Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICORackets for the Government?

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CRIMINAL FORFEITURE AND THE
NECESSITY FOR A POST-SEIZURE
HEARING: ARE CCE AND RICO RACKETS
FOR THE GOVERNMENT?

Motivated by the increasing influence and wealth of organized
crime in the United States, Congress in 1970 enacted legislation to
provide the law enforcement community with the necessary tools
to deal effectively with the problem.¹ The congressional response

¹ See The President's Comm'n on Law Enforcement and Admin. of Justice, The
Challenge of Crime in a Free Soc'y 196-201 (1967) [hereinafter cited as The Challenge
of Crime]; Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO):
congressional response to the problem of organized crime began in 1950 when the Attorney
General of the United States assembled a national conference to consider the problem of
organized crime. See The Challenge of Crime, supra, at 196. By the 1960's, the substantial
impact of organized crime was "well-documented." See, e.g., S. Rep. No. 1784, 87th Cong.,
2d Sess. 1-2 (1960) (report of the Senate Select Committee on Improper Activities in the
this extensive documentation, however, law enforcement organizations had not yet united
into a collective effort against racketeering. See Blakey & Gettings, supra, at 1015. In 1967,
the President's Committee on Law Enforcement and Administration of Justice explored the
impact of organized crime on legitimate business and made recommendations to curb its
growth. The Challenge of Crime, supra, at 203-09. The Senate responded with the intro-
duction of bills which evolved into a concerted effort by Congress to combat the problem of
organized crime. See Blakey & Gettings, supra, at 1015-21. The culmination of this congres-
comprehensive Act includes 12 separate titles designed to control the problems of organized
crime. The Statement of Findings and Purpose prefacing the Act noted the congressional
concern:

[O]rganized crime in the United States is a highly sophisticated, diversified, and
widespread activity that annually drains billions of dollars from America's econ-
omy by unlawful conduct and the illegal use of force, fraud, and corruption; . . .
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.

It is the purpose of this Act to seek the eradication of organized crime in the
United States by strengthening the legal tools in the evidence-gathering process,
by establishing new penal prohibitions, and by providing enhanced sanctions and
new remedies to deal with the unlawful activities of those engaged in organized
crime.

776
included passage of the Racketeer Influenced and Corrupt Organizations Act (RICO)\(^2\) and the Continuing Criminal Enterprises Act (CCE),\(^3\) both of which sought to wrest power from organized crime by attacking its economic base.\(^4\)

Enacted as part of the Organized Crime Control Act of 1970,\(^5\) RICO is a procedural and substantive statute which provides both criminal and civil sanctions for its violation.\(^6\) The Continuing

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\(^4\) See Report of the Comptroller General, supra note 1, at 9. Senator McClellan, a sponsor of RICO, stated:

[T]itle IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members, Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.


\(^6\) Section 1962 sets forth the prohibited activities of RICO, see 18 U.S.C. § 1962 (1976), while sections 1963 and 1964 provide for criminal penalties and civil remedies respectively. See id. §§ 1963-1964. Sections 1965 through 1968 provide the procedure to be used in con-
Criminal Enterprises Act was enacted as part of the Comprehensive Drug Abuse Control Act of 1970, and imposes criminal penalties for participation in a "continuing criminal enterprise." A violation of either statute may result in imprisonment, fines and forfeiture of the "interests" or "profits" derived from the proscribed act. Both statutes permit imposition of a restraining order on the indicted individual's property during the pendency of the trial; upon conviction, the property is forfeited to the government, thereby removing it from the working capital of organized crime.

While these provisions appear to serve as effective weapons to attack the economic foundation of organized crime, several questions have been raised concerning the procedural aspects of the forfeiture process. Of particular import is the necessity for an adversarial hearing at which the individual can challenge the imposition of a restraining order on his property pursuant to a RICO or CCE indictment. Regrettably, however, neither of the statutes connection with civil RICO actions including venue and service of process, expedition of process, evidence, and civil investigative demand. See id. §§ 1965-1968.


9 18 U.S.C. § 1963(a) (1976); 21 U.S.C. 848(a) (1976). The criminal sanctions for violation of RICO include maximum penalties of $25,000, 20 years imprisonment and forfeiture of interests acquired in violation of the Act. 18 U.S.C. § 1963(a) (1976). The penalties for the first violation of CCE include maximum penalties of $100,000, 10 years imprisonment and forfeiture of profits derived from the violation as well as the individual's interest in the enterprise. 21 U.S.C. § 848(a)(1) (1976). For further violations of CCE, a defendant would face similar forfeiture, receive a minimum term of 20 years and be fined a maximum of $200,000. Id.

The forfeiture provisions of each statute are unique in that they are the first in personam forfeiture statutes enacted in America. See infra text accompanying notes 13-14. In personam forfeiture was considered by some legislators to carry a great potential for abuse, see RICO H.R. Rep., supra note 2, at 127-88 (dissenting views of Reps. Conyers, Mivka & Ryan), and to invoke questions of constitutionality, see infra notes 91-99 and accompanying text. But see 116 Cong. Rec. 35,193 (1970) (remarks of Rep. Poff) (attacks on forfeiture provisions are not well founded); 116 Cong. Rec. 592-93 (1979) (remarks of Sen. McClellan) (forfeiture provisions a response to criminal justice system's inability to curb Mafia activity).

10 See RICO S. Rep., supra note 2, at 79-80. See generally REPORT OF THE COMPTROLLER GENERAL, supra note 1, at 4-10.

11 Compare United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (since a restraining order halts business activity, a defendant should "be afforded a prompt hearing once the restraining order has been entered") and United States v. Crozier, 674 F.2d 1293, 1298 (9th Cir. 1982) (sanctions under civil and criminal statutes involve questions of due
delineate the procedural method to the employed in effecting such a seizure.\textsuperscript{12} Moreover, the unique position of RICO and CCE forfeiture in the American jurisprudential system\textsuperscript{13} is reflected by the lack of analogous case law or statutes from which to glean the proper procedures.\textsuperscript{14} Consequently, several courts have concluded that a hearing is constitutionally mandated,\textsuperscript{15} while others have declined to adopt such a position.\textsuperscript{16}
Initially, this Note will examine the history of forfeiture in English and American jurisprudence. It will analyze the distinction between in rem and in personam forfeiture, focusing upon the in personam forfeiture provisions of RICO and CCE. The Note will suggest that a restraining order issued pursuant to a RICO or CCE indictment must be followed by an adversarial hearing to determine the validity of the restraining order. Finally, this Note will propose standards to be employed at such a hearing.

THE HISTORY OF FORFEITURE AS A LEGAL REMEDY

The forfeiture of property as a legal sanction may be traced to the Old Testament and through the early cultures of Greece, Rome and England. English common law expanded the concept of forfeiture to encompass three distinct types. The first type involved the forfeiture of all real and personal property belonging to...
an individual convicted of a felony. The felon’s personal property was forfeited to the Crown, while his real property escheated to his lord.

A second type, statutory forfeiture, existed mainly in the areas of customs, navigation and revenue law. These statutes, which typically required in rem forfeiture proceedings, sanctioned forfeiture of that part of an individual’s personal property used in violation of the statute.

