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RICO's Conspiracy Agreement Requirement: A Matter of Semantics?

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NOTE

RICO’S CONSPIRACY AGREEMENT REQUIREMENT: A MATTER OF SEMANTICS?

I. INTRODUCTION

Since its inception, the Racketeer Influenced and Corrupt Organizations Act1 ("RICO") has been fraught with problems. RICO was enacted by the federal government as part of title IX of the Organized Crime Control Act,2 in an effort to combat the increasing threat of organized crime in modern society. However, RICO may not have met this goal, as commentators have constantly criticized RICO’s ambiguity and overbreadth. Recently, attacks have been made on the constitutionality of RICO, creating further doubt over whether the government overstepped its bounds in its zealous effort to combat organized crime.3

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The attacks against RICO are primarily directed at the civil portions of the Act in that they seem to be punishing criminal acts without the stringent requirements of the criminal process. This is because the predicate acts involved in the civil litigation are criminal acts and the forfeiture and treble damages provisions appear to be punitive measures (as opposed to merely compensatory measures). These challenges raise concerns as to whether some of the provisions, as applied, violate an individual's constitutional rights. Aside from the questions surrounding the Act's legality, there are still unanswered questions as to how RICO is to be applied. This Note will focus on the troubling question as to what a co-conspirator must agree to in order to fall under the scope of RICO liability. It will begin with a brief history of the issue, followed by a short history of RICO's legislative background. This Note will then address the actual conflict in a circuit by circuit survey, and conclude with a proposed approach that the Supreme Court should adopt, if and when it chooses to decide the issue.

II. WHAT MUST A CO-CONSPIRATOR AGREE TO:
THE HISTORY OF THE ISSUE

Although RICO was passed in 1970, it was not until the middle to late 1970s that the courts began to receive large numbers of RICO claims. The various circuit courts, in attempting to interpret the legislative intent behind RICO, created a number of serious inconsistencies among themselves. One such inconsistency is what a co-conspirator


5. See, e.g., United States v. Monsanto, 491 U.S. 600 (1989). This case involved the question of whether the forfeiture provisions had the effect of violating the Sixth Amendment right to counsel. By seizing all assets that were arguably the profits from illegal ventures, the defendant was not able to afford the lawyer of his choice. The Supreme Court upheld the forfeiture provisions as constitutional, and said that the Sixth Amendment was not violated as it only guarantees a right to counsel, which the defendant had in this instance, it did not guarantee his right to the counsel of his choice.

6. This issue has been examined only once before in the law reviews. See James C. Minnis, Note, Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required, 62 Tul. L. Rev. 1399 (1988). However, this article essentially addresses only one side of the argument, the side holding that personal agreement is not necessary.
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must have agreed to do in order to be charged with violating the RICO conspiracy provision. Currently, there exists within the circuits two differing approaches. The first approach will be referred to as the “narrow” approach and the second approach will be referred to as the “broad” approach.

The first approach is termed the narrow approach because it places a higher burden of proof on the government. It is most clearly set out in United States v. Winter. It requires that the co-conspirator personally agree to commit two predicate acts. This does not mean that the acts actually have to be committed, but that the government must be able to prove that the individual’s involvement extended to more than one specific instance. This approach has been adopted by only by the First, Second, and Tenth Circuits.

The broad approach was first enunciated in United States v. Carter. In this approach the co-conspirator must only agree that two acts be committed in furtherance of the conspiracy. He need not agree to commit the acts himself, but merely that the acts be done by someone. The result of this approach is that the applicability of the Act is extended to cover those who cannot be convicted for committing an actual illegal act, but are liable solely because they joined an enterprise whose goal was to commit these illegal acts. They are liable as conspirators in the most basic sense of the term. This approach is currently followed by seven other circuits. The Fifth Circuit is arguably an eighth circuit which follows the broad approach, although it employs different language than the other cir-

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7. An individual charged with a RICO conspiracy is charged under 18 U.S.C. § 1962(d) which reads as follows: “It shall be unlawful for any person to conspire to violate any provisions of subsection (a), (b), or (c) of this section.”

At the outset it must be clearly pointed out that the controversy arises in only a small number of cases. This is because in the majority of RICO cases the government can generally attribute numerous criminal acts to each conspirator. Therefore, the problem only surfaces in smaller RICO cases or with fringe members of a conspiracy. This may also account for the refusal of the Supreme Court to decide what the standard is, because it is only a peripheral concern within the larger framework of RICO.


9. Id.

10. Id. at 1136.


13. Id. at 1528-31.

14. Id. This obviously does not preclude proof that he agreed to commit the acts himself. The more proof the government can provide the stronger the case. This issue focuses more upon the threshold level or required proof.
The inconsistency between the two views creates an issue primarily because the Supreme Court has not yet granted certiorari to a case dealing with this issue, although convicted defendants have petitioned on numerous occasions. The first notable request on this issue was in *Adams v. United States*. In this case Justice White dissented from the denial of certiorari because there was an inconsistency among the circuits and he believed that the Supreme Court should resolve the split. Resolution of this conflict would mean that only one standard would be applied in situations of this type. While there may have been valid reasons for denying certiorari at that time, subsequent petitions have also been denied. The most striking

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15. See United States v. Elliot, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), which states that to be convicted an individual "by his words or by his actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." This language is diametrically opposed to the language found in United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986), which says that "a RICO conspiracy requires only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity. Under this approach it is only necessary that the defendant agree to the commission of the two predicate acts on behalf of the conspiracy." The Fifth Circuit approach could be interpreted to mean that an individual who only indirectly agrees to participate in the activities of the enterprise may be one who only agrees to the commission of two or more predicate acts, as required by the second approach. Neither would restrict the applicability of the statute to those defendants who personally agreed to commit two predicate acts.


18. Id.

19. Some commentators say that the Supreme Court has correctly denied taking this issue up on certiorari. See Michael J. Broyde, Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. Rev. 610 (1987). The author cites four requirements for a case to be heard by the Supreme Court. These are: 1) "the cases in conflict must be from the final courts in their jurisdictions"; 2) "the conflict may not be based on dicta or alternative holdings"; 3) "the issue raised before the Supreme Court must have been raised before the lower courts that heard the case, and either petitioner or respondent must raise the issue in its brief to the Supreme Court"; and 4) "the legal issue must also be relevant to the petitioner's claim." Id. at 620. An additional requirement is that the issue be of one that is of importance to the litigants themselves, and not merely future litigants, meaning that a favorable
recent request is found in *United States v. Pryba*,\(^2\) where the petition was again denied without explanation by the Court,\(^2\) but not without dissent. Justice White dissented from the denial of certiorari and asserted, yet again, that this issue should be resolved.\(^2\) In fact, he made a direct reference to his previous dissent on the issue in the *Adams* case.\(^2\) In spite of Justice White’s dissents and the numerous cases that have petitioned the Supreme Court for certiorari, to date the Court has not yet decided this issue, nor has it accepted a case in which this issue arises.

