REASSESSING THE OVEREXPANSION OF RICO IN WHITE COLLAR CASES

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La Cosa Nostra, biker gangs, drug cartels. All of these organizations have at least one thing in common: they are archetypal targets of the Racketeer Influenced and Corrupt Organizations Act ("RICO" or the "Act"). Enacted as Section 901(a) of the Organized Crime Control Act of 1970, RICO was a profound leap forward in the federal government's fight against organized crime and its infiltration of legitimate business and other aspects of daily life. The purpose of the RICO statute was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[2] Federal prosecutors, long searching for a tool to bring federal charges against organized crime for mostly state-law offenses, finally had a legitimate chance to put some of America's most notorious criminals behind bars, and indeed did so several times.

Over the years, in a marked departure from the Act's original intent, RICO has been applied to an increasingly diverse array of situations and defendants, including some of the most well-known businesses in the world and core "white collar" defendants, cementing its status as one of broadest, if not the broadest, criminal statute in the United States Code.[3] Concededly, RICO casts its net wide enough to facilitate its application to a wide range of situations, and the Department of Justice has clear latitude to use RICO in a variety of situations. However, on a basic level, in light of punishment considerations, policy considerations, and the intent of the Act, one fundamental question persists in the white collar criminal context: why use RICO?

RICO: Background and Elements

The Racketeer Influenced and Corrupt Organization Act was passed by Congress with the declared purpose of seeking to eradicate organized crime in the United States.[4] A violation of Section 1962(c), requires: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.[5]

In order to be found guilty of violating the RICO statute, the government must prove beyond a reasonable doubt: (1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendant was associated with or employed by the enterprise; (4) that the defendant engaged in a pattern of racketeering activity; and (5) that the defendant conducted or

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[1] The authors are Attorneys at Womble Bond Dickinson (US) LLP.
[2] S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).
[3] Congress inserted a clause into RICO at the time of its passing directing that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).
[4] *Russello v. United States*, 464 U.S. 16, 26-27, 104 S. Ct. 296, 302-303, 78 L. Ed. 2d 17 (1983); *United States v. Turkette*, 452 U.S. 576, 589, 101 S. Ct. 2524, 2532, 69 L. Ed. 2d 246 (1981).
[5] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985).

participated in the conduct of the enterprise through that pattern of racketeering activity through the commission of at least two acts of racketeering activity as set forth in the indictment.[6]

An "enterprise" is defined 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.[7] Many courts have held that the term "enterprise" has an expansive statutory definition, noting that Congress mandated a liberal construction of the RICO statute to effectuate its remedial purposes.[8]

A "[p]attern of racketeering activity" requires at least two acts of racketeering activity committed within ten years of each other.[9] Congress intended a fairly flexible concept of a pattern.[10] The racketeering predicates must be proven related, and that they amount to, or pose a threat of, continued criminal activity.[11] Racketeering predicates are related if they 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.[12] Furthermore, the degree in which these factors establish a pattern may depend on the degree of proximity, or any similarities in goals or methodology, or the number of repetitions.[13] The key aspect of RICO is its ability to tie numerous crimes together, whether or not they were committed contemporaneously or over long periods of time, and then charge those who ordered the crimes, as opposed to only those who committed them.

After its passage, the "traditional" — and perhaps intended — use of RICO was plain to see. The target was the "[m]afia as a whole, tying the big bosses to the crimes of their underlings by claiming they were all part of a 'criminal enterprise.'"[14] "The necessity which mothered this statutory invention was caused by the inability of the traditional criminal law to punish and deter organized crime."[15] In that vein, "prosecutors have used RICO to pursue some of the highest-profile organized-crime families, including the Gambino and Genoveses . . . ."[16] The "traditional" use of RICO is apparent from the DOJ's own guidelines, specifically that "[n]o criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Gang Section, Criminal Division ["OCGS"]."[17]

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[6] *United States v. Phillips*, 664 F. 2d 971, 1011 (5th Cir. Unit B Dec. 1981), cert. denied, 457 U.S. 1136, 102 S. Ct. 1265, 73 L. Ed. 2d 1354 (1982).
[7] 18 U.S.C.A. § 1961(4).
[8] *United States v. Delano*, 825 F. Supp. 534, 538-39 (W.D.N.Y. 1993), aff'd in part, rev'd in part, 55 F. 3d 720 (2d Cir. 1995), cases cited therein.
[9] 18 U.S.C.A. § 1961(5).
[10] *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 (1989).
[11] *Id.*
[12] *Id.* at 240, 109 S. Ct. at 2901; *Ticor Title Ins. Co. v. Florida*, 937 F. 2d 447, 450 (9th Cir. 1991).
[13] *United States v. Indelicato*, 865 F. 2d 1370, 1382 (2d Cir.), cert. denied, 493 U.S. 811, 110 S. Ct. 56, 107 L. Ed. 2d 24 (1989).
[14] Nathan Koppel, *They Call It RICO, and It Is Sweeping*, Wall Street Journal (Jan. 20, 2011), https://www.wsj.com/articles/SB10001424052748704881304576094110829882704
[15] *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir. 1978).
[16] *Id.*
[17] Department of Justice Manual, *Approval of Organized Crime and Gang Section Necessary*, 9-110.320, https://www.justice.gov/jm/jm-9-110000-organized-crime-and-racketeering#9-110.320