The final type of forfeiture under early English law was the deodand. Deodands were items of personalty which were the immediate cause of another’s death and as such were subject to forfeiture. Under this type of forfeiture, the chattel itself was not

19 See 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 63-71 (3d ed. 1923); 1 F. POLLOCK & W. MAITLAND, HISTORY OF ENGLISH LAW 35 (2d ed. 1889) (“selling a man beyond the seas . . . as an alternative to capital punishment”). The rationale underlying forfeiture pursuant to a felony conviction is that once an individual has violated principles of society, he no longer has the rights he had as a member of the community, such as the right to transfer property. 1 W. BLACKSTONE, supra note 18, at *299. A felon was also subject to the sanction of attainder. 4 Id. at *382. Attainer “blackened” the individual, and society refused to protect or recognize him. Id. at *381. The individual suffered a grievous loss of civil rights, while the descendants of the tainted individual were prohibited from tracing a line of inheritance up or down through him. Id. at *389; 1 M. HALE, PLEAS OF THE CROWN 356-57 (1736); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 504-05 (10th ed. 1860). The harshness that this statute wrought was subsequently mitigated by prohibiting the imposition of punishment beyond the life of the convicted felon. See 7 Anne, 21.

20 See 4 W. BLACKSTONE, supra note 18, at *378. Personal property was deemed forfeited upon conviction. Id. But cf. infra note 21 (real property is forfeited as of the time of the offense). Criminal forfeiture had an incidental but appealing consequence in that it was an important source of revenue for the Crown. See Note, supra note 13, at 773.

21 4 W. BLACKSTONE, supra note 18, at *378. Forfeiture of realty related back to the time of the offense and the property could not therefore be effectively transferred prior to conviction or attainder. Id. at *380. Upon conviction for treason, real property, along with personal property, was forfeited to the Crown. 1 M. HALE, supra note 19, at 351; 3 W. HOLDSWORTH, supra note 19, at 68-71; 1 F. POLLOCK & W. MAITLAND, supra note 19, at 351.


23 3 W. BLACKSTONE, supra note 18, at *261-62. Actions resulting in statutory forfeiture were commenced either by the King’s Attorney General or by an individual suing qui tam (on behalf of himself and the State). 3 W. BLACKSTONE, supra note 18, at *261-62. Actions were brought to recover property used in violation of the statute, id., and which was forfeited upon the judgment, see id.


25 See O.W. HOLMES, supra note 18, at 24-25; Finkelstein, supra note 24, at 183; Smith, Modern Forfeiture Law and Policy: A Proposal for Reform, 19 WM. & MARY L. REV. 661, 661 (1978). The owner’s lack of knowledge of the crime committed by his agents with the
confiscated but its value was assessed and owed to the Crown.\textsuperscript{26} The underlying rationale of the deodand was that the destruction of human life threatened the general welfare, and the resultant harm could be averted only through expiation of the "offending property."\textsuperscript{27} Although the deodand was abolished by statute in 1846,\textsuperscript{28} the Supreme Court has recognized it as the predecessor of American forfeiture statutes.\textsuperscript{29}

In America, the belief that forfeiture worked an undue hardship resulted in the constitutional prohibition of corruption of the blood and forfeiture of estate for treason except during the life of the person.\textsuperscript{30} Moreover, the First Congress of the United States enacted legislation forbidding corruption of the blood and forfeiture of the estate upon a felony conviction.\textsuperscript{31} Despite these prohibitions, however, forfeiture pursuant to statutory designation survived.\textsuperscript{32}

offending object was no defense to the forfeiture. O.W. Holmes, \textit{supra} note 18, at 25. Thus, "if the master and mariners of a ship furnished with letters of reprisal, committed piracy against a friend of the king, the owner lost the ship by the admiralty law, although the crime was committed without his knowledge or assent." \textit{Id.}

\textsuperscript{26} Finkelstein, \textit{supra} note 24, at 185. The money assessed under the deodand sanction was then offered to the church as a gift to God (deodand is from the Latin, \textit{deo dandum}, which means to be given to God) for the good of the victim's soul. See 3 W. Blackstone, \textit{supra} note 18, at *300; Smith, \textit{supra} note 25, at 661.

\textsuperscript{27} See Finkelstein, \textit{supra} note 24, at 249. Another purpose of the deodand was to support the decedent's dependents. Smith, \textit{supra} note 25, at 661.

\textsuperscript{28} An \textit{Act to Abolish Deodands}, 1846, 9 & 10 Vict., ch. 62.

\textsuperscript{29} See Goldsmith-Grant Co. v. United States 254 U.S. 505, 510-11 (1921). In discussing forfeiture under a federal tax fraud statute, the Court noted that "[t]here is some analogy to the law of deodand, by which a personal chattel that was the immediate cause of death of any reasonable creature was forfeited." \textit{Id.} at 510. Quoting Blackstone, the Court noted that "[a] like punishment is in like cases inflicted by the Mosaic law . . . ." \textit{Id.} at 511. See also United States v. One 1963 Cadillac Coupe de Ville Two-Door, 250 F. Supp. 183, 185 (W.D. Mo. 1966); United States v. One 1960 Mercury Station Wagon, 5 Conn. Cir. Ct. 1, 240 A.2d 99, 102 (1968).

\textsuperscript{30} U.S. Const. art. III, § 3, cl. 2. Section 3, clause 2 provides:

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.


\textsuperscript{31} See \textit{Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117} (presently codified at 18 U.S.C. § 3563 (1970)).

\textsuperscript{32} See C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943); Smith, \textit{supra} note 25, at 661-62; Note, \textit{supra} note 13, at 779-80. While deodands and forfeitures consequent to attainder have not been adopted in America, statutory forfeitures have nevertheless thrived. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682-83 (1974). For instance, in rem forfeiture was utilized in America before the adoption of the Constitution, \textit{Id.} at 683 (quoting C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943)), and its use has not abated, 416 U.S. at 683.
The early forfeiture statutes, as well as most of their modern counterparts, provide for civil in rem proceedings against the "offending property." These statutes have been consistently upheld on the theory that the proceeding against the property stands independent of any action against the individual. The enactment of RICO and CCE, however, represents an unprecedented acceptance of in personam forfeiture of property for criminal violations. Unlike civil in rem proceedings, criminal in personam forfeiture statutes proceed against the offending individual and impose forfeiture

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34 See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-84 (1974); Various Items of Personal Property v. United States, 282 U.S. 577, 580 (1931); Dobbins Distillery v. United States, 96 U.S. 395, 401 (1877); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 237 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827). The basic rationale of this line of cases was articulated by Justice Story in The Palmyra: The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . . Many cases exist, where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent on each other. But the practice has been, and so this Court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam. . . . In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature.


35 See RICO S. REP., supra note 2, at 79-90. The Department of Justice has commented:

The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is in rem against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense . . . .

Id. at 79. CCE contains the same in personam feature. See United States v. Spilotro, 680 F.2d 612, 615, 617 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981); United States v. Veon, 538 F. Supp. 237, 246 (E.D. Cal. 1982); REPORT OF THE COMPTROLLER GENERAL, supra note 1, at 5.
as an additional criminal sanction. While the forfeiture provisions of RICO and CCE have been challenged as unconstitutionally vague, as cruel and unusual punishment, as violative of the prohibition against double jeopardy, as constituting a bill of attainder, and as violative of the due process protections of the 5th and 14th amendments, both statutes have consistently withstood the attacks.

