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RICO Pretrial Restraints and Due Process:  
The Lessons of Princeton/Newport

Bruce A. Baird*  
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The Racketeer Influenced and Corrupt Organizations Act ("RICO") has changed the federal legal landscape in a number of ways. One significant area of innovation has been RICO's use of forfeiture as a penalty for RICO criminal offenses. Although forfeiture has deep historical roots as a legal sanction, in recent American legal history the use of

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2 The concept of forfeiture can be traced to ancient Greece and Rome, as well as to Judaic law. See 1 S. Scott, The Civil Law 69 (1932) (Roman law circa 471 B.C. providing: "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury."); O.W. Holmes, The Common Law 7-17 (1881) (Greek law circa 389-314 B.C. providing "[W]e banish beyond our borders sticks and stones and steel, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow afar from the body . . . Id. at 8.); see also 1 W. Blackstone, Commentaries * 301. See generally Finkelstein, The Gorring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temple L.Q. 160 (1973). Chapter 21 of Exodus reveals the religious origins of forfeiture: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned and his flesh shall not be eaten; but the owner of the ox shall be quit." Exodus 21:28. Punishment was not inflicted upon the owner of the ox unless the owner had knowledge that the ox was "wont to push his horn in time past." Deuteronomy 19:5-6. Medieval Britons also recognized the concept of forfeiture, which was passed down to the English common law. O.W. Holmes, supra, at 24-26 ("'Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.'" Id. at 25 (citing Doctor and Student dialogue 2, ch. 51 (n.p. n.d.) (circa 1550)).

The origins of United States forfeiture provisions are found in the common law of early eighteenth century England, which provided for three types of forfeiture: deodand, statutory or in rem forfeiture, and forfeiture consequent to attainder or in personam forfeiture. See generally 4 W. Blackstone, supra, at * 380-89; O.W. Holmes, supra, at 5-33.

The first, deodand, provided for the forfeiture of the instrument of a man's death, irrespective of the guilt or innocence of the owner of the instrumentality. See O.W. Holmes, supra, at 24-25. Deodand was never adopted in the United States, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682-83 (1974); State v. Richard, 301 S.W.2d 597, 600 (Tex. 1957) (describing deodand as "repugnant to the American concept of justice"), and was abolished in England in 1846; see Note, Criminal Forfeitures and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?, 57 St. John's L. Rev. 776, 782 n.28 (1983) (citing An Act to Abolish Deodands, 1846, 9 & 10 Vict., ch. 62 (1846)). Nonetheless, the influences of deodand can be found in United States decisional law. See Goldsmith-Grant Co. v. United States, 254 U.S. 505, 509-11 (1921) (recognizing deodand as the predecessor of United States forfeiture statutes and describing a car as "guilty"); see also United States v. The Little Charles, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15,612) (anthropomorphism of a ship).

The second, statutory forfeiture, typically took place in the context of violations of customs, revenue and admiralty laws, which provided for in rem proceedings for the forfeiture of objects used in the underlying offense. 3 W. Blackstone, supra, at * 261-62; see C.J. Hendrety Co. v. Moore, 318 U.S. 133, 137-42 (1943). Statutory forfeiture became part of American jurisprudence and in rem
in personam forfeiture has been rare. By including forfeiture provisions in RICO, Congress provided for a mechanism to eliminate the profitability of crime. With the possibility of such forfeiture came a provision in the statute for bonds, restraints, or similar devices to be imposed by a court to ensure that property sought to be forfeited would still be available at the time of verdict. The RICO statute was originally silent as to the procedures required in connection with the imposition of such prejudgment restraints, but in 1984 it was amended to eliminate the necessity for any procedures after an indictment issued.

This article will examine the requirements of the due process clause of the fifth amendment of the United States Constitution with respect to RICO pre-judgment restraining orders and will propose that in a narrow group of cases involving restraints on operating business entities a hearing on the reasonableness of the restraint is required before such a restraint can be imposed. Specifically, Part I of this Article discusses the due process law applicable to pre-judgment takings of property. Part II describes the restraints allowed by the RICO statute before and after the 1984 amendments and the judicial responses to the statute. Part III examines the recent Princeton/Newport case in which RICO restraints were imposed on an operating business entity. Part IV proposes a set of procedures consistent with the due process clause for handling similar cases in the future. Drawing support from both general due process principles and Princeton/Newport, this Article posits an exception to the usual criminal forfeiture rule of "sentence first—verdict afterward" when a proposed forfeiture involves an operating business entity.

proceedings have been frequent means of achieving forfeiture in the United States. Calero-Toledo, 416 U.S. at 682-83.

The third, in personam forfeiture, is the historical antecedent of the forfeiture remedy provided for in RICO. Upon conviction of treason or a felony, the defendant was subject to attainder, which resulted in the "extinction of his civil rights and capacities." 4 W. BLACKSTONE, supra, at * 389. Conviction thus resulted in the immediate forfeiture of all of the defendant's personal property, and upon his death, of his real property. 4 W. BLACKSTONE, supra, at * 387, 385; 2 J. KENT, Commentaries on American Law 504-05 (10th ed. 1980). Conviction constituted a "corruption of blood," precluding not only inheritance by him but also precluding his heirs from inheriting through him. 4 W. BLACKSTONE, supra, at * 388; see United States v. Grande, 620 F.2d 1026, 1038 (4th Cir.), cert. denied, 449 U.S. 830 (1980). In personam forfeiture rested on the belief that "all property is derived from society" so that transgression of the social contract results in forfeiture of the privileges afforded by that contract. 1 W. BLACKSTONE, supra, at * 299.

3 Forfeiture consequent to attainder, or in personam forfeiture, rejected by the framers of the Constitution, was prohibited in the United States Constitution, and by an act of the First Congress in 1790. U.S. Const. art. I, § 9, cl. 3; art. III, § 24, 1 Stat. 112, 117 (1790) (codified at 18 U.S.C. § 3563 (1988)) ("No conviction or judgment shall work corruption of blood or any forfeiture of estate.") (repealed as of Nov. 1, 1986, P.L. No. 98-473, 98 Stat. 1987 (1984)). In personam forfeiture was repugnant to the founders because of the profound effect of forfeiture on the criminal's family and heirs, because his entire estate was forfeited upon conviction of treason or a felony, and was subsequently abolished by statute in England, as well. See K. BRICKLEY, CORPORATE CRIMINAL LIABILITY §§ 7.21 & n.427 (1984) (citing 54 Geo. 3, ch. 45 (1814); 33 & 34 Vic. ch.23 (1870)). See generally Note, Bane of American Forfeiture Law-Banished At Last? 62 CORNELL L. REV. 768 (1977).


