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The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform

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I. INTRODUCTION

Title IX of the Organized Crime Control Act of 1970[1] added Chapter 96, entitled "Racketeer Influenced and Corrupt Organizations" (RICO),[2] to Title 18 of the United States Code. Recognizing the increasing extent of corrupt infiltration of interstate commerce,[3] Congress intended RICO to add a significant weapon to the government's arsenal in the growing effort to combat organized criminal influence in legitimate business operations.[4] The purpose of RICO

1. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in scattered sections of 18 U.S.C. & 28 U.S.C.). Title IX is one of the twelve substantive titles of the Organized Crime Control Act of 1970. The other titles are: Title I, Special Grand Jury, 18 U.S.C. §§ 3331-3334; Title II, General Immunity, *id.* §§ 6001-6005; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826; Title IV, False Declarations, 18 U.S.C. § 1623; Title V, Protected Facilities for Housing Government Witnesses, *id.* § 3481; Title VI, Depositions, *id.* § 3503; Title VII, Litigation Concerning Sources of Evidence, *id.* § 3504; Title VIII, Syndicated Gambling, *id.* § 1511; Title X, Dangerous Special Offender Sentencing, *id.* §§ 3575-3578; Title XI, Regulation of Explosives, *id.* §§ 841-848; Title XII, National Commission on Individual Rights, *id.* § 3331. For an overview of the provisions of the Organized Crime Control Act, see Note, *Organized Crime Control Act of 1970,* 4 U. MICH. J.L. REF. 546 (1971). *See also* McClellan, *The Organized Crime Control Act (S. 30) or its Critics: Which Threatens Civil Liberties?,* 46 NOTRE DAME LAW. 55 (1970).

2. 18 U.S.C. §§ 1961-1968 (1976). For an excellent discussion of the statute and early RICO case law, see Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes,* 69 J. CRIM. L.&C. 1 (1978).

3. In the preamble to the Organized Crime Control Act of 1970, Congress found that

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of findings and purpose).

4. "Organized crime" is the expression used to describe the different groups of individuals who supply illegal goods and services—gambling, narcotics, and other forms of vice—to

is to enable law enforcement authorities not only to punish individual criminals but also to separate their corrupt enterprises from the control of organized crime.[5] Prior to the enactment of RICO, federal prosecution of organized crime's use of a pattern of criminal acts to acquire or to conduct an interstate enterprise was restricted to prosecution for violations of federal statutes of generally narrow applicability.[6] Thus, although it was possible to convict and to imprison individual members for specific types of criminal conduct, this approach did not prevent the criminal organization from replacing the convicted individual and continuing the illegal operation.

RICO attacks this problem by providing a means of wholesale removal of organized crime from business enterprises engaged in interstate commerce. Drawing on presently existing federal and state criminal laws, RICO incorporates by reference twenty-four federal and eight state crimes under the umbrella concept of "racketeering activity."[7] The statute then provides that anyone

countless numbers of citizen customers. The impact of organized crime on American society is manifest. The President's Commission on Law Enforcement and Administration of Justice estimated that organized crime grosses from seven to fifty billion dollars a year. *See* U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 3 (1967). *See generally* D. PACE & J. STYLES, ORGANIZED CRIME: CONCEPTS AND CONTROL (1975); Schelling, *What Is the Business of Organized Crime?*, 20 J. PUB. L. 71 (1971); Comment, *The Strike Force: Organized Law Enforcement v. Organized Crime*, 6 COLUM. J.L. & SOC. PROB. 496 (1970).

5. *See* McClellan, *supra* note 1, at 141.

6. *See, e.g.*, 18 U.S.C. § 659 (1976) (felonious theft from interstate commerce); *id.* § 664 (embezzlement from pension fund); *id.* §§ 891-894 (extortionate credit transactions).

7. "Racketeering activity" is defined as:

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or oth-

found to have committed two of these incorporated offenses within a ten year period has undertaken a pattern of racketeering.[8] If government prosecutors successfully connect a pattern of racketeering with an interstate "enterprise," broadly interpreted to include practically any personal association or business,[9] the defendant may be convicted for a violation of the RICO statute. The severe penalties for a RICO violation, frequently more stringent than the penalties for violations of the predicate federal or state crimes, include fines of up to $25,000 per count, maximum prison sentences of twenty years, and forfeiture of any interest acquired or maintained in violation of the statute.[10] These penalty provisions have become even harsher with judicial acknowledgement that a defendant can be convicted and separately punished for both the underlying crimes that form the basis of a RICO charge and for a substantive violation of RICO without violating the double jeopardy clause.[11]

All RICO prosecutions and decisions are significant at this time because the statute is a potent weapon for prosecutors that is still being tested with every new case.[12] Designed to check the flow of

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erwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

18 U.S.C. § 1961(1) (1976). The definition of "racketeering activity" was amended by Pub. L. No. 95-575, § 3(c), 92 Stat. 2465 (1978) to include violations under sections 2341-2346 relating to trafficking in contraband cigarettes. This amendment was subsequently deleted by Pub. L. No. 95-598, tit. III, § 314(g), 92 Stat. 2677 (1979).

8. "Pattern of racketeering" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.* § 1961(5).

9. "Enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

10. RICO's penalty provisions provide:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Id. § 1963(a) (1976).

11. The fifth amendment provides that "[n]o person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Ninth Circuit has held that a defendant can be convicted and separately punished both for the predicate acts that form the basis of a RICO charge and for a substantive violation of RICO, without violating the double jeopardy clause. United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979). In this regard the Third Circuit has suggested that conviction on the substantive counts that form the basis of the RICO charge is necessary to uphold a RICO conviction. United States v. Brown, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). *See also* United States v. Pray, 452 F. Supp. 788, 801-02 (M.D. Pa. 1978).

12. Available figures indicate that there has been a sharp increase in the number of

illegally obtained funds into legitimate business enterprises,[13] RICO's statutory language is far-reaching and the government is probing its outermost limits.[14] When those limits are overstepped, however, and a prosecutor attempts to apply the statute to situations for which it was not primarily intended, severe hardship and injustice may result.[15]

This Note will first discuss the technical elements of a RICO violation and set forth the four separate crimes that constitute the statute's central provisions. After then examining RICO's crucial statutory definitions and the confusion reflected in their application, this Note will evaluate the various judicial interpretations of the statute and propose a solution for amending the statute that is harmonious with legislative intent and accommodates the needs of both society and the individual.

II. Synopsis of Criminal Provisions

RICO proscribes specific criminal activity by drawing heavily on previously enacted federal and state criminal laws.[16] The statute

RICO prosecutions. Only six RICO court decisions were reported between 1970 and 1974. Between 1975 and 1977, however, thirty-one were reported. Since 1977 more than sixty other trial and appellate decisions have been reported. Lavine, *Court Blunts Major U.S. Rackets Law,* Nat'l L.J., Sept. 17, 1979, at 1, col. 4.

13. *See* notes 150-70 *infra* and accompanying text.

14. *See, e.g.,* United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) (RICO conviction for three house robberies), United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied,* 99 S. Ct. 2055, 2056 (1979) (RICO conviction and forfeiture of family restaurant enterprise on the basis of insubstantial contacts with illegal cocaine trafficking); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (RICO convicton of owner and operator of cosmetology and beauty culture school for mail fraud violations). *But see* United States v. Sutton, 605 F.2d 260 (6th Cir. 1979) (RICO convictions reversed on the grounds that defendants' acts of racketeering were not related to the affairs of an enterprise).

15. For a discussion of federal prosecutors' use of RICO to substantially undermine the traditional safeguards surrounding conspiracy law, see Note, Elliott v. United States: *Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO,* 65 Va. L. Rev. 109 (1979).

16. *See* note 7 *supra.* In addition to RICO's criminal provisions, which are the focus of the instant study, the statute also contains extensive civil remedies. Patterned on federal antitrust laws, section 1964 of RICO not only provides for government civil actions in which equitable relief may be granted but also permits private treble damage actions by any person injured by racketeering activities. These remedies are set forth in the statute as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. In any action

adds the "enterprise" requirement[17] to a prosecution under the statute, but demands little additional proof beyond the evidence necessary to prove the predicate crimes alleged. In outline form, the elements of a RICO cause of action may be parsed as follows:

(1) It is unlawful for any person[18]
(2) through a pattern of racketeering activity[19] or through collection of an unlawful debt[20]
(3) to, directly or indirectly, invest in, or acquire or maintain an interest in, or conduct or participate in[21]
(4) any enterprise[22]
(5) that is engaged in, or the activities of which affect, interstate commerce.[23]

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brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1964 (1976).

Although section 1964(c) allows any injured party to sue for treble damages even in the absence of a criminal prosecution, no private citizen has brought a RICO suit until recently. The first RICO treble damage count was set forth in the complaint in Hensarling v. Conti Commodity Servs. Inc., No. 79-3112 (N.D. Ill., filed July 27, 1979). Plaintiff in *Hensarling*, seeking to invoke section 1964(c)'s treble damage provision, alleged fraud in defendant-broker's nondisclosure of material facts with regard to the sale of commodities futures. The case is now pending before U.S. District Court Judge Hubert L. Will.

17. *See* note 9 *supra* and accompanying text.

18. "Person" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1976).

19. *See* notes 7-8 *supra.*

20. The statute defines an "unlawful debt" as a debt

(A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. 1961(6) (1976).

21. *Id.* § 1962(a)-(c).

22. *See* note 9 *supra.*

23. Congress' power to regulate interstate commerce provides the constitutional authority for RICO. *See* U.S. CONST. art. I, § 8, cl. 3. The commerce clause provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States. . . ." *Id. See also* United States v. Cappetto, 502 F.2d 1351, 1356 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975); United States v. Castellano, 416 F. Supp. 125, 131 (E.D.N.Y. 1975). *See generally*

The crucial concept in the RICO violation is "enterprise," a term broadly defined to include any individual, partnership, corporation, association or other legal entity, and any labor union or group of individuals associated in fact although not a legal entity.[24] It is the relationship between the underlying federal or state predicate crimes and the "enterprise" concept that RICO addresses.

The principal provision of the RICO statute, section 1962, defines the four types of criminal activity encompassed by the Act.