THE FORFEITURE PROVISIONS OF RICO AND CCE

Designed to counteract the expanding influence of organized crime, RICO and CCE seek to achieve their goals through similar means. RICO prohibits the investment of income derived from a pattern of racketeering activity in "any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce." Also prohibited is the acquisition or maintenance of such an enterprise through a pattern of racketeering. The statute pro-

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38 In addition to forfeiture, both statutes provide for fines and imprisonment upon a finding of guilt. See 18 U.S.C. § 1963(a) (1976); 21 U.S.C. § 848(a)(1)(2) (1976). Upon conviction, "interests" under RICO and CCE and "profits" under CCE are subject to forfeiture. 21 U.S.C. § 848(a)(1)-(2) (1976). The Federal Rules of Criminal Procedure have been amended specifically to include procedures to implement in personam forfeiture. See Fed. R. Crim. P. 7(c)(2), 31(e), 32(b)(2), 54(b)(5).


43 Id. § 1962(b)-(c). Under RICO 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. . . . 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 partici-
vides for forfeiture of any interest maintained in such an enterprise. Upon a conviction pursuant to RICO, the government may acquire the felon's interest in a legitimate or illegitimate enterprise, provided the interest was acquired through illegitimate means or with funds acquired through such means. Clearly, these provisions can have a substantial impact upon the economic base of organized crime. Moreover, CCE provides for the forfeiture of the profits derived by the individual from a continuing criminal enterprise, in addition to any interest in such an enterprise. This Act, therefore, seeks to divest the wrongdoer of the fruits of his crime as a means of curtailing the influence of organized crime.

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pate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.  

"Id. § 1963(a)(1)-(2). The Act states:

Whoever violates [RICO] 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 [RICO], 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 [RICO].


46 21 U.S.C. § 848(a)(2),(b) (1976). The CCE provides:

Any person who is convicted . . . of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over such enterprise.

Id.  

"Id. § 848(b); see supra note 46.

48 See REPORT OF THE COMPTROLLER GENERAL, supra note 1, at 915.
Both statutes authorize the district court to implement forfeiture by entering restraining orders, accepting performance bonds, or taking whatever action it believes necessary to achieve the forfeiture.\(^4\) Accordingly, the district court is granted broad latitude in the preconviction stage in dealing with property subject to forfeiture under either RICO or CCE.\(^5\) A typical action proceeds upon the issuance of a grand jury indictment alleging the defendant’s violation of the particular statute and specifying the property subject to forfeiture under the statute.\(^6\) Upon return of the indictment, the government moves for a restraining order to be placed upon this property.\(^7\) Such a motion is made upon an ex parte demonstration of evidence or merely by governmental request.\(^8\) When the restraining order is entered, it remains in effect until final resolution of the conflict and prevents the defendant from selling, transferring, encumbering or disposing of the property.\(^9\) If the defendant is ultimately found guilty, the jury returns


\(^{51}\) See FED. R. CRIM. P. 7(c)(2). Forfeiture may only ensue in a criminal proceeding when the indictment alleges the extent of the property subject to forfeiture. Id. The indictment will thus serve to give the defendant notice of the government’s intent to seek forfeiture of specified property. See id.

\(^{52}\) See, e.g., United States v. Spilotro, 680 F.2d 612, 616 (9th Cir. 1982); United States v. Veon, 538 F. Supp. 237, 240 (E.D. Cal. 1982). The indictment gives the defendant notice of what property is subject to forfeiture. It is therefore reasonable to conclude that the defendant may attempt to transfer his property. See United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981). The restraining order thus serves to prevent a preconviction transfer of assets. RICO H.R. REP. supra note 2, at 57; see also United States v. Spilotro, 680 F.2d 612, 616 (9th Cir. 1982) (discussing the ability of the district court to enter restraining orders). The restraining order cannot issue until the indictment is returned. Weiner, supra note 44, at 250.


\(^{54}\) See, e.g., United States v. Spilotro, 680 F.2d 612, 614 (9th Cir. 1982) (defendant restrained from "disposing of any title to, assets of or interest in [his business] during the pendency of the criminal proceedings"); United States v. Bello, 470 F. Supp. 723, 724-25 (S.D. Cal. 1979) (restraining order entered preventing defendant from "selling, transferring, or otherwise disposing of or encumbering" his residence or business assets); see United
a special verdict, which lists the property subject to forfeiture\textsuperscript{55} and authorizes the attorney general to seize it.\textsuperscript{56}

The entire process, particularly the entry of a restraining order prior to conviction, subjects the individual to substantial hardship. For instance, in \textit{United States v. Crozier},\textsuperscript{57} the district court granted a restraining order on "virtually all [the defendant's] real and personal property" pursuant to a CCE indictment.\textsuperscript{58} Similarly, in \textit{United States v. Thevis},\textsuperscript{59} a restraining order was entered to restrict the payments made out of the defendant's business.\textsuperscript{60} As a result, the defendant was unable to make alimony and support payments and was threatened with a lawsuit.\textsuperscript{61} Particularly troublesome is the fact that after the trial in \textit{Thevis}, the government chose not to pursue the forfeiture of much of the property covered by the restraining order.\textsuperscript{62}

While RICO and CCE both authorize entry of a restraining order to prevent a preconviction transfer of assets, neither statute indicates the procedural methods to be employed in securing such an order.\textsuperscript{63} The statutes do not afford the defendant an opportunity to challenge the entry of the restraining order prior to trial. Further, neither statute provides a procedure to expedite the trial.

\begin{footnotes}
\item[55] \textit{FED. RULE CRIM. P. 31(e).} Rule 31(e) provides that a special verdict will be returned to the extent of the property subject to forfeiture whenever an indictment subjects a defendant to forfeiture. \textit{Id.; see 1972 Amendments, supra note 13, at 159-60; Rule 31(e) advisory committee note.} For the jury to conclude that property is subject to forfeiture, they must find beyond a reasonable doubt that the property to be forfeited is related to the RICO or CCE violation. \textit{See Weiner, supra note 44, at 252.}
\item[56] \textit{FED. R. CRIM. P. 32(b)(2); see also 1972 Amendments, supra note 13, at 160.} Rule 32(b)(2) advisory committee note (specifically applying Rule 32(b)(2) to RICO and CCE).
\item[57] \textit{674 F.2d 1293 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3394 (U.S. Nov. 15, 1982) (No. 82-819).}
\item[58] \textit{Id. at 1295-96.} Part of the property restrained was not Crozier's, but that of a codefendant. \textit{Id. at 1295.} The codefendant occupied the same house, but her property was not subject to forfeiture under the indictment. \textit{Id.} Additionally, property jointly owned by the two was restrained. \textit{Id.}
\item[60] \textit{See id. at 145.}
\item[61] Taylor, supra note 12, at 394.
\item[62] \textit{Id. The special verdict returned by the jury in Thevis further limited some of the property sought. Id.}
\item[63] \textit{See supra notes 12-14 and accompanying text.}
\end{footnotes}
nor penalties for delay. Thus, the only option left to a defendant deprived of virtually all his property is to await the outcome of the trial.