I. Due Process and Pre-Judgment Takings of Property

The rule, enshrined in our Constitution to protect citizens from the despotic power of any state, is that no one may be deprived of property without due process of law. The concepts of "property" and "due process of law" have each been the subject of definition and redefinition throughout American history. The requirements of due process "reflect[] 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." 6

It is well established that temporary deprivations of property, such as those resulting from the entry of a restraining order, are deprivations of "property" within the meaning of this rule.7 "Due process of law" means at least that there must be notice to the property owner and an opportunity to be heard within a "meaningful time and in a meaningful manner." 8 Ordinarily, that meaningful time is prior to the deprivation of property.9 However, the Supreme Court has recognized that extraordinary circumstances may warrant the postponement of a hearing until after the restraint is in place.10 Such a truly unusual situation may arise when three criteria are met:

1. The seizure is directly necessary to secure an important governmental or general public interest;
2. There exists a special need for prompt action; and
3. The person initiating the deprivation is a governmental official responsible for determining the necessity and justification of the seizure.11

Extraordinary circumstances are often found in criminal cases, for example, when property is seized as contraband or pursuant to search warrant.12 They also arise when important governmental and general public interests are at stake, such as in the case of property seized to aid in war efforts, to protect against bank failures, to prevent misbranded drugs from reaching the market where seizure is pursuant to an in rem

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10 Fuentes, 407 U.S. at 90-92; Sniadach, 395 U.S. at 339. A "root requirement" of due process is the right to a hearing before being deprived of a significant property interest unless the government demonstrates "some valid governmental interest . . . that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (footnote omitted).
11 Fuentes, 407 U.S. at 91.
forfeiture.\textsuperscript{13} A restraining order for the purpose of preserving property for subsequent forfeiture, however, is not automatically an extraordinary circumstance.\textsuperscript{14}

Due process also requires the opportunity to be heard to be meaningful in manner.\textsuperscript{15} In Mathews v. Eldridge,\textsuperscript{16} the Supreme Court enunciated three factors to be balanced in order to identify "the specific dictates of due process": (1) the private interest affected; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens an additional procedural requirement would entail.\textsuperscript{17} This balancing test must be applied when an opportunity to be heard is given in order to determine whether a restraining order to preserve property for subsequent forfeiture comports with due process requirements.

II. RICO Restraint Procedures and Judicial Response

A. The 1970 Legislation

In 1970, the Ninety-First Congress reached back into history\textsuperscript{18} to enact in personam forfeiture provisions as part of the Racketeer Influenced and Corrupt Organizations Act (RICO),\textsuperscript{19} and in its narcotics analogy, the Comprehensive Drug Abuse and Prevention Act.\textsuperscript{20} Congress gave the government this powerful remedy as one weapon in its efforts to fight organized crime by "removing the leaders of organized crime from their sources of economic power,"\textsuperscript{21} and eliminating the profitability of

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\textsuperscript{13} Fuentes, 407 U.S. at 91-92; Note, supra note 2, at 794 & nn. 102-105.
\textsuperscript{15} Fuentes, 407 U.S. at 91.
\textsuperscript{16} 424 U.S. 319 (1976).
\textsuperscript{17} Id. at 335.
\textsuperscript{21} S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). \textit{See} 116 Cong. Rec. 511, 592 (Sen. McClellan) ("Title IX . . . would forfeit the ill-gotten gains of criminals whether they enter or operate an organization through a pattern of racketeering activity."). 602 (Sen. Hruska) ("Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods.") For an extensive discussion of the legislative history of the original RICO forfeiture provisions, see generally, Spaulding, \textit{"Hit Them Where it Hurts"}, \textit{RICO Criminal Forfeitures and White Collar Crime}, 80 J. CRIM. L. & CRIMINOLOGY 197, 198-211 (1989).
crime. Two years later, the Federal Rules of Criminal Procedure were amended to govern criminal forfeitures.22

With the possibility of forfeiture of proceeds of racketeering activity23 of any direct or indirect interest in the RICO enterprise (even a legitimate one),24 came the problem of defendants putting these forfeitable assets beyond the reach of the law before the end of the trial. In order to prevent the dissipation or diversion of assets potentially subject to forfeiture by a person indicted under RICO, the 1970 Act enabled the government to seek ex parte restraining orders against forfeitable property prior to trial.25

In general, following the issuance of a grand jury indictment alleging a RICO violation and specifying the property subject to forfeiture,26 the government moved ex parte for a restraining order.27 The entry of such a restraining order was designed to preserve the property subject to forfeiture by preventing the defendant from disposing of the property subject to the order—whether by sale, transfer, encumbrance or any other method—until the final resolution of the underlying criminal case.28 Upon the entry of a guilty verdict, a special verdict29 listing the property subject to forfeiture would authorize the forfeiture of such property.30

RICO, as originally enacted, contained no provision for the procedures to be followed by district courts in entertaining requests by the government for post-indictment restraining orders.31 Indeed, the legislative history of the original enactment reflects no discussion of the necessary procedures governing post-indictment restraining orders. Although the indictment itself provided notice that the property in ques-

22 Fed. R. Crim. P. 7(c)(2), 31(e), 32(b)(2), 54(b)(5). Prior to that time, the Rules made no provision for criminal forfeiture as traditionally forfeiture was civil or in rem in nature. See Note, supra note 3 at 769.
24 Id.
25 The statute provided:
   A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when information or indictment has not been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property ... would, in the event of conviction, be subject to forfeiture under this section and that the provision of notice will jeopardize the availability of the property for forfeiture.
26 See Fed. R. Crim. P. 7(c)(2) (providing that criminal forfeiture may only ensue when the indictment identifies the property subject to forfeiture).
27 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). See also Note, supra note 2, at 796 ("Such a motion is made upon an ex parte demonstration of evidence or merely by governmental request.").
28 See, e.g., Spilotro, 680 F.2d at 614 (order restraining defendant from "disposing of any title to, assets of, or interest in [his jewelry store] during the pendency of the proceedings under a RICO indictment") (footnote omitted); United States v. Bello, 470 F. Supp. 723, 724 (S.D. Cal. 1979) (order restraining defendant from "selling, transferring, or otherwise disposing of or encumbering" his residence or business assets during the pendency of criminal proceedings). But see United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976) (denying motion for restraining order on grounds that it would constitute a pretrial determination of guilt), aff'd in part and vacated and remanded in part, 591 F.2d 1347, aff'd 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980).
29 See Fed. R. Crim. P. 31(e) (providing for special verdicts to be returned to the extent of the property subject to forfeiture).
tion was subject to forfeiture, no provision was made for the defendant to be heard in challenge to the restraining order, nor did the defendant have any opportunity to expedite the trial in the underlying criminal matter in order to have the matter of the restraint on property finally resolved. The statute contemplated that the defendant would be deprived of control over his property until the jury rendered its verdict.

B. The Original Judicial Response

Although the statute provided no guidance to the courts on the procedure for entering post-indictment restraining orders, the overwhelming majority of courts faced with the issue ruled that due process requirements entitled RICO defendants to a post-restraint adversarial hearing on the propriety of a restraining order. Most of these decisions relied upon precedents in creditor's remedies cases or upon the procedures governing civil restraints. The courts differed on what kind of evidence would be entertained in such a hearing, and the government's burden necessary to sustain a restraining order. But the courts uniformly did not require the hearing to be held prior to issuing the restraining order because they found that certain extraordinary circumstances involving compelling governmental interest warranted postponement of the hearing until after the restraint was in place. These cases involved analysis of a black or white question: Is the property in question subject to forfeiture?