### III. A Brief Legislative History of RICO

In understanding what the purposes and goals of RICO are, it is important to know the background surrounding the passage of the

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\(^{20}\) *900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990).*

\(^{21}\) While it is not usual for the Supreme Court to give its reasons for denial of a petition of a writ of certiorari, the result can sometimes indicate that it agree with the decision below. This is somewhat troubling in this instance because one is left unsure of what the Court might be agreeing to. It could be saying that it agrees that the conviction should stand, or it could be saying that it agrees with the result. If the latter is the true interpretation then the Court is allowing two circuits to disregard the “correct” test to be used to decide this issue. By not granting certiorari and making a final decision on the issue the Court is allowing the First and Second circuits the right to thwart justice. If, however, it is not the test that the Court agrees with, but rather the result, it would still appear that the Court would have the responsibility to decide what the true test is. Especially if it does not agree with the test being used, because the challenges are being made in favor of the more strict test, and if this is not the correct test, defendants are being convicted in at least eight of the circuits on the incorrect standard. This would suggest that some of those convictions were not proper.

For a more thorough analysis of what role the Court should take, see Broyde, *supra* note 19.

\(^{22}\) *111 S. Ct. at 305.*

\(^{23}\) *Id.* The essence of his dissent was that the Supreme Court had a duty to hear this issue because of the conflicting results in the circuit courts. He stated that due to the differing results it mattered a great deal in which circuit charges were brought against you because in one the government had a much higher burden and you were more likely to be acquitted. In the other the burden was much lower and as a result convictions would occur more frequently in those circuits. The Supreme Court was supposed to settle the issue and thus would determine if too many individuals were not being punished or whether they were being unjustly punished.

A. The Factual Background of RICO

In 1963, a subcommittee of the Committee on Government Operations held hearings about the scope and depth of organized crime in American society.24 Their inquiry continued into 1964 through further investigation of illicit traffic in narcotics,25 and its results were reviewed by the Committee on Government Operations.26 The focus of the review was directed primarily towards the testimony given by Joseph Valachi, a former Mafia figure who turned government’s witness.27 Valachi was the first key figure directly involved in La Cosa Nostra, the organization more commonly known as the Mafia, to turn government’s witness.28 He provided the government with detailed information on the workings, makeup, and extent to which the Mafia’s activities penetrated into ordinary society. This information revealed that the Mafia was more entrenched in American society than Congress had first suspected.29 The ultimate finding of these hearings, and many others, was that organized crime was infiltrating legitimate businesses and governmental bodies throughout America,30 and the current laws did not adequately provide for a means to combat this infiltration.31

25. Id.
26. Id.
27. Id. at 2.
28. Id. at 3.
29. See supra note 24. The report consists primarily of the detailed information that Valachi was able to give the government: names, dates, crimes, types of businesses infiltrated. It is a very fact-specific report and in essence tells a story as opposed to findings of an administrative body.

For those interested in studying the workings of the Mafia it is a very valuable report as it indicates what its main characteristics are and its basic structure, which in turn shows how so many top individuals in the Mafia are not successfully prosecuted. This is because the orders filter down through the ranks and the lower branches have the responsibility to protect their superiors, and so the newer members tend to incur substantially all criminal liability for many of the crimes ordered by the members higher up.
31. See Organized Crime, supra note 24, at 3. There were several reasons given for the failure of the municipal agencies to deal with these problems. These include: lack of jurisdiction, lack of resources, lack of talent, insulation of criminal leaders, inadequate substantive laws at the state level, and failure to impose available sanctions. What was needed
B. The Introduction of the Act

In 1967, Senator Roman L. Hruska introduced legislation to combat the forces of organized crime. The focus of this legislation was to utilize new techniques to combat organized crime. It was not passed, however, as a consensus could not be reached on the appropriate means to combat this previously, underestimated force in American society.

The Organized Crime Control Act of 1969 was proposed by Senator McClellan. The initial version of the Act, however, did not contain the RICO provision, nor anything that was remotely similar to it. Additionally, this version, which was later to become RICO, did not adequately deal with the key problem, the infiltration of organized crime into American society. Shortly after its introduction, a replacement bill was introduced by Senators Hruska and Stevens. This bill dealt primarily with prohibiting the use of money acquired or "earned" by illegal means to further interests in legal organizations. This bill was also rejected, because, like many of its fore-
runners, it was too narrow and did not provide adequate means to
deal with the problem.\(^40\) Instead, it was only applicable to a small
group of individuals and thus did not accomplish the far-reaching
purposes which were sought after.\(^41\) The debates surrounding the
bills thus far introduced resulted in the introduction by Senators
Hruska and McClellan of S. 1861, the Corrupt Organizations Act.\(^42\)
This bill, while relying heavily on the antitrust laws, as did the first
bill introduced, did not contain a provision for treble damages.\(^43\) Its
goal was not to interfere with existing remedies but to provide the
government with additional means to combat the problem.\(^44\) Through
amendments and compromise this bill became title IX of the Orga-
nized Crime Control Act.\(^45\)

C. The Stated Purpose of the Act

The purpose of title IX is "the elimination of the infiltration of
organized crime and racketeering into legitimate organizations operat-
ing in interstate commerce."\(^46\) It attempts to reach these goals by
fashioning new criminal and civil punishments with which to punish
members of organized crime.\(^47\) While the new civil remedies are
extensive, this Note focuses primarily on the criminal provisions

\(^{40}\) Bradley, supra note 36, at 841.

\(^{41}\) Id. at 840. The bills only dealt with one method by which infiltration occurred,
investment. The report stated that there were four methods
by which organized crime gained control of legitimate businesses had been identi-
fied in 1967 by a presidential task force: investing concealed profits acquired from
farming and other illegal enterprises; accepting business interests in payment of
the owner's gambling debts; foreclosing on usurious loans; and using various forms
of extortion.

\(^{42}\) Blakey, supra note 33, at 262.

\(^{43}\) Id.

\(^{44}\) Id. at 262-63. It is important to remember that the goals of the government were
not only to establish means by which these individuals could be caught and prosecuted
criminally, but they were also supposed to be a means of civil redress. This was so that the
individuals hurt by the actions of organized crime could recoup some of their losses and
hopefully continue on with their businesses. In fact, RICO today is used primarily as a civil
means. This is not to say that no criminal actions are brought under RICO, but that the
citizens have made great use of the civil provisions.

