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# Pretrial Restraint of Substitute Assets under RICO and the Comprehensive Drug Abuse Prevention and Control Act of 1970

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# Pretrial Restraint of Substitute Assets Under RICO and the Comprehensive Drug Abuse Prevention and Control Act of 1970

Erik S. Schimmelbusch\*

## TABLE OF CONTENTS

INTRODUCTION .....	167
I. LEGAL BACKGROUND .....	169
A. <i>The Origins and Purposes of the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	170
1. <i>The Racketeer Influenced and Corrupt Organizations Act</i> ...	170
2. <i>The Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	170
B. <i>The Scope of the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	171
1. <i>The Racketeer Influenced and Corrupt Organizations Act</i> ...	171
2. <i>The Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	173
C. <i>Penalties Under the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	174
1. <i>An Historical Perspective of Asset Forfeiture as a Criminal Penalty Prior to the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	176
2. <i>Asset Forfeiture as a Criminal Penalty Under the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	178

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3. <i>Pretrial Restraint of Assets Under the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970</i> .....	180
II. THE CASES .....	183
A. <i>Pretrial Restraint of Substitute Assets Allowed</i> .....	183
1. <i>United States v. Regan</i> .....	183
2. <i>In re Assets of Billman</i> .....	185
B. <i>Pretrial Restraint of Substitute Assets Prohibited</i> .....	188
1. <i>United States v. Floyd</i> .....	188
2. <i>In re Assets of Martin</i> .....	191
3. <i>United States v. Ripinsky</i> .....	191
III. FUTURE OUTLOOK .....	193
A. <i>Statutory Language and Congressional Intent with Regard to Pretrial Restraint of Substitute Assets</i> .....	194
B. <i>Constitutional Concerns with Allowing Pretrial Restraint of Substitute Assets</i> .....	196
1. <i>Fourth Amendment Concerns</i> .....	196
2. <i>Sixth Amendment Concerns</i> .....	197
CONCLUSION .....	198

INTRODUCTION

Asset forfeiture<sup>1</sup> is one of the most powerful weapons used by the federal government to enforce criminal provisions.<sup>2</sup> The Racketeer Influenced and Corrupt Organizations Act (RICO) and the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Comprehensive Drug Abuse Act") rely on forfeiture of a convicted criminal's property as a means of enforcing the Acts' substantive provisions.<sup>3</sup> Under the terms of both Acts, assets used or acquired in furtherance of or as a result of the Acts' prohibited activities must be forfeited to the United States as a penalty upon conviction.<sup>4</sup> In addition to providing for the seizure of crime-related assets, both RICO and the Comprehensive Drug Abuse Act authorize the forfeiture of assets unrelated to the crime, called substitute assets. Such substitute assets can be forfeited when the crime-related assets of a criminal have been placed beyond the jurisdiction of the court or have been transferred to a third party.<sup>5</sup> Both Acts also provide for forfeiture of substitute assets where forfeitable assets have decreased significantly in value or have been commingled with property that cannot be easily divided.<sup>6</sup>

In order to preserve the availability of crime-related assets for later forfeiture, RICO and the Comprehensive Drug Abuse Act authorize pretrial restraint of the crime-related assets through the Acts' substantially identical provisions for pre-indictment or post-indictment restraint.<sup>7</sup> While both Acts clearly authorize pretrial

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1. See *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978) (defining forfeiture as "divestiture without compensation of property used in a manner contrary to the laws of the sovereign").

2. See Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport*, 65 NOTRE DAME L. REV. 1009, 1012-13 (1990) (describing forfeiture under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Comprehensive Drug Abuse Act") as a "powerful remedy" that fights organized crime by "removing the leaders of organized crime from their sources of economic power and eliminating the profitability of crime"); see also 115 CONG. REC. 9566 (1969) (statement of Senator McClellan) (stating that the forfeiture provisions of RICO could be a powerful weapon which could effectively remove the organized crime element from a particular field of activity, as well as remove the illegal profit potential which made certain fields too attractive).

3. See 18 U.S.C. § 1963 (1988) (providing for forfeiture of property under RICO); 21 U.S.C. § 853 (1988) (providing for forfeiture of property under the Comprehensive Drug Abuse Act).

4. 18 U.S.C. § 1963(a)(1)-(2) (1988); 21 U.S.C. § 853(a)(1)-(3) (1988); see *infra* notes 78-82 and accompanying text (discussing the types of assets forfeitable under RICO and the Comprehensive Drug Abuse Act).

5. 18 U.S.C. § 1963(m) (1988); 21 U.S.C. § 853(p) (1988); see *infra* notes 83-85 and accompanying text (discussing substitute asset forfeiture).

6. 18 U.S.C. § 1963(m) (1988); 21 U.S.C. § 853(p) (1988); see *infra* notes 83-85 and accompanying text (discussing substitute asset forfeiture).

7. See *United States v. Ripinsky*, 20 F.3d 359, 362 n.3 (9th Cir. 1994) (observing that the provisions of 21 U.S.C. § 853 are "substantially identical" to the forfeiture provisions of 18 U.S.C. § 1963 and that the legislative history of 21 U.S.C. § 853 closely parallels that of 18 U.S.C. § 1963); *infra* notes 86-101 and accompanying text (describing the requirements and procedure for obtaining pretrial asset restraints under RICO and the Comprehensive Drug Abuse Act); see also S. REP. No. 98-225, Pub. L. 98-473, 98th Cong., 2d Sess. 198, 213, reprinted in 1984 U.S.C.C.A.N. 3381, 3397 (reflecting congressional intent that the forfeiture provisions of 21 U.S.C. § 853 closely parallel those of 18 U.S.C. § 1963). Compare 18 U.S.C. § 1963(d)(1)-

restraint of crime-related assets and post-trial forfeiture of substitute assets, it is unclear whether, under either Act, substitute assets may be restrained prior to trial. Currently, a split of authority exists among the federal appellate courts regarding whether substitute assets may be restrained prior to trial under RICO and the Comprehensive Drug Abuse Act: While the Second and Fourth Circuits have read RICO's substitute asset forfeiture provisions in harmony with the Act's pretrial restraint provisions to authorize restraint of substitute assets, the Third, Fifth, and Ninth Circuits have refused to give such a reading to either Act.<sup>8</sup>

The issue of pretrial substitute asset restraint is important to the prosecutor and criminal defendant alike. The prosecutor, representing the Government's interest in preserving sufficient assets for later forfeiture, hopes to obtain a pretrial restraint of substitute assets where the crime-related assets cannot be located prior to trial.<sup>9</sup> Pretrial restraint of substitute assets also raises important concerns for the criminal defendant, since the effects of restraint may be to freeze the defendant's only source of funds for attorney's fees and living expenses, and to deny a presumption of innocence to which the defendant is entitled.<sup>10</sup> Moreover, such adverse effects may give the Government bargaining power against the defendant from the initial proceedings through trial, with the powerful threat of control over the quality of the defendant's legal defense and lifestyle, and over the defendant's presumption of innocence.<sup>11</sup>

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(2) (1988) (authorizing the court to enter a restraining order or injunction or to take any other action to preserve the availability of property for forfeiture under RICO) with 21 U.S.C. § 853(e)(1)-(2) (1988) (authorizing the court to enter a restraining order or injunction or to take any other action to preserve the availability of property for forfeiture under the Comprehensive Drug Abuse Act). Courts considering the Acts' respective forfeiture provisions have noted their similarity.

8. Compare *United States v. Regan*, 858 F.2d 115, 121 (2d Cir. 1988) and *In re Assets of Billman*, 915 F.2d 916, 921 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991) (holding that the district court has the authority under RICO to restrain substitute assets prior to trial) with *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993) and *In re Assets of Martin*, 1 F.3d 1351, 1362 (3d Cir. 1993) and *Ripinsky*, 20 F.3d at 365 (holding that the pretrial restraint provisions of RICO and the Comprehensive Drug Abuse Act do not authorize pretrial restraint of substitute assets). The cases allowing and prohibiting pretrial restraint of substitute assets under RICO and the Comprehensive Drug Abuse Act are discussed in notes 106-207 and accompanying text, *infra*. See generally *Cris Carmody, Circuit Court Thaws Pretrial Freeze on Assets: A Split Develops over Pretrial Restraint of Substitute Assets*, NAT'L L.J., May 31, 1993, at 10 (discussing the conflict between the Fourth and Fifth Circuits on the issue of pretrial restraint of substitute assets).

9. See *Regan*, 858 F.2d at 119 (stating that the purpose of the court's authority to enter restraining orders pursuant to RICO's forfeiture provisions is to preserve the availability of forfeitable assets until the end of the trial); see also *Billman*, 915 F.2d at 921 (extending the rationale used to justify pretrial restraint of crime-related assets to the pretrial restraint of substitute assets).

10. See *Floyd*, 992 F.2d at 499 (recounting the district court's denial of the defendant's request that he be allowed to use certain assets for living expenses and attorney's fees after the court had determined that the Comprehensive Drug Abuse Act authorized pretrial restraint of the defendant's substitute assets); Stephen J. Adler, *Are RICO Seizures a Violation of Rights, as Critics Contend?* WALL ST. J., Feb. 15, 1989, at A1 (reporting that opponents of RICO have argued that seizing assets prior to trial deprives a criminal defendant of the presumption of innocence).

11. See Adler, *supra* note 10, at A6 (quoting defense lawyer and law professor Alan Dershowitz as saying that in practice, RICO is used to coerce defendants into one-sided plea bargains).

This Comment examines the subject of pretrial restraint of substitute assets under RICO and the Comprehensive Drug Abuse Act. Part I reviews the relevant legal background of forfeiture and pretrial restraint of assets under both Acts.<sup>12</sup> Part II discusses the conflicting court decisions addressing the issue of pretrial restraint of substitute assets under the Acts' forfeiture provisions.<sup>13</sup> Finally, Part III explores the arguments for and against pretrial restraint of substitute assets, and resolves that substitute assets should not be restrained pretrial under RICO or the Comprehensive Drug Abuse Act because such restraint is not authorized by the clear language of the Acts' provisions and presents concerns over the Fourth Amendment's prohibition against unreasonable searches and seizures, and the Sixth Amendment's protection of the right to counsel of choice.<sup>14</sup>

## I. LEGAL BACKGROUND

The powerful criminal forfeiture provisions and their accompanying pretrial asset restraint remedies available under RICO and the Comprehensive Drug Abuse Act are relatively new in the Government's arsenal of weapons in criminal prosecutions.<sup>15</sup> An overview of the Acts' background demonstrates that the combination of their broad applicability and the severe nature of the criminal forfeiture and pretrial asset restraint remedies make RICO and the Comprehensive Drug Abuse Act extremely powerful tools in the hands of the Government.<sup>16</sup> When the issue of pretrial restraint of substitute assets is considered with an historically enlightened view of the nature and extent of the Government's existing power in forfeiture and pretrial restraint provisions of these Acts, it becomes clear that the exercise of such restraint would be a severe extension of the Government's existing power in criminal prosecutions.<sup>17</sup>

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12. See *infra* notes 15-105 and accompanying text.

13. See *infra* notes 106-207 and accompanying text.

14. See *infra* notes 208-241 and accompanying text.

15. See *infra* notes 61-70 and accompanying text (discussing the historical aversion to, and recent advent of, criminal forfeiture as a punishment in the United States).

16. See *infra* notes 25-47 and accompanying text (discussing the broad applicability of RICO and the Comprehensive Drug Abuse Act); *infra* notes 69-85 and accompanying text (discussing criminal forfeiture and pretrial asset restraint under RICO and the Comprehensive Drug Abuse Act).

17. See *infra* notes 61-103 and accompanying text (discussing the history and nature of criminal forfeiture and pretrial asset restraint under RICO and the Comprehensive Drug Abuse Act).

A. *The Origins and Purposes of the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970*

1. *The Racketeer Influenced and Corrupt Organizations Act*

RICO was enacted by Congress in 1970 to provide better means for the federal government to fight organized crime, through the Act's broad applicability to defendants engaged in a wide range of activities and through its powerful remedial provisions, including forfeiture of assets.<sup>18</sup> RICO was intended to address a perceived shift in organized crime involvement, from activities such as gambling and prostitution, to activities disguised as legitimate business, such as investment of concealed profits acquired illegally, extortion, and even money-lending in exchange for control of a corporation's board of directors.<sup>19</sup> The Act was designed specifically to remove organized crime from legitimate organizations and to prevent the return of organized crime, where possible, through the forfeiture of assets acquired illegally.<sup>20</sup> The forfeiture provisions of RICO were formulated essentially to strike at the economic foundations of criminal enterprises.<sup>21</sup>

2. *The Comprehensive Drug Abuse Prevention and Control Act of 1970*

As with as organized crime was perceived as a growing problem in 1970, drug abuse was considered an ever increasing occurrence.<sup>22</sup> Enacted at the same time as RICO, the Comprehensive Drug Abuse Act was intended to combat the

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18. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. 1073 (explaining the Act's purpose as seeking to eradicate organized crime by (1) providing better tools to gather evidence; (2) adding prohibitions; (3) enhancing sanctions; and (4) offering further remedies); see also *Russello v. United States*, 464 U.S. 16, 26 (1983) (stating that RICO was intended by Congress to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots"); Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 624 (1990) (describing RICO's purpose as the eradication of organized crime in legitimate business). But see *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989) (noting that although Congress enacted RICO to concentrate on organized crime, it chose to create a general statute that was not so limited in scope); Adler, *supra* note 10, at A6 (pointing out that some commentators believe that zealous prosecutors have used RICO in a coercive manner and against crimes not contemplated by Congress, instead of using RICO in accordance with its intended purpose).

19. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, ANNOTATIONS AND CONSULTANTS' PAPERS 2-5 (1967) [hereinafter REPORT ON ORGANIZED CRIME]; Rasmussen, *supra* note 18, at 624; see 115 CONG. REC. 9566 (1969) (statement of Sen. McClellan) (stating that criminals use legitimate organizations to further their crimes and that such use has the adverse effect of corrupting others).

20. 116 CONG. REC. 591 (1970).

21. *Id.*; see REPORT ON ORGANIZED CRIME, *supra* note 19, at 114-26 (describing the economic motivation behind organized crime and the relation of organized crime to enforcement).

22. H.R. REP. No. 1444, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4567.

rising problem of drug abuse through prevention and rehabilitation for drug users, and through more effective law enforcement and penalties against drug offenses.<sup>23</sup>

The enactment of the Comprehensive Drug Abuse Act gave the Government the same powerful tool of forfeiture to combat drug crimes that RICO allowed in the fight against organized crime.<sup>24</sup>

*B. The Scope of the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970*

*1. The Racketeer Influenced and Corrupt Organizations Act*

RICO prohibits investing illegal proceeds in a legitimate business, acquiring an interest in a legitimate business through a pattern of racketeering activity, participating in or conducting the affairs of an enterprise through a pattern of racketeering activity, or conspiring to commit any of the foregoing actions.<sup>25</sup> Although RICO's authority is derived from the commerce power of Congress, a motive of economic purpose is not necessary for an enterprise to be prosecuted, since RICO applies to enterprises engaged in activities that merely affect commerce, as well as to enterprises actually engaged in commerce.<sup>26</sup>

The Act's broad definition of "racketeering activity" includes activities that can be classified into five general categories. The first encompasses certain crimes under state law punishable by more than one year.<sup>27</sup> The second is comprised of a wide variety of federal crimes, including mail fraud and wire fraud.<sup>28</sup> The third covers crimes relating to unions and labor organizations.<sup>29</sup> The

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23. *Id.*

24. See 21 U.S.C. § 853(a) (1988) (providing for criminal forfeiture of property upon conviction under the Comprehensive Drug Abuse Act); *cf.* 18 U.S.C. § 1963(a) (1988 & Supp II 1990) (providing for criminal forfeiture of property upon conviction under RICO).

25. 18 U.S.C. § 1962 (1988).

26. See *id.* § 1962(a)-(c) (1988) (conditioning RICO's applicability on either (1) an enterprise's engagement in interstate commerce; or (2) the effect of an enterprise's activities on interstate commerce); *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 804-06 (1994) (emphasizing that RICO requires merely that an enterprise affect commerce in the sense that it has a detrimental influence thereon, and holding that a motive of economic purpose is not required for a RICO violation); see also U.S. CONST. art. I, § 8 (providing that Congress shall have power to regulate commerce among the states).

27. 18 U.S.C. § 1961(1)(A) (Supp. II 1991). Crimes in this category include any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in narcotics or dangerous drugs. *Id.*

28. See *id.* § 1341 (Supp. II 1991) (describing mail fraud as a scheme to defraud which involves a mailing in furtherance of the scheme); *id.* § 1343 (Supp. II 1991) (describing wire fraud as a scheme to defraud which involves the interstate use of wire communications in furtherance of the scheme); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (asserting that RICO pushes the wire and mail fraud statutes to their extreme limits); Rasmussen, *supra* note 18, at 626 (reporting that the broad definitions of mail fraud and wire fraud have led to an increase in RICO suits). See generally Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 263-67 (1992) (discussing mail fraud as a predicate act for RICO).

29. 18 U.S.C. § 1961(1)(C) (Supp. II 1991).



fourth is composed of drug offenses and securities fraud.<sup>30</sup> The fifth includes money laundering offenses.<sup>31</sup>

RICO defines a "pattern" of racketeering activity as requiring at least two acts of racketeering activity within a ten-year period.<sup>32</sup> Such racketeering acts are commonly known as "predicate acts" to a RICO cause of action.<sup>33</sup> Because RICO provides no specific guidance as to what constitutes a "pattern," the United States Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co.*,<sup>34</sup> gave some substance to its definition. While RICO requires at least two predicate acts, those two acts alone may be insufficient to constitute a RICO violation if they were sporadic, according to *Sedima*.<sup>35</sup>

"Enterprise" is defined by the Act to include an individual, partnership, corporation, association, or any group of individuals which, although not a legal entity, has members that are associated in fact.<sup>36</sup> Such a broad definition of enterprise makes the statute a double-edged sword. It allows RICO to be applied to the almost infinite gamut of arrangements that organized criminals may devise; however, it can also be applied to legitimate businesses, adversely affecting unsuspecting third parties.<sup>37</sup>

Because of its broad definitions of "pattern" and "racketeering activity," RICO has been used by the Government to prosecute a wide variety of offenses

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30. *Id.* § 1961(1)(D) (Supp. II 1991). Drug crimes punishable under RICO include drug crimes punishable under any law of the United States. *Id.* Securities fraud is not defined in RICO. Courts have required that a valid securities fraud claim exist under applicable state or federal law in order to serve as a RICO predicate offense. *See, e.g., In re Catanella and E.F. Hutton & Co.*, 583 F. Supp. 1388, 1424-26 (E.D. Pa. 1984).

31. 18 U.S.C. § 1961(1)(E) (Supp. II 1991).

32. *Id.* § 1961(5) (1988). The two required acts of racketeering activity need not have previously been charged. *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). The two racketeering acts may be federal violations, state violations, or a combination of the two. 1 DAVID R. MCCORMACK, RACKETEER INFLUENCED CORRUPT ORGANIZATIONS § 5.18 (1989). *See United States v. Starnes*, 644 F.2d 673, 678 (7th Cir. 1981) (finding that two offenses arising from a single transaction or activity may satisfy the requirement of two racketeering acts if they can be prosecuted as individual crimes), *cert. denied*, 454 U.S. 826 (1981).

33. Rasmussen, *supra* note 18, at 626.

34. 473 U.S. 479 (1985).

35. *Sedima*, 473 U.S. at 496 n.14.

36. 18 U.S.C. § 1961(4) (1988); *see Scheidler*, 114 S. Ct. at 804 (explaining that "enterprise" as used to determine the Act's applicability in 18 U.S.C. § 1962(c) is defined as the medium through which the pattern of racketeering activity is committed, rather than as the victim of that activity); *United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir. 1986) (deciding that a sole proprietorship is an enterprise within the meaning of RICO, where the defendant's sole proprietorship had several employees who were also defendants in the action); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982) (finding that a corporate division can be an enterprise under RICO); *United States v. Hartley*, 678 F.2d 961, 986 (11th Cir. 1982) (holding that a corporation can be both enterprise and defendant for purposes of RICO); *see also United States v. Thompson*, 685 F.2d 993, 997-98 (6th Cir. 1982) (determining that the office of Governor for the State of Tennessee is an enterprise for purposes of RICO); *Parness*, 503 F.2d at 439-40 (concluding that the term "enterprise" includes a foreign corporation, to the extent that the corporation's operations affect interstate commerce).

37. *See Graeme W. Bush, The Impact of RICO Forfeiture on Legitimate Business*, 65 NOTRE DAME L. REV. 996, 998-99 (1990) (criticizing the enterprise concept of RICO for its potential adverse effects on legitimate businesses).

that extend far beyond what has traditionally been considered organized crime.<sup>38</sup> Since the Act's definitions of "enterprise" and "racketeering activity" do not require a motive of economic purpose, the permissible scope of RICO has even been held to extend to ideologically motivated anti-abortion groups and anti-pornography groups in their efforts to hold organized demonstrations.<sup>39</sup> Thus, many commentators have criticized RICO for being overly broad or inappropriately extended beyond its proper or intended scope of combatting organized crime, thereby potentially infringing on important civil rights, such as the right to free speech guaranteed by the First Amendment.<sup>40</sup>

## 2. *The Comprehensive Drug Abuse Prevention and Control Act of 1970*

The Comprehensive Drug Abuse Act provides for civil and criminal forfeiture against any person convicted of a violation of substantive drug crime provisions or against any person who is engaged in a continuing criminal enterprise in violation of the Act's substantive provisions.<sup>41</sup> Possible predicate offenses under the statute are too numerous to discuss fully in this Comment, but include the manufacture, distribution, or possession (with intent to manufacture, distribute, or dispense) of a controlled substance.<sup>42</sup>

Like RICO, the Comprehensive Drug Abuse Act is extremely broad in scope. In addition to its applicability to numerous drug-related crimes, the range of offenses to which the Act's forfeiture provisions apply reaches further with the incorporation of the Comprehensive Drug Abuse Act's forfeiture provisions into

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38. See *H.J. Inc.*, 492 U.S. at 248 (acknowledging that although Congress enacted RICO to concentrate on organized crime, it chose to create a general statute that was not so limited in scope); Adler, *supra* note 10, at A6 (stating that some commentators believe that zealous prosecutors have used RICO in a coercive manner and against crimes not contemplated by Congress, instead of using RICO in accordance with its intended purpose). The largest percentage of RICO prosecutions has targeted corrupt government officials (28%), followed by crimes involving narcotics (27%), private sector fraud (13%), labor racketeering (7%), government procurement fraud (6%), gambling (5%), and securities fraud (1%). *Id.*

39. See *Scheidler*, 114 S. Ct. at 806 (holding that health care clinics could bring a RICO action against a coalition of anti-abortion groups that had allegedly conspired, through a pattern of racketeering activity, to shut down abortion clinics); *Penthouse Int'l, Ltd. v. American Fam. Ass'n of Fla., Inc.* No. 89-2526 (D. Fla., filed Nov. 14, 1989) (charging the American Family Association with extortion violations for threatening to publicly label magazines published by Penthouse as obscene).

40. Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 821-24 (1990); see *id.* (criticizing the application of RICO to ideological disputes such as those concerning abortion and pornography, as violative of the First Amendment); Adler, *supra* note 10, at A6 (discussing the views of some commentators that zealous prosecutors have used RICO outside its intended scope); see also U.S. CONST. amend. I (guaranteeing the right to freedom of speech); Marcia Chambers, *Sua Sponte*, NAT'L L.J., Feb. 10, 1992, at 15 (lamenting the extension of RICO to the prosecution of the *Princeton/Newport* defendants, discussed *infra* in notes 110-129 and accompanying text).

41. See 21 U.S.C. § 853(a)(3) (1988) (providing for criminal forfeiture upon conviction); *id.* § 848 (1988) (providing for civil forfeiture).

42. *Id.* §§ 841-848 (1988).

the General Criminal Forfeiture Statute, 18 U.S.C. § 982.<sup>43</sup> Section 982 allows forfeiture for crimes prohibited by many federal statutes.<sup>44</sup> As a result, a person accused or convicted of such offenses as altering vehicle identification numbers, importing or exporting stolen motor vehicles, armed robbery of automobiles, and possession or transportation of stolen vehicles in interstate commerce is subject to the forfeiture provisions of the Comprehensive Drug Abuse Act through the General Criminal Forfeiture Statute.<sup>45</sup>

Much of the power of RICO and the Comprehensive Drug Abuse Act as prosecutors' weapons can be attributed to the Acts' broad applicability to defendants in a wide array of circumstances.<sup>46</sup> The true power of RICO and the Comprehensive Drug Abuse Act consists of more than the mere fact that a cause of action can be formulated against a defendant. Rather, because of these Acts' broad applicability, the defendants against whom the Acts apply are potentially subjected to the entire range of penalties authorized under their provisions.<sup>47</sup>

C. *Penalties Under the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970*

RICO and the Comprehensive Drug Abuse Act provide for civil and criminal penalties for their violation. RICO's civil remedies are modeled after federal antitrust laws.<sup>48</sup> These remedies include treble damages and recovery of attorney's fees for any person injured as a result of a RICO violation.<sup>49</sup> A civil

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43. See 18 U.S.C. § 982(b)(1)(A) (Supp. II 1991) (providing that the court must order forfeiture of assets pursuant to the Comprehensive Drug Abuse Act, where the defendant has committed certain enumerated crimes); see also *Floyd*, 992 F.2d at 499 (indicating that at the district court level, the United States sought a restraining order pursuant to the Comprehensive Drug Abuse Act as incorporated in 18 U.S.C. § 982).

44. See, e.g., 18 U.S.C. App. § 2B1.1 (referring to 18 U.S.C. § 982 in sentencing guidelines for larceny, embezzlement, and other forms of theft); 18 U.S.C. App. § 2B4.1 (referring to 18 U.S.C. § 982 in sentencing guidelines for commercial bribery); 18 U.S.C. App. § 2F1.1 (referring to 18 U.S.C. § 982 in sentencing guidelines for offenses involving fraud and deceit, including forgery and counterfeiting).

45. 18 U.S.C. § 982(b)(1)(A) (Supp. II 1991); see *Floyd*, 992 F.2d at 498 (tracing the Government's ability to seek pretrial restraint through the Government's reliance on the General Criminal Forfeiture Statute for numerous offenses under an array of federal criminal statutes); see also *Ripinsky*, 20 F.3d at 361 (observing that the defendant was subject to the forfeiture and pretrial restraint provisions of the Comprehensive Drug Abuse Act because of his indictment for money laundering in violation of 18 U.S.C. § 1957, which authorizes the Government to seize assets under the General Criminal Forfeiture Statute).