In these post-deprivation hearings, the courts generally required the government to establish two things: that it was probable that a jury would (1) convict the defendant of RICO violations, and (2) find the property specified in the indictment subject to forfeiture under RICO. The government was required to produce evidence to enable the district court to

35 FED. R. CIV. P. 65 (requiring an immediate hearing after the entry of an ex parte restraining order in a civil matter). See United States v. Lewis, 759 F.2d 1316, 1225 (8th Cir. 1985); Spilotro, 680 F.2d at 617.
36 Compare Spilotro, 680 F.2d at 619 n.4 with Harvey, 560 F. Supp. at 1087-88.
38 See Spilotro, 680 F.2d at 617 (citing Fuentes., 407 U.S. at 90); Calero-Toledo, 416 U.S. at 678-79. See generally Note, supra note 2, at 794.
39 See Spilotro, 680 F.2d at 618; Crozier, 674 F.2d at 1298; Long, 654 F.2d at 915; Harvey, 560 F. Supp. at 1085; Veon, 538 F. Supp. at 246; Mandel, 408 F. Supp. at 682-83; see also Beckham, 562 F. Supp. at 490 (adding a clear and convincing evidence standard and requiring the government to show it had reasonable grounds to believe the defendant would likely dispose of the property prior to trial).
determine whether the government’s burden was met; the indictment alone would not suffice.\footnote{See Mandel, 408 F. Supp. at 683; Spilotro, 680 F.2d at 618; Long, 654 F.2d at 915; see also Crozier, 674 F.2d at 1297-98 (requiring compliance with the Federal Rules of Evidence in post deprivation hearings). Contra Harvey, 560 F. Supp. at 1087-88 (holding as inapplicable the Federal Rules of Evidence).}

C. The 1984 Amendments

In 1984, Congress amended the forfeiture provisions in RICO, significantly broadening the authority of district courts to issue pre-trial restraining orders and clarifying the pre-trial restraining order provisions by providing for both pre-indictment and post-indictment restraints.\footnote{18 U.S.C. § 1963(d) (Supp. 1990). The statute provides:

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—
   (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
   (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—
      (i) there is substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for the forfeiture; and
      (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:
   Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.
   (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.
   (3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.


The amendments to RICO grew out of Congress’s disappointment with the government’s record of obtaining forfeitures\footnote{See S. Rep. No. 225, 98th Cong., 1st Sess. 194, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3377. The General Accounting Office reported in 1981 that only ninety-eight CCE and RICO cases, involving two million dollars of potentially forfeitable assets, were brought between 1970 and 1980. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A Seldom Used Tool in Combating Drug Trafficking ii (1981). By contrast, drug traffickers generated approximately sixty billion dollars annually during that time frame. Id. at i. A stated purpose of the statute was to enhance the use of forfeiture, particularly in a criminal context, as a “law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking.” S. Rep. No. 225, supra, at 191, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3374.} and disapproval of court decisions hindering the government’s ability to obtain post-indict-
The inability of the government to prevent the transfer of potentially forfeitable property (and to obtain any such property once it had been transferred) was identified as the most significant shortcoming of the 1970 forfeiture provisions in a series of congressional hearings investigating the use of criminal forfeiture procedures.

The Comprehensive Crime Control Act of 1984 "expanded the substantive sweep of criminal forfeiture," by increasing the number of federal offenses subject to criminal forfeiture to include an estimated twenty-five percent of federal criminal cases, including all federal drug felonies. The 1984 amendments included a relation back provision. Thus, the government's interest in the property to be forfeited vests at the time the crime is committed, rather than upon conviction, as had previously been the case.

Unlike the original enactment, the 1984 amendments confer jurisdiction on district courts, upon application of the government, to enter restraining orders and injunctions, to require the execution of a performance bond, or to take any other action, with the stated purpose of preserving the availability of the property for forfeiture. Just as in the original enactment, the statute purposefully makes no provision for notice or hearing in a post-indictment setting. All that is required by the plain language of the statute is an indictment or information charging a

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43 The Senate Report states:

Although current law does authorize the issuance of restraining orders in the post-indictment period, neither the RICO nor CCE statute articulates any standard for the issuance of these orders. Certain recent court decisions have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation and have also held the Federal Rules of Evidence to apply to hearings concerning restraining orders in criminal forfeiture cases. In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order—the sole means available to the government to assure the availability of assets after conviction—quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy for jeopardizing the safety of witnesses and victims in racketeering and narcotics trafficking cases who would be required to testify at the restraining order hearing.

44 United States v. Nichols, 841 F.2d 1485, 1488 (10th Cir. 1988).

45 Id.

46 "All right, title and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section..." 21 U.S.C. § 853(c) (1988); 18 U.S.C. § 1963(c) (1988).


48 Id. § 1963(d)(1)(A).
RICO violation and alleging that specified property is subject to forfeiture.49

In the case of a restraint sought prior to indictment, however, Congress provided specific guidelines that district courts should follow in exercising their statutory jurisdiction.50 In the pre-indictment setting, the statute requires notice and an opportunity for a hearing be given to all persons appearing to have an interest in the property and sets out a test to be met which is patterned after the civil standards for injunctive relief.51 In the context of a post-indictment restraining order, however, the Senate Committee Report rejected both the civil temporary restraining order standard employed by some courts and particularly that prong of the Rule 65 standard requiring a showing of the government’s likelihood of success on the merits of the criminal prosecution.52 As far as Congress was concerned, the probable cause established in the indictment or information served as a sufficient basis for the restraining order to issue.53 Congress would allow the court to “consider factors bearing on the reasonableness of the order sought,”54 but prohibited any attempt to “look behind” the indictment or require additional evidence regarding the merits of the case.55

Because an arrest warrant may issue upon the filing of an indictment or information, the Committee Report asserts that a similarly sufficient basis existed for a restraint upon the defendant’s ability to transfer or remove property subject to forfeiture in the indictment.56 The Senate Report specifically states that a post-indictment restraining order does

49 Id.
50 Id. § 1963(d)(1)(B).
51 Id. The statute calls for a three-part test by the issuing court:
   1) Whether there is a substantial probability that the United States will prevail on the issue of forfeiture;
   2) Whether the absence of restraint will result in the property being made unavailable for forfeiture; and
   3) Whether the need to preserve the availability of the property out-weights the hardship on any party against whom the order is to be entered.
Id. Compare FED. R. CIV. P. 65. A pre-indictment restraining order remains in force for ninety (90) days, unless an indictment issues or the court extends it for good cause shown. 18 U.S.C. § 1963(d)(1)(B) (1988).

Also available to the government in a pre-indictment setting is an emergency temporary restraining order, without notice or opportunity to be heard given to interested parties. Id. § 1963(d)(2). To obtain such a restraining order the government must demonstrate that probable cause exists to believe that: 1) the property is subject to forfeiture; and 2) prior to notice to interested parties would jeopardize the future availability of the property for forfeiture. Id. In the absence of consent of the affected parties or good cause shown, this type of restraining order expires in ten (10) days. Id. If the affected parties request a hearing concerning the emergency order, it must be held expeditiously and prior to the end of the ten (10) day period. Id.
54 Id. (emphasis added).
55 Id.
56 Id. at 203, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3386.
not require prior notice and opportunity for a hearing.\textsuperscript{57} Congress did not prohibit courts from holding a hearing after the entry of the restraining order, at which time the court may modify or vacate an order that is clearly improper.\textsuperscript{58} Nonetheless, it is clear that Congress determined that such a challenge could not reach the indictment itself.\textsuperscript{59}

D. The Judicial Response to the 1984 Amendments

The majority of courts considering post-indictment restraining orders since the 1984 amendments have required adversarial hearings. Only three courts have found no denial of due process in the issuance of post-indictment restraining orders as contemplated in the statute and its legislative history.\textsuperscript{60} In general, the majority of courts have not diverged from the analysis of decisions concerning RICO as originally enacted.\textsuperscript{61} Some courts have upheld the statute but ignored the legislative history, stubbornly importing the standards of Federal Rules of Civil Procedure on temporary restraining orders into the post-indictment restraining order provision.\textsuperscript{62} Other courts—recognizing the lack of legislative intent for requiring a hearing on post-indictment restraining orders—have held the restraining order provisions unconstitutional.\textsuperscript{63}

\textsuperscript{57} Id. "The indictment or information itself gives notice of the government's intent to seek a forfeiture of the property. Moreover, the necessity of quickly obtaining a restraining order after indictment in the criminal forfeiture context presents exigencies not present when restraining orders are sought in the ordinary civil context." Id.

