President and General Manager of its Quincy Division and General Manager of the Electronic Boat Division. He also owned as much as 114,659 shares of General Dynamics stock. 147. United States v. Regan, 858 F.2d 115 (2d Cir. 1988).
148. Provision for posting of a bond as an alternative to restraint may also be used in United States v. Milken, where an indictment was returned by a grand jury on March 29, 1989, against Michael Milken and two other defendants who traded high yield ("junk") bonds at Drexel, Burnham, Lambert. The case against Milken may produce the largest financial penalty ever assessed against individuals; the United States Attorney could seek forfeiture of
it still froze substantial assets of the firm, resulting in eventual liquidation.

RECOMMENDATIONS AND CONCLUSION

Any amendment to the Criminal Forfeiture Act that would strengthen due process rights for third party property owners would diminish the prosecutor's strength in fighting racketeers and other criminals. There must be some attempt, however, to balance the rights of unindicted third parties and the laudable goals of the Act. Section 1963 itself might provide the answer. In allowing for pre-indictment restraining orders, Congress provided for temporary restraint similar to that of Rule 65 of the Federal Rules of Civil Procedure, which establishes guidelines for obtaining temporary restraining orders. In the Comprehensive Forfeiture Act, Congress provided for notice to be given to third parties with an interest in the property. The same provision also allowed for the third party's participation in the proceedings. The government must be able to obtain a post-indictment temporary restraining order without warning to the defendant. That necessity is one of the "extraordinary exceptions" to the due process requirement of prior notice and opportunity to be heard. That, in itself, is not a violation of due process. What the statute lacks is a provision that any such ex parte restraining order be temporary, limited to a reasonable length of time. It should be extended only after an adversarial hearing is held at which any third party with an interest in the property may be heard.

Section 1963(d)(1)(A) provides that a restraining order or injunction may be issued upon the filing of an indictment or information. There is no provision for a timely adversarial hearing. Further conditions should be added to the statute; I propose the following addition:

18 U.S.C. § 1963(d)(1)(A) . . . Provided that,
(i) any ex parte temporary restraining order shall be effective for no more than 90 days; and
(ii) a temporary injunction may be issued only upon notice to any persons appearing who have an interest in the property and opportunity for a hearing at which such persons shall have an opportunity to be heard and hearsay evidence may be admitted; and

over $1.8 billion on the RICO counts alone. N.Y. Times, March 30, 1989 at 1, col. 6.
150. Id.
(iii) the court determines that 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

(iv) the need to preserve the property outweighs the hardship on any party against whom the order is to be entered.

While the above changes in the Organized Crime Control Act would require more time and effort on the part of prosecutors in preparing for and conducting hearings, and some potentially forfeitable property might be allowed to fall through the RICO net, due process rights of third parties will be better protected. Damage to the goals of the statute could be minimized by allowing hearsay evidence to be introduced at the hearings. The important purposes advanced by the RICO legislation — dismantling organized crime by stripping criminals of the assets used or obtained in their criminal enterprise — must be balanced against constitutional protections, and adjustments made to safeguard the property rights of third parties. While Congress has indicated that in personam forfeiture is entirely different from in rem forfeiture, the RICO statute and its legislative history have unduly blurred those differences. Although the 1984 amendments to the Organized Crime Control Act added some judicial process for affected third parties, courts have continued to demonstrate their concern for the lack of notice and opportunity to be heard in § 1963 cases. If RICO and CCE forfeitures are to be effective, and not eviscerated by courts rightfully concerned with due process, the differences ought to be made clearer and adequate protections provided.

Third parties should be given notice and the right to be heard in a post-restraint, pre-trial adversary hearing. Even if probable cause is still the standard of proof and the rules of evidence suspended, third party property owners should be given some opportunity to be heard at a meaningful time and meaningful manner.

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154. See supra note 79.