46. See *supra* notes 25-45 and accompanying text (discussing the broad applicability of RICO and the Comprehensive Drug Abuse Act).

47. See *infra* notes 48-85 and accompanying text (discussing penalties under RICO and the Comprehensive Drug Abuse Act).

48. Rasmussen, *supra* note 18, at 627.

49. Compare 18 U.S.C. § 1964(c) (1988) (providing for treble damages and attorney's fees for any person injured in his business or property as a result of a RICO violation) with 15 U.S.C. § 15a (1988 & Supp. II) (providing for recovery of treble damages, cost of the lawsuit, and reasonable attorney's fees to any person who has been injured in his business or property through violation of antitrust laws).

RICO action may be brought by a private party, the U.S. Attorney General, and, in certain circumstances, state agencies, counties, or cities.<sup>50</sup>

As criminal penalties for their violation, RICO and the Comprehensive Drug Abuse Act provide for fines of up to \$25,000, imprisonment for up to twenty years (or for life, if the violation is a crime punishable by life imprisonment), and forfeiture of assets.<sup>51</sup> Forfeiture of assets acquired or maintained illegally is a mandatory punishment under RICO.<sup>52</sup> Asset forfeiture is mandatory under the Comprehensive Drug Abuse Act as well, where the assets were derived from or used in connection with a crime that violates the Act's provisions.<sup>53</sup> The drastic remedy of mandatory forfeiture as a punishment for crime is a relatively new practice in the United States, where it had been restrained for much of the nation's legal history.<sup>54</sup>

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50. See 18 U.S.C. § 1964(b) (1988) (providing that the U.S. Attorney General is authorized to institute civil proceedings for a RICO violation); *id.* § 1964(c) (1988) (providing that any person injured by a RICO violation may sue in federal court and may recover treble damages and attorney's fees); *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984) (allowing a county to maintain an action to recover sums paid for supplies billed to it by a supplier who allegedly had bribed a county employee to falsify records for purchase); *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp 536, 542-43 (E.D. N.Y. 1987) (holding that the city had standing to sue for treble damages under RICO where the defendant allegedly had evaded city regulations by bribing inspectors).

51. 18 U.S.C. § 1963(a) (1988 & Supp. II 1991); see 21 U.S.C. §§ 841-848 (1988 & Supp. II 1991) (providing for fines or imprisonment as a penalty under the Comprehensive Drug Abuse Act); *id.* § 853(a) (1988) (providing for forfeiture of property as punishment for a criminal violation under the Comprehensive Drug Abuse Act); see also *United States v. Marrone*, 746 F.2d 957, 959 (3d Cir. 1984) (allowing consecutive sentences for violation of one of the substantive RICO sections and for conspiring to violate another); *United States v. McNary*, 620 F.2d 621, 629 (7th Cir. 1980) (sustaining the jury's special verdict finding that defendant's proprietary interests in two businesses were forfeitable where the defendant had placed payoff money into bank accounts belonging to those businesses); *United States v. Rone*, 598 F.2d 564, 570-71 (9th Cir. 1979) (concluding that consecutive sentences may be imposed for a RICO violation and for the predicate offense on which the RICO violation is based).

52. See *United States v. Kravitz*, 738 F.2d 102, 104 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) and *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982) (insisting that if the jury finds that the defendant's assets were used in violation of RICO, the court is required to enter an order to forfeit the assets), *cert. denied*, 464 U.S. 959 (1983).

53. 21 U.S.C. § 853(a) (1988).

54. See Michael P. A. Cohen, Note, *The Constitutional Infirmity of RICO Forfeiture*, 46 WASH. & LEE L. REV. (1989) 937, 939-44 (describing the longstanding historical resistance to criminal forfeiture in the United States prior to the enactment of RICO and the Comprehensive Drug Abuse Act); *infra* notes 55-68 and accompanying text (discussing the history of criminal forfeiture).

1. *An Historical Perspective of Asset Forfeiture as a Criminal Penalty Prior to the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970*

Two types of forfeiture existed under early English common law: *in rem* and *in personam*.<sup>55</sup> A forfeiture action *in rem* was an action directly against the property to be forfeited, rather than against the individual defendant.<sup>56</sup> In an *in rem* forfeiture action, the court's jurisdiction was over the property to be forfeited because of its connection with wrongdoing, regardless of the guilt or innocence of the criminal defendant.<sup>57</sup>

*In rem* forfeiture is the traditional type of forfeiture used in the United States, where it has been applied in civil actions to allow the seizure of property involved in prohibited activity.<sup>58</sup> RICO and Comprehensive Drug Abuse Act violations sometimes give rise to *in rem* forfeitures, since the unlawful use of property under either Act may satisfy the requirements for civil forfeiture of property involved in narcotics violations.<sup>59</sup> The importance of the connection of the property to the alleged wrongdoing prevails in the United States today, thus accounting for the requirement that in *in rem* actions, the Government must prove that each item to be seized was involved in furtherance of the crime.<sup>60</sup>

As a punishment for crime, a second type of forfeiture was used under early English common law: A conviction for felony or treason required the criminal to

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55. William W. Taylor III, *The Problem of Proportionality in RICO Forfeitures*, 65 NOTRE DAME L. REV. 885, 885 (1990). *In rem* literally means "against the thing." BLACK'S LAW DICTIONARY 793 (6th ed. 1990). *In personam* literally means "against the person." *Id.* at 791. See *infra* notes 56-68 and accompanying text (discussing the characteristics of *in rem* and *in personam* forfeiture).

56. Taylor, *supra* note 55, at 885; see Karla R. Spaulding, "Hit Them Where It Hurts:" RICO Criminal Forfeitures and White Collar Crime, 80 J. CRIM. L. & CRIMINOLOGY 197, 198-99 (1989) (tracing the origin of *in rem* forfeiture to the English practice of deodand, which required forfeiture to the Crown of any chattel that caused the death of "any reasonable creature").

57. See *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. 210, 233 (1844) (treating the vessel used in the crime as the offender, without regard to the owner's character or actions); see also Irving A. Pianin, Note, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 233-34 (1982) (describing *in rem* forfeiture and stating that the Government may bring a civil suit seeking forfeiture of the property if the owner is acquitted on the criminal charge).

58. Spaulding, *supra* note 56, at 199; see *The Palmyra*, 25 U.S. 1, 14-15 (1827) (allowing forfeiture on the basis of the property's connection with the crime). But see Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 174-75 (1990) (criticizing application of *in rem* forfeiture in the United States for having produced harsh results, mainly because of harm to the property's owners not at fault for the crime).

59. See Pianin, *supra* note 57, at 233 (describing *in rem* forfeiture and stating that the Government may bring a separate civil suit seeking forfeiture of the property, if the owner is acquitted on the criminal charge); see, e.g., 21 U.S.C. § 881 (1988 & Supp. II 1991) (providing for civil forfeiture of property used in drug violations).

60. See, e.g., *United States v. One 1978 Mercedes Benz, Four Door Sedan*, 711 F.2d 1297, 1305 (5th Cir. 1983) (holding that the telephone in a forfeited automobile was not forfeitable, because the Government had failed to produce evidence that the telephone had been used in furtherance of the crime).

forfeit all property, real and personal.<sup>61</sup> Such forfeiture was *in personam*, because it was based on the guilt of the convicted felon, rather than upon the use of the property in the commission of the crime.<sup>62</sup> Because it was abused by the English Crown, forfeiture was expressly restricted in the Magna Carta and in the English Bill of Rights.<sup>63</sup> Criminal *in personam* forfeiture was rejected altogether by the Framers of the United States Constitution and by the First Federal Congress.<sup>64</sup> At least three factors discouraged criminal forfeiture in the United States: (1) The colonial government wanted to prevent property from being forfeited to England; (2) most criminals had no significant property to forfeit; and (3) colonial authorities did not want innocent family members of the criminal to be adversely affected.<sup>65</sup>

During the Civil War, *in personam* forfeiture was authorized by the Confiscation Act of 1862 to allow the life estates of confederate sympathizers to be seized by the President.<sup>66</sup> During the period between the Civil War and 1970, however, Congress adhered to the original prohibition of *in personam* forfeiture.<sup>67</sup> With the enactment of RICO and the Comprehensive Drug Abuse Act, Congress reinstated *in personam* forfeiture, which represented a significantly broader application and stronger punitive use of forfeiture than had ever been practiced in the United States, since it was based on the defendant's guilt rather than upon the connection of the forfeited property to the alleged wrongdoing.<sup>68</sup>

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61. MCCORMACK, *supra* note 32 at § 5.27.

62. See 8 WILLIAM BLACKSTONE, COMMENTARIES, \*299-300 (explaining that *in personam* forfeiture was based on the rationale that since all property is derived from society, any member of society who violates his fundamental social contract by violating society's laws forfeits his right to that property; therefore, the state is justified in retaking the portion of the property that the felon had been granted by society).

63. See Jed S. Rakoff, *Will the Supreme Court Restrain Forfeiture?* N.Y. L.J., July 8, 1993, at 3 (attributing anti-forfeiture provisions in the Magna Carta and excessive-fine provisions in the English Bill of Rights to forfeiture abuses by the English Crown).

64. Cohen, *supra* note 54, at 939. The Constitution banned corruption of blood (as punishment for treason) and forfeiture of estate, two of the most severe forms of forfeiture. See U.S. CONST. art. 3, § 3 (specifying that "[t]he 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 attainted"); see also James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?* 62 CORNELL L. REV. 768, 773-74 (1977) (equating corruption of blood with preventing descendants to trace a line of inheritance through the attainted ancestor). The prohibition of *in personam* forfeiture was extended to all felonies by the First Federal Congress in 1790. See Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (prohibiting corruption of blood or forfeiture of estate).

65. Edward C. Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. L. REV. 225, 231 (1981).

66. Confiscation Act, ch. 195, § 5, 12 Stat. 589, 590 (1862).

67. Spaulding, *supra* note 56, at 199; Kathleen C. Van Olst, Note, *Caplin & Drysdale v. United States and United States v. Monsanto: Forfeiture of Attorney Fees and Constitutional Rights*, 39 CATH. U.L. REV. 269, 276 (1989).

68. See S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969) (referring to the use of criminal forfeiture as a return to our common law heritage to address the modern problem of organized crime); *Alexander v. United States*, 113 S. Ct. 2766, 2778 (1993) (Kennedy, J., dissenting) (observing that modern forfeiture provisions are novel for their punitive nature as well as for their unprecedented range of application, which was not known in the federal system until RICO was enacted in 1970); see also C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 125.1 (2d ed. 1982) (recognizing that *in personam* criminal penalties were not known in the

2. *Asset Forfeiture as a Criminal Penalty Under the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970*

Forfeiture under RICO and the Comprehensive Drug Abuse Act differs from traditional *in rem* forfeiture in the United States in that it is an action *in personam*, directly against the criminal defendant.<sup>69</sup> Insofar as RICO criminal forfeiture focuses on the individual defendant, rather than on the property, it resembles *in personam* forfeiture as a criminal punishment under early English common law.<sup>70</sup> While both RICO and the Comprehensive Drug Abuse Act have contained criminal forfeiture provisions since their inception in 1970, Congress decided to change them after observing that these Acts were not being used as the powerful weapons they had been intended to be.<sup>71</sup> Concerned that the Government was not using RICO and the Comprehensive Drug Abuse Act to their full potential to prosecute criminals, Congress passed the Comprehensive Forfeiture Act in 1984.<sup>72</sup>

The Comprehensive Forfeiture Act amended RICO and the Comprehensive Drug Abuse Act to more clearly authorize the forfeiture of assets obtained through racketeering or illegal drug activity,<sup>73</sup> to render void the pre-conviction transfer of such assets to certain third parties,<sup>74</sup> and to make more readily available the issuance of pre-trial protective orders to preserve assets for later

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federal system until RICO was enacted in 1970).

69. Taylor, *supra* note 55, at 885.

70. See S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969) (referring to the use of criminal forfeiture as a return to common law heritage to address the modern problem of organized crime); MCCORMACK, *supra* note 32, at § 5.27 (pointing out the focus on the defendant rather than on the property, in both RICO forfeiture and forfeiture under early English common law); see also *supra* notes 62-69 and accompanying text (discussing the history and recent revival, through RICO, of *in personam* forfeiture).

71. See COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATING DRUG TRAFFICKING 9 (1981) (attributing the ineffectiveness of the 1970 RICO forfeiture provisions to statutory flaws); Kathleen A. Ravotti, Caplin & Drysdale v. United States and United States v. Monsanto: *The War on Drugs Gets a New Recruit*, 22 LOY. U. CHI. L.J. 269, 298-99 n.9 & 99 n.11 (1990) (describing the poor success rate of RICO's forfeiture provisions prior to passage of the Comprehensive Forfeiture Act); see also Baird & Vinson, *supra* note 2, at 1015 (stating that the amendments to RICO pursuant to the Comprehensive Forfeiture Act were a result of the government's lack of success in obtaining forfeitures under the existing forfeiture provisions).

72. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040 (1984) (codified as amended at 18 U.S.C. § 1963 (1988 & Supp. II 1991) and 21 U.S.C. § 853 (1988)); see S. REP. No. 225, 98th Cong. 1st Sess. 191 (1984) (defining the purpose of the Comprehensive Forfeiture Act to be the enhanced use of forfeiture as a tool to enforce the law in fighting the nation's two most serious crime problems of racketeering and drug trafficking).