In the absence of specific statutory guidance, several courts have upheld RICO against procedural due process challenges. In United States v. Bello, the Southern District of California held that a grand jury indictment provided sufficient probable cause to subject the property to restraint pending the outcome of the trial. The court rejected the defendant’s claim that the restraining order constituted a violation of due process, analogizing the entry of a restraining order to the posting of a bail bond by a defendant to ensure his appearance at trial. In United States v. Scalzitti, a Pennsylvania district court held that the restraining order issued pursuant to an indictment did not deprive the defendant of any property interest, but merely served to protect the status quo. Scalzitti did not address the question of a hearing either before or

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64 See Tarlow, supra note 44, at 295 & n.732; cf. Crozier, 674 F.2d at 1297 (restraint pending outcome of criminal trial may result in unjust deprivation with no remedy for the loss).
65 See Crozier, 674 F.2d at 1296.
68 Id. at 724. The Bello court held that the grand jury indictment provided probable cause to believe that the defendant was guilty of a RICO violation and that the property was subject to forfeiture under the Act. Id. But see United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976) (a “mere indictment . . . [containing] only conclusory allegations” held to be an insufficient ground upon which to restrain property), aff’d in part and vacated and remanded in part, 591 F.2d 1347 (4th Cir.), aff’d en banc, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980).
69 470 F. Supp. at 724-25. The court rejected the defendant’s argument that the restraining order constitutes a pretrial determination of guilt. Id. The district court in Mandel noted that in order for the government to obtain a restraining order on the defendant’s property, it would be necessary for the prosecution to prove that they are likely to prevail at the trial. 408 F. Supp. at 682. The court held, however, that such a finding would be inconsistent with the presumption of defendant’s innocence. Id. at 683.
70 470 F. Supp. at 724-25.
72 Id. at 1015. The court held that the defendant’s claim of deprivation was premature since a restraining order serves only to preserve the existing situation. Id. But see supra note 12 & infra notes 84-96 and accompanying text (restraint of property is the equivalent of seizure).
73 408 F. Supp. at 1015. The Scalzitti court analogized the restraining order to a bail bond that a defendant is required to post. Id.; cf. United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (restraining order does not deprive defendant of due process but merely freezes assets pending trial). But see infra notes 91-95 and accompanying text (property seizure is a violation of defendant’s due process rights).
after entry of a restraining order. It is suggested, however, that ex parte restraint of a defendant's property without affording him an opportunity to challenge the order prior to trial raises serious questions as to the sufficiency of procedural safeguards. Apparently recognizing these problems, the Ninth Circuit in United States v. Crozier\textsuperscript{4} and United States v. Spilotro,\textsuperscript{7} concluded that due process mandates a post-seizure hearing.\textsuperscript{7} It is submitted that the mandatory hearing advocated by the Ninth Circuit is essential to preserving the constitutionality of RICO and CCE.

**CONSTITUTIONAL NECESSITY FOR AN ADVERSARIAL HEARING**

Primary among the reasons for advocating an adversarial hearing are the demands of due process. Due process\textsuperscript{77} protections emanate from the fifth\textsuperscript{78} and fourteenth\textsuperscript{79} amendments and impose restraints upon the government's ability to deprive an individual of his liberty or property.\textsuperscript{80} Procedural due process requires that an individual whose liberty and property are to be affected by government action be given notice and an opportunity to be heard in a

\textsuperscript{4} 674 F.2d 1293 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3394 (U.S. Nov. 15, 1982) (No. 82-819).

\textsuperscript{5} 680 F.2d 612 (9th Cir. 1982).

\textsuperscript{6} 680 F.2d at 616-18; 674 F.2d at 1297.

\textsuperscript{7} Due process guarantees have their origin in the Magna Carta, which was intended to "secure the subject against the arbitrary action of the crown and place him under the protection of the law." Dent v. West Virginia, 129 U.S. 114, 123 (1889). Today, due process requirements similarly protect the individual from arbitrary government action. See Kelley v. Johnson, 425 U.S. 238, 244 (1976). Due process is a flexible concept, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), which works to protect individuals within the context of a particular situation, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 848 (1977) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Due process protection includes both a substantive and procedural aspect. Kelley v. Johnson, 425 U.S. at 244. Substantive due process reaches "those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." Poe v. Ullman, 367 U.S. 497, 541 (1961). Procedural due process relates to the process necessary when government action subjects an individual to possible deprivation of life, liberty or property. See Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972).

\textsuperscript{7} U.S. CONST. amend. V. The fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Id.

\textsuperscript{8} U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Id.

"meaningful" time and manner. Compliance with these requirements necessarily involves a two-step inquiry. First, the court must determine whether the individual has a property interest which entitles him to due process protection. Second, if the individual's property interest is sufficient, the court must decide what level of process is due.

In assessing whether an individual has a property interest which triggers due process safeguards, the interests protected by the Constitution serve as guidelines. The fourteenth amendment's protection encompasses "[t]he security of interests that a person has already acquired in specific benefits," including all the interests to which an individual is entitled. Accordingly, property interests protected by the fourteenth amendment include vehicles, consumer goods, utility services, wages and bank accounts.

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81 Robinson v. Hanrahan, 409 U.S. 38, 39-40 (1972); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385, 394 (1914). The opportunity to be heard necessarily implies that the individual is entitled to notice. Grannis v. Ordean, 234 U.S. at 394; Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863). The underlying rationale for requiring an opportunity to be heard, in cases involving seizure of property, is to protect the individual's right to use and possess the property and to minimize the possibility of an erroneous deprivation. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Due process protection "reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Id. (citation omitted).


85 Board of Regents v. Roth, 408 U.S. 564, 576 (1972). An individual "must have more than an abstract need" for the property, as well as a "legitimate claim" to it, in order to have a protected property interest. Id. at 577.

86 See Board of Regents v. Roth, 408 U.S. 564, 576 (1972). The protection of "property" has been interpreted expansively to include protection of "any significant property interest." Fuentes, 407 U.S. at 86 (quoting Bodde, 401 U.S. at 379). Property interests are not limited to ownership interests but extend to include statutory entitlements, Bell v. Burson, 402 U.S. 535, 539 (1971), and interests in goods purchased under a conditional sales contract, Fuentes, 407 U.S. at 86. The protection of the fourteenth amendment is not limited to goods which are necessities. Id. at 90.


88 See, e.g., Fuentes v. Shevin, 407 U.S. 67, 87 (1972) (goods purchased on conditional sales contract, where full title had not yet vested in the buyer, constitutes sufficient property interest to invoke due process protection).

89 See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978) (termination of utility services without notice or an opportunity to present the complaint violates due process).

Under RICO and CCE, property subject to forfeiture and thus to entry of a restraining order includes the defendant's interest in an enterprise, as well as the profits on income the defendant derives from such enterprise. Therefore, it is submitted that property subject to restraint under RICO and CCE forfeiture provisions is within the purview of the property interests protected under the due process clause.