A. Section 1962(a)—Legal Acquisition with Illegal Funds

Section 1962(a)[25] proscribes the acquisition with any income derived from an illegal activity of any interest in, or the establishment or operation of, any enterprise that affects interstate commerce. The crux of the offense is the illegal derivation of the capital; the acquisition itself may be completely legal. Subsection (a) is thus confined to the situation in which there has been a legal acquisition with illegal funds derived from a pattern of racketeering activity or the collection of an unlawful debt in interstate or foreign commerce.[26]

B. Section 1962(b)—Illegal Acquisition by Illegal Means

Section 1962(b)[27] prohibits the acquisition or maintenance of

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Comment, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. ILL. L.F. 805.

24. *See* note 9 *supra*.

25. 18 U.S.C. § 1962(a) (1976) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

26. *See generally* Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974).

27. 18 U.S.C. § 1962(b) (1976) provides:

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

any interest in or control of any enterprise through a pattern of racketeering activity or loan sharking. The gist of the offense is the illegal acquisition or maintenance of an interest or control. Thus, in contrast to section 1962(a), which focuses on strictly legal acquisitions, section 1962(b) requires proof of an illegal "takeover" of an enterprise through bribery, extortion, a scheme to defraud, or similar criminal activity.

C. Section 1962(c)—Illegal Use of an Enterprise

Section 1962(c)[28] prohibits the use of an enterprise in a pattern of racketeering activity or collection of an unlawful debt. It is aimed at reaching any individual who, through employment or association with others, uses an enterprise to conduct unlawful activities. Thus, section 1962(c) encompasses a criminal syndicate's control of a business or financial organization through the use of a corrupt individual within the organization. Subsection (c) also addresses those instances within the coverage of the RICO statute when the enterprise is a group of individuals associated for the purpose of engaging in criminal conduct.

D. Section 1962(d)—Conspiracy

Section 1962(d)[29] makes conspiracy to violate subsections (a), (b), or (c) subject to the same penalties as a violation of the substantive offenses. Thus, section 1962(d) proscribes conspiracy to violate a substantive RICO provision and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity.

By identifying, isolating, and focusing on four specific types of criminal infiltration,[30] RICO provides prosecutors with the tools to attack organized crime by penetrating to the heart of corrupt interstate enterprises. RICO is a powerful force, however, and caution must be exercised in its application.[31]

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28. *Id.* § 1962(c) provides:

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

29. *Id.* § 1962(d) provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

30. *See* text accompanying notes 25-29 *supra.*

31. *See* notes 11-12 *supra* and accompanying text.

III. Analysis of Statutory Definitions and Concepts and the Confusion Reflected in Their Application

An analysis of the operating definitions and underlying concepts of the RICO statute is vital not only to understand the scope of the technical statutory terminology but also to appreciate the magnitude of the confusion that emerges from conflicting judicial interpretations of the statute's fundamental elements.

A. Section 1961(1)—Racketeering Activity

Section 1961(1) defines "racketeering activity" as including numerous federal offenses and, in addition, any offense involving murder, kidnapping, gambling, arson, robbery, extortion, or drugs punishable under state law by imprisonment for more than one year.[32] Several defendants have challenged RICO on the basis that the statute's definition of "racketeering activity" applies solely to members of organized crime.[33] Although a majority of the courts that have considered this issue have rejected this contention, a review of the statute's legislative history reveals that the need to combat organized crime was the reason repeatedly given for supporting the unique measures of the proposed legislation.[34]

RICO's underlying legislative intent was first evaluated in *Barr v. WUI/TAS, Inc.*[35] In *Barr* plaintiffs, attempting to invoke RICO's civil sanctions, moved to amend their complaint to include a count under section 1962.[36] Alleging that defendant, a national telephone answering service, had mailed them monthly bills intentionally inflated by twenty percent, plaintiffs charged that the defendant corporation had engaged in a pattern of racketeering activity as defined in section 1961 to include mail fraud.[37] In addition, plaintiffs alleged that the money received from the inflated bills was then used to operate the defendant corporation.[38] Plaintiffs, however, did not allege that defendant was in any way connected with organized crime.[39] In finding plaintiffs' RICO claim for relief specious and without merit, the court noted the frequent references in the Act's legislative history to "racketeers," "organized crime," and

32. *See* note 7 *supra.*

33. *See, e.g.,* United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom.* 423 U.S. 1050 (1976); United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976); United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973).

34. *See* note 158 *infra* and accompanying text.

35. 66 F.R.D. 109 (S.D.N.Y. 1975).

36. *Id.* at 112.

37. *Id.*

38. *Id.*

39. *Id.* at 113.

"organized crime families," as well as the "syndicate," "Mafia," and "Cosa Nostra" and held that the defendant corporation could not be properly charged under a RICO count because it was not a member of a society of criminals operating outside the law.[40]

Although a majority of the courts, rejecting the *Barr* defense that RICO applies only to members of organized crime, generally concede that Congress was primarily concerned with organized crime in drafting the statute, they have emphasized that Congress focused on the kinds of activities by which persons engage in racketeering, rather than on the status of those persons as members of "organized crime."[41] This argument is straightforward and relies almost entirely upon the text of the statute. Section 1961(3), for instance, defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." Moreover, each subsection of the principal provisions of section 1962 refers to "any person"; the words are general and contain no restriction to particular persons.[42] In addition, neither RICO nor the Organized Crime Control Act contains any definition of "organized crime." Thus, the majority position emphasizes that if Congress had intended to limit the application of RICO to only those persons classified as members of organized crime, it would have explicitly indicated so in the statutory framework and carefully defined the term "organized crime."[43] Moreover, to require proof that a defendant was a member of "organized crime," in light of the highly subjective and prejudicial connotations of that classification, would clearly render the statute unenforceable.[44]

Title IX of the Organized Crime Control Act also stands in contrast to Title VI. Title VI, which addresses the preservation of testimony in criminal proceedings through the use of depositions, is specifically limited to situations in which the United States Attorney General has certified "that the legal proceeding is against a person who is believed to participate in organized criminal activity."[45] Given the absence of a similar explicit provision in RICO, the statute would rightfully appear to make unlawful the proscribed criminal activity without regard to an individual's status vis-a-vis organized crime.

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40. *Id.*

41. *See, e.g.*, United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom.* 423 U.S. 1050 (1976).

42. *See* notes 25-29 *supra.*

43. *See* United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976). *See also* Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 NOTRE DAME LAW. 41, 48 (1970).

44. Wilson, *supra* note 43, at 48.

45. 18 U.S.C. § 3503(a) (1976).

B. *Section 1961(5)—Pattern of Racketeering Activity*

Section 1961(5) defines a "pattern of racketeering activity" as requiring at least two acts of racketeering committed within a period of ten years.[46] Although proof of a pattern of racketeering activity is a crucial element for a RICO conviction,[47] the statute does not indicate what conduct is necessary to constitute a "pattern" in either section 1961(5), which discusses "pattern" in quantitative terms only,[48] or in section 1962, which uses "pattern" as an element of the crime charged.[49] Moreover, the interpretation and application of this essential RICO element has given rise to judicial confusion and contradiction.[50] As a result of the vague definitional contours of the "pattern" concept, several questions emerge: should the word "pattern" be construed to require more than accidental or unrelated instances of proscribed behavior? Does the statutory concept of "pattern" require that the two or more acts of "racketeering activity" actually be interrelated? How can a man of ordinary intelligence decide when the execution of a single scheme ends and a "pattern of racketeering," with the potential for triggering the harsh RICO penalties, begins?

The word "pattern" is relatively new to the legislative criminal lexicon.[51] A literal reading of the statute which defines a "pattern" of racketeering activity to consist of "at least two acts,"[52] suggests that the two acts must be separate. The composition of the pattern would appear to include either two indictable acts under any two of the incorporated twenty-four federal and eight state crimes,[53] or, alternatively, two separate violations involving the same incorporated offense. RICO's legislative history, however, suggests a different interpretation. According to one of the House sponsors of the Organized Crime Control Act, Representative Poff, the "pattern" of racketeering activity means "at least two independent offenses

46. *See* note 8 *supra.*

47. *See* text accompanying note 19 *supra.*

48. *See* note 8 *supra.*

49. *See* notes 25-29 *supra.*

50. *Compare* United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied sub nom.* 439 U.S. 953 (1978) (the two or more predicate crimes need not be related to each other to constitute a pattern of racketeering) *with* United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976) *and* United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975) (pattern of racketeering activity requires that the two or more predicate offenses he related to each other).

51. United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976).

52. *See* note 8 *supra.*

53. *See* note 7 *supra* and accompanying text.

forming a pattern of conduct."[54] Representative Poff's definition of pattern thus would not seem to encompass two acts that occur on the same day in the same place and form part of a single criminal episode. This definition accords with the statutory definition of "pattern" in the Senate Report:

> The concept of "pattern" is essential to the operation of the statute. . . . The target of Title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.[55]

Thus, the question of exactly what conduct constitutes the requisite pattern of racketeering remains unclear: the statutory definition requires only two "acts," but the legislative history suggests a narrower and somewhat more precise explanation of the pattern requirement.

The confusion and uncertainty inherent in reconciling the statutory definition with the legislative history of the "pattern" requirement is clearly reflected in the development of RICO case law. For example, the recent Fifth Circuit decision in *United States v. Elliott*[56] represents a completely different analysis and application of the requisite pattern of racketeering principles from that expressed by the leading three prior decisions.[57] In *Elliott* the court noted that the provisions of RICO do not proscribe either associating with an enterprise or engaging in a pattern of racketeering activity standing alone.[58] The gravamen of the offense described in section 1962(c), the Fifth Circuit reasoned, is the conduct of an enterprise's affairs through a pattern of racketeering activity.[59] Consequently, the court concluded that the two or more predicate crimes must be related to the affairs of the enterprise but need not otherwise be related to each other.[60]

Conversely, in *United States v. Stofsky*[61] the United States District Court for the Southern District of New York held that the word "pattern" included as a requirement that the racketeering acts must be connected with each other by some common scheme, plan,

54. 116 CONG. REC. 35193 (1970).

55. SENATE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) [hereinafter cited as SENATE REPORT].

56. 571 F.2d 880 (5th Cir. 1978).

57. United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975); United States v. White, 386 F. Supp. 883-84 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973).