\(^{45}\) Bradley, supra note 36, at 843. The bill passed the Senate on January 23, 1970 and
passed the House on October 7, 1970, with only minor changes, and was again approved by
the Senate on October 12, 1970. It was signed into law on October 15, 1970.

\(^{46}\) Senate Comm. on the Judiciary, Organized Crime Control Act of 1969,

\(^{47}\) Id. at 78-79.
which are codified in title 18 §§ 1961-1963. Section 1961 is the
definitional section, providing definitions of conduct which is punish-
able under the statute. The heart of the statute is § 1962, which
provides in detail what activities are prohibited by the Act. The
last criminal section is § 1963, which deals solely with the penalties
for violating any of the provisions in § 1962. The remaining sec-
tions, §§ 1964-1968, contain the civil provisions of the statute.

D. The Debates Over the Act

In the debates and hearings, the definition of what conduct
would be included as a criminal act under §§ 1961-1962 was not

49. Id. § 1961.
50. Id. § 1962. Section 1962 provides:
(a) It shall be unlawful for any person who has received any income de-
ivered, directly or indirectly, from a pattern of racketeering activity or through col-
lection of any unlawful debt in which such person has participated as a principal
within the meaning of section 2, title 18, United States Code, to use or invest,
directly or indirectly, any part of such income, or the proceeds of such income, in
acquisition of any interest in, or the establishment or operation of, any enterprise
which is engaged in, or the activities of which affect, interstate or foreign com-
merce. A purchase of securities on the open market for purposes of investment,
and without the intention of controlling or participating in the control of the issuer,
or of assisting another to do so, shall not be unlawful under this subsection if the
interests of the issuer held by the purchaser, the members of his immediate fami-
ly, and his or their accomplices in any pattern or racketeering activity or the col-
lection of an unlawful debt after such purchase do not amount in the aggregate to
one percent of the outstanding securities of any one class, and do not confer,
either in law or in fact, the power to elect one or more directors of the issuer.
(b) It shall be unlawful for any person through a pattern of racketeering
activity or through collection of an unlawful debt to acquire or maintain, directly
or indirectly, any interest in or control of any enterprise which is engaged in or
the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any
enterprise engaged in, or the activities of which affect, interstate or foreign com-
merce, to conduct or participate, directly or indirectly, in the conduct of such
enterprise’s affairs through a pattern of racketeering activity or collection of unlawful
debt.
(d) It shall be unlawful for any person to conspire to violate any of the
provisions of subsection (a), (b), or (c) of this section.

Id.

51. Id. § 1963. This Note will not be considering this section at all as the inquiry is
focused directly on what is necessary to obtain a conviction and not what occurs as a result
of the conviction.

52. Id. §§ 1964-1968. Although these sections provide the civil penalties, all penalties
are based on the acts listed in § 1962. See supra note 4 and accompanying text for articles
concerning the controversy surrounding this fact.
subject to much debate, because that was not the primary focus of the
Organized Crime Control Act. The focus was on the remedy; Congress was not trying to create new classifications of criminal behavior.\textsuperscript{53} Therefore, it was relatively easy for the members of Congress to decide what crimes it was going to punish and what constituted a violation of the Act, as opposed to creating a new definition of criminal conduct. The main points of contention arose mainly in the areas of criminal punishment and the civil provisions.\textsuperscript{54} The end result was that the courts had little guidance in determining what was meant by many of the criminal sections, § 1962(d) in particular.\textsuperscript{55} The courts were left largely to their own means to determine what was required by the Act in order to be guilty of conspiring to violate any of the activities specified in the Act. This lack of guidance is the direct cause that created the issue in question: what must a co-conspirator agree to in order to be held liable under § 1962(d) of the Act?

IV. THE CONFLICTING INTERPRETATIONS AMONG THE CIRCUITS: A CLOSER LOOK

As stated above, there appears to be two basic interpretations of what a co-conspirator must agree to, the narrow approach and the broad approach.\textsuperscript{56} This section will first analyze the narrow approach and the analysis employed by the circuit courts utilizing this approach. The focus will then shift to the broad approach and the analysis of law employed by those courts that have used this approach. Lastly, this section will focus on the slight deviation adopted by the Fifth Circuit to determine whether it is significant.

A. The Narrow Approach

The narrow approach is so named because it establishes a higher burden of proof borne by the government in proving its case: the government is required to produce evidence that meets very limited and specific requirements. The narrow approach requires the government to prove that an individual personally agreed to commit two or more predicate acts.\textsuperscript{57} This approach was first enunciated by the

\textsuperscript{53} See \textit{supra} notes 32-45 and accompanying text.

\textsuperscript{54} See \textit{generally} Bradley, \textit{supra} note 36.

\textsuperscript{55} See \textit{supra} note 7 and accompanying text.

\textsuperscript{56} See \textit{supra} notes 7-11 and accompanying text.

\textsuperscript{57} United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), \textit{cert. denied}, 460
First Circuit in *United States v. Winter*,\(^{58}\) and is currently followed by two other circuits, the Second and Tenth. Although the standard is the same, each circuit has dealt with the issue in a slightly different manner. It is these individual approaches that this Note will explore below.

1. The First Circuit Approach

In *Winter*, the First Circuit was faced with a case of first impression.\(^{59}\) In formulating its decision, it relied heavily on the decision in *United States v. Elliot*.\(^{60}\) The court’s analysis, however, went one step further. *Elliot* had established the following as the appropriate test:

> [t]o be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes.\(^{61}\)

At issue in *Winter* was whether the government must prove that the individual *personally* agreed to the commission of two predicate acts or whether it must prove that the individual personally committed two predicate acts.\(^{62}\) The court framed its decision on the basis of federal conspiracy law, as opposed to RICO conspiracy law. Federal conspiracy law, as enunciated in 18 U.S.C. § 371, does not require the requisite act to be committed, but merely requires that some action be taken towards the goal of the conspiracy.\(^{63}\) The *Winter* court
held that

a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes in addition to charging an agreement to participate in the conduct of an "enterprise's" affairs through a "pattern of racketeering activity." 64

The First Circuit has, in subsequent years, further defined what constitutes sufficient conduct to support a charge of RICO conspiracy. In United States v. Anguilo, 65 the First Circuit tailored the standard it previously articulated in Winter. 66 In Anguilo, the comparison to federal conspiracy law was again utilized, with the court focusing on the requirement for overt actions. "Overt actions" was defined as an actual manifestation towards realization of the goals of the conspiracy. 67 The First Circuit held that "the commission of 'overt acts' is not required for a RICO conspiracy conviction." 68 This decision was based on the language of the statute itself. The court held that a plain reading of the statute does not include a requirement for overt acts, nor even a mention of them. 69 The Anguilo court, therefore, cleared up any lingering doubts as to the necessity of overt acts, but adhered to its previous requirement that the defendant must have personally agreed to commit two predicate acts. 70

normal conspiracy law. In order to prove the substantive crime the government would need proof that the individual committed the crime.