Step two of the due process inquiry mandates determination of the process due in light of the interest at stake. The property interest involved in proceedings under RICO and CCE is the individual's right to possess property freely and to dispose of it as he chooses. This property interest must be accorded great weight in view of the potential length of the deprivation as well as the potentially large investment subject to forfeiture. The duration of an erroneous deprivation is a significant factor to be considered in assessing the process due. As neither RICO nor CCE provides for expedition of the trial, the action will proceed along the course of

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93 See supra notes 44-47 and accompanying text. Under these two statutes, restraining orders have been entered upon houses, see, e.g., United States v. Crozier, 674 F.2d 1293, 1296 (9th Cir.) (restraining order placed on defendant's home pursuant to CCE indictment), petition for cert. filed, 51 U.S.L.W. 3394 (U.S. Nov. 15, 1982) (No. 82-819); United States v. Bello, 470 F. Supp. 723, 724 (S.D. Cal. 1979) (restraining order entered on defendant's home, which government contended was purchased with money derived from racketeering), businesses, see, e.g., United States v. Spilotro, 680 F.2d 612, 614 (9th Cir. 1982) (restraining order entered on business pursuant to indictment under RICO charging racketeering activity in connection with the conduct of the business); United States v. Scalzitti, 408 F. Supp. 1014, 1014-15 (W.D. Pa. 1975) (restraining order entered on defendant's business pursuant to a RICO indictment), jewelry, see, e.g., United States v. Crozier, 674 F.2d at 1296, and vehicles, see, e.g., United States v. Long, 654 F.2d 911, 912 (3d Cir. 1981) (pursuant to CCE indictment, restraining order entered upon the defendant's airplane).
94 It may be argued that property sought to be forfeited under RICO and CCE is not within the protection of due process because it is property which an individual has illegally obtained, and thus he has no legal entitlement to it. This argument must be discounted, however, because the criminal defendant is accorded a presumption of innocence. See infra text accompanying note 118. Further, there is no established nexus between the property alleged to be forfeited in a RICO or CCE indictment and the crime allegedly committed. See infra text accompanying notes 122-23. Absent sufficient proof of violation of a crime, the defendant's connection to the crime, and a nexus between the property and the crime allegedly committed, there is no justification for restraint of the property. Cf. infra notes 126-31 and accompanying text.
95 See supra note 54 and accompanying text.
other criminal actions. Thus, the potential risk of a lengthy deprivation is high, as the restraining order will remain on the property pending resolution of the conflict. Moreover, the weight of the property interests is strengthened by the likelihood that substantial investments will be at stake, given that both RICO and CCE grant the government broad authority to employ the forfeiture and attack the economic base. Arguably therefore, the property interests involved require the due process protections of a hearing.

Arguably therefore, the property interests involved require the due process protections of a hearing.

In addition to the due process argument, two other arguments may be advanced in favor of provision for a hearing pursuant to the entry of a restraining order. Entry of a restraining order on a defendant's property in the absence of a probable cause finding may result in a violation of the sixth amendment right to counsel. See United States v. Veon, 538 F. Supp. 237, 247 n.16 (E.D. Cal. 1982); United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1982). In order to guarantee a defendant's right to a fair trial, he is entitled to the assistance of counsel. Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Gideon v. Wainwright, 372 U.S. 335, 340 (1963). The right to counsel has been interpreted to include more than just the right to be represented by an attorney. It has been interpreted to mean the "right to a meaningful attorney-client relationship." Slappy v. Morris, 649 F.2d 718, 721 (9th Cir. 1981), cert. granted, 102 S. Ct. 2005 (1982); see United States v. Green, 680 F.2d 183, 188 (D.C. Cir. 1982). This right includes such factors as trust, confidence, candor, communication, Slappy, 649 F.2d at 720 (quoting McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974)), and complete fidelity between the attorney and his client, Green, 680 F.2d at 192 (Bazelon, J., dissenting). Therefore, it is argued that the sixth amendment right to counsel includes the right to hire counsel of choice. Restraint of a defendant's assets can freeze available financial resources and render him unable to hire counsel. See United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979). While court-appointed counsel is available to a defendant, it is submitted that precluding an individual from entering into the attorney-client relationship of his choice violates his sixth amendment right to counsel.

Further, the issue of the necessity for a hearing pursuant to in personam seizure may be resolved by looking solely to principles of statutory construction. See United States v. Veon, 538 F. Supp. 237, 243-45 (E.D. Cal. 1982). The principle of lenity states that a court "will not interpret a federal criminal statute so as to increase the penalty it places on an individual, when such an interpretation can be based on no more than a guess as to what Congress intended." Ladner v. United States, 358 U.S. 169, 178 (1958); see Whalen v. United States, 445 U.S. 684, 695 n.10 (1980); United States v. Bass, 404 U.S. 336, 347 (1971). Lenity is applicable when an ambiguity exists in a statute, Bifulco v. United States, 447 U.S. 381, 387 (1980), and extends to the ambit of the statute and its penalties, Albernaz v. United States, 450 U.S. 333, 342 (1981). As ambiguity exists in both the RICO and CCE statutes in relation to the necessity for a hearing, it is submitted that strict construction of those statutes in favor of a criminal defendant requires that the statutes be construed so as to provide for a hearing. Veon, 538 F. Supp. at 243; see Busic v. United States, 446 U.S. 398, 407 (1980).
The term "hearing," however, contemplates a wide range of proceedings. It is therefore necessary to set out the appropriate components of the proposed postseizure hearing.

HEARING REQUIREMENTS

Procedural due process is a flexible concept which does not mandate any standard form of hearing. Rather, it requires an analysis of the particular fact situation to determine the appropriate form of proceeding. Establishing the requisite formalities of the hearing requires a balancing of such factors as the nature of the proceeding, the value of the property interest to the individual involved, whether the government's action deprives an individual of property he possesses or simply denies him a potential benefit, and the government interest at stake. The balancing of these factors in the context of RICO and CCE restraining orders results in the following proposed set of hearing requirements.

(where the text of a statute fails to address an issue, an ambiguity exists and the rule of lenity applies).


Cramton, A Comment on Trial-Type Hearings In Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 592 (1972); see K. Davis, supra note 97, § 13.0, at 236. One commentator has noted that a determination of the adequacy of administrative proceedings turns on "the extent to which the procedure furthers the accurate selection and determination of relevant facts and issues, the efficient disposition of business, and, when viewed in the light of the statutory objections, its acceptability to the agency, the participants, and the general public." Cramton, supra at 592. Professor Davis suggests that the traditional two-part due process test, see supra text accompanying notes 82-83, is in fact a three-tiered inquiry: 1) is the interest a protected one?; 2) if it is, does due process mandate a hearing?; 3) if it does, then what kind of hearing is required? K. Davis, supra note 97, § 13.0, at 256; see, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (an analysis of the private interest, the risk of an erroneous deprivation, and the government interest involved, requires something less than an evidentiary hearing prior to deprivation of social security benefits); Bell v. Burson, 402 U.S. 535, 540-41 (1971) (examination of the purpose of the hearing in light of subsequent procedures as well as the government interest and the expense requires a hearing before suspension of a driver’s license); see Goldberg v. Kelly, 397 U.S. 254, 261 (1974) (analysis of the need to protect public funds, the individual’s need to be protected from a deprivation of financial assistance, and the expense of a hearing requires an evidentiary hearing before termination of welfare benefits).