58. 571 F.2d at 899 n.23.

59. *Id.*

60. *Id.*

61. 409 F. Supp. 609 (S.D.N.Y. 1973).

or motive so as to constitute a pattern.[62] In reaching this decision, the *Stofsky* court stated that the word "pattern" should be construed as requiring more than accidental or unrelated instances of proscribed behavior.[63] The court supported this interpretation by analogy to the meaning of "pattern" under the civil rights acts.[64] Noting further that statutes enacted together with the Organized Crime Control Act of 1970 have been construed *in pari materia*,[65] the court buttressed its position by pointing to 18 U.S.C. § 3575, a simultaneously enacted section of the Organized Crime Control Act of 1970, in which a "pattern of criminal conduct" is requisite for special offender status for the purpose of sentencing.[66] In this regard, the court observed that section 3575(e) provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[67] The *Stofsky* court further emphasized that despite the quantitative nature of the section 1961 definition of "pattern," the major concern of Congress, when it enacted sections 1961 *et seq.* was the special danger to legitimate business of a continuity of racketeering activity.[68] Thus, the *Stofsky* court concluded that "a pattern of racketeering activity," as used in RICO, requires that the two or more acts of racketeering activity be interrelated.[69] The different judicial interpretations of the pattern requirement illustrated by *Elliott* and *Stofsky* and the problems posed by the search for the proper interpretation of this element emerge as a common theme in RICO cases.

This confusion as to the meaning of "pattern" clearly needs to be resolved. By placing the label of racketeer and the resulting severe penalties[70] on an individual who has demonstrated a propensity for racketeering activities, Congress must have intended that the individual have engaged in criminal activity more serious than unrelated and disconnected acts. This concern becomes even more important with the realization that it is possible that a series of intrastate acts will be deemed racketeering if some negligible effect on interstate commerce can be demonstrated.[71] The *Stofsky* ap-

62. *Id.* at 614.
63. *Id.* at 613.
64. *Id; see, e.g.*, United States v. Gilman, 341 F. Supp. 891, 906 (S.D.N.Y. 1972).
65. 409 F. Supp. at 614.
66. *Id.*
67. *Id.* (quoting 18 U.S.C. § 3575(e) (1976)).
68. 409 F. Supp. at 614.
69. *Id.*
70. *See* notes 10-11 *supra* and accompanying text.
71. *See* notes 7 & 23 *supra.*

proach appears to offer the better reasoned view. Since RICO is aimed at the special danger to legitimate businesses posed by a continuity of racketeering activity and not at individual criminal acts, which are already adequately proscribed under other federal and state laws, the statute should require that the predicate racketeering acts must be connected with each other by some common scheme, plan, or motive so as to constitute a pattern. Any other interpretation of the pattern requirement has the effect of reading this element out of the statute and replacing it with the need to prove merely the commission of any two unrelated criminal acts. Congress enacted RICO specifically to attack the infiltration of interstate business enterprises; a narrow definition and interpretation of the pattern element of the crime will prevent RICO from becoming simply a criminal catch-all.

C. Section 1961(6)—Unlawful Debt

The use or investment of funds collected on an unlawful debt is prohibited under section 1962.[72] Only one "collection of an unlawful debt," in contrast to proof of at least two acts of racketeering activity, is necessary to establish a RICO violation.[73] Analysis of the statute's definition of unlawful debt, however, reveals its vagueness and overbreadth. Section 1961(6) defines "unlawful debt" as:

> a debt (A) incurred or contracted in gambling activity wbich was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or tbe business of lending money or a tbing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.[74]

The use of "a State" in this definition raises a number of vexing and unsettled problems by creating a federal law against gambling and usury. For example, a gambling transaction may involve activity in more than one state. If such activity is legal in one state and illegal in the other, the section 1961 definition suggests that innocent action in one state may be the grounds for proving the collection of an "unlawful debt" in the other. The RICO statute thus fails to identify which state's laws should govern an interstate gambling transaction.

The definitional terminology of section 1961(6), moreover, appears to establish a usury standard indexed to the most exacting

72. *See* notes 25-29 *supra.*
73. *See* notes 7-8 & 20 *supra.*
74. 18 U.S.C. § 1961(6) (1976).

state law. If the maximum lawful interest rate in State *A* is fifteen percent and in State *B* is twelve percent, the collection of a debt in State *B* by a citizen of State *A* from another citizen of State *A* could constitute the collection of an "unlawful debt."[75]

The statute also fails to define the term "collection." The collection of unlawful debts, however, as embodied in the substantive criminal offenses enumerated in section 1962, would appear to apply to only two types of criminal activity; illegal gambling and loan sharking. Unfortunately, the statute fails to define exactly what conduct constitutes either a "business of gambling" or "business of lending money." Thus, although RICO specifically incorporates violations of the federal gambling statute, 18 U.S.C. § 1955,[76] it fails to specify whether the statutory terminology "business of gambling" has a different meaning from the definition of "illegal gambling business" as set forth in 18 U.S.C. § 1955. This distinction is important because one of the elements necessary to prove a violation of 18 U.S.C. § 1955 is the involvement of five or more persons.[77] Addressing this statutory ambiguity, the Seventh Circuit, one of the only courts to consider this issue, held in *United States v. Nerone*[78] that the jurisdictional requirements of a section 1962 RICO violation differ from those of a section 1955 gambling violation. As a result, the *Nerone* court found that the definition of "illegal gambling business" as used in section 1955 is inapplicable to section 1962.[79] The court, however, ultimately failed to resolve the question of what conduct is sufficient to meet the RICO definition of "business of gambling."

The failure to define the terms "business of gambling," "business of lending money," and "collection of an unlawful debt"

75. For a discussion of the problems with the usury standards in RICO, see the dissenting views of Representatives Conyers, Mikva and Ryan in HOUSE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1970, H. REP. No. 1549, 91st Cong., 2d Sess. 186 (1970) [hereinafter cited as HOUSE REPORT].

76. *See* note 7 *supra.*

77. 18 U.S.C. § 1955(b) (1976) provides:

As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or a part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

78. 563 F.2d 836 (7th Cir. 1977). *See also* United States v. Salinas, 564 F.2d 688 (5th Cir.), *cert. denied*, 435 U.S. 951 (1977) (holding that 18 U.S.C. § 1961(6), which defines unlawful debt, applies in a state that forbids gambling although there is no specific statutory proscription of business of gambling).

79. 563 F.2d at 853.

raises serious doubts about whether these aspects of RICO can withstand scrutiny under the due process clause of the fifth amendment.[80] Due process entitles every citizen to a precise statutory warning that makes it possible for him to decide intelligently, in advance, exactly what course of conduct is lawful for him to pursue.[81] Moreover, the due process guarantees provide that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."[82]

Section 1961(6)'s crude attempt to define "unlawful debt" and section 1962's dependence on the undefined concept of "collection of an unlawful debt" in those cases in which the "pattern of racketeering activity" element is not present raises the problem of constitutional invalidity for statutory vagueness. The lack of specific statutory definitions for these touchstone concepts leaves a number of questions unanswered and open to myriad interpretations in different jurisdictions: Which state's law governs an interstate gambling transaction? Can a poker party in the privacy of one's own home that involves an exchange of money trigger a RICO prosecution? What conduct does the statute proscribe in the "collection" of an unlawful debt? Is the potential of force or violence requisite for proving a "collection" under section 1962 as it is under the extortionate extension of credit provisions of 18 U.S.C. § 892?[83]

To date, the potentially broad reach of RICO allowed by this lack of specific legal definitions has been tempered only by prosecutorial discretion. The delegation to prosecutors of such fundamental matters, however, for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application, is constitutionally unacceptable.[84] To allow a prosecutor or court to define and to apply on a case-by-case basis such vague but nevertheless crucial concepts clearly offends the due process considerations underlying the constitutional principle that any federal or state criminal stat-

80. The fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

81. Connally v. General Constr. Co., 269 U.S. 385, 393 (1926).

82. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at tbe peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids.")

83. The Extortionate Extension of Credit Act, 18 U.S.C. §§ 891-896 (1976) defines an extortionate extension of credit as

> any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause barm to the person, reputation, or property of any person.

18 U.S.C. § 891(6) (1976).

84. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

ute must give fair warning of the conduct that it proscribes.[85] Thus, section 1961(6)'s definition of "unlawful debt" and section 1962's concept of "collection of an unlawful debt" fall short of the requirements of certainty imposed by the fifth amendment due process clause.

D. Section 1961(4)—Enterprise

"Enterprise" is the most crucial concept in the RICO statute; it is the relationship between the underlying federal or state predicate crimes and the enterprise notion that the statute addresses.[86] Section 1961(4) defines enterprise to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[87] Analysis and application of the enterprise concept, however, has given rise to confusion and inconsistency. The debate over the precise scope of the enterprise notion generally focuses on three principal areas: first, whether the statute applies to persons engaged in racketeering activity unrelated to any legitimate enterprise; second, whether a RICO enterprise properly encompasses a foreign corporation or group of corporations; third, whether an enterprise may properly include either an office of government or an agency of government.

(1) Application to Racketeering Activity Unrelated to a Legitimate Enterprise

There is presently a wide split among the United States Circuit Courts on what kinds of enterprises fall within the scope of RICO. The Sixth Circuit in *United States v. Sutton*[88] recently held that an

85. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

86. *See* note 9 *supra* and accompanying text.

87. 18 U.S.C. § 1961(4) (1976).

88. 605 F.2d 260 (6th Cir. 1979) (2-1 decision). Judge Albert J. Engel in dissent argued that the plain language of the RICO statute is not limited in application to the illegal infiltration of legitimate businesses. *Id.* at 273-74. Although recognizing that such a broad interpretation of the statute makes it possible for federal enforcement to intrude heavily into areas of traditional state domain, the dissent nevertheless asserted that RICO applies to both illegal and legitimate enterprises. *Id.*

On November 7, 1979, the Sixth Circuit granted the government's petition for *en banc* consideration of the *Sutton* decision. The oral argument in the *en banc* consideration of the case is presently scheduled for April 1980.