64. Winter, 663 F.2d at 1136.
66. Id. at 964.
67. Id.
68. Id. In doing so the court broadened its approach. By not requiring overt acts by the members charged, it was sufficient that the defendants personally agreed to commit two acts, and the government need not prove that they had actually taken any steps towards committing those acts. As a general rule, in most RICO cases the government has at least one member of the enterprise that will testify against the others and this is how it proves what the others said to each other.

In making this decision the court joined other circuits which had already decided that overt acts were not necessary. See United States v. Coia, 719 F.2d 1120, 1123-24 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984); United States v. Barton, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981).

69. Anguilo, 847 F.2d at 964. The court held, "[s]ince section 1962(d) does not, itself, require overt acts, there is no reason for us to imply such a requirement." However, the requirement of two predicate acts is also not found in this section of the statute. It is found in 18 U.S.C. § 1961(5), which says that to prove the existence of a conspiracy there must be two or more predicate acts. The courts have applied this to the conspiracy provision as well. This seems somewhat strange in that in conspiracy law all that is needed is one act. 18 U.S.C. § 371 (1988).

70. Anguilo, 847 F.2d at 964; see also United States v. Boylan, 898 F.2d 230, 241 (1st
2. The Second Circuit Approach

The Second Circuit also follows the approach of the First Circuit. It decided the issue for the first time in 1984, just one year after the First Circuit decided Winter. However, the vagueness of the opinions and lack of clear guiding rules evidences a strong reluctance on its part to deal with the issue at an earlier date.

The case law indicates that the Second Circuit has chosen not to employ an identically phrased test as employed by the First Circuit. The test it adopted was set out in United States v. Ruggiero. While not utilizing the word "personally," Ruggiero clearly endorses the view that the government must show that the defendant personally agreed to the commission of two predicate acts, not that he merely agreed that the acts be committed. Instead, the Second Circuit maintains that the defendant must agree to participate in two predicate acts, intimating that personal participation is inherent in the agreement.
While the test utilized is easily discernable, there does not appear to be any discernable reason or reasons why the Second Circuit adopted this test, as opposed to any other test. In fact, the case law does not indicate an awareness that an almost identical test was being utilized in another circuit.

Interestingly enough, the Second Circuit in United States v. Persico,76 made an observation that § 1962(d) only requires an agreement to join the conspiracy, not an agreement to commit two or more predicate acts.77 Despite the relevancy of the observation to the issue at hand, the court held that the government must produce proof that the defendant agreed to commit two or more predicate acts to charge him with a RICO conspiracy.78 The decision is confusing because the Second Circuit stated that it was analyzing the RICO conspiracy statute in the same manner as it would any other conspiracy statute, whereas its holding clearly proves that it was not.79

The Second Circuit's approach is more confusing as it follows the majority of circuits in holding that the RICO conspiracy statute does not require proof of overt acts, which is a requirement of the federal conspiracy statute.80 The confusion is intensified because the federal conspiracy statute only requires an agreement and some overt act by one member of the conspiracy towards the furtherance of the goal to find culpability for all members, not action by each of the participants.81

agreement to commit two charged predicate crimes." Id. at 614. This clearly has the same effect as saying that the defendant must personally agree to commit two predicate crimes. See also United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 439 U.S. 982 (1989).
76. 832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988).
77. Id. at 713.
78. Id. The court held that:
[although proof of a RICO conspiracy requires a demonstration that a defendant agreed to commit two or more predicate acts, rather than a simple showing that the defendant agreed to join the conspiracy, the agreement proscribed by section 1962(d) is conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts.
Id.
79. "We perceive no valid reason why the RICO conspiracy statute should be analyzed in a manner inconsistent with other conspiracy statutes not requiring proof of overt acts." Id. at 713. This indicates that the agreement of a defendant to commit two predicate crimes is the overt act required, as opposed to any steps taken. This in itself is interesting as this circuit has also held that overt acts are not required by RICO. Id.; see also United States v. Barton, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981).
80. See supra note 79 and accompanying text. See also United States v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984).
81. 18 U.S.C. § 371; see also Pinkerton v. United States, 328 U.S. 640 (1946). It
3. The Tenth Circuit Approach

The Tenth Circuit recently joined the ranks of the First and Second Circuits. The issue first arose in *United States v. Killip*,\(^8\) but was summarily disposed of by the court.\(^3\) The issue was not dealt with again until 1991 in *United States v. Sanders*.\(^4\) The court at this juncture also dealt with the issue in a highly superficial manner. The court noted that the issue had not been decided, that it needed to be decided, and held that it would decide it, even though it was not briefed, and then it summarily picked an approach.\(^5\) Its continued adherence to its hastily set forth standard is questionable as it expressly stated that “this issue may be ripe for reconsideration at a future time . . . upon an opportunity for fuller briefing by the parties.”\(^6\) This tends to indicate that the Second Circuit did not fully consider the two differing approaches, nor an approach of its own, but merely adopted the one that had been applied by the district court below.

B. The Broad Approach

The broad approach is currently followed by seven, and arguably eight, of the other circuits and is thus easier to analyze.\(^7\) Moreover, in some instances the circuit courts have given the reasoning they utilized for choosing one approach over the other. The analysis in this section will proceed in a circuit by circuit fashion, starting with the

\(^8\) 819 F.2d 1542 (10th Cir. 1987).
\(^3\) Id. The issue was not decided by the court because the trial judge had used the “personally must commit” language below. The court noted that it had been previously undecided, but choose instead not to deal with it. “This court has not decided the issue, but because of the trial court’s instructions in this case, we do not reach it here.” Id. at 1548.
\(^4\) 929 F.2d 1466 (10th Cir. 1991).
\(^5\) Id. at 1473. The court dealt with the entire issue in two short paragraphs. It cited a case from each side and then stated that it could not dismiss the issue as it did previously in *United States v. Killip*. The court then stated, “we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by an conspirator.” Id.
\(^6\) Id.
\(^7\) See supra notes 12-15 and accompanying text.
Third Circuit.

1. The Third Circuit

The issue of what a co-conspirator must agree to arose in the Third Circuit at the same time the First Circuit was deciding the issue. The Third Circuit first dealt with this issue in United States v. Boffa. Working from the standard established by the First Circuit in United States v. Winter, the defendants argued that the government must show that each individual defendant personally agreed to commit two predicate acts. It too based its analysis upon United States v. Elliot. The Third Circuit evaded the issue at this time on the basis that the jury charge was substantially similar to the one given in Elliot and, therefore, there was no need for further clarification of the standard at this point. The issue returned, however, in United States v. Riccobene, but was again cleverly evaded. The court held that "[a]n agreement merely to commit the predicate offenses would not be sufficient to support a RICO conspiracy. Nor is it sufficient if the defendants merely participate in the same enterprise," which seemed to indicate that both an agreement to participate in the enterprise and an agreement to commit predicate offenses were required.