K. Davis, supra note 97, § 13.12, at 509-12; B. Schwartz, Administrative Law § 93, at 258-59 (1976); Friendly, supra note 97, at 1296-1304; see Mashaw, Administrative Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423-24 (1981); infra notes 144-45.
Preseizure v. Postseizure Hearing

Initially, it is necessary to determine the time at which a hearing should be granted. Due process requires that an individual be given notice and an opportunity to be heard before his rights are affected.\(^{100}\) The Supreme Court has recognized, however, that certain “extraordinary circumstances” exist in which a compelling governmental reason justifies postponement of the hearing until after the deprivation.\(^{101}\) Courts have permitted postseizure hearings where property was seized in aid of the war effort,\(^{102}\) to protect against a potential bank failure,\(^{103}\) to protect the general public from misbranded drugs,\(^{104}\) and where seizure was pursuant to in rem forfeiture.\(^{105}\) Each of these situations presents the same compelling factors justifying postponement of the hearing: (1) the seizure is necessary to protect an important government or public interest, (2) there is a need for quick action, and (3) the state strictly controls the force exerted.\(^{106}\) Consideration of the RICO and CCE forfeiture situations indicates the presence of the same three factors, thereby warranting a postponement of the hearing.

\(^{100}\) See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); supra note 81 and accompanying text. Justice Frankfurter noted that “the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” 341 U.S. at 168. Notice protects the individual against an arbitrary deprivation of the right to use and possess property. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). Further, the most effective means of arriving at the truth is to give the individual notice and an opportunity to prepare his case. Id. However, for notice and hearings to serve their purpose, they “must be granted at a time when the deprivation can still be prevented.” Id. at 81. Future hearings and damage awards cannot correct the harm caused by an arbitrary deprivation effected in the absence of the necessary procedural due process. Id. at 82; see generally Simet, The Right To A Pre-Deprivation Hearing Under the Due Process Clause—Constitutional Priorities and a Suggested Method for Making Decisions, 11 CREIGHTON L. REV. 1201, 1212 (1978) (property owners have a right to procedural protection prior to a deprivation).


\(^{102}\) See, e.g., United States v. Pfitsch, 256 U.S. 547, 548 (1921); Stoehr v. Wallace, 256 U.S. 239, 246-46 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921).

\(^{103}\) See, e.g., Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947).


\(^{106}\) Id. at 678 (citing Fuentes v. Shevin, 407 U.S. 67, 91 (1972)).
CRIMINAL FORFEITURE

until after the seizure. First, the government has a compelling interest in preventing the illegal use of property and in enforcing the criminal law.\textsuperscript{107} Similarly, the government must act quickly to prevent a preconviction transfer of property which would frustrate the goals of the statute.\textsuperscript{108} Finally, the restraint of property is conducted entirely by government officials and is strictly within their control.\textsuperscript{109} Therefore, it is submitted that while RICO and CCE seizures mandate a hearing as a matter of due process, the hearing may justifiably be postponed until after the entry of the restraining order.

Hearing Format

In establishing the proper procedures to be utilized at the postseizure hearing, it is important to emphasize that forfeiture pursuant to RICO and CCE is essentially criminal in nature.\textsuperscript{110} A criminal defendant must be provided with more stringent procedural safeguards in light of the relative strength of the state against him, the possible sanctions facing him, and the stigma attached to criminal proceedings.\textsuperscript{111}

Accordingly, it is suggested that the postseizure RICO and CCE hearing adopted by the federal courts be patterned after the postarrest hearing currently employed to determine if there is probable cause to justify holding criminal suspects for further judicial action.\textsuperscript{112} The preliminary examination provided for under the

\begin{footnotes}
\item[107] Cf. id. at 679 (under in rem forfeiture statute, government found to have a compelling interest in preventing illegal use of property and enforcing criminal sanctions).
\item[108] Cf. id. (strong government interest in preventing transfer prior to conviction).
\item[109] Cf. id. (neutral government officials control in rem seizure as opposed to "subinterested private parties"); Ewing v. Mytinger & Casselberry, 339 U.S. 594, 598-99 (1950) (seizures and suits are dependent on the discretion of the attorney general); Fahey v. Malonee, 332 U.S. 245, 250-54 (1947); (Federal Home Loan Bank Board prescribes rules and regulations for appointments for conservators); Phillips v. Commissioner, 283 U.S. 589, 595 (1931) (government has right to collect tax by summary administrative proceedings); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315-16 (1908) (health officials determine if food is unfit).
\item[110] See supra notes 35-36 and accompanying text.
\item[111] See In re Winship, 397 U.S. 358, 363 (1970); McNabb v. United States, 318 U.S. 332, 343-44 (1943). The Winship Court noted that "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." 397 U.S. at 363.
\end{footnotes}
The federal rules is an adversarial hearing, held promptly after arrest, which affords the accused the right to counsel, the right to confront and cross-examine witnesses, the right to subpoena witnesses, and the right to present evidence in his own behalf. This type of hearing, held to be sufficient protection against improper restraint of the liberty of a criminal defendant, is arguably sufficient to safeguard against improper restraint of an individual's property.

Applying these procedures to the postseizure hearing under RICO and CCE would provide the individual an adequate opportunity to challenge the imposition of a restraining order. Additionally, the procedural safeguards encompassed in such a hearing would serve to reduce, if not to prevent, potential errors inherent in determining which items of property may ultimately be subject to forfeiture. Finally, this form of postseizure hearing would...

§§ 85-86, at 171-87 (1982). The preliminary examination is a constitutionally mandated hearing, the purpose of which is to determine whether or not probable cause exists to restrain an individual's liberty pending trial. Gerstein v. Pugh, 420 U.S. 103, 114 (1975); see 1 C. Wright, supra, § 86, at 185. But see United States v. Veon, 538 F. Supp. 237, 249 n.18 (E.D. Cal. 1982) (distinguishing the preliminary examination to detain a criminal defendant from a RICO hearing to restrain property).

113 1 C. Wright, supra note 112, § 85, at 180-85. The defendant has a right to counsel under federal rule 44(a), FED. RULE CRIM. P. 44(a). Further safeguards are provided under federal rule 5.1(a), which states in part:

If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf.

Id. 5.1(a). But see Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("full panaply of adversarial safeguards" need not be provided). The federal rules, however, go beyond the constitutional minimum required by the majority in Gerstein. See 1 C. Wright, supra note 112, § 85, at 180-85.

114 See Fed. R. Crim. P. 5.1(a); 1 C. Wright, supra note 112, § 86, at 185-87; see also Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (in preliminary hearings "the detached judgment of a neutral magistrate is essential"); Friendly, supra note 97, at 1279 ("an unbiased tribunal is a necessary element in every case where a hearing is required").


116 A determination of sufficient cause justifying restraint of property will often involve complex factual issues. See Weiner, supra note 44, at 248 & n.88; see also Magarity, RICO Investigations: A Case Study, 17 AM. CRIM. L. REV. 367, 369 & n.16 (1980). Forfeiture pursuant to RICO and CCE may concern difficult financial questions, Weiner, supra note 44, at 248 n.88, tracing problems, id. at 255-56, and questions of ownership, see United States v. Crosier, 674 F.2d 1293, 1296 (9th Cir. 1982); cf. United States v. Veon, 538 F. Supp. 237, 246...
serve to avoid the administrative burden of a "full-blown" trial on
the merits prior to adjudication of the pending criminal charges.\footnote{117} Having advanced a postseizure hearing modeled after the pre-
liminary hearing afforded criminal defendants as that most appro-
priate in RICO and CCE prosecutions, attention is now focused
upon the procedural aspects of the hearing.