Although the majority opinion in *Sutton* has been a source of controversy, there is evidence that this position is gaining wider judicial recognition. The Seventh Circuit, in a split decision addressing a factual situation strikingly similar to that of *Sutton*, recently held that RICO could be applied against defendants who were not actively involved in infiltrating

enterprise includes only formally constituted groups "organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized."[89] This decision flies in the face of decisions in the Second,[90] Fifth,[91] Seventh,[92] Ninth[93] and District of Columbia[94] Circuits, all of which have upheld broader interpretations of the enterprise concept. Consequently, a close analysis of the *Sutton* decision, the arguments advanced by the majority opinions in the Second, Fifth, Seventh, Ninth and District of Columbia Circuits, the vigorous dissents in the Second and Ninth Circuit decisions, and RICO's legislative history is necessary to untangle the controversy surrounding the enterprise concept.

The conflict between the circuits as to the proper scope of the enterprise concept focuses on those instances in which the alleged enterprise is delineated as a group of individuals associated in fact to engage in some unlawful activity.[95] In such circumstances, defendants have argued that Congress only intended to cover "legitimate" businesses within the definition of enterprise and that the "group of individuals associated in fact" was in their case an illegitimate entity. Since to date this contention has been successful only in *Sutton,* the Sixth Circuit's analysis and reasoning in that case deserve careful study.

In *Sutton* the government argued for an expansive reading of the enterprise element that included not only legitimate but also plainly illegitimate enterprises.[96] Noting that the statute on its face does not distinguish between "legitimate" and "illegitimate" enterprises, but instead applies to "any enterprise," the government emphasized that the term "enterprise" is defined broadly in section

ongoing, established business enterprises. United States v. Aleman, 609 F.2d 298 (7th Cir. 1979). Judge Luther M. Swygert, however, dissenting in *Aleman,* argued that the application of RICO to the "pattern" of criminal activity at issue in the case—the robbing of homes—was "absurd." *Id.* at 311. Citing *Sutton,* Judge Swygert stated: "I believe that the recent Sixth Circuit opinion in *United States v. Sutton* . . . correctly decides this very issue. The facts are analogous, and the Government's contentions are the same. Judge Merritt has offered, with admirable clarity, an analysis that is irrefutable." *Id.* at 312.

89. 605 F.2d at 270.

90. United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977).

91. United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied sub nom.* 439 U.S. 953 (1978); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976).

92. United States v. Aleman, 609 F.2d 298 (7th Cir. 1979); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

93. United States v. Rone, 598 F.2d 564 (9th Cir. 1979).

94. United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied,* 99 S. Ct. 2055 (1978).

95. *See* note 9 *supra.*

96. 605 F.2d at 264.

1961(4) to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[97] Thus, the government argued, since the evidence demonstrated that the appellants were a "group of individuals associated in fact" and that each committed the required number of racketeering offenses while in that association, their convictions were plainly within the scope of RICO.[98] The government had clearly proven the existence of a single enterprise operated for the purpose of making money from repeated criminal activity.[99]

The *Sutton* court, however, rejected the government's literal treatment of the definition of enterprise as seriously flawed.[100] Starting with the dictionary meaning of "enterprise" as any "undertaking" or "project," the court noted that the term is also often used to describe a unit of organization established to perform any such undertaking or project.[101] Although the RICO statute defines enterprise only in the latter sense, section 1961(4) cataloges the types of organizational units that may qualify as an enterprise as ranging from legal entities, such as corporations or partnerships, to entities without formally recognized legal personalities, such as labor unions or a group of individuals associated in fact, and finally even to "any individual." The court then noted that the statute is silent as to what attributes or activities these units must assume or undertake before they constitute an "enterprise."[102] Reasoning that every "individual" or "group of individuals," considered in the abstract, is not an enterprise, the court observed that individuals and groups do not become an enterprise except in relation to something they do.[103] Thus, the *Sutton* court concluded that the statutory definition of enterprise contained in section 1961(4) is incomplete because it does not define what that "something" is.[104]

The government had finessed this problem, the court maintained, by characterizing appellants as a "group of individuals associated in fact" around numerous patterns of racketeering activity, and therefore as an "enterprise" organized for the purpose of profiting from racketeering activity.[105] Hence, in the government's view,

97. *Id.*
98. *Id.* at 264-65.
99. *Id.* at 265.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

the racketeering activity was the "something" that transformed the group of individuals into an enterprise;[106] the appellants' enterprise *was* racketeering.

In reviewing previous case law in which the government had succeeded in merging the enterprise requirement into the racketeering activity, the *Sutton* court noted that in *United States v. Cappetto* the defendants had been charged with engaging in a pattern of racketeering activity "consisting of participating on two or more occasions in an illegal gambling business" in the conduct of the affairs of an enterprise, "*viz.*, an illegal gambling business."[107] Moreover, in *United States v. Morris*, the enterprise was described as "a group of individuals associated in fact to defraud in illegal card games persons who had travelled to Nevada," and the racketeering activity through which the enterprise's affairs were conducted consisted of running fraudulent card games and recruiting victims to travel to Nevada.[108] The *Sutton* court reasoned, however, that to apply the statute in such a fashion reads the enterprise element out of the statute and virtually transforms it into a simple proscription against "patterns of racketeering activity."[109] Thus, the court concluded that the approach reflected in cases such as *Cappetto* and *Morris* transformed every "pattern of racketeering activity" into an "enterprise" if its affairs were conducted through the "pattern of racketeering activity."[110]

The *Sutton* court, turning to the precise statutory language, noted that the language of the statute makes it unlawful " 'for any person employed by or associated with any enterprise . . . to conduct . . . such enterprise' s affairs through a pattern of racketeering activity.' "[111] The court observed that Congress would not have chosen such a complex formulation if the legislative purpose had been merely to proscribe simply racketeering activity; if this purpose alone had been Congress' intent, not only would a straightforward prohibition against engaging in "patterns of racketeering activity" have sufficed but it would have been unnecessary to introduce the "enterprise" concept.[112] The court stated that the plain meaning of the words in context indicates that the reference to enterprise was included to denote an entity larger than, and conceptually distinct from, any "pattern of racketeering activity"

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 266.
111. *Id.*
112. *Id.*

through which the enterprise's affairs might be conducted.[113] Thus, the court observed that if the enterprise element is to have independent meaning, a "criminal enterprise" must involve something more than simply an individual or group engaged in a pattern of racketeering activity.[114]

Ultimately distilling the crux of the issue as the statutory distinction between simple patterns of racketeering activity outside RICO's scope and criminal enterprises within RICO's ambit, the Sixth Circuit concluded that the RICO statute failed to address the question of how to determine when racketeering becomes a criminal enterprise.[115] In reaching this determination, the court specifically rejected the definition advanced by the Fifth Circuit in *United States v. Elliott* that a criminal enterprise is "an amoeba-like infrastructure that controls a secret criminal network."[116] The *Sutton* court reasoned that due process required greater statutory precision and held that persons of ordinary intelligence are entitled to know before the fact at what point their criminal activities will be deemed sufficiently "amoeba-like" to violate the statute.[117]

The Sixth Circuit's detailed analysis of RICO's enterprise element in *Sutton* radically departs from the earlier case law addressing this issue. In *United States v. Altese*[118] the Second Circuit considered whether section 1962(c) applied only to a legitimate enterprise that was conducted through a pattern of racketeering activity or the collection of unlawful debts. The *Altese* court examined the language of section 1962 that "[i]t shall be unlawful for *any* person . . . who has received *any* income derived from *any* pattern of racketeering activity, etc., to use *any* part of such income in the acquisition of *any* enterprise engaged in . . . interstate or foreign commerce."[119] In light of the continued repetition of the word "any," the Second Circuit inferred no legislative intent to eliminate illegitimate businesses from RICO's scope.[120] Thus, the court concluded that, on the basis of what it termed clear, precise, and unambiguous language—the use of the word "any"—all enterprises conducted through a pattern of racketeering activity or collection of unlawful debts fall within the interdiction of RICO.[121]

A vigorous dissent[122] argued that the *Altese* majority seriously

113. *Id.*
114. *Id.*
115. *Id.*
116. 571 F.2d at 897-98.
117. 605 F.2d at 266.
118. 542 F.2d 104 (2d Cir. 1976).
119. *Id.* at 106 (emphasis in original).
120. *Id.*
121. *Id.*
122. Judge Van Graafeiland wrote in dissent. *Id.* at 107-11.

misconstrued the language and legislative history of RICO and predicted that the majority's holding would radically extend federal jurisdiction to virtually every criminal venture affecting interstate commerce.[123] The dissent contended that the majority's extensive reliance on the word "any" that precedes "enterprise" in section 1962 was misplaced.[124] Noting that the majority opinion omitted any reference to section 1961(4), which sets forth the definition of enterprise, the dissent determined that the scope of section 1962, on its face, is uncertain at best.[125] Turning to the legislative history, the dissent argued that Congress never contemplated that "enterprise" as used in sections 1961 and 1962 would extend beyond legitimate businesses or organizations. Moreover, the dissent was deeply troubled by tbe majority's lack of awareness of the prospective consequences of their decision on the sensitive federal-state relationship, limited federal police resources, and the resultant transformation of relatively minor state offenses into federal felonies by mere geographic happenstance.[126] The dissent concluded that the result of the majority's expansive interpretation of section 1962(c) was to equate the word "enterprise" with the term "conspiracy."[127]

The Fifth Circuit also adopted an expansive interpretation of enterprise by holding that the term encompasses more than legitimate businesses. In *United States v. Hawes*[128] the Fifth Circuit rejected the argument that RICO reached only legitimate business enterprises.[129] It is important to note, however, that the enterprise at issue engaged in the legitimate manufacture, sale, repair, and leasing of jukeboxes and penny arcade amusements in addition to its illegal gambling operations.[130] As a legitimate business front for racketeering activities it clearly fell within the ambit of those activities that Congress intended RICO to combat. In *United States v. Morris,*[131] however, the Fifth Circuit extended this liberal interpretation of the RICO enterprise concept when it held that the concept encompassed a group of individuals associated in fact to defraud in illegal card games persons who had travelled to Nevada and that the racketeering activity through which the enterprise's affairs were conducted consisted of running fraudulent card games and recruit-

123. *Id.* at 107.
124. *Id.*
125. *Id.*
126. *Id.* at 108.
127. *Id.*
128. 529 F.2d 472 (5th Cir. 1976).
129. *Id.* at 479.
130. *Id.* at 476.
131. 532 F.2d 436 (5th Cir. 1976).

ing victims to travel to Nevada.[132] An analysis of *Hawes* and *Morris* therefore indicates that the Fifth Circuit interpretation of RICO reads the enterprise element out of the statute and regards section 1962 as prohibiting racketeering activity per se so long as the requisite effect on commerce can be found.