The issue was not resolved until United States v. Adams. The Third Circuit, clearly aware of its past delinquency, noted that it had not directly dealt with the issue before, but that it had been dealt with in other circuits with conflicting results.

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90. See supra note 15 and accompanying text.
91. The jury charge stated that:
   "in order to convict a defendant of a RICO conspiracy, [the jury] must conclude beyond a reasonable doubt "that the defendant, with knowledge of the conspiracy, willfully became a member of that conspiracy by agreeing to participate directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity . . . ."
Boffa, 688 F.2d at 937 (quoting the jury instructions of the district court).
93. Id.
96. Id. at 1116. Compare United States v. Carter, 721 F.2d 1514, 1529-31 (11th Cir.) (personal commission not required), cert. denied, 469 U.S. 819 (1984); United States v. Brooklier, 685 F.2d 1208, 1220 (9th Cir. 1982) (personal commission not required), cert. denied, 459 U.S. 1206 (1983) with United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.)
The Third Circuit, in finally resolving the controversy, held that the "defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts." It based its decision primarily upon the analysis given by the Eleventh Circuit in *United States v. Carter.* It also held that the statutory language did not require personal agreement, and further held that reading RICO in a narrow fashion defeated the purposes of the statute, which was intended to be far reaching. Although this case created a direct conflict within the circuits, it was denied certiorari by the Supreme Court. The view espoused by the court in *Adams,* however, has consequentially been consistently followed by the Third Circuit. It has not been followed blindly, however. The Third Circuit has displayed a willingness to reconsider the issue at some point if there was a clear demonstration that justice required it.

2. The Fourth Circuit

The Fourth Circuit has been very quiet on this issue, and has only very recently addressed the issue in *United States v. Pryba.*


97. *Adams,* 759 F.2d at 1116.

98. 721 F.2d 1514, 1528-31 (11th Cir.), *cert. denied,* 469 U.S. 819 (1984). The analysis was given by Judge Johnson.


100. *United States v. Adams,* 474 U.S. 971 (1985). A dissent was filed by Justice White and Chief Justice Burger. *Id.* Justice White noted the differences in the circuits over what the interpretation was, and drew attention to the fact that even the government itself could not decide which was the proper test. He felt that this provided ample justification for the Supreme Court accepting the case to resolve the dispute. *Id.; see Broyde,* supra note 19, and accompanying text for possible reasons explaining why certiorari was denied.


102. *See United States v. Triatz,* 871 F.2d 368, 396 (3d Cir.), *cert. denied,* 493 U.S. 821 (1989). The court stated that "appellants have not proffered any justification for this Court to change its current position. Accordingly, being bound by controlling precedent, we find that appellants' argument must fail." *Id.* This indicates that the court is open to change, and, if such proof was forthcoming, it would probably change the standard that it is now employing.

103. 900 F.2d 748 (4th Cir.), *cert. denied,* 111 S. Ct. 305 (1990). It would be interesting to know why this circuit has been so quiet, whether it is due to less RICO cases or whether...
The defendants on appeal argued that the trial court judge erred in his instruction because the instruction did not require the government to prove that each defendant personally agreed to commit two predicate acts, but instead allowed the jury to convict if they found that each defendant agreed that two predicate acts would be committed. The Fourth Circuit held that the jury charge was correct, and that the government was not required by law to prove anything else. The Fourth Circuit focused its inquiry on what the RICO conspiracy statute intended to prevent: an agreement to perform unlawful acts. It held that a more stringent requirement would "add an element to RICO conspiracy that Congress did not direct, and this would be contrary to the majority of circuits which have decided the issue." This case was also recently denied certiorari by the Supreme Court, and Justice White again dissented. Justice White's dissent focused on the need for a resolution of this issue, indicating that a decision was long overdue through reference to his 1984 dissent on this same issue. The issue has not since been addressed by the Fourth Circuit.

3. The Sixth Circuit

The broad standard was adopted by the Sixth Circuit in *United States v. Joseph*. The Sixth Circuit, while not clearly detailing its reasoning for adopting the broad approach, clearly indicates its agreement with the reasoning of other circuits adopting this approach.

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104. *Id.* at 760. The charge was that to convict a defendant of a RICO conspiracy charge the government had to prove:

[T]hat each defendant agreed to personally commit or aid and abet two or more acts of racketeering in violation of Section 1962(a) or that each defendant agreed that another co-conspirator would commit two or more acts of racketeering in violation of 1962(a).

*Id.*

105. *Id.* at 760.

106. *Id.*

107. *Id.* The court then went on to cite numerous authorities on which it relied. The citations have been omitted here because the cases used will be discussed, or have already been, in this Note.


109. *Id.*; see Broyde, *supra* note 19, and accompanying text.

110. 781 F.2d 549 (6th Cir. 1986).

However, the Sixth Circuit held that "[f]or a conspiracy conviction it is not necessary to prove that the defendant agreed to personally commit the requisite acts, but only that he agreed that another violate § 1962(c) by committing two acts of racketeering." While not ever providing a clear explanation for adoption of this method, the Sixth Circuit has consistently followed this decision, which indicate its acceptance of it. It is interesting to note that while it has continued to employ the same standard, it has done so with varying language.

4. The Seventh Circuit

The Seventh Circuit is the first circuit to provide a detailed assessment of the conflicting views of the circuits. The Seventh Circuit first considered the issue in United States v. Melton, but did not adequately address it at that time. The issue was not squarely examined until 1986, in United States v. Neapolitan. The Seventh Circuit then did what no other circuit had done: it examined the issue in depth in its opinion, giving its reasoning and support for the decision.