**Evidentiary Issues**

Both RICO and CCE are criminal statutes which provide for
criminal sanctions, including forfeiture. Therefore, an individual
indicted under either statute is presumed innocent until proven
guilty.\footnote{118} As in any criminal case, the prosecution bears the burden
of proving guilt.\footnote{119} Because the forfeiture sanction is inextricably
tied to the guilt of the individual, it is submitted that the govern-
ment must necessarily bear the burden of proof at a hearing chal-
lenging the seizure of property pursuant to the criminal indict-
ment. Additionally, since the proposed postseizure hearing is a
criminal proceeding,\footnote{120} both the Federal Rules of Criminal Pro-
dure and the Federal Rules of Evidence should apply.\footnote{121}

\footnote{117} Since the indicted individual will be accorded a full opportunity to adjudicate his
claim at trial, it is submitted that lack of a full hearing in the preliminary stage is justified.
\footnote{119} See infra text accompanying note 121.
\footnote{120} See infra text accompanying note 121.
\footnote{121} FED. R. CIuM. P. 1; FED. R. EVID. 1101(b). The Federal Rules of Criminal Procedure
were amended to encompass the in personam forfeiture provisions of RICO and CCE. See
1972 Amendments, supra note 13, at 156-57, 159-60, 179-80, Rules 7(c)(2), 31(e), 32(b)(2),
54(b)(5) advisory committee notes. The Federal Rules of Evidence apply to all "criminal
cases and proceedings." FED. R. EVID. 1101(b).
Elements to be Proven

Both statutes authorize the district court to take whatever action it deems necessary in connection with the property to be forfeited. This broad discretion could lend itself to abuse by the government, by permitting restraint of virtually all of an individual’s property without establishing its connection to the RICO or CCE violation. By requiring the government to show that the property it seeks to have restrained is property subject to forfeiture, it is possible to prevent such abuse. It is submitted that the government will satisfy its burden by proof of two elements. First, the government must show that probable cause exists to believe that the defendant is guilty of violating either RICO or CCE. An additional nexus requirement will mandate that the government establish that each item of property sought to be restrained is connected to a violation of the statute and is therefore subject to forfeiture.

Standard of Proof

The postseizure hearing will provide the forum for the presen-
tation of evidence sufficient to justify pretrial restraint of an indicted individual's property because of its alleged connection with a crime. The suggested standard of proof for the postseizure hearing is probable cause, which comports with the nature of the criminal pretrial proceeding. While several courts have proposed appropriate standards of evidence for the pretrial hearing, there is no clear consensus. For instance, in United States v. Veon, a California district court determined that the government must prove by a preponderance of the evidence that it is "likely to convince a jury beyond a reasonable doubt . . . that the defendant is guilty of violating [the Act] . . . and . . . that the profits or properties at issue are subject to forfeiture. . . ." Adopting the view of the Third Circuit espoused in United States v. Long, the Ninth Circuit in Crozier and Spilotro concluded that the government must show that "it is likely to convince a jury beyond a reasonable doubt" of the existence of the same two elements set forth in Veon.

128 United States v. Veon, 538 F. Supp. 237, 239 (E.D. Cal. 1982); see T. Gardner, supra note 119, at 123. Gardner sets forth the situations in which the probable cause standard of evidence is employed. Probable cause is necessary: 1) at a preliminary hearing to hold the defendant over for trial; 2) to make an arrest; 3) to obtain a search warrant or an arrest warrant; and 4) to make a probable cause search. T. Gardner, supra note 119, at 123. In all instances, the probable cause standard is employed in a criminal "non-trial type" proceeding.

128 Id. at 246-48 (quoting United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981)). The Veon court addressed the question of what standard of proof was appropriate by means of the balancing test set down by the Supreme Court in Santosky v. Kramer, 455 U.S. 745, 754-55 (1982); 538 F. Supp. at 247-48. Santosky recognized that there were three levels of proof applicable in a trial-type proceeding: a preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. 455 U.S. at 755-56. It is submitted, however, that Santosky may be distinguished from RICO and CCE deprivation on the ground that the hearing accorded in the RICO and CCE contexts is a pretrial proceeding. The standard of proof in a pretrial adjudication need not and should not be a standard equivalent to that used at trial. Cf. Gerstein v. Pugh, 420 U.S. 103, 111-12, 120-21 (1975) (in criminal pretrial proceedings the probable cause standard avoids formality of a "full-blown" trial, yet affords sufficient procedural safeguards). Additionally, the pretrial proceeding in the in personam forfeiture action is criminal in nature and the burden of proof should be the one applicable in criminal pretrial cases. See supra notes 35-36 and accompanying text.

129 654 F.2d 911 (3d Cir. 1981).
130 674 F.2d at 1298.
131 680 F.2d at 618.
132 Id.; 674 F.2d at 1298. The Ninth Circuit further propounded that the guidelines for issuance of a civil preliminary injunction may be applied in the context of a criminal RICO or CCE pretrial hearing. Spilotro, 680 F.2d at 617; Crozier, 674 F.2d at 1297. This test proposes four elements that the prosecution must meet in order to obtain a restraining order: 1) a likelihood of prevailing on the merits; 2) irreparable harm will result in the absence
It is submitted that a probable cause standard is more appropriate for the postseizure hearing for several reasons. First, in personam forfeiture is a criminal sanction and restraint pending trial is a criminal action. Probable cause is the standard of proof used in criminal preliminary hearings, while the preponderance standard and the "likely to" standard are civil in nature. Additionally, restraint of a criminal defendant's property is strongly analogous to the restraint of a defendant's liberty and to the seizure of property pursuant to a search. The probable cause standard has been deemed sufficient to restrain a defendant pending trial, to confiscate property which is the fruit of a crime, and to seize contraband. Certainly, if probable cause is sufficient in these instances, it is a constitutionally appropriate predicate to justify the restraint of an individual's property. Finally, use of the probable cause standard is less burdensome than the more stringent preponderance standard. A stricter standard could likely lead to extended hearings, with the parties introducing more evidence, calling more witnesses, and essentially trying the case on the merits in an effort to meet or overcome their burden of proof. It is submitted that the

of relief; 3) the issuance will not substantially harm other parties; and 4) the public interest supports the issuance. United States v. Mandel, 408 F. Supp. at 682. It is submitted that requiring the prosecution to prove that "it is likely to convince the jury beyond a reasonable doubt" is a vague standard of proof. Cf. Veon, 538 F. Supp. at 246-47 n.13 (stating that the standard set down in Mandel is the degree of persuasion and not a standard of proof). Additionally, it is suggested that the four-part preliminary injunction test does not provide a sufficient method of determining whether a restraining order should enter in a RICO or CCE hearing. The first inquiry has been criticized as a pretrial determination of guilt annihilating the defendant's right to a fair trial. 408 F. Supp. at 683. Secondly, proof of irreparable harm can easily be shown by evidence of a possible preconviction transfer or disposition of property. See id. Thirdly, the public interest inquiry will automatically be met as the proceeding is criminal and the public interest in removing legitimate business concerns from the reach of organized crime is a strong one. Id.

See supra notes 35-36 and accompanying text.