73. See 18 U.S.C. § 1963(a) (1988 & Supp. II 1991) (authorizing the forfeiture of: (1) Any interest in, security of, claim against, or property or contractual right affording a source of influence over an enterprise associated with a RICO violation; and (2) any property constituting or derived from proceeds obtained from a RICO violation); 21 U.S.C. § 853(a) (1988) (authorizing the forfeiture of assets obtained as a result of or derived from the proceeds of a Comprehensive Drug Abuse Act violation).

74. See 18 U.S.C. § 1963(c) (1988) (authorizing the forfeiture of crime-related property that is transferred to a third party, unless the transferee is a *bona fide* purchaser for value, who at time of purchase had reasonable cause to believe that the property was not subject to forfeiture).

forfeiture.<sup>75</sup> In addition, the Comprehensive Forfeiture Act added a relation-back provision, vesting the Government's interest in the property at the time the crime was committed, instead of upon conviction.<sup>76</sup> The effect of the relation-back doctrine is to allow the Government to void post-offense transfers of property.<sup>77</sup>

While RICO and the Comprehensive Drug Abuse Act call for forfeiture of criminal proceeds and property used in furtherance of the crime, the *in personam* basis for forfeiture under the Acts extends the Government's forfeiture power greatly. The *in personam* basis allows forfeiture of property that has only a very tenuous relationship or no relationship to the crime, since the focus of *in personam* forfeiture is on the criminal defendant rather than on the fictitious guilt of the property.<sup>78</sup> Under section 1963(a)(2)(D) of RICO, for example, an asset or interest will be forfeited if it merely provides a source of influence over any enterprise in which the defendant was involved in violation of RICO.<sup>79</sup> Thus, forfeitable interests may include voting rights in a corporation, a contract for management between the defendant and the enterprise, or the right to hold office in a political organization or a union.<sup>80</sup> In addition, *in personam* forfeiture allows the Government to obtain the proceeds from illegally obtained property, which would not be reachable through *in rem* forfeiture.<sup>81</sup> The combination of the *in personam* basis of criminal forfeiture under these Acts and the Acts' broad applicability creates enormous potential for adverse effects on unsuspecting third parties who share property interests with criminal defendants.<sup>82</sup>

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75. See *infra* notes 86-105 and accompanying text (describing the issuance procedures for obtaining pretrial restraint of assets under both Acts).

76. 18 U.S.C. § 1963(c) (1988); 21 U.S.C. § 853(c) (1988); see Jankowski, *supra* note 58, at 177 (criticizing the relation-back doctrine as it presently exists under civil forfeiture provisions in federal drug statutes, because of its inadequate protection of innocent owners). The relation-back provision has been held by the United States Supreme Court to allow the Government to recover money RICO defendants have paid to their attorneys. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 (1989).

77. Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1, 16-17 (1991).

78. See 18 U.S.C. § 1963(a)(1) (1988 & Supp. II 1991) (requiring forfeiture of any interest acquired in violation of activities prohibited by RICO); *id.* § 1963(a)(3) (1988 & Supp. II 1991) (requiring forfeiture of any property constituting or derived from proceeds obtained from any activity prohibited by RICO); 21 U.S.C. § 853(a) (1988) (providing for forfeiture of property as punishment for a criminal violation under the Comprehensive Drug Abuse Act); see also Taylor, *supra* note 55 at 885 (criticizing RICO's broad applicability to property not necessarily obtained as a direct result of criminal conduct, as violating the principle that the punishment be proportional to the crime); *supra* notes 61-68 and accompanying text (discussing the history and nature of *in personam* forfeiture as a criminal punishment).

79. 18 U.S.C. § 1963(a)(2)(D) (1988 & Supp. II 1991).

80. MCCORMACK, *supra* note 32, at § 5.31.

81. Elizabeth A. Skorcz, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. REV. 1199, 1211 (1990); see Alexander, 113 S. Ct. at 2778 (Kennedy, J., dissenting) (observing that the use of civil *in rem* forfeiture ordinarily is ordinarily limited to unlawfully used property).

82. See Skorcz, *supra* note 81, at 1206-12 (discussing the dangers posed by *in personam* forfeiture to third parties who have made loans to defendants with property subject to forfeiture under RICO or the Comprehensive Drug Abuse Act); see also Bush, *supra* note 37, at 1000 (pointing out that the broad enterprise concept of RICO may allow forfeiture of the entire enterprise, limited only by the requirement that the forfeiture be proportional to the crime); *supra* notes 25-47 and accompanying text (discussing the broad applicability of RICO due to its broad concept of "enterprise"); *supra* notes 41-45 and accompanying text



The shift of punitive forfeiture from *in rem* to *in personam* has allowed Congress to extend the reach of forfeiture beyond assets bearing a loose connection to the crime, thus including property in no way connected with the crime through the forfeiture of substitute assets under RICO and the Comprehensive Drug Abuse Act.<sup>83</sup> The forfeiture of assets unrelated to the crime is only possible when the basis for the forfeiture is the defendant's guilt, since *in rem* forfeiture requires a showing that the property was used in connection with the prohibited activity.<sup>84</sup> Although the taking of untainted property to punish criminals was abhorred by the Framers of the Constitution and has been criticized recently, forfeiture of substitute assets pursuant to RICO and the Comprehensive Drug Abuse Act has been allowed by courts thus far.<sup>85</sup>

### 3. *Pretrial Restraint of Assets Under the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970*

RICO and the Comprehensive Drug Abuse Act provide a procedural framework for restraining assets prior to trial.<sup>86</sup> A federal court may enter a restraining order or an injunction, require the execution of a bond, or take any other action to preserve the availability of crime-related assets.<sup>87</sup> Restraint of assets under RICO and the Comprehensive Drug Abuse Act may take place either before or after indictment.<sup>88</sup> While the requirements for post-indictment restraints are much more lenient, a pre-indictment restraint may be more desirable to a prosecutor,

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(discussing the applicability of the Comprehensive Drug Abuse Act, particularly as extended by the incorporation of its forfeiture provisions into the general criminal forfeiture statute).

83. See *Billman*, 915 F.2d at 920 (justifying the forfeiture of substitute assets under RICO because such a forfeiture is an *in personam* proceeding against the criminal defendant).

84. See *One 1978 Mercedes Benz, Four Door Sedan*, 711 F.2d at 1304 (prohibiting forfeiture of property that was not proven to have been used in committing the crime); *supra* notes 56-60 and accompanying text (discussing *in rem* forfeiture and the requirement that the property be related to the crime).

85. See U.S. CONST. art. III, § 3 (prohibiting forfeiture of estate as a punishment for treason); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); *United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991) (finding that forfeiture of defendant's substitute assets was permissible under 18 U.S.C. § 1963(m), where defendant had sold the crime-related property to a *bona fide* purchaser for value); *United States v. Martenson*, 780 F. Supp. 492, 495 (N.D. Ill. 1991) (holding that defendant's house could be forfeited as a substitute asset under 18 U.S.C. § 1963(m), and that such forfeiture would not violate the *ex post facto* provision of the Constitution, notwithstanding the fact that § 1963(m) was enacted after the defendant was sentenced); see also U.S. CONST. art. 1, § 9 (prohibiting *ex post facto* laws). *But see Taylor*, *supra* note 55 at 891-94 (criticizing forfeiture of untainted assets under RICO as violative of the Constitution's prohibition of forfeiture of estate, and as constituting cruel and unusual punishment).

86. 18 U.S.C. § 1963(d)(1)-(2) (1988); 21 U.S.C. § 853(3)(1)-(2) (1988).

87. 18 U.S.C. § 1963(d)(1) (1988); 21 U.S.C. § 853(d)(1) (1988).

88. 18 U.S.C. § 1963(d)(1)-(2) (1988); 21 U.S.C. § 853(d)(1)-(2) (1988); see *infra* notes 86-101 and accompanying text (discussing the differing requirements and procedures for obtaining a restraint of assets before and after indictment).

because it can prevent the defendant from disposing of his property at an early stage in the proceedings.<sup>89</sup>

For pre-indictment restraints, prior notice and opportunity for hearing are required by the Acts unless the Government can demonstrate that probable cause exists to believe that the property would be subject to forfeiture and that providing notice would jeopardize the availability of the property.<sup>90</sup> In order for a pre-indictment restraining order to issue, the statute requires that a three-pronged test be satisfied. First, the Government must show that there is a substantial probability that it will prevail on the forfeiture issue.<sup>91</sup> Second, the Government must show that the property will be unavailable for forfeiture unless restrained.<sup>92</sup> Third, the Government must show that the need to preserve the availability of the property outweighs the hardship to any party against whom the restraining order is entered.<sup>93</sup> A pre-indictment restraining order is valid under both Acts for ninety days, unless an indictment issues.<sup>94</sup>

Post-indictment restraints are authorized without a hearing under the Acts.<sup>95</sup> Federal courts generally allow such post-indictment restraints under the seizure provisions without requiring a pre-seizure hearing, since the probable cause determination of the grand jury at the indictment satisfies the procedural requirements of a hearing to determine probable cause for restraint.<sup>96</sup> Most federal courts agree, however, that a post-seizure hearing is required where property is restrained after indictment, in order to assure that a defendant's rights to due process under the Fifth Amendment are not violated.<sup>97</sup> There is, however, disagreement as to the proper standard for such a hearing.<sup>98</sup> In extreme circumstances, the

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89. MCCORMACK, *supra* note 32, at § 5.18.

90. 18 U.S.C. § 1963(d)(1)(B) (1988); *id.* § 1963(d)(2) (1988); 21 U.S.C. § 853(e)(1)(B) (1988); *id.* § 853(e)(2) (1988).

91. 18 U.S.C. § 1963(d)(1)(B)(i); 21 U.S.C. § 853(e)(1)(B)(i) (1988).

92. 18 U.S.C. § 1963(d)(1)(B)(i); 21 U.S.C. § 853(e)(1)(B)(i) (1988).

93. 18 U.S.C. § 1963(d)(1)(B)(ii) (1988); 21 U.S.C. § 853(e)(1)(B)(ii) (1988).

94. 18 U.S.C. § 1963(d)(1)(B)(ii) (1988); 21 U.S.C. § 853(e)(1)(B)(ii) (1988).

95. 18 U.S.C. § 1963(d)(1)(A) (1988); 21 U.S.C. § 853(e)(1)(A) (1988); *see* S. REP. NO. 225, 98th Cong., 1st Sess. 202 (1984) (rejecting the civil temporary restraining order standard used by some courts for post-indictment restraining orders under RICO because of the belief that the probable cause requirement for the issuance of an indictment constitutes grounds for restraint of assets).

96. *See, e.g.,* United States v. Musson, 802 F.2d 384, 387 (10th Cir. 1986) (concluding that the probable cause determination of the grand jury at the indictment is sufficient to authorize post-indictment restraint of assets under RICO assets without a prior hearing). *But see* United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986) (holding that a hearing is required before a post-indictment restraint of assets may issue under the Comprehensive Drug Abuse Act); Baird & Vinson, *supra* note 2, at 1018-23 (criticizing the general practice of issuing post-indictment asset restraints without a hearing under RICO as violative of the Fifth Amendment's Due Process Clause).

97. Baird & Vinson, *supra* note 2, at 1018-23.

98. *See* Thier, 801 F.2d at 1468 (finding that all restraining orders, including post-indictment restraining orders under RICO, must comply with the requirements of Federal Rule of Civil Procedure 65, and that a hearing must be held within 10 days of their issuance), *modified*, 809 F.2d 249 (5th Cir. 1987); United States v. Crozier, 674 F.2d 1293, 1297-98 (9th Cir. 1982) (holding that the Due Process Clause requires an evidentiary hearing on the issue of probable cause before a restraining order can issue), *vacated and remanded*, 468 U.S. 1206 (1984); United States v. Perholtz, 622 F. Supp. 1253, 1256 (D.C. 1985) (stating that due process

Government may obtain an *ex parte* restraining order, and thus escape any requirement for an immediate hearing, if it can demonstrate that there is probable cause to believe that the property involved is subject to forfeiture and that providing notice will jeopardize the availability of property.<sup>99</sup> An *ex parte* restraining order is valid for ten days unless good cause is shown for an extension.<sup>100</sup> A defendant finding his assets restrained prior to trial under RICO or the Comprehensive Drug Abuse Act may immediately appeal the restraining order, as may defendants faced with traditional injunctions.<sup>101</sup>

Although relatively clear standards have been developed regarding the procedural requirements of pretrial asset restraint, no guidance has been provided by Congress or the Supreme Court regarding the pretrial restraint of substitute assets. While the Acts clearly allow forfeiture of substitute assets upon conviction where crime-related assets are no longer available, neither RICO nor the Comprehensive Drug Abuse Act expressly authorizes the pretrial restraint of substitute assets.<sup>102</sup> The Federal Courts of Appeals for the Second and Fourth Circuits have read RICO's substitute asset forfeiture provisions in harmony with that Act's pretrial restraint provisions to authorize restraint of substitute assets.<sup>103</sup> The Third and Fifth Circuits, however, have refused to give such a reading to either Act.<sup>104</sup>

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requires that a restraining order be temporary and that the Government give a defendant a hearing within "a brief amount of time"); Baird & Vinson, *supra* note 2, at 1018-23 (discussing the various viewpoints regarding the necessity of a post-seizure hearing where there has been a pretrial restraint of assets under RICO); *see also* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (holding that due process of law requires that where there is a temporary deprivation of property such as that pursuant to a restraining order, there must be notice to the property owner.) In addition, there must be an opportunity to be heard within a "meaningful time and in a meaningful manner." *Id.* (quoting *Armstrong v. Manso*, 380 U.S. 545, 552 (1965)). *But see Musson*, 802 F.2d at 386 (finding that a hearing is required when the Government seeks a restraining order prior to indictment, but is not necessary following post-indictment restraint).