A subsequent Fifth Circuit decision, *United States v. Elliott,*[133] responding to judicial criticism of the court's consideration of the enterprise element in *Hawes* and *Morris,*[134] stated that RICO extended beyond conventional business organizations to reach "*any* . . . group of individuals" whose association, however loose or informal, furnished a vehicle for the commisson of two or more predicate crimes.[135] The court found no distinction for "enterprise" purposes between a "duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network."[136] The court, however, did not address how the enterprise element retained any actual independent significance in view of its assertion that any informal group qualifies as an enterprise. Thus, the *Elliott* decision, although reflecting the Fifth Circuit's recent concern with the need to identify the enterprise element, did not really depart from the court's expansive interpretation of the enterprise concept in *Hawes* and developed in *Morris.*

The Seventh Circuit in *United States v. Cappetto*[137] held that section 1962 applied to all gambling enterprises, legitimate or illegitimate.[138] Although the appellants in *Cappetto* argued that the legislative intent underlying section 1962 was to protect "legitimate business" against infiltration and not to prohibit racketeering itself, the Seventh Circuit, relying on its interpretation of the language and legislative history, rejected this contention.[139] Acknowledging that one of Congress' principal targets, as reflected in section 1962(a), was the "infiltration of legitimate organizations," the court pointed to the langnage of subsections (b) and (c) of section 1962 to demonstrate that Congress also intended to prohibit "any pattern of racketeering activity in or affecting commerce."[140] To buttress

132. *Id.* at 442.

133. 571 F.2d 880 (5th Cir. 1978).

134. Dissenting in *Altese,* Judge Van Graafeiland, in discussing the Fifth Circuit's consideration of the scope of section 1962 in *Hawes* and *Morris,* stated: "Concededly, . . . the Fifth Circuit now regards § 1962 as prohibiting racketeering activity *per se* as long as the requisite effect on commerce can be found. I am confident that Congress never intended such a result." 542 F.2d at 111.

135. 571 F.2d at 898.

136. *Id.*

137. 502 F.2d 1351 (7th Cir. 1974).

138. *Id.* at 1358.

139. *Id.*

140. *Id.*

this contention, the Seventh Circuit first looked to the Second Circuit's holding in *United States v. Parness.*[141] The *Cappetto* court then analyzed a statement from the Senate Report on Title IX of the Organized Crime Control Act of 1970.[142] The Seventh Circuit's reliance on these two sources, however, appears flawed. The *Parness* decision addressed only the question of whether RICO's enterprise concept encompassed foreign as well as domestic corporations[143] and never considered whether the enterprise concept included the operation of illegitimate as well as legitimate enterprises. Moreover, the Seventh Circuit's use of the Senate Report on Title IX to demonstrate that Congress intended to include illegal gambling business within the category of enterprises covered by section 1962 is misplaced. The excerpt from the Senate Report on which the Seventh Circuit relied applies *only* to Title VIII, which deals with proscribed gambling businesses.[144] Therefore, given the inappropriateness of the Seventh Circuit's reasoning the *Cappetto* opinion would not appear to have great precedential value.

The Ninth Circuit in *United States v. Rone*[145] also considered whether an enterprise must be a legitimate business to bring it under the umbrella of RICO. Adopting an analysis strikingly similar to the one employed by the Second Circuit in *United States v. Altese,*[146] the *Rone* court held that any enterprise conducted through a pattern of racketeering activity falls within the purview of RICO.[147] The dissent,[148] however, argued that the majority placed unnecessary reliance on the word "any" preceding "enterprise" in

141. 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975). For a discussion of *Parness,* see text accompanying notes 171-74 *infra.*

142. The *Cappetto* court examined the following statement from the Senate Committee Report on the Organized Crime Control Act of 1970:

> Despite the best efforts made to date by both the Federal and the several State governments, gambling continues to exist on a large scale to the benefit of organized crime and the detriment of the American people. A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal government must be able not only to deny the use and facilities of interstate commerce to day-to-day operations of illegal gamblers—as it can do under existing statutes—but also to prohibit directly substantial business enterprises of gambling . . . .

SENATE REPORT, *supra* note 55, at 72-73.

143. 503 F.2d at 439-40.

144. The portion of the Senate Report that the *Cappetto* court relied on related to section 1955 (the gambling statute). The quoted language was clearly never intended to be applied to sections 1961 or 1962. United States v. Altese, 542 F.2d at 110; United States v. Moeller, 402 F. Supp. 49, 60 (D. Conn. 1975). *See also* Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity",* 124 U. PA. L. REV. 192, 202-03 (1975).

145. 598 F.2d 564 (9th Cir. 1979).

146. *See* text accompanying notes 118-21 *supra.*

147. 598 F.2d at 568.

148. Judge Ely wrote in dissent. *Id.* at 573-74.

section 1962. Adopting the perceptive analysis of the vigorous *Altese*[149] dissent, the *Rone* dissent concluded that Congress never contemplated that enterprise, as used in sections 1961 and 1962, would extend beyond legitimate businesses or organizations.[150]

The foregoing analysis of the scope of the enterprise concept in RICO reveals the judicial inconsistency, uncertainty, and contradiction underlying the concept's interpretation and application. Because a surface reading of the statute fails to define the proper scope of this vital element, a consideration of the statute's legislative history is necessary.

The RICO statute enacted in 1970 is the product of two bills independently introduced in the Senate in 1969.[151] On January 15, 1969, Senators McClellan, Ervin, and Hruska introduced S. 30.[152] This bill originally had only eight titles and did not include the RICO provisions. On March 20, 1969, Senator Hruska introduced S. 1623, the "Criminal Activities Profits Act."[153] Patterned upon traditional antitrust legislation, S. 1623 prohibited the investment of "certain illegally gained income in any business enterprise affecting interstate or foreign commerce." On April 18, 1969, Senators McClellan and Hruska jointly introduced S. 1861, the "Corrupt Organizations Act of 1969."[154] Aimed at proscribing the infiltration or management of legitimate organizations by racketeers, S. 1861 merged the framework of Senator Hruska's original Criminal Activities Profits Act with several provisions first presented by Senator McClellan in S. 30 into a new, complete act that was subsequently incorporated as Title IX of the Organized Crime Control Act of 1970.[155]

From the date of its introduction as the offspring of S. 30 and S. 1623, Title IX of the Organized Crime Control Act of 1970 focused on the infiltration of legitimate businesses by organized crime. The Report of the Senate Judiciary Committee, for instance, unequivocably stated that Title IX "has as its purpose the elimination of the

149. *See* text accompanying notes 122-27 *supra*.

150. 598 F.2d at 574.

151. *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 556-57 (1969). *See also* McClellan, *supra* note 1, at 61-62.

152. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 527 (1969).

153. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6925 (1969).

154. S. 1861, 91st Cong., 2d Sess., 115 CONG. REC. 9512 (1969). A companion bill was introduced in the House by Congressman Poff on April 21, 1969, H.R. 10312, 91st Cong., 2d Sess., 115 CONG. REC. 9753 (1969).

155. *Hearings on S. 30 and Relative Proposals Relating to the Control of Organized Crime Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 106 (1970) *See also* 116 CONG. REC. 602 (1970).

infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[156] Similarly, the Department of Justice described Title IX before the House Judiciary Committee as "designed to inhibit the infiltration of legitimate business by organized crime, and, . . . to reach the criminal syndicates' major sources of revenue."[157] Moreover, an examination of the legislative debates that accompanied the passage of Title IX demonstrates that Congress was only concerned with the infiltration of legitimate business.[158] Thus, the House and Senate Reports, the Justice Department's recommendation, the opinion of the House dissenters, and the floor debates all reflect legislative intent to limit Title IX's scope to organized crime's corruption of legitimate enterprises. Indeed, Senator McClellan succinctly stated this legislative consensus during the floor debates when he described RICO as a potent weapon aimed at those criminals who "operate illegitimately in legitimate channels."[159]

In view of the concern Congress exhibited solely as to organized crime's corruption of legal enterprises, it is necessary to analyze RICO's statutory framework and terminology with respect to the enterprise concept. Although the legislative intent, which restricts the enterprise concept to legitimate business entities, apparently

156. SENATE REPORT, *supra* note 55, at 76.

157. HOUSE REPORT, *supra* note 75, at 56-57.

158. The legislative debates that accompanied the passage of the Organized Crime Control Act of 1970 fully establish the limited scope of Congress' intentions. Congressional concern with the infiltration of legitimate businesses is the central theme reflected throughout the legislative history. In this regard, Senator McClellan stated that "with its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise tbeir own judgment." 115 CONG. REC. 5874 (1969).

Senator McClellan in the Senate debates said that Title IX "is aimed at removing organized crime from our legitimate organizations . . . . Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations . . . in view of the extent of infiltration of our legitimate organizations by the mob." 116 CONG. REC. 591-92 (1970).

Senator Dole stated that Title IX "would create strict criminal penalties for using the proceeds of racketeering activity to acquire an interest in businesses engaged in interstate commerce, or to acquire or operate such businesses by racketeering methods." 116 CONG. REC. 36296 (1970).

House sponsor Representative Poff, in discussing Title IX, pointed out that "perhaps the single most alarming aspect of the organized crime problem in the United States in recent years has been the growing infestation of racketeers into legitimate business enterprises. This evil corruption of our commerce and trade must be stopped." 116 CONG. REC. 35295 (1970).

Moreover, Senator McClellan, as principal sponsor of the Act, stated his understanding of Title IX as follows: "Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under Title IX." McClellan, *supra* note 1, at 144.