See United States v. Veon, 538 F. Supp. 237, 244 n.4 (E.D. Cal. 1982) ("employing in rem procedure in a criminal action would raise substantial constitutional issues").

See supra note 117 and accompanying text.

Fed. R. Crim. P. 41(b)(1). Under the Federal Rules of Criminal Procedure certain property can be seized when there is probable cause to believe grounds for such seizure exist. See id. Property which may be seized upon probable cause includes contraband, or fruits or instrumentalities of a crime. See id. 41(b); see also 3 C. Wright, supra note 112, §§ 661-662, at 578-89.
probable cause standard provides adequate procedural protection for the defendant without placing an unnecessary burden on an already overburdened judiciary.

Assessing the Sufficiency of the Suggested Proceeding: The 
Eldridge Test

Before the proposed postseizure hearing can be embraced as an answer to the questions raised by RICO and CCE, it is necessary to examine the extent to which it satisfies due process requirements. The Supreme Court, in *Mathews v. Eldridge*,

\[138\] concluded that in testing the sufficiency of the process to be used in connection with the seizure of property, the interest of the government must be weighed against the interest of the private party.\[139\] Specifically, the following factors must be considered: 1) the private interest that will be affected by the government's action; 2) the risk of erroneous deprivation through the procedures used in light of the potential value of additional safeguards; and 3) the government interest affected in consideration of the fiscal and administrative burdens that alternate hearings would necessarily entail.\[140\]

Clearly, the private interest affected by RICO and CCE prosecutions must be accorded substantial weight in light of the potential length of deprivation and the value of the economic interest at stake.\[141\] As to the second factor, the risk of erroneous deprivation, it is submitted that restraint of property upon the sole basis of a grand jury indictment presents more than ample ground for er-


\[139\] Id. at 334. Due process requires procedures to comport with the protections demanded by the particular situation. *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Therefore, resolution of what procedures are necessary requires an inquiry into both the government and the private interest. *Id.* at 334.

\[140\] 424 U.S. at 335. The *Eldridge* Court addressed the sufficiency of the prescribed agency review in connection with the termination of Social Security disability payments. *Id.* at 324-25. Upon receipt of notice that payments would be discontinued, the individual was entitled to a nonadversarial board review. *Id.* at 339. The Court assessed the sufficiency of this review through the use of three factors. First, the Court determined the weight of the private interest at stake in light of two important considerations: the degree of potential deprivation and the possible length of deprivation. *Id.* at 341-42. Second, to assess the risk of erroneous deprivation, the Court considered the hardship the family would suffer due to loss of monetary resources, *id.* at 342, as well as the fairness and reliability of the proceeding, *id.* at 343, and possible alternative proceedings, *id.* at 344-47. The third factor weighed in *Eldridge* was the public interest in view of the administrative and financial burden alternate hearings would impose. *Id.* at 347-49. The Supreme Court concluded that the existing administrative proceeding was sufficient to assure fair consideration of a claim. *Id.* at 349.

\[141\] See supra notes 94-95 and accompanying text.
Alternatively, a hearing before a neutral and detached magistrate, providing the defendant with such safeguards as the right to counsel, the right to confront and cross-examine witnesses, and the right to present evidence in his own behalf, would vitiate the risk of erroneous deprivation. Further, when similar private interests have been at stake, as in the case of property seizure pursuant to in rem forfeiture, a hearing has been held to be constitutionally mandated. Therefore, it is argued that the private interest is

\[142\] Indeed, while a criminal defendant may be restrained solely on the basis of a grand jury indictment, there are numerous procedural safeguards which protect his rights prior to the trial. 

\[143\] See Friendly, supra note 97, at 1279-95. Judge Friendly lists the elements, in order of priority, that may be afforded at a hearing: an unbiased tribunal, notice, an opportunity to defend, the right to call witnesses, the right to hear evidence against him, and to have the decision based only upon the evidence presented, the right to counsel, the right to a record of the proceedings, and a statement of the reasons, public attendance, and the right to judicial review. See id. The greater the deprivation, the greater the number of procedural safeguards necessary. Id. at 1278. 

\[144\] See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677 (1974). In Calero, the Supreme Court addressed the necessity for a hearing in connection with in rem forfeiture of property. The Court recognized that a hearing was necessary to protect the property owner's due process rights though it may be postponed until after seizure. Id. The Court noted that the forfeiture provisions of the statute in question closely resembled CCE, except for "unimportant differences." Id. at 686-87 n.25. It is submitted, therefore, that the due process requirements of the postseizure hearing mandated after an in rem seizure are similarly applicable to the in personam forfeiture. See Mackey v. Montrym, 443 U.S. 1, 17, 19 (1978) ("something less than a full evidentiary hearing" must be accorded promptly after suspension of a driver's license); Goss v. Lopez, 419 U.S. 565, 582 (1975) (a hearing should precede temporary suspension from school); North Ga. Finishing Co. v. Di-Chem Inc., 419 U.S. 601, 606 (1970) (garnishment of a corporate bank account mandates prior hearing); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (deprivation of welfare benefits mandates the procedural due process protections of a full hearing before termination); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (garnishment of wages is "so obvious" a taking of property as to mandate notice and a prior hearing); Slochower v. Board of Educ., 350 U.S. 551, 559 (1956) (before a professor can be discharged from public employment he must be afforded a hearing consistent with the mandates of due process).
substantial, and provision for a hearing could greatly reduce the risk of erroneous deprivation.

The third consideration requires an assessment of the fiscal and administrative burden a hearing would entail. The proposed adversarial hearing would be conducted before a neutral and detached magistrate. Such a proceeding is employed in other administrative actions, and, as has been noted, is analogous to the probable cause hearing afforded a pretrial detainee. It is submitted that this type of hearing, when used in other contexts, has not proved to be an unjustifiable drain upon fiscal and administrative resources. Further, in light of the argument that the hearing is constitutionally implied to protect the defendant's due process rights, the fact that the hearing might result in a greater administrative and financial burden becomes irrelevant. It is submitted that any additional burden imposed by a hearing does not and cannot override the need for its protections mandated by consideration of the dictates of the due process clause.

CONCLUSION

By providing for the unprecedented penalty of in personam forfeiture, RICO and CCE are unique statutes in American jurisprudence. While frequently the subject of constitutional attack and opposing judicial interpretation, these two statutes have survived scrutiny. It is submitted that to preserve their constitutionality, RICO and CCE must be read to provide the criminal defen-

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140 See supra note 114 and accompanying text.
147 Fed. R. Crim. P. 5.1(a) The Federal Rules of Criminal Procedure provide that “[a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . . .” Id. The purpose of the hearing is to determine if sufficient probable cause exists to detain the defendant. See id. The defendant is entitled to cross-examine adverse witnesses, and to introduce evidence in his own behalf. See id. Detention of an individual can deprive him of rights protected by the Constitution. The probable cause hearing accorded a pretrial detainee is a procedural safeguard which aids in ensuring that the defendant will not erroneously be deprived of his liberty. J. GORA, supra note 142, at 28.
dant with the protections of an adequate hearing immediately after the government restrain property alleged to be subject to forfeiture. Such a requirement minimizes the potential for error and abuse inherent in the broad grant of enforcement power embodied in both statutes.

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