99. 18 U.S.C. § 1963(d)(2) (1988); 21 U.S.C. § 853(e)(2) (1988).

100. 18 U.S.C. § 1963(d)(2) (1988); 21 U.S.C. § 853(e)(2) (1988).

101. *Floyd*, 992 F.2d at 500; *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 900-01 (2d Cir. 1992); *United States v. Roth*, 912 F.2d 1131, 1132-33 (9th Cir. 1990); *see Ripinsky*, 20 F.3d at 361 (noting that an order restraining assets prior to trial is a preliminary injunction for procedural purposes and is therefore appealable as such); *see also United States v. Kramer*, 912 F.2d 1257, 1259 (11th Cir. 1990) (observing that restraining orders issued pursuant to RICO have all the characteristics of a traditional injunction for appellate review purposes).

102. *See* 18 U.S.C. § 1963(d)(1) (1988) (authorizing the pretrial restraint of assets described in § 1963(a)); 21 U.S.C. § 853(e)(1) (1988) (authorizing restraint of assets described in § 853(a)); *see also* 18 U.S.C. § 1963(a) (1988 & Supp. II 1991) (describing assets to be forfeited as being derived from or used in a RICO violation); 21 U.S.C. § 853(a) (1988) (describing assets to be forfeited as bearing a connection to a drug-related crime under the Comprehensive Drug Abuse Act).

103. *See Regan*, 858 F.2d at 117 and *Billman*, 915 F.2d at 921 (holding that the district court had the authority to restrain substitute assets under RICO prior to trial); *infra notes* 106-155 and accompanying text (discussing the cases permitting pretrial restraint of substitute assets under RICO).

104. *See In re Assets of Martin*, 1 F.3d 1351, 1362 (3d Cir. 1993) (holding that the provisions of RICO authorizing pretrial restraint of assets do not authorize pretrial restraint of substitute assets); *Floyd*, 992 F.2d at 502 (holding that the forfeiture provisions of the Comprehensive Drug Abuse Act do not authorize the pretrial restraint of substitute assets); *infra notes* 156-207 and accompanying text (discussing the cases prohibiting pretrial restraint of substitute assets). *See generally* Cris Carmody, *Circuit Court Thaws Pretrial Freeze on Assets: A Split Develops over Pretrial Restraint of Substitute Assets*, NAT'L L.J., May 31, 1993, at 10 (exploring the conflict between the Fourth and Fifth Circuit Courts of Appeals on the issue of pretrial

The discussion below highlights the current split among the federal courts of appeals on whether substitute assets may be restrained prior to trial.<sup>105</sup>

## II. THE CASES

### A. Pretrial Restraint of Substitute Assets Allowed

To date, only the Second and Fourth Circuit Courts of Appeals have allowed the pretrial restraint of substitute assets under RICO.<sup>106</sup> In both of the cases described below, the courts read the pretrial restraint provisions in harmony with the substitute asset forfeiture provisions of RICO to authorize the restraints.<sup>107</sup> Furthermore, in both cases, each of the courts believed its construction of the Act to be in conformity with congressional intent.<sup>108</sup>

#### I. United States v. Regan<sup>109</sup>

James Sutton Regan was indicted for, *inter alia*, conspiring to commit securities fraud, mail fraud, wire fraud, and tax fraud, and for creating and maintaining false books.<sup>110</sup> Regan had allegedly committed these acts in connection with his involvement in the Princeton/Newport Group, which consisted of a limited partnership and nineteen associated business ventures engaged in the arbitrage business.<sup>111</sup> Regan had been the managing partner in the Princeton/Newport Group.<sup>112</sup>

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restraint of substitute assets); Rakoff, *supra* note 63, at 3 (discussing the split of authority in the federal appellate courts on the issue of pretrial restraint of substitute assets).

105. See *infra* notes 106-207 and accompanying text.

106. *Regan*, 858 F.2d at 117; *Billman*, 915 F.2d at 921; see *infra* notes 109-130 and accompanying text (describing the Second Circuit's decision to restrain substitute assets prior to trial in *United States v. Regan*); *infra* notes 131-155 and accompanying text (describing the Fourth Circuit's decision to restrain substitute assets prior to trial in *In re Assets of Billman*).

107. *Regan*, 858 F.2d at 120-21; *Billman*, 915 F.2d at 921; see *infra* notes 123 and accompanying text (describing the Second Circuit's harmonized reading of the pretrial restraint and substitute asset forfeiture provisions of RICO in *Regan*); *infra* notes 142-151 and accompanying text (describing the Fourth Circuit's harmonized reading of the pretrial restraint and substitute forfeiture provisions of RICO in *Billman*).

108. *Regan*, 858 F.2d at 119; *Billman*, 915 F.2d at 921.

109. 858 F.2d 115 (2d Cir. 1988).

110. *Regan*, 858 F.2d at 117; see Kurt Eichenwald, *6 Charged with Racketeering in Wall Street Insider Inquiry*, N.Y. TIMES, Aug. 5, 1988, at A1 (reporting the indictments of Regan and his partners on charges that they had created illegal tax losses through fraudulent stock transactions); see also James Buchan, *Former Drexel Trader Indicted*, FIN. TIMES, Aug. 5, 1988, at 117 (describing the indictments of Regan and his partners as unprecedented in Wall Street History). See generally Steve Coll, *Former Drexel Trader, 5 Others Indicted*, WASH. POST, Aug. 5, 1988, at F1 (detailing the alleged actions for which Regan and his partners were indicted).

111. *Regan*, 858 F.2d at 117. Arbitrage is the practice of making a simultaneous purchase in one market and sale in another of a security to make a profit on the difference in price. BLACK'S LAW DICTIONARY 104 (6th Ed. 1990).

112. Coll, *supra* note 110, at F1; see *Regan*, 858 F.2d at 117 (identifying Regan as a former partner of the Princeton/Newport Group).

The indictment sought forfeiture of the proceeds derived from Regan's unlawful activities.<sup>113</sup> On the day it was issued, the Government moved, pursuant to 18 U.S.C. § 1963(d)(1)(A), for an order freezing real property and other assets of the individual defendants that were not connected with the criminal enterprise.<sup>114</sup> The United States District Court for the Southern District of New York authorized the requested restraints, which were not appealed.<sup>115</sup> The Government also sought an order restraining the Princeton/Newport Group's use of its assets, even though Princeton/Newport was not a defendant in the case.<sup>116</sup> The district court entered an order restraining the Princeton/Newport Group from disposing of any of its assets (except in the ordinary course of business), unless it first provided the Government with notice and then obtained permission from the court.<sup>117</sup>

The issue addressed by the Second Circuit was whether, under the order entered by the district court, restraining non-criminally derived assets of an unindicted third party was appropriate.<sup>118</sup> Before taking up that point, however, the court first disposed of the issue as to whether assets of a third party can be restrained under RICO.<sup>119</sup> The court pointed out that where a RICO defendant is a partner, his interest in the partnership is forfeitable, but the entire partnership is not subject to forfeiture.<sup>120</sup> In this case, although the defendants' partnership interests had been restrained, the Government sought further restraint by way of totally limiting the Princeton/Newport Group's ability to dispose of any of its assets.<sup>121</sup> The court concluded that RICO's pretrial restraint provisions allow pretrial restraint of assets that will later be subject to forfeiture, even if the restrained assets are in the hands of a third party.<sup>122</sup> In reaching its conclusion, the court focused on the language of § 1963(d)(1)(A).<sup>123</sup> It found that the language

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113. *Regan*, 858 F.2d at 117.

114. *Id.* at 117-18.

115. *Id.* at 118.

116. *Id.* at 117-18.

117. *Id.* at 118. Four months after its officials were indicted, the Princeton/Newport Group was liquidated because RICO had driven the Group out of business, according to counsel for the defendants. Adler, *supra* note 10 at A1; see Jane Rohrer, Note, *What Price Investor Confidence? RICO Abuse as Compensable Takings*, 66 S. CAL. L. REV. 1675, 1677 (1993) (characterizing the effects of the charges against the Princeton/Newport partners as irreversible and economically more severe than most criminal convictions).

118. *Regan*, 858 F.2d at 118.

119. *Id.* at 118-19; see 18 U.S.C. § 1963(d)(1)(A) (1988) (describing property which may be restrained prior to trial as property or any enterprise that the person has established, operated, controlled, conducted, or participated in the conduct of in violation of RICO, and as any property constituting or derived from proceeds obtained in violation of RICO).

120. *Regan*, 858 F.2d at 119 n.2; see *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983) (holding that where a RICO defendant has a partnership interest, only his interest in the partnership may be forfeited).

121. *Regan*, 858 F.2d at 118; see *id.* at 120-21 (stating that the restraining order's weakness consisted of its inclusion of all of Princeton/Newport's assets, instead of only those of the individual defendants).

122. *Id.* at 120-22 (explaining that the restraining order provision does not limit restraining orders to indicted persons in situations where restraints on defendants are inadequate to protect forfeitable assets).

123. *Id.* at 119.

of that section refers to the forfeitable property, rather than the parties,<sup>124</sup> and authorizes the district court to “take any other action” it believes necessary to ensure that the property will be available for forfeiture.<sup>125</sup> Defining the Act’s expressed purpose to be the preservation of forfeitable property pending trial, the court opined that this purpose cannot be fulfilled if property cannot be restrained whenever it is in the hands of third parties.<sup>126</sup>

The court reasoned that the restraint of Princeton/Newport’s assets was authorized by the RICO restraint provision, since Princeton/Newport had the opportunity to adversely affect the partnership interests of the defendants.<sup>127</sup> Furthermore, according to the court, the restraining order did not have the effect of a total restraint on Princeton/Newport’s assets, but still allowed the organization to conduct transactions in the ordinary course of business.<sup>128</sup> The court warned that before resorting to restraining orders directed against third parties, other assets of the defendant, seizable under the forfeiture provisions as substitute assets where crime-related assets are not available, should be restrained.<sup>129</sup> The court reasoned that although § 1963(n)(5) authorized only the forfeiture of substitute assets to preserve assets of equal value to those related to the crime, the substitute asset forfeiture provision of RICO suggests that restraining orders should be used for the same purpose.<sup>130</sup>

## 2. In re Assets of Billman<sup>131</sup>

In 1990, the United States Court of Appeals for the Fourth Circuit held in *In re Assets of Billman* that RICO authorizes the pretrial restraint of substitute assets.<sup>132</sup> The Government obtained an indictment against the defendant, Tom J. Billman, for racketeering, conspiracy to commit mail and wire fraud, and for

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124. *Id.*; *see id.* (interpreting the language of that section as Congress’ intent to preserve forfeitable property pending trial).

125. *Id.*; *see* 18 U.S.C. § 1963(d)(1)(A) (1988) (providing that the court may enter a restraining order or take any other action “to preserve the availability of the property described in subsection(a)”); *see also* 18 U.S.C. § 1963(a) (describing as forfeitable assets, those properties that are connected with the crime).

126. *Regan*, 858 F.2d at 119-20; *see* S. REP. NO. 225, 98th Cong., 2d Sess. 202, 204, *reprinted in* 1984 U.S.C.A.N. 3182, 3385, 3387 (clarifying that the only purpose of the restraining order provision is to ensure that property will continue to be available while trial is pending).

127. *Regan*, 858 F.2d 115 at 120-21.

128. *Id.* at 121. *But see id.* (stating defendants’ position to be that such a restraining order would limit the organization’s ability to attract lenders or investors); Adler, *supra* note 10, at A1 (reporting that counsel for Princeton/Newport attributed the RICO prosecution to the Group going out of business within four months after its officials were indicted).

129. *Regan*, 858 F.2d at 121; *see supra* notes 83-85 and accompanying text (discussing forfeiture of substitute assets under RICO and the Comprehensive Drug Abuse Act).

130. Subsection (n) of 18 U.S.C. § 1963, as cited by the court in *Regan*, was redesignated as subsection (m) in 1988.

131. 915 F.2d 916 (4th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991).

132. *Billman*, 915 F.2d at 921.

other counts of fraud that had led to the failure of a savings and loan.<sup>133</sup> The indictment charged that the proceeds obtained through racketeering were subject to forfeiture under 18 U.S.C. § 1963, subsections (a)(1) and (3).<sup>134</sup> Billman had fled the country before the indictment was issued.<sup>135</sup> From a location overseas, he transferred non-tainted funds, which were allegedly subject to post-judgment forfeiture, to Barbara A. McKinney, a co-conspirator.<sup>136</sup>

The United States District Court for the District of Maryland issued a temporary restraining order prohibiting McKinney from disposing of the assets.<sup>137</sup> McKinney later requested a determination from the District Court, as to the validity of the temporary restraining order.<sup>138</sup> The Government moved for an injunction to prohibit disposal of the assets prior to forfeiture proceedings.<sup>139</sup> The court held that the assets that had not been proven to be proceeds of a RICO offense could not be restrained prior to trial under 18 U.S.C. § 1963.<sup>140</sup> Accordingly, the district court denied the Government's motion, and vacated the temporary restraining order.<sup>141</sup>

In reversing the decision of the district court, the Court of Appeals for the Fourth Circuit read the provision providing for forfeiture of substitute assets in harmony with the provision providing for pretrial restraint, even though the pretrial restraint provision refers only to assets related to the crime.<sup>142</sup> The Fourth

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133. *Id.* at 917-18; see Paul Duggan & Paul W. Valentine, *S&L Chief Said to Take \$50 Million; \$8 Million Hidden in Swiss Accounts*, WASH. POST, June 28, 1989, at B1 (reporting that Billman had overseen a failed business venture that ruined his savings and loan and received approximately \$50 million from the savings and loan and associated companies, \$8 million of which he had hidden in Swiss Banks).