\textsuperscript{58} Id. Congress' example of a clearly improper restraint is one on property not specified in the underlying indictment. Id.

\textsuperscript{59} Id. "For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is based." Id.

\textsuperscript{60} United States v. Musson, 802 F.2d 384, 387 (10th Cir. 1986) (holding that reliance of the district court on the indictment in issuing a restraining order comportted with due process); United States v. Keller, 730 F. Supp. 151, 162-63 (N.D. Ill. 1990); United States v. Draine, 637 F. Supp. 482, 485 (S.D. Ala. 1986) ("A blanket assertion that the failure of 21 U.S.C. § 853 to require a prompt post-seizure hearing must render the statute unconstitutional irrespective of the particular facts involved is clearly contrary to the concept of flexibility espoused by the Supreme Court."). (footnote omitted).

\textsuperscript{61} See supra notes 32-41.

\textsuperscript{62} See United States v. Thier, 801 F.2d 1463, 1468 (5th Cir. 1986), modified, 809 F.2d 249 (1987) (holding that the requirements of Fed. R. Civ. P. 65 apply to all restraining orders and injunctions issued by U.S. courts, including RICO post-indictment restraining orders and requiring a hearing to be held within ten days of issuance); United States v. Perholtz, 622 F. Supp. 1253, 1256 (D.D.C. 1985) ("The United States cannot obtain a permanent restraining order that prevents a defendant from disposing of his property by means of an ex parte proceeding. Due process requires that such an order be temporary and the United States must give the affected defendants notice of a hearing within a brief amount of time or the ex parte order expires."); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); see also Spaulding, supra note 21, at 269.

\textsuperscript{63} See United States v. Harvey, 814 F.2d 905, 929 (4th Cir. 1986) (holding the provision in violation of Fifth Amendment due process guarantees to the extent that RICO "authorizes the issuance of ex parte restraining orders after indictment without any post-deprivation hearing other than a criminal trial"), modified, 837 F.2d 637 (4th Cir. 1988), aff'd sub nom., Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2546 (1989); United States v. Moya-Gomez, 860 F.2d 706, 1729 (7th Cir. 1988) (holding the statutory scheme in violation of the due process clause in that it allows no opportunity to place into question the government's allegation that certain property is subject to forfeiture).
1. No Hearing Required

In *United States v. Musson*, the government moved for a restraining order three days after filing the indictment under both RICO and the Comprehensive Drug Abuse Prevention and Control Act, to protect the government’s interest in property alleged to be subject to forfeiture in the event of a criminal conviction. On the basis of the indictment, which alleged that certain real property and personalty were subject to forfeiture, the district court issued a restraining order. The restraining order required notice to the government and court approval if the defendant sought to sell or transfer the restrained property.

A pre-trial hearing was held at which the defendant mounted a three-part attack on: 1) the impact of the order on interested third parties; 2) the failure of the indictment to describe the nexus between the illegal acts alleged and the restrained property; and 3) the inclusion in the restraining order of certain property that defendants claimed were exempt. The district court rejected all three arguments of the defendant.

On appeal, the United States Court of Appeals for the Tenth Circuit upheld the constitutionality of the district court’s action. Defendants argued that they were entitled to an evidentiary hearing in which the government had to demonstrate through factual submissions “a reasonable probability that forfeiture will be ultimately obtained,” and that compliance with the requirements of Rule 65 of the Federal Rules of Civil Procedure was necessary.

Reviewing the legislative history, the *Musson* court found it apparent that Congress required a hearing of the nature proposed by defendants to be held only when the government sought a restraining order prior to an indictment. The court stated that an indictment has long been recognized as sufficient probable cause for an immediate arrest. According to the *Musson* court, the RICO forfeiture provisions added another element to the determination of probable cause by a grand jury: the grand jury must determine that the described property is subject to forfeiture if certain statutory provisions are applicable. The Tenth Circuit found no serious problem with placing such a determination within the functions of a grand jury. The court concluded that, based upon the legislative history and the plain language of the statute, Congress intended that the probable cause determination of the grand jury to include forfeiture in the indictment was sufficient to support the issuance of the restraining order. The court based its conclusion on the assumption that

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64 802 F.2d 384 (10th Cir. 1986).
66 802 F.2d at 385.
67 Id. at 387.
68 Id. at 385.
69 Id. at 386.
70 Id.
71 Id.
72 Id. at 387.
the grand jury received evidence to support its probable cause determination on the forfeitability of the property.

On the question of whether the defendants had been denied procedural due process, the Musson court suggested that a restraint on property is far less intrusive than a physical seizure of property.73 The court cited the Supreme Court in Fuentes v. Shevin74 for the proposition that due process allows the physical seizure of property without a prior hearing where prompt action is necessary to secure an important government interest. It further relied upon Calero-Toledo v. Pearson Yacht Leasing Co.,75 which upheld a seizure on the basis of probable cause in the absence of a hearing, stating that "with such benchmarks we cannot conclude that the reliance of the district court upon the grand jury indictment in issuing a restraining order which restricted free alienation of the subject property failed to comport with due process."76

The United States District Court for the Southern District of Alabama has also upheld the issuance of a restraining order on the basis of an indictment. In United States v. Draine,77 the United States obtained an indictment under the Comprehensive Drug Abuse Prevention and Control Act and an order authorizing the United States Marshal to restrain $11,400 that had been seized by the State of Alabama pursuant to an search warrant.78 In analyzing the due process issue raised by the defendant, the district court applied the balancing test developed by the Supreme Court in Baker v. Wingo79 in the context of a speedy trial challenge. The factors to be weighed in the Wingo test are: 1) the length of the delay; 2) the reason for the delay; 3) whether defendant has requested a hearing; and 4) whether any prejudice to the defendant can be traced to the delay.80 The court attributed the bulk of any relevant delay in the instant case to the defendant, who had moved for continuance of his trial on two occasions.81 The court refused to address whether the defendant had been prejudiced by the restraining order.82 The Draine court stated that "a blanket assertion that the failure of 21 U.S.C. § 853 to require a prompt post-seizure hearing must render the statute unconstitutional irrespective of the particular facts involved is clearly contrary to the concept of flexibility espoused by the Supreme Court."83 The court asserted that trial would provide the defendant with an opportunity to rebut the presumptions that the money was acquired during the period of the violation and that no other likely source for the money existed.84

73 Id.
76 802 F.2d at 387.
78 Id. at 483-85.
80 Id. at 530.
81 637 F. Supp. at 485.
82 Id.
83 Id.
84 Id. at 486.
Very recently, the United States District Court for the Northern District of Illinois denied a motion to vacate a restraining order that prevented defendants from selling their interests in currency exchanges. In *United States v. Keller* the defendants argued, inter alia, that the pre-trial restraining order should be vacated on grounds that due process required a pre-trial hearing before that order was entered. The court stated that “[t]he government correctly argues that the statute does not require a hearing.”

The court also found that the indictment alone was an insufficient basis for permitting the continued restraint on property by way of an ex parte pre-trial restraining order. The court adopted the balancing test enunciated in *United States v. Harvey*, which weighs the risk of erroneous deprivation, the government’s interest in providing specific procedures and the strength of the individual’s interest. Since the defendants failed to argue any particular harm caused by the restraining order, the court concluded that a showing of probable cause, that the defendants committed the alleged crime and that the restrained property was forfeitable would suffice.