The Seventh Circuit clearly spent a great deal of time and effort to determine which test was correct, and thus which one it should apply. It began by laying out the two conflicting views, and then determined which circuits were following each view. Its research

112. Joseph, 781 F.2d at 568.
113. See United States v. Hughes, 895 F.2d 1135, 1141 (6th Cir. 1990). The court held that "[d]efendant's agreement to participate in the RICO conspiracy may be inferred from their acts; United States v. Joseph, 835 F.2d 1149, 1152 (6th Cir. 1987) (inference drawn from defendant's acts is sufficient evidence of an agreement to participate in the affairs of the enterprise)." Id. This has the same meaning. While the latter does not expressly state the above enunciated rule it is self-evident that you can draw a direct inference that the defendant agreed that two acts be committed, and that is enough to support a RICO conspiracy charge, assuming that all other elements are met.
114. 689 F.2d 679 (1982).
115. Id. The court used that analysis employed in the Fifth Circuit, by using Elliot-like language. The court employed United States v. Bright, 630 F.2d 804, 834 (5th Cir. 1980), which says that "[t]o be convicted of a conspiracy to violate RICO there must be proof that the individual, by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of the enterprise, through the commission of two or more of the predicate crimes." Melton, 689 F.2d at 683.
117. Id. at 494-99.
118. Id. at 494.
also indicated that not even the Department of Justice knew which approach was correct, but had merely established what its approach was. Its analysis then focused on the rules of RICO construction: how the statute has been read by the Supreme Court and the fact that RICO is not a substantive statute, but merely a remedial statute. Close attention was given to the analysis and reasoning of the Eleventh Circuit in United States v. Carter. This concluded the Seventh Circuit's analysis of the broad approach. Due to the lack of analysis by the courts utilizing the narrow view, the Seventh Circuit was compelled to complete the analysis of the theory of the First and Second Circuits, since it had not been previously undertaken.

The conclusion reached after its extensive analysis was that the Carter approach was the preferable approach and it adopted it as its

119. Id. at 494-95. See U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 72 (1985), stating, "as of mid-1985, it is the policy of the Organized Crime and Racketeering Section that every defendant in a proposed RICO conspiracy count must be shown to have agreed personally to commit two or more racketeering acts." Id. This view has subsequently changed. The new version now holds:

In view of the strong analysis in Neapolitan and because a majority of the circuits have reached a similar conclusion, the Criminal Division, as of mid-1988, will permit RICO conspiracy counts to allege that defendants agreed to be members of the conspiracy and agreed to the commission of two or more predicate acts by others on behalf of the conspiracy . . . . This policy, modified somewhat from the first edition of this Manual, is subject to further development as the case law evolves.

U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 89 (1988). This statement strongly suggests that the Criminal Division does not have an opinion on what is the correct interpretation, and that it will rely on majority rule.

120. Neapolitan, 791 F.2d at 495. The Seventh Circuit noted that the Supreme Court has always read the statute in a broad manner, one whose focus is on the literal meaning. This reading of course is based upon the express statement of the statute itself: "RICO is to be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947. The fact that it is a remedial statute is based upon the goal of the statute which is "to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in Organized Crime." Statement of Findings of the Organized Crime Control Act of 1970, 84 Stat. 923. No new crimes are created, but old ones are redefined and the punishments are altered. Neapolitan, 791 F.2d at 495.


122. Id. The court stated "[in contrast to Carter, the First and Second Circuits have, without extensive analysis, adopted a requirement of agreement to personally to commit predicate acts . . . . Because of the lack of an extensive development of the First and Second Circuit approach the issue before this court is in a sense not well framed." Id. at 496-97.

123. Id. at 497-98.
own. This decision has great precedential strength due to the lengthy analysis of the issue. Additionally, other circuits have utilized the extensive analysis provided in determining which approach to adopt.

5. The Eighth Circuit

The decisions in the Eighth Circuit are limited as the issue was not dealt with until 1987. The issue arose in the case of United States v. Kragness, which in turn relied heavily on United States v. Neapolitan. The Eighth Circuit does not appear to have independently analyzed this issue in depth, preferring instead to rely on the analysis of the Seventh Circuit in Neapolitan, in adopting the "agreement only" test, as opposed to the "personal agreement" test. Subsequent decisions endorse this view, also without much analysis. For example, in United States v. Leisure, the court summarily states that it had recently held that "a conviction for RICO conspiracy requires only that each defendant agree to join the conspiracy." The same approach was utilized in subsequent years as well, and will most likely to continue to be the standard.

6. The Ninth Circuit

The Ninth Circuit first decided the issue in 1984, but was

In *Brooklier* the Ninth Circuit was faced with the necessity of defining the "essence of a RICO conspiracy," and determined that it was the agreement to participate in the enterprise, not an agreement to commit any acts. They stated later in the opinion that "[i]t is sufficient if a defendant who participated in an enterprise through a pattern of racketeering knows that the enterprise operates by a pattern of racketeering." After establishing this firm foundation, the Ninth Circuit dealt with the issue squarely in *United States v. Tille*. In determining the correct test, the court focused on the analysis provided by the circuits that had already decided the issue and the statutory language itself. It held that:

"[t]he statutory language, however, does not require proof that a defendant participated personally, or agreed to participate personally, in two predicate offenses. Read in context, section 1962(d) makes it unlawful to conspire to conduct or participate in the conduct of an enterprise's affairs, where its affairs are conducted through a pattern of racketeering activity."

At present no decision has disagreed with or overruled this decision.

7. The Eleventh Circuit

The Eleventh Circuit is one of the leaders in this controversy, as it adopted the broad approach in what is considered to be the leading case within the majority approach in 1984, *United States v. Carter*. The court at that time thoroughly considered the issue at hand in an attempt to determine whether RICO created an additional requirement in conspiracy law or whether the requirements were the same as in federal conspiracy law. The court determined that RI-
CO was intended to mirror federal conspiracy law because to decide otherwise would defeat Congress' purpose for adopting the provision, which was to provide the government with better means of dealing with the spread of organized crime. As such, it was not necessary to prove that an individual agreed to personally commit two predicate acts. While the rationale was not fully developed, as in Neapolitan, it has provided the courts with a very clear, concise rule which has been adhered to and cited consistently.

C. Deviations

The Fifth Circuit provides the only deviation from the rule, attacking the issue by using the specific language found within the statute itself (as opposed to adding interpretation). It was first used by this circuit in United States v. Elliot. The court stated that the test to be used was "[t]o be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." This is a very flexible rule as it allows direct proof that the defendant agreed to commit two or more

sporacy law to require that the defendant must agree to personally commit two predicate acts, or whether consonant with federal conspiracy law a RICO conspiracy agreement consists of a defendant agreeing to participate in the conduct of an enterprise's affairs with the knowledge and intent that two predicate acts be committed.

Id. at 1529. The court noted that Congress was concerned with the ability to deal with organized crime which was hampered by the currently existing statutes and procedures.

Id. at 1531. It did, however, state that an agreement to commit two predicate acts is necessary if the government does not prove an agreement that the objective of the conspiracy is to violate a RICO conspiracy provision. If the government does not prove this objective of the conspiracy then proving an agreement to commit two predicate acts will fulfill this requirement, and is therefore, necessary for conviction. Id. at 1530-31.