159. 116 CONG. REC. 8671 (1970).

leads to the rather undesirable result that a racketeer is better off the more illegal his activities, a careful study of the structure of RICO reveals that this is not the case. Illegitimate criminal activities are already comprehensively proscribed and punished by the previously existing twenty-four federal and eight state criminal laws that RICO incorporates by reference under the umbrella concept of racketeering activity.[160] Given the already well-defined nature of established criminal penalties for these independently separate federal and state crimes, RICO's special purpose becomes clear—to impose even harsher penalties on already adequately proscribed criminal behavior when it is aimed at the infiltration of legitimate businesses.

RICO's inherent limitation to legitimate entities is also reflected in the statute's framework and language. Section 1961(4) sets forth a uniform definition of an enterprise as that term is used throughout the statute.[161] Section 1962(a) proscribes acquisition by means of any income derived from an illegal activity of an interest in, or the establishment or operation of, any enterprise that affects interstate commerce.[162] This subsection further provides that a "purchase of securities on the open market for purposes of investment" with illegally derived capital is not unlawful so long as the holdings of the purchaser, the members of his immediate family, and his accomplices in any pattern of racketeering activity or the collection of an unlawful debt "do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer . . . the power to elect one or more directors of the issuer."[163] Thus, the language of subsection (a) requires that the enterprise be a legitimate one. It is difficult to justify the application of a broader definition of enterprise to the other principal subsections of section 1962—subsection (b) prohibits the use of racketeering to "acquire or maintain . . . any interest in or control of any enterprise," and subsection (c) proscribes the "conduct of [an] enterprise's affairs through a pattern of racketeering activity"[164]—since subsections (a), (b), and (c) all derive from the same definition of enterprise in section 1961(4).[165]

This review of the legislative history and the statutory framework and terminology reveals that the enterprise element of RICO should be narrowly construed to encompass only legitimate entities.

160. *See* note 7 *supra* and accompanying text.
161. *See* note 9 *supra.*
162. *See* notes 25-26 *supra* and accompanying text.
163. *See* note 25 *supra.*
164. *See* notes 27-28 *supra.*
165. *See* note 9 *supra.*

The recent decision in *United States v. Sutton,* in which the Sixth Circuit held that RICO could be invoked only against formally constituted groups "organized and acting for some ostensibly lawful purpose," is the first to recognize that any other interpretaton of this important statutory concept reads the enterprise element completely out of the crime.[166] Through a careful analysis of legislative history, statutory language, and canons of statutory construction, the *Sutton* court correctly recognized that any of the prior interpretations of the enterprise element could make a federal felon out of any individual or any member of a group who has committed any two of the broad range of federal and state offenses denominated racketeering activity by section 1961(1).[167] Although such a sweeping expansion of federal criminal jurisdiction may be within Congress' power, such an interpretation cannot be inferred from the vagne contours of the statute. Hence, the *Sutton* majority[168] and the vigorous dissents in *Altese*[169] and *Rone*[170] properly recognized that "enterprise" as used in sections 1961 and 1962 should not extend beyond legitimate businesses or organizations. RICO, like a high-powered rifle, is carefully aimed at organized crime's infiltration of legitimate entities and its scope should not be enlarged into a blunderbuss approach by judicial construction.

(2) Application to a Foreign Corporation or Group of Corporations

The debate over the scope of the enterprise concept extends beyond those instances in which the alleged enterprise is delineated as a group of individuals associated in fact to engage in some unlawful activity. The debate also includes controversy over the geographical reach of the enterprise concept and the possible amalgamation of different corporate and quasi-corporate business entities into a single enterprise.

In *United States v. Parness*[171] the Second Circuit considered whether Congress had in fact or by express intention extended the geographical reach of the RICO enterprise concept to include the acquisition of a foreign corporation by means of criminal conduct committed in the United States.[172] Recognizing not only that section 1962(b) proscribes the acquisition of "any interest in or control of any enterprise which is engaged in, or the activities of which affect,

166. *See* text accompanying notes 88-117 *supra.*
167. *Id.*
168. *Id.*
169. *See* text accompanying notes 122-27 *supra.*
170. *See* text accompanying notes 148-50 *supra.*
171. 503 F.2d 430 (2d Cir. 1974).
172. *Id.* at 439.

interstate or foreign commerce," but also that section 1961(4) defines enterprise to include "any . . . corporation," the *Parness* court found no inference that Congress intended RICO to have a parochial application.[173] Consequently, the Second Circuit dismissed appellant's claim that RICO is limited to the infiltration of purely domestic enterprises, noting that such an interpretation would both frustrate the statute's salutary purposes and permit domestic criminal activity to escape prosecution under RICO when the ill-gotten gains were simply invested in a foreign enterprise.[174]

In *United States v. Huber*[175] the Second Circuit again confronted the problem of defining the meaning and application of the RICO enterprise concept. Appellant, convicted for participating through racketeering in the affairs of an enterprise consisting of seven wholly-owned corporations, argued that the seven corporations did not qualify as an enterprise within the meaning of RICO.[176] To this end, appellant emphasized the definition of enterprise set forth in section 1961(4).[177] Noting that the term "corporation" in section 1961(4) is only in the singnlar, the appellant reasoned that a group of corporations may be an enterprise only if they qualify as a "group of individuals associated in fact."[178] Appellant then pointed out that section 1961(3) does not define "individual" except as a species of "person."[179] Thus, appellant contended, since section 1961(3) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property," the disjunctive reference to "individuals" on the one hand and "entities capable of holding a legal or beneficial interest in property" on the other hand demonstrates that the term "individual" was meant only to refer to natural persons.[180] Moreover, appellant argued that to interpret the "group of individuals" classification as encompassing "corporations, associations, and other legal entities" would render the definition of enterprise in section 1961(4) completely superfluous and repetitious.[181] Therefore, appellant maintained that a group of corporations cannot be a "group of individuals associated in fact" within the meaning of the enterprise concept.

In rejecting appellant's argument that a group of corporations

173. *Id.*
174. *Id.*
175. 603 F.2d 387 (2d Cir. 1979).
176. *Id.* at 393.
177. *Id.*
178. *Id.*
179. *Id.* at 394.
180. *Id.*
181. *Id.*

cannot be an enterprise, the Second Circuit relied on the statutory language of section 1961(4).[182] Noting that the definition of enterprise is a list that begins with the word "includes," the court held that such a list is merely illustrative and by no means exhaustive. The court recognized that in enacting RICO Congress was concerned with the impact on the American economy of the infiltration of organized crime into interstate commerce and concluded that appellant's interpretation of the statute would perversely insulate the most sophisticated racketeering combinations from RICO's reach.[183] Hence, the Second Circuit determined that multi-corporate groupings qualify as an enterprise under RICO.

The Second Circuit in *Parness* and *Huber* properly rejected the appellants' myopic interpretations of the enterprise concept. Recognizing that Congress intended to purge the influences of organized crime from the American business community as a whole, and not merely its infiltration into purely domestic enterprises, the *Parness* court examined the substantive impact that Parness' activities had on domestic commerce rather than focusing exclusively on the foreign nature of the corrupt corporation involved in the pattern of racketeering.[184] Similarly, the *Huber* court, realizing that appellant's argument that a group of corporations cannot be an enterprise[185] would insulate cunningly structured corporate combinations from RICO's sanctions, rejected such an overly rigid reading of the enterprise definition. The Second Circuit's analysis and application of the enterprise element in *Parness* and *Huber* properly addresses the evil at which the statute was thoughtfully aimed—the infiltration of legitimate businesses by organized crime.

(3) Application to Governmental Entities

Defendants indicted under RICO for racketeering activity involving corruption of state governmental entities have challenged the applicability of the statute on the grounds that a governmental body is not an enterprise within the meaning of section 1961(4). Although such challenges have met with varying degrees of success, the debate over whether a RICO enterprise properly encompasses only private entities continues.

United States v. Frumento[186] was one of the first cases to consider the question of whether an enterprise properly includes such

182. *Id.* at 393-94.
183. *Id.* at 394.
184. *See* note 174 *supra* and accompanying text.
185. *See* text accompanying notes 182-83 *supra.*
186. 405 F. Supp. 23 (E.D. Pa. 1975).

public entities as governmental departments or agencies. In *Frumento* defendants, former employees of the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes (Bureau), charged that the Bureau, as a government agency, was not an enterprise under RICO.[187] The court rejected defendants' challenge as an unreasonably narrow interpretation of the statute and, relying on both the specific language of the statute and the relevant legislative history, held that the Bureau clearly qualified as an enterprise.[188] The *Frumento* court first noted that Congress provided that Title IX "shall be liberally construed to effectuate its remedial purposes."[189] Scrutinizing the legislative history to determine the scope of these remedial purposes, the court observed that a synopsis of the Senate bill subsequently enacted as the Organized Crime Control Act of 1970 stated that Title IX "prohibit[ed,] by racketeers or proceeds of racketeering[,] activities where interstate commerce is affected."[190] Probing further into the legislative history, the court argued that the repeated use of the term "organization," not only in the statutory language but also in the remarks of Senator McClellan, the principal sponsor of the bill and floor leader in the Senate, belied the narrow interpretation advanced by defendants that the Act was only intended to combat the corruption of legitimate businesses and labor unions.[191] Thus, the *Frumento* court concluded that the congressionally-mandated broad construction of RICO's enterprise concept properly included illegal activity involving a governmental agency.[192]

While the defendants in *Frumento* appealed this decision to the Third Circuit,[193] the Federal District Court in Maryland was presented with a strikingly similar issue in *United States v. Mandel.*[194] In *Mandel* the Governor of the State of Maryland and several other defendants were indicted on twenty counts of mail fraud and four RICO counts of prohibited patterns of racketeering activity. Defendants argued that the court should dismiss one count of the RICO indictment on the ground that the State of Maryland was not an enterprise.[195] The government, however, contended that a state falls within the statutory definition of enterprise on the basis that it

187. *Id.* at 29.
188. *Id.*
189. *Id.*
190. *Id.* at 29-30.
191. *Id.*
192. *Id.* at 30.
193. United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom.* 434 U.S. 1072 (1978).
194. 415 F. Supp. 997 (D. Md. 1976).
195. *Id.* at 1020.

qualifies either as a "legal entity" or a political "corporation."[196]

Addressing the question of whether the State of Maryland qualified as an enterprise under RICO, the *Mandel* court expressed caution about construing expansive and undefined statutory language to the broad limits that the words taken by themselves might initially suggest.[197] Thus, the court decided that a review of the legislative history of the statute was necessary to ascertain the legislative intent regarding the scope of the enterprise concept.