134. *Billman*, 915 F.2d at 917-18; see 18 U.S.C. § 1963(a)(1) (1988 & Supp. II 1991) (providing that any interest acquired in violation of RICO shall be forfeited); *id.* § 1963(a)(3) (1988 & Supp. II 1991) (providing that any property consisting of or derived from proceeds obtained in violation of RICO shall be forfeited).

135. *Billman*, 915 F.2d at 918; see Bill Atkinson, *On the Lam: Tales from Banking's Dark Side*, AM. BANKER, May 20, 1992, at 1 (describing Billman's flight as "an elaborate disappearing act" and reporting that more than three years after he had fled the country, he had managed to elude intensive international searches conducted by Interpol and United States Marshals); David A. Markiewicz, *Crime Show Spotlights Fugitive S&L Executive*, USA TODAY, Feb. 1, 1991, at 2B (noting that the Fox television program *America's Most Wanted*, which normally focuses on violent criminals, featured Tom Billman, and reporting that Billman had last been seen in Spain on his yacht, sipping gin by the side of his Norwegian model girlfriend).

136. *Billman*, 915 F.2d at 917-18; see *Defendant Denied Money*, WASH. POST, June 4, 1991, at C6 (reporting that the United States Supreme Court had, without comment, let stand the [*In re Billman*] ruling by denying Barbara McKinney's appeal, thus allowing prosecutors to keep McKinney from spending the \$500,000 she had received from Billman).

137. *Billman*, 915 F.2d at 919.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*; see 18 U.S.C. § 1963(a) (1988 & Supp. II 1991) (authorizing forfeiture of assets derived from or otherwise used in the commission of a RICO violation); *id.* § 1963(d)(1)(A) (1988) (authorizing the district court to issue a restraining order or take other action to preserve property forfeitable because of its relation to the crime); *Billman*, 915 F.2d at 918 (emphasizing that where the defendant's crime-related assets have been placed beyond the district court's jurisdiction, 18 U.S.C. § (d)(1)(A) is to be read in conjunction with 18 U.S.C.

Circuit, in part, drew support for reconciling the two provisions from *United States v. Skiles*,<sup>143</sup> a decision of the District Court for the Northern District of Georgia that had construed analogous provisions of the Comprehensive Drug Abuse Act to permit the pretrial restraint of substitute assets.<sup>144</sup>

In reaching its decision, the court stressed that Congress intended that RICO be construed liberally to fulfill its remedial purpose.<sup>145</sup> According to the *Billman* court, the remedial purpose of the pretrial restraint provisions was to protect the defendant's assets for forfeiture in case of conviction.<sup>146</sup> Therefore, the Fourth Circuit reasoned, a liberal construction to achieve the purpose of preserving assets required reading the substitute asset forfeiture and pretrial restraint subsections in harmony.<sup>147</sup>

The Fourth Circuit found additional justification for reading the pretrial restraint provisions in conjunction with the forfeiture provisions in *United States v. Monsanto*,<sup>148</sup> a Supreme Court case, in which the Court had read other provisions of RICO in the same manner in order to discern their meaning.<sup>149</sup> In *Monsanto*, however, the Supreme Court addressed whether assets in the hands of a third party are subject to pretrial restraint when those assets could be traced to violations of the Comprehensive Drug Abuse Act, but did not consider the issue of substitute assets.<sup>150</sup> Although the Court in *Monsanto* had not discussed any issue involving substitute assets, the *Billman* court believed that the Supreme Court's harmonizing of the Comprehensive Drug Abuse Act's provisions in *Monsanto* provided adequate support for the *Billman* court to do likewise with regard to pretrial restraint of substitute assets.<sup>151</sup>

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§ 1963 (m) in order to effectuate the remedial purpose of 18 U.S.C. § (d)(1)(A)); see also *Regan*, 858 F.2d at 119 (describing the purpose of 18 U.S.C. § 1963(d)(1)(A) as the preservation of forfeitable assets pending trial).

143. 715 F. Supp. 1567 (N.D. Ga. 1989).

144. *Billman*, 915 F.2d at 921; see *United States v. Skiles*, 715 F. Supp. 1567, 1568 (N.D. Ga. 1989) (reading the provisions of 21 U.S.C. § 853 to permit the pretrial restraint of substitute assets).

145. *Billman*, 915 F.2d at 921; see *Organized Crime Control Act of 1970*, Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (providing that the provisions of RICO are to be liberally construed to effectuate RICO's remedial purpose); see also *Russello v. United States*, 464 U.S. 16, 27 (1983) (emphasizing that the forfeiture provisions of RICO should be construed liberally to achieve their remedial purpose).

146. *Billman*, 915 F.2d at 921.

147. *Id.*

148. 491 U.S. 600 (1989).

149. See *Billman*, 915 F.2d at 921 (stating that the Supreme Court's harmonizing of provisions of the Comprehensive Drug Abuse Act confirms the Court of Appeals' reading of the RICO forfeiture and asset restraint provisions in conjunction with each other).

150. See *United States v. Monsanto*, 491 U.S. 600, 612 (1989) (analyzing whether assets traceable to Comprehensive Drug Abuse Act violations are subject to pretrial restraint when such assets are in the possession of a third party).

151. See *Billman*, 915 F.2d at 921 (drawing justification from *Monsanto* for its reading of RICO's substitute asset forfeiture provision with its pretrial restraint provision); *Monsanto*, 491 U.S. at 612 (construing the third party transfer and pretrial restraint provisions of the Comprehensive Drug Abuse Act to permit the restraint of assets in possession of a third party).



The decisions of *United States v. Regan*<sup>152</sup> and *In re Assets of Billman* authorize pretrial restraint of substitute assets.<sup>153</sup> Both of these appellate decisions rely on a harmonized reading of RICO's substitute asset forfeiture provisions with that Act's pretrial restraint provisions.<sup>154</sup> The Courts of Appeals in other circuits, however, have not been willing to construe RICO or the Comprehensive Drug Abuse Act in the same fashion.<sup>155</sup>

## B. Pretrial Restraint of Substitute Assets Prohibited

The Third, Fifth, and Ninth Circuit Courts of Appeals have not been willing to restrain substitute assets prior to trial under RICO or the Comprehensive Drug Abuse Act.<sup>156</sup> Each of these federal appellate courts have held that substitute asset restraint was outside the scope of the statutes' language and Congress' intent in enacting their provisions.<sup>157</sup> The following decisions directly contradict the decisions of the Second and Fourth Circuits discussed above.

### I. *United States v. Floyd*<sup>158</sup>

In *United States v. Floyd*, the Fifth Circuit reached the issue of whether substitute assets may be restrained prior to trial under the Comprehensive Drug Abuse Act.<sup>159</sup> The defendant, a former president and chief executive officer of United Bank, was indicted on charges relating to his fraudulent disposal of \$1.96

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152. 858 F.2d 115, 118-19 (2d Cir. 1988).

153. See *supra* notes 109-154 and accompanying text (discussing *United States v. Regan* and *In re Assets of Billman*).

154. *Id.*

155. See *infra* notes 156-207 and accompanying text (discussing cases refusing to read the forfeiture and pretrial restraint provisions of RICO or the Comprehensive Drug Abuse Act to permit pretrial restraint of substitute assets).

156. *United States v. Ripinsky*, 20 F.3d 359, 365 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351, 1362 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993); see *infra* notes 158-177 and accompanying text (describing the Fifth Circuit's refusal to authorize pretrial substitute asset restraint under the Comprehensive Drug Abuse Act in *United States v. Floyd*); *infra* notes 178-207 and accompanying text (describing the Third Circuit's recent decision in *In re Assets of Martin*, which refused to authorize pretrial substitute asset restraint pursuant to RICO); *infra* notes 189-207 and accompanying text (describing the Ninth Circuit's decision in *United States v. Ripinsky*, holding that substitute assets may not be restrained prior to trial under the Comprehensive Drug Abuse Act).

157. See *infra* notes 170-174 and accompanying text (describing the Fifth Circuit's findings in *United States v. Floyd* that substitute asset restraint was outside the scope of the language of the Comprehensive Drug Abuse Act and contrary to congressional intent); *infra* notes 183-188 and accompanying text (describing the Third Circuit's findings in *Ripinsky* that pretrial restraint of substitute assets was outside the scope of RICO's language and contrary to congressional intent); *infra* notes 196-204 and accompanying text (discussing the Ninth Circuit's ruling in *In re Assets of Martin* that pretrial restraint of substitute assets exceeded the scope of the statutory language and was contrary to congressional intent under the Comprehensive Drug Abuse Act).

158. 992 F.2d 498 (5th Cir. 1993).

159. *Floyd*, 992 F.2d at 500.

million of the bank's assets.<sup>160</sup> The Government sought an *ex parte* restraining order pursuant to the general forfeiture provisions of 18 U.S.C. § 982 to restrain specified assets and requested a general restraint of Floyd's right to dispose of other assets.<sup>161</sup> After obtaining the order to restrain assets totaling \$401,719, the Government sought a protective order restraining Floyd from disposing of substitute assets up to the \$1.96 million amount he had allegedly obtained from his crimes, since he no longer was in possession of the money he had allegedly derived from his crimes.<sup>162</sup>

The United States Court for the Northern District of Texas granted the Government's motion to restrain the substitute assets, but limited the amount to \$450,000 because the Government had not persuaded the court that the amount it sought to restrain would be forfeitable upon conviction.<sup>163</sup> The district court, relying on the reasoning of *In re Assets of Billman*,<sup>164</sup> determined that the Comprehensive Drug Abuse Act permitted pretrial restraint of substitute assets.<sup>165</sup> The district court thus denied Floyd's request that he be allowed to use the restrained funds for living expenses and attorney's fees.<sup>166</sup> On appeal, the Government argued that section 853(e)(1)(A) authorized pretrial restraint of substitute assets, based on the reasoning of *In re Assets of Billman*.<sup>167</sup> The *Floyd* court, however, was not persuaded by the Fourth Circuit's reasoning, even though the *Billman* court had interpreted language in the RICO statute that was in essence identical to the provisions of section 853 involved in this case.<sup>168</sup>

In reversing the decision of the district court, the Court of Appeals for the Fifth Circuit held that section 853(e)(1)(A) of the Comprehensive Drug Abuse Act does not allow the pretrial restraint of substitute assets.<sup>169</sup> The *Floyd* court

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160. *Id.* at 499; see Tracy Everbach, *Former Developer Indicted; Bank Fraud Case 'Vindictive,' He Says*, DALLAS MORNING NEWS, Dec. 18, 1992, at 29A (reporting the indictments of Floyd and Thomas Merrill Gaubert, Floyd's alleged co-conspirator, and quoting Gaubert as saying that he had been a target of vindictive prosecutors because of his 1988 acquittal on other charges).

161. *Floyd*, 992 F.2d at 499; see 18 U.S.C. § 982 (Supp. II 1991) (providing for criminal forfeiture in general); see also *supra* notes 43-45 and accompanying text (discussing 18 U.S.C. § 982 and its incorporation of the criminal forfeiture and pretrial restraint provisions of the Comprehensive Drug Abuse Act); *supra* notes 99-101 and accompanying text (describing the circumstances and requirements for issuance of an *ex parte* restraining order pursuant to RICO and the Comprehensive Drug Abuse Act).

162. *Floyd*, 992 F.2d at 499.

163. *Id.*

164. 915 F.2d 916 (4th Cir. 1990).

165. *Floyd*, 992 F.2d at 499; see *supra* notes 142-155 and accompanying text (discussing the reasoning of *In re Assets of Billman*).

166. *Floyd*, 992 F.2d at 501; see *infra* notes 234-241 and accompanying text (discussing the implications of pretrial restraint of substitute assets on the right to assistance of counsel guaranteed by the Sixth Amendment of the Constitution).

167. *Floyd*, 992 F.2d at 501; see *supra* notes 142-155 and accompanying text (discussing the reasoning of *In re Assets of Billman*).

168. See *Floyd*, 992 F.2d at 501 (acknowledging that the RICO forfeiture provisions were essentially identical to the provisions of 21 U.S.C. § 853 involved in this case); *Floyd*, 992 F.2d at 502 (indicating that the court was not persuaded by the reasoning of *Billman* to support restraint of property); *supra* notes 142-155 and accompanying text (discussing the reasoning in *In re Assets of Billman*).

169. *Floyd*, 992 F.2d at 502.

emphasized that the language of the pretrial restraint provision in section 853(e) refers only to property described in section 853(a) as crime-related property.<sup>170</sup> While acknowledging that section 853, like the RICO statute, directs that its provisions be liberally construed to fulfill its remedial purposes,<sup>171</sup> the court stated that even such a requirement of liberal interpretation does not authorize what the court viewed as amendment by interpretation.<sup>172</sup>

The court in *Floyd* criticized the Fourth Circuit's reliance on *United States v. Monsanto*.<sup>173</sup> According to the *Floyd* court, *Monsanto* had cautioned against finding an exception to the express language of the Act where no such exception had been provided by Congress.<sup>174</sup> Further, the *Floyd* court believed the Supreme Court's reading of the pretrial restraint provisions of the Act to be consistent with its own interpretation.<sup>175</sup> The court emphasized its strong aversion to allowing pretrial restraint of substitute assets, elaborating that such restraints are reminiscent of writs of assistance<sup>176</sup> and pose Fourth Amendment concerns, since they would allow the Government to seize property that is neither evidence nor the fruit of a crime.<sup>177</sup>

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170. *Id.*; see 21 U.S.C. § 853(a) (1988) (authorizing forfeiture of property derived from or used in the commission of a criminal violation); *id.* § 853(e)(1)(A) (1988) (authorizing the pretrial restraint of assets described in § 853(a)).

171. 21 U.S.C. § 853(o) (1988); *Floyd*, 992 F.2d at 502.

172. *Floyd*, 992 F.2d at 502.

173. *Id.*; see *Monsanto*, 491 U.S. at 600, 612 (1989) (construing the third party transfer and pretrial restraint provisions of the Comprehensive Drug Abuse Act to permit the restraint of assets in possession of a third party).

174. See *Floyd*, 992 F.2d at 502 (emphasizing that the *Monsanto* decision cautioned against reading language into the Act that Congress had not included); see also *Monsanto*, 491 U.S. at 612 (refusing to read language into 21 U.S.C. § 853 that would protect assets from restraint to allow for payment of attorney's fees, in the absence of a clear expression of congressional intent).

175. See *Floyd*, 992 F.2d at 502 n.7 (quoting the *Monsanto* Court as stating that the pretrial restraint provisions of 21 U.S.C. § 853 are clearly aimed at implementing the requirements of the crime-related asset forfeiture provision). The district court is authorized by 21 U.S.C. § 853(e)(1)(A) to enter an order restraining assets to preserve the availability of property listed in in 21 U.S.C. § 853(a). 21 U.S.C. § 853(e)(1)(A); see 21 U.S.C. § 853(a) (1988) (authorizing the forfeiture of property derived from or used in the commission of a criminal violation).

176. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369-70 (1983) (explaining that writs of assistance were a powerful tool used during colonial times to search for goods that had been smuggled in order to avoid taxes, and that they allowed agents of the Crown to search for such goods without discretion).

177. *Floyd*, 992 F.2d at 502; see U.S. CONST. amend. IV (guaranteeing the right to be secure against unreasonable searches and seizures); Stewart, *supra* note 176, at 1369-70 (stating that the Fourth Amendment was adopted primarily to ensure that citizens' liberty would no longer be threatened by general warrants and writs of assistance); see also *infra* notes 226-233 and accompanying text (discussing the Fourth Amendment implications of pretrial substitute asset restraint).

2. In re Assets of Martin<sup>178</sup>

The Third Circuit Court of Appeals held in *In re Assets of Martin* that RICO does not authorize pretrial restraint of substitute assets.<sup>179</sup> The defendants in *Martin* allegedly violated RICO through schemes to avoid excise taxes in the heating oil business.<sup>180</sup> The Government obtained pre-indictment temporary restraining orders under the restraint provisions of RICO, which included the restraint of substitute assets.<sup>181</sup> In denying the order, the court, like the Fifth Circuit in *United States v. Floyd*,<sup>182</sup> relied on a plain reading of the statute.<sup>183</sup> The *Martin* court disagreed with the *Billman*<sup>184</sup> and *Regan*<sup>185</sup> decisions for looking to the purpose of the statute, when, according to the court, the statute's meaning is clear on its face.<sup>186</sup> Nevertheless, the court concluded that it was compelled to look to legislative history, because its ruling would stand in conflict with the *Billman* and *Regan* decisions.<sup>187</sup> In discussing the statute's legislative history, the court cited language that, in the court's view, clearly established that Congress had intended that substitute assets should not be restrained under RICO prior to trial.<sup>188</sup>

3. United States v. Ripinsky<sup>189</sup>

In perhaps the strongest pronouncement against pretrial restraint of substitute assets to date, the Ninth Circuit Court of Appeals recently reversed a district court decision authorizing such restraint in *United States v. Ripinsky*.<sup>190</sup> As with *Floyd*, *Ripinsky* involved an appeal of a lower court decision authorizing pretrial restraint

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178. 1 F.3d 1351 (3d Cir. 1993).

179. *Id.* at 1362.

180. *Id.* at 1353; see *Jobber Sting Crushes Huge Russian Mafia Tax Scam*, U.S. OIL WEEK, May 30, 1994 (reporting that the conspirators in the tax schemes had sold untaxed heating oil as diesel fuel at eight cents per gallon below market price, and that some salespeople involved had earned more than \$500,000 within approximately one year).

181. *Martin*, 1 F.3d at 1354; see *id.* at 1354 n.2 (describing the indictment in the case as a "formidable document" that included 89 counts and was 169 pages in length).

182. 992 F.2d 498 (5th Cir. 1993).

183. *Martin*, 1 F.3d at 1358.

184. *In re Assets of Billman*, 915 F.2d 916 (4th Cir. 1990).

185. *United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988).

186. *Martin*, 1 F.3d at 1359.

187. *Id.*; see *supra* notes 109-155 and accompanying text (discussing the decisions in *Regan* and *Billman*, which authorized pretrial restraint of substitute assets).

188. *Martin*, 1 F.3d at 1359. The legislative history on which the court relied emerged in the context of proposed amendments to RICO in 1982. Although these amendments were not enacted that year, their substantive content was adopted with the amendments to RICO and the Comprehensive Drug Abuse Act in 1986). Rakoff, *supra* note 63, at 3; see S. REP. 97-520, 97th Cong. 2d Sess. (1982) (commenting on the amendments to RICO and the Comprehensive Drug Abuse Act that were proposed in 1982, and noting that the restraining order provisions applied only to subsection(a) property, and may not be applied to other assets).

189. 20 F.3d 359 (9th Cir. 1994).

190. *Id.* at 365.

of assets, which had no connection to the defendant's alleged crimes under the provisions of 21 U.S.C. § 853 as incorporated into the General Criminal Forfeiture Statute, 18 U.S.C. § 982.<sup>191</sup>

In *Ripinsky*, the defendant, Juri Ripinsky was indicted for violations of conspiracy, bank fraud, wire fraud, money laundering, and forfeiture statutes involving approximately \$2.3 million.<sup>192</sup> On the day the indictment was issued, the Government obtained a restraining order freezing Ripinsky's assets totalling \$1,745,500, which were held by the defendant in England.<sup>193</sup> Although the assets would have been forfeitable if Ripinsky were convicted, the Government conceded that the assets were not in any way connected to the charges against him.<sup>194</sup> Through a series of motions, the Government converted the temporary restraining order into a preliminary injunction over Ripinsky's objections, and then modified the preliminary injunction, with the final effect being a total restraint of \$1,017,500—none of which was connected to Ripinsky's alleged crimes.<sup>195</sup>

The *Ripinsky* court agreed with the decisions of the Third and Fifth Circuits that the plain language of 18 U.S.C. § 853 did not authorize the pretrial restraint.<sup>196</sup> In response to the Government's argument that the statute's mandate for liberal construction to further its remedial purpose prohibited such a focused reading, the court agreed with *Floyd* that it does not authorize amendment "by interpretation."<sup>197</sup> In addition, the *Ripinsky* court addressed the Government's argument that the latter's interpretation of the statute would be required to achieve the remedial purpose of the forfeiture provisions.<sup>198</sup> The court responded by pointing out the Supreme Court's recent recognition in *Alexander v. United States*<sup>199</sup> and *Austin v. United States*,<sup>200</sup> that the criminal forfeiture provisions of RICO and the Comprehensive Drug Abuse Act are not strictly remedial, but also punitive.<sup>201</sup>

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191. *Id.* at 360.

192. *Id.*; see *Enforcement*, 60 Banking Rep. (BNA) No. 19, at 682 (May 10, 1993) (reporting that Ripinsky and his alleged co-conspirators had been partners in several real estate development companies based in Los Angeles, and that they were alleged to have diverted over \$2 million from real estate joint ventures).

193. *Ripinsky*, 20 F.3d at 365.

194. *Id.*

195. See *id.* at 360-61 (detailing the process by which the Government obtained restraints for \$272,500 and \$745,000 through a series of motions).

196. *Id.* at 363.

197. *Id.*; see *Floyd*, 992 F.2d at 502 (refusing to read 21 U.S.C. § 853 to permit restraint of substitute assets because such a reading would require the court to "amend by interpretation").

198. *Ripinsky*, 20 F.3d at 363.

199. 113 S. Ct. 2766 (1993).

200. *Id.* at 2801.

201. *Ripinsky*, 20 F.3d at 363 n.5; see *Alexander*, 113 S. Ct. at 2775-76 (characterizing 18 U.S.C. § 1963 as a form of monetary punishment); *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993) (stating that 21 U.S.C. § 853 "can only be explained as serving in part to punish").

To support its decision, the *Ripinsky* court turned to legislative history to discern congressional intent.<sup>202</sup> The court found that Congress, in a 1983 Senate report discussing subsection (p) (the substitute asset provision of section 853), had described it as “a provision authorizing the court to order the defendant to forfeit substitute assets when his property originally subject to forfeiture had been made unavailable at the time of conviction.”<sup>203</sup> The court emphasized that a Senate report from 1982 had analyzed a provision nearly identical to subsection (e) (the restraining order provisions of section 853), stating that the restraining order provisions applied only to crime-related assets and could not be applied to other assets that might eventually be forfeitable under the substitute asset provision.<sup>204</sup>

Finally and most significantly, the *Ripinsky* court asserted that if it granted the Government’s wish, it would expand the Government’s extensive powers by handing the Government a more powerful weapon which could be used against the accused, who, as the court emphasized, is to be presumed innocent.<sup>205</sup> Furthermore, in response to the Government’s argument that pretrial restraint of substitute assets would only preserve the status quo, such restraint could have “far reaching effects,” according to the court. Giving the government such a powerful tool, the court emphasized, would enable it essentially to reach all of the assets of an individual or a business, a phenomenon that could “cripple a business and destroy an individual’s livelihood.”<sup>206</sup> In conclusion, the court expressly refused to allow such a severe remedy to assets that are not related to the crime, where a person is merely accused and is entitled to a presumption of innocence.<sup>207</sup>

### III. FUTURE OUTLOOK

While the forfeiture provisions of RICO and the Comprehensive Drug Abuse Act serve as important tools in fighting crime, forfeiture has significant potential for unchecked use by the Government, without regard to the individual rights of the defendant.<sup>208</sup> *In personam* forfeiture, authorized by RICO and the Comprehensive Drug Abuse Act, is really a form of punishment, rather than strictly a confiscation of property based on illegal use.<sup>209</sup> While pretrial restraint may be

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202. *Ripinsky*, 20 F.3d at 363-64.

203. *Id.* at 364; S. Rep. 98-225, Pub. L. 98-473, 98th Cong., 2d Sess, 198, 213, reprinted in 1984 U.S.C.C.A.N. 3381, 3396 (1984).

204. *Ripinsky*, 20 F.3d at 364; S. REP. 97-520, 97th Cong., 2d Sess. 10, 14, 17 (1982).

205. *Ripinsky*, 20 F.3d at 365.

206. *Id.*

207. *Id.*

208. See Rakoff, *supra* note 63, at 3 (observing that forfeiture has potential for governmental abuse, if not checked by Congress or the courts).

209. *Alexander*, 113 S. Ct. at 2778 (1993) (Kennedy, J., dissenting); see *Billman*, 915 F.2d at 920 (noting that criminal forfeiture under RICO is an *in personam* proceeding against the defendant, and that such forfeiture is a punishment against the defendant); *supra* notes 61-68 and accompanying text (discussing the characteristics and use of *in personam* forfeiture).

necessary sometimes to preserve the availability of property tainted by the commission of a crime, such restraint of substitute assets is not authorized by the plain language of RICO or the Comprehensive Drug Abuse Act, and apparently was not intended by Congress.<sup>210</sup> Furthermore, as suggested by the court in *Floyd*, granting the Government power to seize property that is neither evidence nor the fruit of a crime may violate the Fourth Amendment's search and seizure provision.<sup>211</sup> Finally, the Constitutional right assuring a criminal defendant of the right to counsel of choice poses serious concerns that should prohibit the pretrial restraint of substitute assets.<sup>212</sup>

*A. Statutory Language and Congressional Intent with Regard to Pretrial Restraint of Substitute Assets*

The United States Supreme Court has stated with regard to RICO that if its statutory language is unambiguous, and Congress has not clearly expressed intent to the contrary, that language must normally be regarded as conclusive.<sup>213</sup> Only if statutory language is unclear may the court look to legislative history.<sup>214</sup> The language of RICO and the Comprehensive Drug Abuse Act seems to disallow restraint of substitute assets prior to conviction. The pretrial restraint section of RICO, as set out in 18 U.S.C. § 1963(d), expressly limits its application to ensuring the availability of property described in section 1963(a), which covers only forfeiture of assets related to the crime.<sup>215</sup> The pretrial restraint section of the Comprehensive Drug Abuse Act, 21 U.S.C. § 853(e), similarly restricts its reach to property described in section 853(a), which, like RICO, covers only forfeiture of assets related to the crime.<sup>216</sup> The provisions allowing for forfeiture of substitute assets upon conviction are described in wholly separate subsections of each Act.<sup>217</sup> These provisions expressly authorize only the forfeiture of assets unrelated to the crime and do not make any reference to pretrial restraint.<sup>218</sup>

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210. See *infra* notes 213-224 and accompanying text (discussing why pretrial restraint of substitute assets is not authorized by the language of RICO and the Comprehensive Drug Abuse Act's forfeiture and pretrial restraint provisions and is contrary to congressional intent).