144. See United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991); United States v. Beale, 921 F.2d 1412, 1436 (11th Cir. 1991); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. Alonso, 740 F.2d 862, 871-72 (11th Cir. 1984). Perhaps the best explanation for the less developed rationale is the fact that the case occurred earlier and therefore there was less case law on which to rely. The court was forced to forge its own path by looking at the brief contemplation given the issue by the other circuits that preceded the Eleventh Circuit in ending the controversy.

145. The court uses the language of 18 U.S.C. § 1962(c), omitting very little of the actual language. See infra note 147.

146. 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

147. Id. at 903.
crimes, while also allowing for indirect proof that he agreed that two or more crimes would be committed.\textsuperscript{148}

The Fifth Circuit further defined its position in \textit{United States v. Sutherland}.\textsuperscript{149} It held that the agreement must only show that "each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity."\textsuperscript{150} This is very similar to what is required in a general conspiracy context, which indicates an intent to mirror that approach.

The court has also had occasion to consider the controversy that currently exists between the circuits. In \textit{United States v. Manzella},\textsuperscript{151} it noted that there was an issue as to what was required for a conspiracy conviction between the other circuits, although it decided not to enter into the argument.\textsuperscript{152} It would appear that it has decided to continue application of the \textit{Elliot} test, as the Fifth Circuit refused the opportunity to join sides in the controversy in 1987.\textsuperscript{153}

\section*{V. An Analysis of How to Approach the Conflict}

In analyzing this conflict one must first begin with the actual statute at hand, to determine whether there are any guidelines or requirements contained within it that are useful for our analysis. Next, attention must be given to the federal conspiracy statute, which contains the requirements as to what must be proven in a conspiracy charge and to which § 1962(d) is subject.

\subsection*{A. Statutory Interpretation}

As indicated in several cases, § 1962(d) does not expressly require an agreement to personally commit two acts.\textsuperscript{154} In fact,
§ 1962(d) says very little. The requirement for two predicate acts is drawn from § 1961(5), which defines a pattern of racketeering activity as being at least two acts. Therefore, the requirement for two acts itself is secondhand in nature, as the primary provision does not contain it, nor does it make reference to this section.

Additionally, § 1962(d) does not specify what type of agreement is necessary. This, instead, is drawn from § 1962(c), which is very ambiguous. It says merely that one who participates or conducts affairs, directly or indirectly, can be found to violate the provision. This in turn is to be read in conjunction with the requirement of § 1962(d) that one conspire to take these actions. When viewed against this background of stretched interpretation, the statute can hardly be said to contain a requirement of personal agreement to commit two predicate acts. The statute requires individuals to conspire, but allows them to participate, directly or indirectly, in the activities of an organization.

1. What Must the Government Prove?

The statutory language does not state that the government must show personal agreement. What then must it show? The government must first prove that the individual was part of the enterprise, which itself is an additional requirement that does not exist in the federal conspiracy statute. Then the government must show that at least two predicate acts were committed. However, the government, with a RICO conspiracy charge, does not have to show that there was an overt act taken towards each goal of the conspiracy, but merely


155. See supra note 7 and accompanying text.

156. 18 U.S.C. § 1961(5). The acts in a conspiracy case are considered predicate acts. They are acts that are criminal in themselves. They are to be distinguished from overt acts, which were mentioned previously. Overt acts are preparatory in nature. They are not criminal by themselves, but are made so only because of the criminal goal of these actions.

157. Id. § 1962(d).

158. Id.

159. Id. § 1962(c). See supra note 50 and accompanying text for the exact wording. This is less secondhand in nature than the two act requirement because § 1962(d) does specifically refer to § 1962(c).

160. Id. § 1962(c).

161. Id. § 1962(d).

162. Id.

163. Id. § 1961(a)-(c). Each section mentions that the individual must be doing these prohibited activities in conjunction with an enterprise.

164. See id. § 371.
the existence of the two acts and the purpose of the enterprise.\textsuperscript{165} Then, to convict the defendant of conspiracy under § 1962(d), the government has to show that the defendant agreed that these two acts be committed.\textsuperscript{166} Therefore, the creation of an additional requirement of proof of the involvement in an enterprise and overt acts by each individual would create a tremendous burden on the government in proving a RICO conspiracy.\textsuperscript{167}

2. Does Personal Agreement Conform to the Stated Purpose of the Act?

The Statement of Findings and Purpose states:

[i]t is the purpose of the Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.\textsuperscript{168}

This indicates that RICO was to be a new tool, a better, more efficient method of dealing with organized crime. The newer, more efficient remedies would enable law enforcement personnel to “catch” more criminals.\textsuperscript{169} In fact, Congress specifically directed that RICO “shall be liberally construed to effectuate its remedial purposes.”\textsuperscript{170} Moreover, many courts have focused on this exact provision in making determinations of how to apply RICO.\textsuperscript{171} In light of the fact

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{165}] See id. § 1962(d).
\item[	extsuperscript{166}] Agreement does not have to be express; it can be implied from the actions of those involved. See United States v. Hughes, 895 F.2d 1135, 1141 (6th Cir. 1990); United States v. Joseph, 835 F.2d 1149, 1152 (6th Cir. 1987); United States v. O’Malley, 796 F.2d 891, 895-96 (7th Cir. 1986); United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir.), cert. denied, 479 U.S. 940 (1986); United States v. Riccobene, 709 F.2d 214, 225 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Elliot, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978).
\item[	extsuperscript{167}] The statute also states that an individual involved in a pattern of racketeering activity through an enterprise is guilty of violating these sections. This leads to the conclusion that the enterprise must be the one involved in the pattern of racketeering, and the individual must have been involved in that enterprise during at least two acts. For conspiracy, it is enough that the individual had made an agreement to join the enterprise. See 18 U.S.C. § 1962(a)-(d).
\item[	extsuperscript{169}] See Barry Tarlow, \textit{RICO: The New Darling of the Prosecutor’s Nursery}, 49 FORDHAM L. REV. 165 (1980).
\item[	extsuperscript{171}] See United States v. Turkette, 452 U.S. 576, 588-89 (1980); United States v.
\end{enumerate}
\end{footnotesize}
that Congress specifically stated that RICO was to be liberally construed, it is very difficult to imagine how a court could do otherwise.\textsuperscript{172} While there may be a few questions about the constitutionality of this, based upon a due process attack,\textsuperscript{173} it would appear that a constitutional challenge would fail, as the federal conspiracy statute has been upheld and RICO does not require any less than that provision.\textsuperscript{174}

**B. Federal Conspiracy Requirements**

The federal conspiracy provision is found in 18 U.S.C. § 371. This provision is not clearly detailed and therefore it has been left to the courts to determine what will suffice to convict an individual of conspiracy. The courts have held that the essence of a conspiracy is the agreement to do something unlawful.\textsuperscript{175} The government must also prove that there was some overt action taken towards the completion of the goal of the conspiracy.\textsuperscript{176} The reason for punishing the agreement was stated succinctly by the United States Supreme Court in *Callanan v. United States*:\textsuperscript{177}

> collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes pos-

\textsuperscript{172} This is not a situation where the legislative history of the Act suggests or implicates how Congress meant the Act to be applied. This removes the cloud of uncertainty that many justices feel exists over the legislative history of acts. Here, the requirement is specifically stated within the Act, although it is not included in 18 U.S.C. §§ 1961-1963.