The court noted that the legislative history of Title IX of the Organized Crime Control Act contained no express consideration of the question whether an enterprise may include such public entities as governments and states.[198] Recognizing that it would be difficult to infer from this legislative silence any authority to construe the statute so broadly as to include public entities, the court contended that such an interpretation would disregard the plain purposes of Title IX. The court acknowledged that the principal purpose of Title IX was to eradicate racketeering influences from the commercial life of the nation and emphasized that nothing in the legislative history indicated any concern over the subversion of states or governments.[199] Furthermore, the court observed that the judiciary should be reluctant to give a broad construction to a criminal statute that would transform matters of primarily local concern into federal felonies.[200]

The *Mandel* court then examined the District Court's holding in *United States v. Frumento*[201] that the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes was an enterprise. Although recognizing that Congress had instructed that RICO should be "liberally construed to effectuate its remedial purposes," the *Mandel* court declared that this Congressional mandate cannot require the courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency.[202] Specifically rejecting the *Frumento* analysis, the *Mandel* court held that a state does not qualify as an enterprise within the meaning of the RICO statute.[203]

Following *Mandel*, the Fifth Circuit in *United States v. Brown*[204] held that the Macon, Georgia municipal police department

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 1021.
201. 405 F. Supp. at 29-30; *see* text accompanying notes 186-92 *supra.*
202. 415 F. Supp. at 1022.
203. *Id.*
204. 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

was an enterprise. Rejecting the contention that RICO encompassed only private corporations and labor organizations as overly narrow and unsupported by legislative history, the court noted that the actual language of section 1961(4) defines enterprise to include any "legal entity" or "group of individuals associated in fact although not a legal entity."[205] Consequently, the Fifth Circuit concluded that a police department qualified at least as a group of individuals associated in fact if not also as a legal entity.[206] The *Brown* court looked to the expansive phrases regarding the corruption of the "democratic processes" and threats to "domestic security" set forth in the Congressional Statement of Findings and Purpose of the Organized Crime Control Act[207] to justify this broad interpretation of the enterprise concept.[208] The Fifth Circuit buttressed such an expansive reading of the enterprise notion by pointing to the statutory language providing that the provisions of Title IX "shall be liberally construed to effectuate its remedial purposes."[209] The Fifth Circuit thus found no justification in either the statutory definition or RICO's legislative history for limiting the language of section 1961(4) to exclude individuals and entities in the public sector.

The most recent decision to address the sharply conflicting views represented by *Frumento, Mandel,* and *Brown* is the Seventh Circuit's opinion in *United States v. Grzywacz.*[210] Defendants, former police officers of Madison, Illinois, were charged with conspiracy to violate the RICO statute by conducting and participating in an enterprise, the Madison, Illinois, Police Department, through a pattern of racketeering activity. On appeal to the Seventh Circuit, defendants maintained that they could not be charged with conspiracy under RICO because a police department is not an enterprise.[211] Arguing that a public utility such as a municipal police department cannot constitute an "enterprise engaged in . . . interstate or foreign commerce . . . ," defendants stated that no legislative intent supported the application of RICO to acts of corruption by public employees or officials.[212]

After considering precedent, legislative history, and the express language of RICO, the Seventh Circuit held that public entities and

205. *Id.* at 415.
206. *Id.*
207. For the text of the Congressional Statement of Findings and Purpose to the Organized Crime Control Act of 1970, see note 3 *supra.*
208. 555 F.2d at 415.
209. *Id.* at 416.
210. 603 F.2d 682 (7th Cir. 1979).
211. *Id.* at 685.
212. *Id.*

individuals may properly constitute section 1961(4) enterprises through which racketeering is conducted.[213] Looking to the Third Circuit's decision in *United States v. Frumento*[214] and the Fifth Circuit's holding in *United States v. Brown*,[215] the Seventh Circuit concluded that section 1961(4) draws no distinctions between the public and private sector. Consequently, the *Grzywacz* court held that a police department and individual police officers are legal entities and thus qualify as an enterprise under RICO.[216]

A strong dissent[217] in *Grzywacz* argued that the majority placed too much reliance on broad language extracted from the Congressional Statement of Findings and Purpose of the Organized Crime Control Act (of which Title IX is but one of eleven titles) and virtually ignored the narrow language in the legislative history and the statute.[218] Pointing to the majority's use of such expansive phrases from the Act's statement of findings and purpose as "subvert and corrupt our democratic processes" and "general welfare of the nation" to support its broad reading of the enterprise notion, the dissent vigorously attacked the rationale of the majority opinion.[219] Noting that in 2097 pages of hearings, two congressional reports, and the statutory language of RICO there are no explicit references to governmental units as "enterprises," the dissent argued that the only rational explanation is that Congress did not intend the term "enterprise" to encompass governmental organizations.[220] Finally, the dissent, in a careful review of the legislative history of Title IX, set forth a persuasive argument that Congress did not intend to include governmental units within the ambit of the enterprise provisions of RICO.[221]

The dissent also contended that the majority ignored not only the doctrine of *ejusdem generis*,[222] which warns against expansive

213. *Id.* at 685-86.

214. The Third Circuit opinion in *Frumento* affirmed the district court's pretrial order which is discussed in the text accompanying notes 186-92 *supra*.

215. *See* text accompanying notes 204-09.

216. 603 F.2d at 687.

217. Judge Swygert wrote in dissent. *Id.* at 690-94.

218. *Id.* at 690.

219. *Id.*

220. *Id.*

221. *Id.* at 691.

222. The *ejusdem generis* doctrine may be defined as follows:

> [W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

BLACK'S LAW DICTIONARY 608 (4th ed. 1951); *see* United States v. Mescall, 215 U.S. 26, 31 (1909); United States v. Insco, 496 F.2d 204, 206 (5th Cir. 1974).

interpretations of broad language that immediately follows narrow and specific terms, but also the due process principle that statutes creating crimes must be strictly construed.[223] Thus buttressing the lack of support for an expansive reading of the enterprise concept in RICO's legislative history with an analysis of the majority's disregard of two canons of statutory interpretation, the dissent concluded that a police department does not qualify as a RICO enterprise.[224]

The conflicting interpretations of the definition of the enterprise concept vis-a-vis state governmental entities and the judicial gloss that shadows this crucial aspect of RICO highlight the necessity for consistency and clarity. Since 2097 pages of hearings, two congressional reports, and the operative provisions of Title IX make no explicit references to governmental bodies as enterprises,[225] the most rational explanation is that Congress did not intend to include government organizations as RICO enterprises. Although the Fifth and Seventh Circuits have looked to the expansive phrases such as the corruption of the "democratic processes" and threats to "domestic security" that appear in the Congressional Statement of Findings and Purpose to find legislative justification for a broad interpretation of the enterprise concept of Title IX,[226] on close analysis this rationale appears flawed. The broad phrases drawn from the Congressional Statement of Findings and Purpose apply generally to all eleven titles of the Organized Crime Control Act.[227] Canons of statutory construction and common sense indicate that such a broad introductory statement should not be used as authority for the interpretation of one specific definition within one subsection of one of the eleven titles when much more specific legislative history is readily available.

RICO's legislative history, completely silent on the classification of public entities as enterprises, is replete with examples of legislators' use of the word "business" synonymously with the statutory concept of "enterprise."[228] Again and again the legislators considered the enterprise concept with reference to the major purpose of RICO—the eradication of racketeering influences from the commercial life of the nation.[229] Probing the extent of organized crime's infiltration into the business community, Congress examined the impact of such infiltration in a wide variety of contexts, including

223. 603 F.2d at 692.
224. *Id.*
225. *Id.* at 690.
226. *See* text accompanying notes 207 & 219 *supra.*
227. *See* notes 1 & 3 *supra.*
228. *See* note 158 *supra.*
229. *Id.*

industry, unions and service organizations. At no time, however, was any consideration given to inclusion in the enterprise concept of public entities such as the federal government, a state government, or any of their instrumentalities.

An analysis of the delicate balance of federal-state relationships reveals that even if Congress had considered the applicability of RICO to corruption at the state governmental level it would have had to do so with the utmost caution since RICO's validity rests upon Congress' authority to regulate interstate commerce.[230] Although it is well settled that Congress has the power to prohibit activities made lawful by state law that take place in, or affect, interstate commerce, the Supreme Court has held that the commerce power does not extend to the regulation of the conduct of integral government functions at the state level. In *National League of Cities v. Usery*[231] the Supreme Court held that the minimum wage and overtime pay provisions of the Fair Labor Standards Act[232] are inapplicable to state government employees. Congress' intention that the Fair Labor Standards Act should apply to state governmental bodies was evidenced not only by the inclusion in the definitional provisions of the Act that an enterprise comprised related activities performed for a common business purpose, but also by the definition of business purpose to include the activities of a "public agency."[233] The Supreme Court, however, held that Congress could not properly designate an agency of state government as an enterprise subject to the Fair Labor Standards Act.

States already have their own efficient means for combatting threats to their integrity posed by organized crime. States have laws governing the conduct of public officials that adequately protect a state from any racketeering acts undertaken by that official. To permit Congress to use the commerce clause power to create laws binding on state officials would grant Congress the power to destroy the essentials of state sovereignty. Congress, in enacting the RICO statute, never intended to expand the power of the commerce clause

230. *See* note 23 *supra.*

231. 426 U.S. 833 (1976). For a discussion of the applicability of RICO to state governmental entities in light of the *Usery* decision, see Brief for Defendant Sisk Re: "Enterprise" and Legislative History, at 25-27, United States v. Sisk, 476 F. Supp. 1061 (M.D. Tenn. 1979).

232. 29 U.S.C. §§ 201-219 & 557 (1976).