211. *Floyd*, 992 F.2d 498 at 502; see U.S. CONST. amend. IV (protecting the right to be secure against unreasonable searches and seizures); *infra* notes 226-233 and accompanying text (discussing the Fourth Amendment implications of pretrial restraint of substitute assets).

212. See *infra* notes 234-241 and accompanying text (discussing constitutional right to counsel under the Sixth Amendment).

213. *Russello v. United States*, 464 U.S. 16, 20 (1983).

214. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

215. 18 U.S.C. § 1963(a) (1988 & Supp. II 1991); *id.* § 1963(d) (1988).

216. 21 U.S.C. § 853(a) (1988); *id.* § 853(e) (1988).

217. See 18 U.S.C. § 1963(m) (1988) (authorizing forfeiture of substitute assets under RICO upon conviction); 21 U.S.C. § 853(p) (1988) (authorizing forfeiture of substitute assets under the Comprehensive Drug Abuse Act upon conviction).

218. See *id.* § 1963(m) (1988) (authorizing forfeiture of substitute assets under RICO upon conviction, but making no mention of pretrial restraint); 21 U.S.C. § 853(p) (1988) (authorizing forfeiture of substitute assets under the Comprehensive Drug Abuse Act upon conviction, but making no mention of pretrial restraint).

Although the language of the pretrial restraint and substitute asset forfeiture provisions seems abundantly clear, some courts have deemed it sufficiently ambiguous to justify inquiring into congressional intent.<sup>219</sup> In attempting to discern the intent of Congress, courts have looked to statutory language and to legislative history.

The internal statutory language that arguably conveys a congressional intent to allow pretrial substitute asset restraint is found in section 904(a) of Pub. L. 91-452 (containing the statutes enacting RICO). That section provides that the provisions of Title 18, including RICO, are to be liberally construed to effectuate the remedial purpose of Title 18.<sup>220</sup> The *Billman* court relied on that language in supporting its decision to read the pretrial restraint provisions together with the substitute asset forfeiture provisions, in order to restrain substitute assets before trial.<sup>221</sup> Such a reading, however, has two significant flaws. First, it requires an assumption (made by the *Billman* court) that the remedial purpose of RICO includes the specific purpose of preserving any asset that may later be subject to forfeiture, despite language within the statute clearly defining its aim as the preservation of crime-related property.<sup>222</sup> Second, the *Billman* court's reading assumes that the concept represented by the term "liberal construction" permits a court to read into the Acts language that does not exist and that clearly could have been included by Congress.

Although the 1986 amendments to RICO are devoid of legislative history on the congressional intent concerning pretrial restraint of substitute assets, an express intent not to restrain substitute assets can be found in a Senate report accompanying a 1982 proposal aimed at amending RICO to permit post-conviction forfeiture of substitute assets, but not to permit the pre-conviction seizure of such assets.<sup>223</sup> Although the amendments proposed in 1982 were not passed at the time, they were included without substantial change in amendments made to RICO and the Comprehensive Drug Abuse Act in 1986, which added the

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219. See *supra* note 145 and accompanying text (discussing the Fourth Circuit's inquiry into congressional intent in *In re Assets of Billman*); *supra* notes 172-174 and accompanying text (discussing the Fifth Circuit's inquiry into congressional intent in *United States v. Floyd*); *supra* notes 187-188 and accompanying text (discussing the Third Circuit's inquiry into congressional intent in *In re Assets of Martin*); *supra* notes 202-204 and accompanying text (discussing the Ninth Circuit's inquiry into congressional intent in *United States v. Ripinsky*).

220. Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

221. See *Billman*, 915 F.2d at 921 (maintaining that liberal construction of 18 U.S.C. § 1963 requires reading the substitute asset provision together with the pretrial restraint provision).

222. See 18 U.S.C. § 1963(d)(1) (1988), 21 U.S.C. § 853(e)(1) (1988) (authorizing the court to issue a restraining order or take other action to preserve the availability of property described in subsection (a) of both statutes); see also 18 U.S.C. § 1963(a) (1988 & Supp. II 1991), 21 U.S.C. § 853(a) (1988) (authorizing forfeiture of property derived from or involved in the commission of the crime).

223. See S. REP. 97-520, 97th Cong. 2d Sess. 10, 14, 17 (1982) (stating that the restraining order provisions applied only to crime-related assets and could not be applied to other assets that might eventually be forfeitable under the substitute asset provisions).



substitute asset provisions.<sup>224</sup> Therefore, the intent set forth in the 1982 report can be deemed applicable to the congressional enactments in 1986.

## B. Constitutional Concerns with Allowing Pretrial Restraint of Substitute Assets

*In personam* forfeiture is primarily punitive in nature. If RICO and the Comprehensive Drug Abuse Act are construed to authorize pretrial restraint of substitute assets, significant constitutional concerns are raised regarding the right to be free from unreasonable seizures under the Fourth Amendment and the right to assistance of counsel under the Sixth Amendment.<sup>225</sup>

### 1. Fourth Amendment Concerns

Even if Congress had intended to allow pretrial restraint of substitute assets, such a practice may violate the fundamental purpose of the Fourth Amendment's protection from unreasonable governmental searches and seizures. The Supreme Court has defined the seizure of property as a meaningful interference with an individual's possessory interests in that property.<sup>226</sup> Post-conviction forfeiture of substitute assets, a seizure within the Supreme Court's definition, may be considered reasonable and therefore not violative of the Fourth Amendment, since it is authorized by RICO and the Comprehensive Drug Abuse Act only to the extent necessary to satisfy a judgment for forfeiture in the amount of the tainted assets.<sup>227</sup> The same cannot always be said when the seizure precedes trial, and property is restrained pending an order of forfeiture.

While it may be reasonable under some circumstances for the Government to seize crime-related assets prior to trial, the seizure of wholly untainted assets prior to a judgment ordering forfeiture and a finding that the crime-related assets are unavailable is unreasonable.<sup>228</sup> As the Ninth Circuit recognized in *United States v. Ripinsky*, pretrial restraint of untainted assets is potentially crippling to

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224. Rakoff, *supra* note 63, at 3.

225. See U.S. CONST. amend. IV (guaranteeing the right to be free from unreasonable searches and seizures); *id.* amend. VI (guaranteeing a criminal defendant the right to assistance of counsel); *infra* notes 226-233 and accompanying text (discussing Fourth Amendment implications of pretrial substitute asset restraint); *infra* notes 234-241 and accompanying text (discussing Sixth Amendment implications of pretrial substitute asset restraint).

226. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

227. See 18 U.S.C. § 1963(m) (1988) (authorizing the forfeiture of substitute assets under RICO upon conviction where tainted assets are unavailable); 21 U.S.C. § 853(p) (1988) (authorizing the forfeiture of substitute assets under the Comprehensive Drug Abuse Act upon conviction, where tainted assets are unavailable).

228. See *Floyd*, 992 F.2d at 502 (finding that the pretrial restraint of substitute assets "posed sufficient Fourth Amendment concerns" to prohibit reading the provisions of the Comprehensive Drug Abuse Act to permit such restraint); Jay Wishningrad, *RICO v. The Bill of Rights*, N.Y.L.J., Feb. 15, 1990, at 2 (asserting that RICO raises Fourth Amendment concerns because it permits the seizure of assets prior to trial).

a criminal defendant.<sup>229</sup> The severe practice of substitute asset restraint could affect the criminal defendant's ability to pay for his legal defense, obtain personal sustenance, and continue his legitimate business activities.<sup>230</sup> Furthermore, extended restraint of a defendant's assets can cause permanent financial loss through depreciating values and lost market opportunities.<sup>231</sup>

Beyond crippling the criminal defendant, such restraint can adversely affect important rights of third parties as well. For example, a defendant's legitimate financial interests in a business association such as a partnership might be restrained as substitute assets, thereby inhibiting the activities of a business connected in absolutely no way with the crime.<sup>232</sup> Third parties are potentially vulnerable in two ways with regard to restraint of substitute assets. First, where substitute assets are involved, it is likely that the third party sharing an interest with the defendant in a particular asset will not know of the risk of forfeiture, since the defendant's tainted assets maybe involved in a wholly separate enterprise. Second, in the event that the third party is affected by restraint of the defendant's interest in the shared asset, the third party lacks standing to address the defendant's guilt or innocence, upon which the restraint and ultimate forfeiture will be based.<sup>233</sup>

## 2. Sixth Amendment Concerns

Pretrial restraint of substitute assets raises concerns over the defendant's right to counsel under the Sixth Amendment.<sup>234</sup> While the Supreme Court has addressed the Sixth Amendment impact of pretrial restraint of crime-related assets under the criminal forfeiture provisions of the Comprehensive Drug Abuse Act, it has not addressed the issue of pretrial restraint of substitute assets under either Act.

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229. *Ripinsky*, 20 F.3d at 365.

230. *See Floyd*, 992 F.2d at 500-01 (recounting the district court's denial of the defendant's request that he be allowed to use certain assets for living expenses and attorney's fees after the court had determined that the Comprehensive Drug Abuse Act authorized pretrial restraint of the defendant's substitute assets); Adler, *supra* note 10, at A1 (reporting that four months after its officials were indicted, the Princeton/Newport Group (discussed in notes 111-117 and accompanying text, *supra*) was liquidated because RICO had driven the Group out of business); Jane Rohrer, Note, *What Price Investor Confidence? RICO Abuse as Compensable Takings*, 66 S. CAL. L. REV. 1675, 1677 (1993).

231. Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable 'Interests,' and Procedural Due Process*, 62 N.C. L. REV., 57, 72 (1983).

232. *See Bush*, *supra* note 37, at 1000 (criticizing the forfeiture and pretrial restraint provisions of RICO for their potential to adversely affect legitimate business); *see also* Skorcz, *supra* note 81, at 1205-12 (discussing the dangers posed by *in personam* forfeiture to third parties who have made loans to defendants with property subject to forfeiture pursuant to RICO or the Comprehensive Drug Abuse Act).

233. Reed & Gill, *supra* note 231, at 72.

234. *See* U.S. CONST. amend. VI (guaranteeing criminal defendants the right to assistance of counsel).

In *Caplin & Drysdale, Chartered v. United States*,<sup>235</sup> and *United States v. Monsanto*,<sup>236</sup> the Supreme Court held that pretrial restraint of crime-related assets pursuant to section 853 of the Comprehensive Drug Abuse Act does not violate a criminal defendant's right to assistance of counsel or choice.<sup>237</sup> Specifically, in holding that the defendant in *Caplin & Drysdale* had no Sixth Amendment right to use property acquired as a result of drug violations to pay for his legal defense, the Court acknowledged that the Government's power to prevent a defendant from using assets to pay for an attorney has its limits. In the words of the Court: "Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend *his own money* to obtain the advice and assistance of . . . counsel."<sup>238</sup>

An important distinction should be made between the factual situations under which *Caplin & Drysdale* and *Monsanto* were decided and the facts in a case where substitute assets are restrained. The *Caplin & Drysdale* and *Monsanto* decisions were rendered in the context of pretrial restraint of assets allegedly tied to Comprehensive Drug Abuse Act violations.<sup>239</sup> In each case, assets could be identified as connected to the alleged crimes. In such scenarios, restraint of the crime-related assets does not adversely affect the defendant's right to counsel, according to the Court, because the defendant has no right to illegally acquired assets.<sup>240</sup> In the case of assets unrelated to the crime, however, the property is the defendant's own and should not be taken away or restrained in any way, absent a judgment that the defendant is guilty and a determination that crime-related assets are no longer available. Restraint of such assets clearly crosses the line recognized by the Supreme Court, protecting the "individual's right to spend *his own money* to obtain the advice and assistance of . . . counsel."<sup>241</sup>

## CONCLUSION

Currently, criminal defendants prosecuted under either RICO or the Comprehensive Drug Abuse Act receive inconsistent treatment so far as pretrial

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235. 491 U.S. 617 (1989).

236. 491 U.S. 600 (1989).

237. *United States v. Monsanto*, 491 U.S. 600, 614 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631-33 (1989); *see also supra* notes 148-151 and accompanying text (discussing the Supreme Court's harmonized reading of Comprehensive Drug Abuse Act provisions to allow the restraint of crime-related assets in the hands of a third party).

238. *Caplin & Drysdale*, 491 U.S. at 626 (emphasis added); *see Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting) (asserting that a defendant has the right to use his own funds to obtain the advice and assistance of counsel).

239. *See Caplin & Drysdale*, 491 U.S. at 619-20, *Monsanto*, 491 U.S. at 602-03 (characterizing the assets in question as allegedly subject to forfeiture under 21 U.S.C. § 853(a), the section of the Comprehensive Drug Abuse Act authorizing forfeiture of crime-related assets).

240. *Monsanto*, 491 U.S. at 626-28.

241. *Caplin & Drysdale*, 491 U.S. at 626 (emphasis added).

### *1995 / Pretrial Restraint of Substitute Assets*

restraint of substitute assets is concerned. Defendants in one jurisdiction may rest assured that their untainted assets are safe from restraint, while defendants in another jurisdiction are denied access to substitute assets.

Absent a Supreme Court decision resolving the conflict over pretrial restraint of substitute assets or a congressional amendment to the pretrial restraint provisions under RICO and the Comprehensive Drug Abuse Act, defendants in jurisdictions allowing pretrial substitute asset restraint will continue to suffer deprivation of constitutional rights to the use of legitimate property.