The Expansive Use of RICO by Federal Prosecutors

As years passed following the passage of RICO, prosecutors began to apply the Act in increasingly more diverse situations against defendants who were further and further from the typical RICO defendant. Recently, federal prosecutors have continued the broad application of RICO[18] and added a large international bank to the long list of RICO targets. A Wall Street bank joined the ranks of Wall Street giants ensnared by RICO, including Michael Milken and his firm Drexel Burnham Lambert. In 2018, federal prosecutors charged four traders employed by the bank on its precious metals commodities trading desk with violations of RICO, and alleged that the bank itself was criminally liable under RICO, accusing the financial institution of, for all intents and purposes, operating a criminal enterprise, specifically through its precious metals trading business.

The allegations leveled at the bank and its traders centered around the use of a trading technique called spoofing. Spoofing, in its most basic form, is market manipulation. A trader will place an order to buy or sell a security or commodity with the intent to cancel the trade. The goal is to induce other traders to react to the trade, which will move the market, allowing the original trader to withdraw the spoofed order, and make a new order on the other side of the market to capitalize on the market reaction set off by the spoofed order. The Dodd-Frank Act of 2010 amended the Commodity Enforcement Act to make spoofing unlawful and defined spoofing as "bidding or offering with the intent to cancel the bid or offer before execution."[19] The Department of Justice has the power to criminally prosecute spoofing violations, in addition to its power to prosecute mail, wire, and commodities fraud.

The use of RICO to charge the bank and its traders with alleged spoofing was unusual, given that the alleged predicate offenses — including securities fraud, commodities fraud, spoofing, and wire fraud —, standing alone, would have been sufficient to charge the traders and the bank itself with serious criminal offenses.

DOJ's choice to charge RICO, despite the availability of alternative charges, is somewhat baffling, given that "[t]he necessity which mothered this statutory invention [of RICO] was caused by the inability of the traditional criminal law to punish and deter organized crime."[20] Certainly, charging the bank and its traders under RICO did not arise from the "inability of traditional criminal law to punish and deter" the alleged activities.

Is RICO the Appropriate Charge?

In assessing whether RICO is the appropriate mechanism to address conduct, such as spoofing and other financial crimes, the DOJ's published guidelines, which prosecutors are urged to consider before seeking a RICO indictment, are instructive. The Justice Manual guidelines

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[18] "[B]y far the greater number of RICO indictments in the white collar area have no connected whatsoever to organized crime. Rather, they run the gamut of ordinary business regulatory offenses."); Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts 1 and II*, 87 COLUM. L. REV. 661, 750 (1987) Available at: https://scholarship.law.columbia.edu/faculty_scholarship/132?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F132&utm_medium=PDF&utm_campaign=PDFCoverPages

[19] 7 U.S.C. § 6c(a)(5).

[20] *Elliott*, 571 F.2d at 911.

dictate that the government should seek approval from the OCGS for a RICO indictment only if one or more of the following requirements is met:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;

2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;

3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;

5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;

6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest; [and]

7. The case consists of violations of State law, but involves prosecution of significant or government individuals; which may pose special problems for the local prosecutor.[21]

As a threshold matter, do white collar prosecutions like the spoofing case above, fit the criteria described above? It appears not – at least not in any "clear cut" manner. Although it could have been argued that the pattern of trading activity present in the spoofing case could not have been adequately addressed outside of RICO, that seems unlikely given that a plethora of other federal criminal statutes address spoofing activities.[22] Moreover, it appears that there was not even an arguable basis for claiming that any of the other guidelines were met or weighed in favor of prosecuting the spoofing activities under RICO.

To be sure, federal prosecutors have the discretion to investigate and ultimately charge white collar crimes under RICO. The Supreme Court has made clear that RICO is broad and its applicability is not limited to organized crimes cases, stating:

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[21] Department of Justice Manual, *Approval of Organized Crime and Gang Section Necessary*, 9-110.310, https://www.justice.gov/jm/jm-9-110000-organized-crime-and-racketeering#9-110.320

[22] These include laws precluding insider trading under the Securities Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, prohibitions of Securities and Commodities Fraud under 18 U.S.C. § 1348; against mail fraud under 18 U.S.C. §1341; wire fraud under 18 U.S.C. § 1343; and against spoofing in particular under the Commodity Exchange Act, Section 4c(a)(5)(C), as amended by the Dodd-Frank Act of 2010.