Although the court found that a grand jury’s finding of probable cause was not conclusive, it held that no evidentiary hearing was necessary because defendants had pointed to no material factual dispute as to the existence of probable cause.

2. Hearing Required

In *United States v. Thier*, the United States Court of Appeals for the Fifth Circuit held that a hearing following the form of the traditional requirements of Rule 65 of the Federal Rules of Civil Procedure for restraining orders was “an appropriate outline for the government’s burden” in seeking a post-indictment restraining order. In reaching its decision, the court flagrantly disregarded key portions of the legislative history of the Comprehensive Forfeiture Act of 1984.

The Thier court found the statute to be silent as to the durational limits of a post-indictment restraining order and as to notice and hearing requirements, which the court noted was in contrast to the procedures enunciated for pre-indictment restraining order. The court determined that it need not consider the constitutionality of the provision governing post-indictment restraining orders because the statute did not on “its face nor by necessary implication bar minimum due process protections.”

The Thier court posited that the requirements of Rule 65 apply to the issuance of all restraining orders and injunctions issued by courts of

86 Id. at 162.
87 Id. (citations omitted).
88 814 F.2d at 928. See infra text accompanying notes 128-37.
89 730 F. Supp. at 162.
90 Id.
92 Id. at 1470.
93 Id. at 1467.
94 Id. at 1468.
the United States. The court then suggested that the requirements of Rule 65 were not excluded from the statute, and as such, those requirements would apply to the post-indictment restraining orders. The court concluded that with the procedures of Rule 65, the statute comport with due process.

Applying the civil standards for injunctive relief to the case at issue, the Thier court found that the irreparable loss requirement was satisfied by the exigencies of the post-indictment context. The court stated that the indictment itself constituted a "strong" but "not irrefutable" showing for injunctive relief. The court held that a hearing on modification of a restraining order must be held within ten days. Acknowledging that portion of the Act's legislative history which admonished the court not to look behind the indictment or require the government to prove the merits of its case, the court suggested that Rule 65 would only give the defendant an opportunity to be heard in a meaningful way and at a meaningful time, before he is denied the present use of property that may not prove forfeitable. "The court is not free to question whether the grand jury should have acted as it did, but is free, and indeed required, to exercise its discretion as to whether and to what extent to enjoin based on all matters developed at the hearing." The Thier court acknowledged the admonishment in the legislative history, yet ignored the fact that Congress clearly rejected the Rule 65 standard. The Senate Report criticized "recent court decisions [requiring] the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation." The legislative history clearly establishes congressional intent to reject the Rule 65 standard. Essentially, the Thier court reached its decision without giving full attention to the legislative history of the post-indictment restraining order provision, and based it instead upon the type of statutory construction that a court could use to import any requirements into any statute: that the absence of any procedural requirements did not preclude their imposition.

In United States v. Perholtz, a district court concluded that the hearing requirements of Rule 65 remain applicable to RICO's provision on post-indictment restraining orders. The court stated that unless the defendant was given the opportunity to be heard within ten days of the restraint, the statute violated his right to due process. In addition to the preliminary injunction standard, the court determined that post-injunction restraining orders must be guided by the requirements of pre-

95 Id.
96 Id.
97 Id.
98 Id. at 1470.
99 Id.
101 801 F.2d at 1470.
102 Id.
105 Id.
indictment restraining orders. In reaching its conclusion, the court relied upon pre-amendment cases as well as on the case of first impression on the Comprehensive Forfeiture Act of 1984.

The *Perholtz* court ruled that to obtain a restraining order pending the outcome of a trial, the government must show that

1) The failure to enter an order will result in the property being destroyed, removed from the jurisdiction of the court or otherwise made unavailable for forfeiture; and
2) The need to preserve the property outweighs the hardship that the order may impose on the party against whom the order is entered.

The court found that in those cases in which the underlying offense involves fraudulent and manipulative transactions, the government is entitled to a presumption that negotiable and liquid assets may be made unavailable for forfeiture if not restrained. In the case of non-negotiable assets and real estate, however, the court found that the government needs to demonstrate more specific evidence that the property may be made unavailable.

3. Striking Down the Statute as Unconstitutional

In a recent case in which the post-indictment restraining order provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 was reviewed, the court held that the statutory scheme, allowing it no opportunity to place into question the government's allegation that certain property is subject to forfeiture, violates due process when it results in preventing the defendant from using the restrained funds to secure the services of his counsel of choice. Although the sixth amendment issue of right to counsel has now been decided by the Supreme Court, the analysis of the *Moya-Gomez* court on the due process considerations of post-indictment restraining orders is instructive.

At the outset, the court determined that the defendant had suffered a deprivation of property in a constitutional sense. The court stated:

Although the government's title is not established definitively until the entry of a judgment of conviction, title shifts through the operation of

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106 *Id.* at 1259.
107 *Id.* at 1256 (citing United States v. Rogers, 602 F.Supp. 1332, 1342-45 (D. Colo. 1985)).
108 *Id.* at 1259.
109 *Id.*
110 *Id.*
113 United States v. Monsanto, 109 S. Ct. 2657 (1989) (holding that the sixth amendment is not violated by freezing assets a criminal defendant might use to pay attorneys' fees before conviction if freeze is based on a finding of probable cause to believe the assets are forfeitable); Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989) (holding that the sixth amendment is not violated by preventing a criminal defendant from using assets adjudged to be forfeitable to pay attorneys' fees); *see also* United States v. Noriega, 1990 U.S. Dist LEXIS 9099 No. 88-79-CR (S.D. Fla. June 14, 1990) (LEXIS, Genfed library, Current file) (ordering that "a hearing be held at which the government must demonstrate the likelihood that the [seized] assets . . . are the product of the defendant's illegal activities").
114 860 F.2d at 725.
the relation back provision at the time of the commission of the crime. The restraining order thus operates to remove the assets from the control of the defendant on the claim of the government that it has a higher right to those assets. While the restraining order does not divest definitively, it certainly does remove those assets from his immediate control and therefore divests him of a significant property interest.\textsuperscript{115}

The court next turned to the question of whether the method of removal of the property interest is consonant with the notice and hearing requirements of the due process clause.\textsuperscript{116}

The Moya-Gomez court employed a three-part balancing test enunciated by the Supreme Court in determining what process is due:

1) Whether there is a private interest that will be affected by official government action;
2) Whether there is a risk of erroneous deprivation through the procedures used and what probable value any additional procedural safeguards would have; and
3) Whether additional procedural prerequisites would unduly burden the government interest, including the function involved and official and administrative burdens.\textsuperscript{117}

In considering the first factor, the court found that the defendant's private interest in retaining counsel of choice to be significant.\textsuperscript{118}

On the question of erroneous deprivation, the court stated:

The return of an indictment by the grand jury is, no doubt, adequate notification to the defendant of the pending forfeiture action as part of the criminal proceeding against him. However, due process requires that the party who may be deprived of a property right not only be informed of that possibility but also have an opportunity to respond.\textsuperscript{119}