\textsuperscript{173} U.S. Const. amend. XIV § 1.

\textsuperscript{174} See *Pinkerton v. United States*, 328 U.S. 640 (1946) (upholding conspiracy liability where one acts as the agent of the other, where that individual has not taken any steps towards the completion of the goals of the conspiracy); *United States v. Notarantonio*, 758 F.2d 777, 788 (1st Cir. 1985) (overt act by one serves as overt act for all members of the conspiracy).


\textsuperscript{176} United States v. Hegwood, 977 F.2d 492, 497 (9th Cir. 1992); United States v. Hill, 971 F.2d 1461, 1467 (10th Cir. 1992); *Notarantonio*, 758 F.2d at 789.

\textsuperscript{177} 364 U.S. 587 (1961).
sible the attainment of ends more complex than those which one criminal could accomplish.\textsuperscript{178}

In fact, a coconspirator under the conspiracy statute "is liable for the acts of his coconspirators as long as he is a member of the conspiracy."\textsuperscript{179} This means that once he agrees to join the conspiracy, he is liable for all actions taken towards the eventual achievement of their goal, even if he did not know that these actions were being taken, or agree to them. It is important to note that the agreement to join the conspiracy may be proven by circumstantial evidence, just as a RICO conspiracy can.\textsuperscript{180}

The strictness of this requirement is exemplified in one of the most famous conspiracy cases, \textit{Pinkerton v. United States}.\textsuperscript{181} In \textit{Pinkerton}, two brothers were convicted of conspiracy, even though there was no evidence that one of the brothers had taken part in "the commission of the substantive offenses."\textsuperscript{182} The Supreme Court held that the gravamen of the crime was the agreement, and because he had struck an agreement with his brother he could be guilty of conspiracy.\textsuperscript{183}

\textbf{C. Comparison of RICO Conspiracy and Conspiracy Requirements}

The application of RICO in the context of the conspiracy requirements appears to be very easy. Assuming that the elements of the enterprise have been met, the focus is whether the defendant agreed to join the conspiracy. Since the agreement may be proven by direct or indirect facts, this condition is easy to meet.\textsuperscript{184}

The next consideration is whether the requirement of personal agreement is necessary at all. All the circuits have held that some

\begin{itemize}
\item \textsuperscript{178} Id. at 593-94.
\item \textsuperscript{179} United States v. Andrus, 775 F.2d 825, 850 (7th Cir. 1985); see also United States v. Roper, 874 F.2d 782, 787 (11th Cir. 1989) ("Once having joined a conspiracy and not having withdrawn, the conspirator cannot insulate himself from the actions of his co-conspirator.").
\item \textsuperscript{180} United States v. Nueva, 979 F.2d 880, 884 (1st Cir. 1992); United States v. Morrow, 914 F.2d 608, 612 (4th Cir. 1990); United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); \textit{Roper}, 874 F.2d at 787; United States v. Gonzalez, 810 F.2d 1538, 1542 (11th Cir. 1987); United States v. O’Malley, 796 F.2d 891, 895 (7th Cir. 1986); see \textit{supra} note 151 and accompanying text.
\item \textsuperscript{181} 328 U.S. 640 (1946).
\item \textsuperscript{182} Id. at 645.
\item \textsuperscript{183} Id. at 647.
\item \textsuperscript{184} See \textit{supra} notes 159-60 and accompanying text.
\end{itemize}
degree of acquiescence must be given by the defendant to at least two predicate acts.\textsuperscript{185} Does it need to be personal agreement to commit the acts, or merely a reaffirmation that actions towards the goals of the enterprise be taken?

"Personal agreement" means essentially that the defendant is obligating himself to take some overt action towards the goal. The circuits, however, are in agreement that no overt acts are required in a RICO conspiracy.\textsuperscript{186} So what is the purpose of the defendant's personal obligation? It cannot be to show that he has agreed to join the enterprise, nor that he is agreeing to the goals of the enterprise, because these requirements have already been met. Under conspiracy law, the only other requirement is for overt acts,\textsuperscript{187} to show that steps are being taken to ensure the success of the conspiracy. There appears, then, to be no logical or statutory reason for the inclusion of this requirement by some circuits. The courts are simply adding an additional proof requirement to the RICO conspiracy charge that would not be required if the defendant was being charged under a federal conspiracy theory. The courts would find that he agreed to join a conspiracy, that the goals were unlawful, and that some steps had been taken towards that end, although not necessarily by him.\textsuperscript{188} In fact, in some cases the requisite steps could not have been taken by the defendants, yet they were still found guilty of conspiracy.\textsuperscript{189}

This interpretation also does not comport with the stated purpose of the statute, which was to provide a broad powers to the government to combat the threat of organized crime.\textsuperscript{190} As shown, the additional requirement of personal agreement hinders Congress' goal, by requiring the government to show that the defendant personally agreed to commit two acts, when all that is required is proof that he agreed to join, and that he agreed that two acts be taken.

VI. CONCLUSION

On the basis of the absence of a provision directly requiring
proof of personal agreement and the express statement that RICO is to be liberally construed, it appears that the correct approach is the one taken by the majority. This is because it follows the language of the statute by not creating a requirement that is not contained within the language of the statute. In addition, it further effectuates the purpose of the Act by providing the government with a more effective tool to deal with organized crime.

This issue is ripe for adjudication. The controversy between the circuits has existed for a number of years and several requests to the Supreme Court have been made to resolve the conflict. It would appear that by not resolving the issue, there are two systems under which an individual may be convicted of a RICO conspiracy. In one system, the government has a strong burden of proof where it is required to prove that each defendant joined an enterprise, had an intent to further the goals of the enterprise, and that each defendant actually agreed to personally commit two acts. Logically, this does not appear to make sense as what the defendant is being charged with is an agreement by two or more individuals to commit illegal activities. In the other system, the government has a less strenuous burden and must show only that the defendant was a member of the enterprise and agreed that illegal action be taken. Whether this issue will ever be heard is a matter of speculation. In light of the recent criticisms leveled at RICO there may not be an issue at all. If, on the other hand, RICO is upheld as constitutional, it would appear to be of paramount importance that the Supreme Court should grant certiorari and resolve the pronounced controversy among the circuit courts regarding what type of agreement RICO requires.

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