> The notion that RICO is limited to organized crime finds no support in the Act's text and is at odds with the tenor of its legislative history . . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.[23]

There could have been any number of tactical reasons for the government's choice to proceed under RICO for the spoofing case. Perhaps the use of RICO was punishment driven: the federal prosecutors were seeking stiffer sentences to deter similar schemes by other bankers in the future. Certainly, charging RICO changes the calculus for defendants who might be inclined to plead guilty to securities fraud, thinking they would face only a short prison sentence, restitution, and probation. In contrast, a RICO conviction, which defendants likely would be compelled to fight at trial, could result in a 20-year prison sentence, plus government seizure of the business associated with the criminal enterprise. The significantly greater punishments that could result from a RICO conviction would work as a serious deterrent for anyone engaging in, or planning to engage in, similar conduct.

Plus, being charged under RICO opens a defendant up to consecutive sentences for the RICO offense and the predicate offenses, if convicted.[24] The statutory maximum criminal punishment for RICO predicate offenses common to financial crimes, including securities fraud, wire fraud, and mail fraud, is in the 25-to-30-year range.[25] Under RICO, the statutory maximum in 20 years.[26] But a defendant convicted of RICO and a predicate offense would, consistent with Congressional intent, face very lengthy consecutive sentences.[27]

In addition to the penalty differences, other impacts of RICO may influence the government's decision to charge RICO instead of the predicate offenses individually. For example, RICO has a number of advantages that could be strategically or tactically significant in a given case:

- Under RICO, every additional racketeering offense committed in furtherance of the enterprise within 10 years extends the statute of limitations another 5 years.[28] In practical

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[23] *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229 (1989).

[24] *See United States v. Rone*, 598 F.2d 564, 571-72 (9th Cir. 1979) (holding that convictions and consecutive sentences for RICO violations and underlying predicate offenses of extortion did not violate "double jeopardy," rather they followed the spirit of what Congress intended when it passed RICO to provide enhanced penalties in addition to those imposed for the underlying predicate offenses).

[25] *See* 18 U.S.C. § 1348 (establishing that a person convicted of securities or commodities fraud "shall be fined under this title, or imprisoned not more than 25 years, or both."); 18 U.S.C. § 1348 (establishing that a person convicted of fraud by wire "shall be fined . . . or imprisoned not more than 30 years . . . .").

[26] *See* 18 U.S.C. § 1963 ("Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment) . . . .").

[27] *See United States v. Garcia*, 754 F.3d 460, 4747 (7th Cir. 2014) (holding that Congress intended to "allow defendants to receive consecutive sentences for both the predicate acts and the RICO offense.")."

[28] *See e.g, Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) ("We recognize that RICO's criminal statute of limitation runs from the last, *i.e.*, the most recent predicate act.").; *see also Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 n. 11 (4th Cir. 1997) ("Despite RICO's failure to provide a statute of limitations for criminal violations, the general five-year "catchall" federal criminal statute of limitations applies to criminal RICO prosecutions only because Congress has provided such a criminal limitations period when no other period is specified." (internal quotations omitted)); *United States v. Pizzonia*,, 577 F.2d 455 (2d Cir. 2009) (upholding a RICO conspiracy conviction even

effect, this means that defendants could face criminal liability offenses that were committed as many as 20 years before charging, which is a dramatic increase on the normal 5-year statute of limitations for most federal crimes;

- In dealing with RICO, the usual rules on joinder, severance, and unfair prejudice are stripped away, meaning that a single jury can hear about multiple and various crimes that would not be permitted to be heard together under normal circumstances under the Federal Rules of Evidence;[29]

- Under RICO, rules regarding jurisdiction and venue are modified, allowing state crimes, sometimes even acquitted conduct, to be included in a RICO indictment and trial;[30] and

- Under RICO, a defendant can be charged twice for the same conduct – once for the predicate offense and once under RICO. Ordinarily, the principle of "double jeopardy" would prohibit this.[31]

While side-stepping double jeopardy and other procedural safeguards is permissible on the face of the Act, commentators have raised certain constitutional concerns about RICO's expanded use. Chiefly, certain aspects of RICO seemingly disregard due process, including the "the power to freeze a defendant's assets at the time of indictment and confiscate them after conviction."[32] The seizures are not limited in nature, and could amount to an entire business being seized.[33] This creates an added and especially sharp arrow in the quiver of prosecutors. "[B]y allowing the government to seize entire businesses connected even indirectly, with a defendant at the time of indictment, before any proof of guilty, is a major exception" to the general principal that defendants are presumed innocent and not subject to punishment until they are found guilty.[34] "The government is authorized, in effect, to act as a prosecutor, judge, and jury in the same case."[35] This departure from typical criminal practice in the RICO context is potentially drastic and far

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though the two predicate acts occurred outside of the applicable limitations period because the government proved that the conspiracy continued into the limitations period).