233. Section 203(r) of the Fair Labor Standards Act specifies that " 'enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . ." 29 U.S.C. § 203(r) (1976). Section 203(r)(3) further provides that a common business purpose explicitly includes the activities "of a public agency." *Id.* § 203(r)(3). In addition section 203(s)(5) expressly defines "enterprise engaged in commerce" as including any "activity of a public agency." *Id.* § 203(s)(5).

by intruding into criminal matters traditionally handled entirely by the states.[234] Moreover, since Congress did not intend the RICO enterprise concept to apply to state governmental entities, it excluded the word "state" in the definition of enterprise in section 1961(4).[235] Consequently, a RICO enterprise does not properly encompass state governmental entities and overzealous prosecutors should not be permitted to include in RICO's definition of enterprise that which Congress wisely omitted. The *Mandel* court and the vigorous dissent in *Grzywacz* reached this proper conclusion when each refused to apply the RICO enterprise concept to state governmental entities. It is inconceivable that Congress, without expressly providing, intended to federalize crimes that involve the acts of public officials and thus profoundly alter the traditionally delicate federal-state balance.

IV. Comment and Proposal

RICO is a powerful force designed by Congress to aid the government's efforts against professional and organized criminals by checking the flow of illegally obtained funds into legitimate business enterprises.[236] The complex nature of RICO's essential provisions, the broad statutory language of the Act, and prosecutorial zeal in invoking RICO[237] have unfortunately combined to result in the application of the statute to situations for which it is not primarily intended.[238] The statute has begun to be applied so widely against

234. The Federal Government must never assume the role of the Nation's policeman. True the Federal Government has certain direct law enforcement responsibilities. But these are carefully limited to such matters as treason, espionage, counterfeiting, tax evasion and certain interstate crimes.

Crime is essentially a local matter. Police operations—if they are to be effective and responsible—must likewise remain basically local. This is the fundamental premise of our constitutional structure of our heritage of liberty.

L. Johnson, The Challenge of Crime to Our Society, H.R. Doc. No. 250, 90th Cong., 2d Sess. 4 (1968).

235. For the statutory definition of enterprise, see note 9 *supra*.

236. *See* note 151-59 *supra* and accompanying text.

237. In United States v. Huber, 603 F.2d 387 (2d Cir. 1979), Judge Feinberg warned against prosecutorial zeal in invoking RICO:

We note . . . that the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended. Therefore, we caution against undue prosecutorial zeal in invoking RICO. We also emphasize to the district judges that when RICO is invoked each set of facts must be evaluated independently.

Id. at 395-96.

238. *See, e.g.*, United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) (RICO conviction for three house robberies); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (RICO conviction of owner and operator of cosmetology and beauty culture school for mail fraud violations).

such myriad criminal activities that the major purpose underlying the statute's enactment has paradoxically become obscured. Thus, although the statute was designed to attack organized crime's use of racketeering profits to infiltrate and to gain control of private enterprises, a review of RICO case law reveals that the use of the statute for such purposes is rare. Instead, government prosecutors have seized upon RICO's expansive language and judicial willingness to construe the statute in an unreasonably broad manner to distort deliberately the reach of the statute and to extend its outermost limits. Consequently, in view of the extent of prosecutorial abuse of RICO and judicial willingness to allow its misconstruction, principles of fundamental fairness demand that immediate attention be given to these problems. The scope of the statute must be narrowed, either by the judiciary or Congress, so that it focuses on the evil it was designed to address—the infiltration of legitimate businesses by organized crime.

First, the definition of pattern of racketeering activity in section 1961(5) must be clarified to follow the guidelines of *Stofsky* in requiring that the racketeering acts be connected with each other by some common scheme, plan or motive.[239] This solution would effectively prevent the prosecution of an individual under RICO for the commission of completely unrelated criminal acts already adequately proscribed by other presently existing federal and state criminal laws. A concise explanation of the interrelationship between the acts of racketeering activity necessary to establish a pattern could be adopted from the Proposed Federal Criminal Code's definition of "pattern" which provides that "[acts of racketeering activity] . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[240] The amendment of section 1961(5)'s definition of pattern of racketeering activity to include this language would codify the *Stofsky* guidelines and go a long way toward resolving the confusion and inconsistency evidenced by judicial interpretations of this crucial RICO concept.

Second, a close examination of the statutory framework suggests that the "collection of an unlawful debt" provision as an alternate method of establishing a RICO violation might profitably be

239. *See* notes 61-71 *supra* and accompanying text.

240. *Proposed Criminal Code Reform Act of 1977: Hearings on S. 1437, S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, S. 1221 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9633 (1977).

eliminated.[241] In addition to removing the troubling due process questions,[242] the elimination of this provision would help to narrow the scope of the statute to reflect more precisely the legislative intent underlying its enactment. Since RICO is specifically aimed at the special danger posed by a continuity of racketeering activity,[243] before the harsh penalty provisions of the statute are invoked, evidence of such a continuity, rather than of one isolated criminal act, should be required. The pattern of racketeering provision affords some guarantees since it requires the commission of at least two predicate criminal acts. The same, however, cannot be said for the "collection of an unlawful debt" provision that requires only a single criminal act to establish a RICO violation.

In addition, the prohibited activities encompassed by the "collection of an unlawful debt" provision, primarily illegal gambling and loan sharking, are already adequately covered under RICO's umbrella concept of racketeering activity.[244] Thus, while the "collection" alternative contributes little to effectuate the remedial purposes of the statute, this provision is pregnant with the potential for abuse by permitting the harsh sanctions of RICO to apply to an individual guilty of only an isolated criminal act.[245] Hence, the "collection" provision, as it presently stands, poses a great potential for abuse against individual defendants without significantly contributing to the statute's effectiveness. Furthermore this provision flaunts both concepts of fair treatment and the eighth amendment's prohibition against cruel and unusual punishment[246] and thus should not be allowed to stand.

Third, the wide split among the United States Circuit Courts on which kinds of enterprises fall within the scope of RICO[247] must be resolved. This divergence between the circuits focuses on those instances in which the alleged enterprise is delineated as a group of individuals associated in fact to engage in some unlawful activity.

241. *See* notes 72-73 *supra* and accompanying text.

242. *See* notes 80-85 *supra* and accompanying text.

243. *See* text accompanying note 55 *supra.*

244. The definition of racketeering activity in section 1961(1) specifically incorporates 18 U.S.C. §§ 891-894 (1976) (extortionate credit transactions) and 18 U.S.C. § 1955 (1976) (prohibition of illegal gambling businesses). *See* note 7 *supra.*

245. For a discussion of RICO's harsh penalty provisions, see notes 10-11 *supra* and accompanying text.

246. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Although the Supreme Court has not heard a RICO case to date, it did note that RICO and other sections of the Organized Crime Control Act contain "relatively severe penalty provisions." Iannelli v. United States, 420 U.S. 770, 786-87 & 787 n.19 (1975).

247. *See* text accompanying notes 88-95 *supra.*

Recognizing that every "individual" or "group of individuals," considered in the abstract, is not an enterprise, the Sixth Circuit in *United States v. Sutton*[248] was the first to realize that individuals and groups do not become enterprises except in relation to something they do. Hence, the Sixth Circuit properly recognized that the definition of enterprise in section 1961(4) is incomplete because it fails to define what that something is.

Decisions by the Second, Fifth, Seventh, Ninth and District of Columbia Circuits,[249] however, have evaded this crucial issue. These courts have tautologically reasoned that a "group of individuals associated in fact" around numerous patterns of racketeering activity constitutes a statutory "enterprise" organized for the purpose of profiting from racketeering activity. The Sixth Circuit in *Sutton* properly recognized that such an interpretation reads the enterprise element out of RICO and transforms the statute into a simple proscription against racketeering activity.

Given the extent of judicial confusion and contradiction surrounding the proper interpretation of the RICO enterprise concept, it is clear that this statutory definition needs redrafting. The amendment that would probably best codify the legislative intent underlying RICO—the concern with the growing financial infiltration and corrupt operation of legitimate business operations—would be the addition of the term "legitimate" to the definition of enterprise in section 1961(4). Such an amendment, however, has two drawbacks: first, "legitimate" is a slippery term and a good definition will be difficult to arrive at; second, any attempt to define "legitimate" might result in organized crime's structuring sophisticated racketeering combinations specifically to evade the statute.

Alternatively, in order to extend the reach of the statute to illicit enterprises of some description, and yet preserve the content of the enterprise element, a set of standards might be grafted upon the definition of enterprise sufficient to warn any person or group engaged in racketeering activity when they will be deemed to have embarked upon an "enterprise" to that end. The problem here, of course, is to develop flexible enough guidelines to cover the variety of crimes committed by organized criminals while at the same time to preserve the integrity of the statute.

Perhaps the best solution to this dilemma is to amend the definition of enterprise in section 1961(4) to reflect the Sixth Circuit's *Sutton* decision. In *Sutton* the court held that an enterprise within the meaning of the statute is "any individual, partnership, corpora-

248. *See* text accompanying notes 88-117 *supra.*
249. *See* text accompanying notes 118-50 *supra.*

tion, association . . . and any union or group of individuals associated in fact that is organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized."[250] Rather than restricting RICO's reach to solely "legitimate" enterprises, the *Sutton* definition strikes an equitable balance between legitimate and illegitimate enterprises. Thus, whenever any person associated with an enterprise meeting the *Sutton* test conducts its "affairs," for example, undertakes any activity on behalf of, or relating to, the purpose of the enterprise, by committing at least two criminal acts constituting a pattern of racketeering, a RICO violation could be found.

Codification of the *Sutton* enterprise definition would not only narrow the scope of RICO to reflect the type of criminal activity that Congress sought to proscribe, but also would leave prosecutors with a flexible enough standard to combat the ingenuity characteristically demonstrated by organized crime.

V. CONCLUSION

Since its enactment by Congress on October 15, 1970, the Racketeer Influenced and Corrupt Organizations Act has been the subject of increasing controversy throughout the district and circuit courts concerning the scope of its operative language and the interpretation of many of its fundamental elements. With the Department of Justice seeking more indictments under RICO, the risk of draconian applications of the statute from prosecutorial overreaching becomes apparent.

The scope of the statute must be narrowed, either by the judiciary or Congress, and its language refined to focus on the evil it was designed to eradicate—the financial infiltration and corrupt operation of legitimate business operations. With such a corrected focus, RICO would be a powerful tool equal to the difficult task of combatting the sophisticated elements of organized crime. Without such remedial revisions, RICO will continue to develop into a standardless criminal catch-all.

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250. 605 F.2d at 270.