The court correctly found that the statute does not provide for a post-restraint hearing, stating “it is clear that Congress did not intend that such a hearing be held. What is . . . already clear in the text of the statute is reinforced by the legislative history.”\textsuperscript{120} The court then acknowledged that the case of a seizure pursuant to the Bank Secrecy Act, in which the Supreme Court suggested that the eighteen-month subsequent criminal trial was an adequate opportunity for defendant to contest the validity of the seizure, tended to support the proposition that the criminal trial following a post-indictment restraining order was an adequate opportunity for the defendant to be held.\textsuperscript{121} Nonetheless, the court found that a dis-

\textsuperscript{115} Id. at 725-26.
\textsuperscript{116} Id. at 726.
\textsuperscript{117} Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976) and Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43 (1985)).
\textsuperscript{118} 860 F.2d at 726.
\textsuperscript{119} Id. at 726-27.
\textsuperscript{121} Id. at 727-28 (citing United States v. § 8850, 461 U.S. 555 (1983) (upholding an 18 month delay between seizure and trial)).
tinction arises where the defendant needs the frozen assets to make his case at trial.\textsuperscript{122}

The court determined that the statutory scheme presents a great opportunity for prosecutorial abuse, permitting the government, merely on the basis of an ex parte application to a grand jury, to significantly affect the defendant’s ability to participate in the adversary process at his criminal trial.\textsuperscript{123} The court stated that “if one party can skew the process to its advantage, the integrity of the entire process is harmed.”\textsuperscript{124}

As for the government’s interest, the court would not “second-guess” Congress in its conclusion that the magnitude of the threat of drug trafficking was great.\textsuperscript{125} But the court concluded its balancing of the three factors by finding that it was of constitutional necessity to afford the defendant an opportunity to challenge the government’s allegation that certain property is subject to forfeiture.\textsuperscript{126} The court held that a pre-trial, post-indictment restraint on a defendant’s assets without affording the defendant an “immediate post-restraining adversary hearing at which the government is required to prove the likelihood that the restrained assets are subject to forfeiture” violates the defendant’s right to due process to the extent that it impinges on his qualified sixth amendment right to his counsel of choice.\textsuperscript{127}

The United States Court of Appeals for the Fourth Circuit has held that post-indictment, ex parte restraints on property transfers violate fifth amendment procedural due process rights where “no opportunity for an early post-restraint hearing is afforded.”\textsuperscript{128} The Harvey court cited with approval three pre-amendment cases holding that neither the indictment itself nor a criminal trial held months after the issuance of an ex parte restraining order affords the due process guaranteed by the fifth amendment.\textsuperscript{129}

The Fourth Circuit relied on the test articulated by the Supreme Court which balances 1) the risk of erroneous deprivation; 2) the government’s interest in providing specific procedures; and 3) the strength of the individual’s interest.\textsuperscript{130} The court stated:

Post-indictment restraining orders of the kind authorized by the Act and as actually entered in Harvey’s case obviously may work a tremendous hardship on accused persons. Stripped of all or major portions of his financial resources, an accused (unless in detention) may be unable to provide for the basic necessities of life and whether or not in detention, to provide for the preparation of his legal defense.\textsuperscript{131}

\textsuperscript{122} \textit{Id.} at 728 (“Relief not obtained prior to the commencement of the criminal trial will not be helpful in securing the assistance of counsel of choice at criminal trial.”)

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} at 729.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} at 731.

\textsuperscript{128} United States v. Harvey, 814 F.2d 905, 909 (4th Cir. 1987).

\textsuperscript{129} \textit{Id.} at 928 (citing Crozier, 777 F.2d at 1383-84; Lewis, 759 F.2d at 1324-25; and Long, 654 F.2d at 915).

\textsuperscript{130} 814 F.2d at 928 (citing Cleveland Board of Education vs. Loudermill, 470 U.S. 532, 542-43 (1985)).

\textsuperscript{131} \textit{Id.}
The court concluded that the risk of erroneous deprivation is substantial in this type of case.\textsuperscript{132}

As for the government's interest, the court suggested that it is no different in the pre-indictment setting as opposed to the post-indictment setting.\textsuperscript{133} The court stated: "No reason appears why the government would be unduly burdened or any public interest disserved by providing the same sort of immediate post-deprivation hearing in the post-indictment setting as is required in the pre-indictment setting by Section 853 or as is contemplated by Fed. R. Civ. P. 65."\textsuperscript{134} The court ruled that the indictment itself suffices as adequate notice and as sufficient justification for entering a restraining order ex parte.\textsuperscript{135} But, according to the Harvey court, a criminal trial, held as many as three months after the issuance of a restraining order, fails to provide a hearing on that order within the meaningful time required by due process.\textsuperscript{136} The court held that to the extent the post-indictment restraining order provision authorizes the issuance of an ex parte restraining order without any post-deprivation hearing other than the criminal trial, it violates the fifth amendment's due process guarantees.\textsuperscript{137} (In Harvey, however, the court found the lack of a post-deprivation hearing to be a harmless error because the conviction stood and the forfeiture with it).

E. Synthesis

Certain principles can be drawn from these cases. First, there is no real disagreement that due process in these cases allowed a restraint before any hearing. Second, there is disagreement as to whether a hearing is required later. Third, there is uncertainty as to the standard to be applied at the hearing. Fourth, there is implicit agreement that the purpose of the hearing, if and when it is held, would be to determine primarily (1) whether the government was likely to succeed, and (2) whether the property was forfeitable.

As to the government's likelihood of success, government agencies in civil cases get ex parte restraining orders against property every day with far less evidence than a grand jury must have put before it and far less than what must be specified to describe the charge in a RICO indictment.\textsuperscript{138} An additional hearing on this issue can have no genuine func-

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. (citing United States v. Thier, 801 F.2d 1463, at 1469 (5th Cir. 1986)).
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} For example, the Securities and Exchange Commission ("SEC") can obtain preliminary injunctive relief without a showing of irreparable injury if the evidence establishes a strong \textit{prima facie} case of previous violations of securities laws and a reasonable likelihood that such wrongs will be repeated. \textit{See} SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963); \textit{see also} SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); SEC v. Scott, 565 F. Supp. 1513, 1536 (S.D.N.Y. 1983), \textit{aff'd sub nom.}, SEC v. Cayman Islands Reinsurance Corp., 734 F.2d 118 (2d Cir. 1984). One of the most common forms of ancillary relief available to the SEC in enforcement actions is disgorgement. \textit{See e.g.}, SEC v. Materia, 745 F.2d 197, 201 (2d Cir. 1984), \textit{cert. denied}, 471 U.S. 1053 (1985); SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985); SEC v. Manor Nursing Center, Inc., 458 F.2d 1082 (2d Cir. 1972). In order to preserve the remedy of disgorgement, the SEC often seeks
The indictment itself satisfies due process by giving an accused a post-restraint opportunity to present any evidence to the contrary. As to whether the property is forfeitable, there may sometimes be genuine questions as to forfeitability of specific assets. A post-restraint hearing on this issue at which a defendant can carry a burden of going forward by showing reason to believe that certain property is not forfeitable, contrary to what the grand jury has found probable cause to believe, seems to satisfy due process.

All of the cases have arisen with respect to whether or not the government has a right to take property at all. They have not arisen with respect to the reasonableness of the kind of restraint employed. This article will turn to the facts of the Princeton/Newport case to examine that question.

III. The Princeton/Newport Case

Princeton/Newport Partners L.P. and a number of associated entities (hereinafter collectively referred to as “Princeton/Newport”) invested money both for its general partners and employees, and for a number of limited partners for whom Princeton/Newport managed money. The partnership had 80 employees who managed more than $1 billion in partnership investments. The partnership primarily engaged in anomaly arbitrage, the buying and selling of securities based on mathematical models that identify market anomalies.

The government obtained information from a former employee in the fall of 1987 that Princeton/Newport was also engaged in some unsavory activities. Information about ongoing tax fraud, securities fraud and stock manipulation led to the issuance and execution of a search warrant in December of 1987. The search uncovered tape recorded conversations in which Princeton/Newport general partners and high-ranking employees committed these crimes with employees of Drexel Burnham Lambert and others.

This information led to an indictment on August 4, 1988 charging the five highest-ranking Princeton/Newport employees, along with one employee of Drexel Burnham Lambert, with mail fraud, wire fraud, conspiracy and racketeering. The indictment alleged that Princeton/Newport had a relationship with Drexel Burnham Lambert in which Princeton/Newport “parked” securities at Drexel (pretended to sell them to Drexel) for the purpose of creating bogus tax losses in order to defraud both the government and their own limited partners. In return, the indictment alleged, Princeton/Newport agreed to do favors for freeze orders to ensure that if the SEC succeeds on the merits, the profits will be available to satisfy disgorgement orders. See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972); United States v. Cannistraro, 694 F. Supp. 62, 71 (D.N.J. 1988), modified, 871 F.2d 1210 (3d Cir. 1989); SEC v. Vaskevitch, 657 F. Supp. 312, 315 (S.D.N.Y. 1987).

It may, of course, have the useful purpose of getting discovery of the government’s case beyond that allowed by the Federal Rules of Criminal Procedure.


Brief for Appellants at 7, United States v. Regan, 858 F.2d 115 (2d Cir. 1988).

United States v. Regan, 858 F.2d 115, 120 (2nd Cir. 1988).
Drexel Burnham Lambert which included the manipulation of stock. The Princeton/Newport entity was not itself made a defendant, but was named as the enterprise through which the named defendants conducted and conspired to conduct their criminal activity.

The indictments sought the forfeiture not only of the proceeds of the racketeering activity, including salaries, but also the interests of the defendants in the enterprise. Since Princeton/Newport was a partnership, the interest of the defendants consisted, among other things, of their partnership interests, amounting to about 20% of the value of the company. Consequently, Princeton/Newport's assets under management totaled approximately $1 billion, its net assets were around $300 million, and the government could hope to forfeit no more than approximately $50 million.

Princeton/Newport was also a very active business. Because its legitimate activities consisted of taking advantage of small anomalies (or price differences) between different markets for securities, the partnership engaged in a large number of transactions in order to make small amounts of money on each one. In the past, the firm had been involved in as much as one percent of all trades in one day on the New York Stock Exchange.

The government concluded that it could only be assured that money would remain for payment of the forfeiture after trial if it obtained a bond or restraining order on some of the assets of Princeton/Newport up to some percentage of the possible forfeiture amount. The reasons why the government sought to convince the court of the need for such a bond or order were twofold. First, immediately after the search described above, the Princeton/Newport defendants had withdrawn $15 million of their stake in the enterprise. Shortly after that, part of the money was put back into the business in their wives' names. Second, Princeton/Newport was the kind of business in which millions of dollars could be sent to Japan or Switzerland by wire in an instant. Princeton/Newport was in constant communication with a number of overseas clients and financial institutions and did in fact transfer such sums of money on a continuous basis.

Because Princeton/Newport was not a car carrying drugs, or a piece of land, or a bank account, but rather a complex, ongoing business, only part of which was forfeitable, the restraining order had to be carefully drawn. Moreover, the government would have been content with a bond in the appropriate amount.

In these circumstances, to have simply gone ex parte to the district court to ask for the order, as allowed by the RICO statute, seemed irresponsible. Instead, after drafting a restraining order which by its terms would allow the continuation of all normal business activities at Princeton/Newport, but would forbid it to transfer funds other than as part of its ordinary business, the government notified defense counsel after return of the indictment that it would go before the district court to seek the ex parte restraining order allowed by the statute unless a bond were posted. The government also notified the district court that it
would be presenting such an order, and that the government foresaw the need for a quick hearing on the reasonableness of the restraint thereafter in view of the complex nature of the business involved.

As a result of these disclosures, the district court determined to hold an adversary hearing before signing any order. The hearing lasted for seven hours ending at 2:00 a.m. on the night following the return of the indictment. The hearing did not focus on whether the government had shown a probability of success on the merits. The specificity of the indictment, which quoted from tape-recorded criminal conversations obtained during the search, made a hearing on this issue pointless. Nor did the hearing focus on whether the property alleged in the indictment was forfeitable. The indictment simply tracked the statutory language involving proceeds in the racketeering activity and interests of the defendants in the enterprise, so while the amounts were debatable, the forfeitability of the generic categories named in the indictment was not. Rather, the hearing revolved almost entirely around the practical effect of the order on the business of the unindicted entity, Princeton/Newport. Corporate lawyers from Princeton/Newport appeared and at the district court's request, negotiations were undertaken regarding ways in which the order could be altered to ensure that the business would continue to operate, without lenders and trading partners shying away from doing business with Princeton/Newport because of some erroneous fear that its assets were irrevocably and completely frozen.

The order in its final form was considerably altered to meet objections and fears of counsel for the Princeton/Newport entity. Finally, the district court found that the restraining order as altered would not harm the business beyond the harm inherent in a criminal indictment of its principals and signed the order. The following day, after hearing additional proffers of testimony and argument for the better part of another day, the district court adhered to its decision.

On interlocutory appeal from the district court's order, the type or timing of hearing required by the RICO statute was not an issue because a full pre-seizure hearing had in fact been held. The Second Circuit upheld the government's ability to put a restraint of this type on a non-party business entity part of which might be forfeitable, and to require a monitor selected by the government and paid for by the entity who would ensure compliance with the order. The court pointed out that this was "strong medicine" which should be avoided in the event that a bond could be posted. On remand, after argument over the amount of the bond, a bond was in fact posted.

These facts raise the question of what process is due to an operating entity like Princeton/Newport, whether or not it is a defendant in the case, with respect to the reasonableness of the restraint which the Second

143 Record at 111, Regan (88 Cr. 517 (RLC)).
144 See id. at 118-21.
146 United States v. Regan, 858 F.2d at 121.
Circuit ruled in *United States v. Regan* could be imposed. Is a post-seizure hearing good enough or is a pre-seizure hearing required, and in either case what are the issues to be determined at such a hearing and under what standard? Whatever the answers to these questions, the facts described above suggest that Princeton/Newport did indeed get due process before a restraining order was entered in that case, but there was neither a theory nor a practice supporting that result. The statute clearly requires no hearing whatever. Prior cases had all involved post-forfeiture hearings, and had only concerned the black or white issue of whether or not specific property was forfeitable, rather than the reasonableness of the type of restraint to be imposed.

IV. Due Process and the Operating Business Entity

There can be no question that a pre-judgment restraining order even of the partial type used in *Princeton/Newport*, is a deprivation of property in a constitutional sense.\(^1\)\(^4\)\(^8\) The important area of focus is what kind of process and hearing is due, and when is it due. Applying the three-part *Fuentes* test in the case of the ordinary RICO forfeiture indictment, due process requires that (1) the government have a compelling interest in preventing continued illicit use of property, in obtaining full recovery of all forfeitable assets, and in enforcing the criminal law;\(^1\)\(^4\)\(^9\) (2) quick action is warranted to prevent the dissipation of assets subject to forfeiture and the ensuing frustration of the forfeiture provisions;\(^1\)\(^5\)\(^0\) and (3) the restraint of property in RICO is sought by government officials responsible for determining that such restraint is appropriate in the particular instance.\(^1\)\(^5\)\(^1\) All of these factors support the existence of extraordinary circumstances in the context of the ordinary RICO post-indictment setting. In such a case, postponement of a hearing of any kind until after the restraint is in place is warranted.\(^1\)\(^5\)\(^2\) For example, in *United States v. Chinn*,\(^1\)\(^5\)\(^3\) a hearing held three weeks after a restraining order application was granted, at which the court modified the order to allow for business and living expenses of the defendant, was deemed appropriate.\(^1\)\(^5\)\(^4\)

The calculus is different when the property sought to be restrained is an operating business entity. The government interest is still strong,
though not as strong when only part of the entity is forfeitable, but the need for quick action and indeed the effect of quick action on the government's interest may be quite different.

An operating entity is an organism. If its operations are jolted too severely, it may stop working entirely. This can be seen most easily if the restraint imposed is a freeze on accounts and activities of the entity. Even if the restraint is intended to allow continued business, however, it may inadvertently cause suppliers or creditors to stop dealing with the entity. For example, there may be misunderstanding as to the type or degree of restraints, which causes fear that repayment of obligations will be forbidden. If the government's ultimate aim is to gain possession of the entire entity, a sudden cessation of business by an operating business entity is very likely to lessen or destroy the value of that entity as a going concern and thus injure the government's interest. This is particularly true of such industries as financial services or securities trading, which depend on extensions of credit and the confidence of contrary parties in transactions. If investors pull out, if lenders will no longer lend, and if other participants in the securities markets refuse to trade with an entity, the entity quickly loses the ability to function. This is one of the many lessons in the demise of Drexel Burnham Lambert.155 If the government wants to forfeit the entity or parts thereof, such a demise is not in its interest because the value of the entity will decrease, to say nothing of the interest of the entity itself. Moreover, if only part of the entity is possibly forfeitable, as in Princeton/Newport, the strength of the government's interest is correspondingly lessened.

Whether the entity is a defendant or, like Princeton/Newport, a non-party repository of forfeitable assets, is not relevant to this analysis. The government's interest is in maintaining the availability of assets until forfeitability is determined by judgment. It has no additional interest if the entity is a defendant, except to an appropriate punishment upon conviction. Such an interest does not exist before judgment.

This analysis suggests that when property sought to be forfeited is from an operating business entity the affected entity should be given an opportunity to challenge the reasonableness of the restraint before it takes effect. Since the Fuentes test is not met in such circumstances by a post-seizure hearing on the reasonableness of the restraint, only a pre-seizure hearing will give the opportunity to be heard on that issue at a meaningful time156 as due process requires.157

Due process also requires that the opportunity to be heard be meaningful in manner.158 The issue here is the bounds of the opportunity to be heard which will be afforded pre-seizure. In Matheus v. Eldridge,159 the Supreme Court enunciated three factors to be balanced in order to identify "the specific dictates of due process": (1) the private interest affected;

157 See text accompanying notes 9-14.
(2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens an additional procedural requirement would entail. These factors weigh in favor of allowing an operating business entity to be heard pre-seizure on the issue of the reasonableness of the restraint, though not on the issues of probable cause or forfeitability.

First, the private interest is significant. The property interest of an operating business entity is at stake when its assets are restrained. This is even more true when only a portion of the assets are subject to forfeiture. If the government’s restraint is overbroad or unreasonable, the risk of putting such a company out of business is real. To delay a hearing until after the restraint is in place even for a matter of days could so stymie the operation of a business that it inadvertently could be destroyed.

Second, the risk of erroneous deprivation is significant in the case of an operating business entity. If the indictment identifies a percentage of such a business as forfeitable, the government’s restraint must be narrowly tailored to achieve the purpose of preserving the assets for forfeiture. Inadvertent over-restraint is a significant danger. Because due process protects against arbitrary deprivations of property, the defendant should be afforded an immediate opportunity to be heard on the reasonableness of the restraint on its property to protect from erroneous deprivation of assets necessary to conducting its legitimate business. The value of such an additional safeguard would not only serve the significant private interest, but also the government’s interest in keeping the legitimate enterprise viable so that assets will be available for forfeiture upon conviction. In addition, a pre-restraint hearing on the issue of reasonableness would offer the opportunity for such an operating commercial entity to post a performance bond in lieu of a restraint on its continuing operation as suggested by the appeals court in Princeton/Newport.

As for the third factor, the government indeed has a strong countervailing interest in preserving the assets subject to forfeiture. The requirement of some showing of reasonableness prior to restraint would clearly be an additional burden on the government. Whether this burden is sufficient to require temporary measures to secure the potentially forfeitable property before a hearing, however, should depend on the facts. If the property cannot readily be disposed of, a pre-seizure hearing should typically be required by due process. For example, if the property is a personal residence, and a simple property law device like a lis pendens can cloud its title preventing any sale, due process requires a full hearing before any seizure. However, if the situation is similar to Princeton/
Newport, where the property was readily transportable, but in which there was sufficient value in excess of the forfeitable amount and to make complete disposal required a matter of days and not of hours, a pre-seizure hearing on reasonableness held on the day of indictment should be sufficient to protect the government's interest. Other situations could be imagined involving smaller amounts of forfeitable assets which could be instantly hidden and plans designed to hide them, which would justify restraints before any hearing.

Generally, in the case of an operating business entity, if an opportunity to be heard on the question of reasonableness is given to the defendant at the same time that the government seeks the restraint, the burden on the government would not be undue. A delayed hearing changes the calculus and favors imposing some restraint temporarily. The calculus is different as to hearings on the issues of probable cause and forfeitability which, on this analysis, should wait until after seizure, as the private interest is lessened if the safeguards imposed have been tested for reasonableness, and the government's interests are greater.165

Thus, in the case of an indictment against an operating business entity in which a percentage of the entity's assets are sought for forfeiture, the three factors enunciated by the Supreme Court should generally mandate giving the defendant an opportunity to be heard on the reasonableness of the restraint sought. In order to provide that opportunity at a meaningful time, the hearing should generally be required prior to the issuance of the restraining order so that the normal, legitimate business activities of the defendant will not be disrupted unnecessarily. But in order to protect the government's interest, that hearing must occur immediately and only on the issue of the reasonableness of the restraint. After the restraint is in place, the two questions of the likelihood of the government's success and whether the property is forfeitable may be addressed at a subsequent hearing. This fact-based balancing of interests accords with the fact-specific way in which due process jurisprudence has evolved. Due process is a flexible concept, requiring an analysis of the facts particular to each case in determining the form of the procedures necessary to comport with constitutional dictates.166

V. Conclusion

Pre-judgment restraints on property are always "strong medicine" not to be imposed except when necessary and to the extent necessary to protect important interests. Restraints without a hearing are stronger medicine still. In the case of an operating business entity such restraints may be a kind of overenthusiastic chemotherapy that kills the patient in order to save it. Yet RICO violations are serious, and the importance of maintaining property subject to forfeiture within reach of government is undeniable. One lesson of Princeton/Newport is that the

165 See supra text accompanying notes 91-110.
167 Regan, 858 F.2d at 121.
case of an operating business entity a pre-seizure hearing solely on the issue of the reasonableness of the restraint is consistent with protection of the government's interest, and indeed may be important to protection of that interest. Because of this factual predicate, due process in these circumstances requires a pre-seizure hearing of the dimensions outlined above.