[29] *See* U.S. Department of Justice, Organized Crime and Gang Section, *Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors*, 6th Ed., pp. 306-307 (May 2016) ("The advantages of charging a RICO conspiracy offense are the advantages associated with general conspiracy prosecutions: ease of joinder."). *See generally* Fed. R. Evid. 404(b), 403, 401; *see also United States v. Scarfo*, 2012 U.S. Dist. LEXIS 134169, at *31 (D. N.J. Sept. 19, 2012) (discussing permissive joinder rules in RICO prosecutions); Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts III and IV*, 87 COLUM. L. REV. 920, 940 (1987) Available at: https://scholarship.law.columbia.edu/faculty_scholarship/132?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F132&utm_medium=PDF&utm_campaign=PDFCoverPages

[30] *See United States v. Coonan*, 938 F.2d 1553, 1562 (2d. Cir. 1991) (discussing using state law crimes for which defendant was acquitted as predicate offenses for RICO in the context of the "chargeable under state law" language in the RICO Act).

[31] *See Rone*, 598 F.2d at 571-72 (holding that convictions and consecutive sentences for RICO violations and underlying predicate offenses of extortion did not violate "double jeopardy," rather they followed the spirit of what Congress intended when it passed RICO to provide enhanced penalties in addition to those imposed for the underlying predicate offenses); *see also United States v. Coonan*, 938 F.2d 1553, 1562 (2d. Cir. 1991).

[32] Fischel, Daniel R., *Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution*, 122-123 (1995), New York, HarperBusiness.

[33] Fischel, *Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution*, at 122-123.

[34] *Id.*

[35] *Id.*

reaching for financial institutions charged under RICO because the criminal seizure of their assets and profits could have far-reaching consequences for the financial markets and economic stability. In addition to other constitutional concerns, at least one Supreme Court justice has expressed concern that RICO is unconstitutionally vague.[36]

However, the use of RICO may not be solely a function of penalties and strategic and tactical advantages to DOJ. Granted, the tools RICO offers and changes to criminal procedure are powerful incentives for the government. But, there are other statutory tools with similar maximums available to the government. So, the question still remains: Why use RICO in white collar crime cases like the spoofing case?

What we may be seeing through the use of RICO is a strategic decision by the government, an attempt to use RICO — with all of its ramifications, criminal and financial —to secure guilty pleas to lesser charges.[37] Faced with the complications and implications of a RICO prosecution, defendants may be more inclined to plead guilty to a "lesser" offense, such a securities or commodities fraud.

Indeed, whether intended or not, this was the result in the spoofing case. The bank entered into a deferred prosecution agreement with the government and agreed to pay financial penalties for the spoofing scheme as well as another fraudulent trading scheme. Some of the individual defendants also pled guilty to "lesser" offenses, including: commodities fraud, conspiracy to commit wire fraud, spoofing, and commodities price manipulation. Other charged defendants recently failed to obtain a dismissal of the racketeering charges, leaving open the possibility that some of the former commodities traders will go to trial on RICO charges.

Regardless of how the spoofing case is finally resolved, the use of RICO in the context of securities fraud and other financial crimes is a profound shift by the Department. Attorney General Holder's 2010 memorandum and the Justice Manual requires prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."[38] Given the available penalties, the most serious offense typically is the underlying substantive offense, not RICO. While we do not question the motives of the federal prosecutors who made these decisions, given this game-changing nature and increasing application in areas outside of the traditionally understood original purpose, we ask: is it time to reassess the use of RICO for white collar offenses?

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[36] *H.J., Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 255-256 (1989) (Scalia, J. Concuring) ("No constitutional challenged to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge [concerning RICO's unconstitutional vagueness] is presented."). It is worth noting that a significant number of courts who have assessed the constitutionality of RICO have rejected those concerns. *See, inter alia, United States v. DeRosa*, 670 F.2d 889, 895 (9th Cir. 1982), *cert denied* 495 U.S. 993 (1982).

[37] This would not be the first time the government has been accused of utilizing RICO as a coercive weapon to get defendants to plead, as the accusation was leveled at Giuliani and his office during the prosecution of Princeton/Newport in the 1980s. Scot J. Paltrow, *Six in Princeton/Newport Case Escape Tough RICO Sentences*, LOS ANGELES TIMES, Nov. 7, 1989, Six in Princeton/Newport Case Escape Tough RICO Sentences - Los Angeles Times (latimes.com).

[38] Justice Manual § 9-27.300; *see also* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf