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RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?

I. Introduction

During its consideration and passage by Congress as well as during its course through the courts, the Racketeer Influenced and Corrupt Organization Act (RICO), has been at the center of controversy. Legislators, commentators, dissenting judges as well as majority judges have all expressed the opinion that the statute is too broad and constitutes a snare for persons and activities within, as well as outside of, the statute’s intended coverage. Three recent decisions have attempted to narrow various aspects of RICO’s coverage. In United States v. Mandel the United States Court of Appeals for the Fourth Circuit, in a case of first impression, held that an organization’s transferring a part interest in itself to a racketeer in payment “for unconnected criminal activity” did not cause the organization “to become a racketeer influenced organization proscribed by § 1962(c),” despite the fact that section 1962(c) provides, in pertinent part, that, “[i]t shall be unlawful for any person . . . associated with any enterprise . . . to conduct . . . such enterprise’s affairs through a pattern of racketeering activity.” In United States v. Marubeni American Corp. the United States Court of Appeals for the Ninth Circuit likewise made the only case law on the issue holding that profits accruing to an enterprise as a result of racketeering activity are not subject to RICO’s forfeiture provisions, despite the fact that section 1963(a)(1) provides, in pertinent part, that, “[w]hoever violates any provision of section 1962 . . . shall

2 Nat'l L. J. April 7, 1980, at 5.
[i]the salutary purposes for which this bill aimed at organized crime was intended, somehow never come to fruition. Instead, the spread of the shotgun approach will involve a lot of activities not intended to be covered and will not be successful in addressing itself to the problems that were intended to be covered. It will subject the courts, the prosecutors, and indeed every person who studies the law to incredible burdens and problems in trying to decipher, administer, and uphold some of the provisions that we are about to enact. The overreach, the looseness of the language, the whimsy in this bill just simply do not enhance the legislative process.
4 See, e.g., Atkinson, “Racketeer Influenced and Corrupt Organizations,” 18 U.S.C. §§ 1961-68: Broader of the Federal Criminal Statutes, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978). The author describes RICO as “a sweeping act which intrudes on state power and has great potential for abuse against individual defendants.” Id. at 18; Note, Racketeers and Non-Racketeers Alike Should Fear Florida’s RICO Act, 6 FLA. ST. U.L. REV., 483 (1978). In commenting upon Florida’s enactment of a statute “patterned after” (id. at 484) RICO, the author concludes that “[t]he very broad definition of ‘racketeering activity’ makes the RICO statute a potential candidate for prosecutorial abuse.” Id. at 506.
6 United States v. Marubeni America Corp. 611 F.2d 763 (9th Cir. 1980); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979); United States v. Mandel, 591 F.2d 1347, 1374-75 (4th Cir. 1979.)
7 591 F.2d 1347 (4th Cir. 1979).
8 Id. at 1376.
10 611 F.2d 763 (9th Cir. 1980).
forfeit to the United States . . . any interest he has acquired or maintained in violation of section 1962." In *United States v. Sutton* the United States Court of Appeals for the Sixth Circuit, marking a split with every other circuit court deciding the issue, held that RICO's coverage under section 1962(c) extends only to a legitimate enterprise which is operated by a "pattern of racketeering activity." The court held RICO inapplicable to racketeering enterprises of an entirely illicit nature, despite the fact that section 1962(c) provides, in pertinent part that, "[i]t shall be unlawful for any person . . . associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity. . . ." The restrictive reading given the statute by the *Mandel, Marubeni* and *Sutton* courts as well as various commentators threatens RICO's continued usefulness in controlling organized crime. More significantly, the process by which these courts have interpreted and applied the statute warrants a close analysis. To the extent these decisions encourage judicial lawmaking, their impact upon the continued judicial treatment of RICO ultimately may be more significant than their precedential impact on the isolated issues involved.

**II. The Mandel Decision**

In *United States v. Mandel*, the Fourth Circuit held that the defendants' transfer of an interest in an enterprise to then-Governor of Maryland Marvin Mandel as payment for fraudulent conduct regarding legislation favorable to the defendants did not, "absent other proof not present in this record,"

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12 605 F.2d 260 (6th Cir. 1979).
13 Id. at 270.
15 See notes 3-6 supra. The American Bar Association has solicited opinions on whether RICO ought to be reworded by amendment to narrow its scope. 26 CRIM. L. REP. 2282 (1979). "Criminal defense lawyers are enraged by the law. Stanley S. Arkin of New York called it a 'cruel' statute because of the penalty provisions. George Collins of Chicago said . . . 'it is a totalitarian law which invites prosecutorial abuse.' " Nat'l L.J., Nov. 26, 1979, at 12.
16 591 F.2d 1347 (4th Cir. 1979).
17 "The fact developed at trial touching upon the alleged bribery of the Governor and the alleged misrepresentation and concealment of material information by appellants were essentially uncontroversial." Id. at 1354.

The evidence established that several months after Mandel vetoed a bill favorable to the Marlboro Racetrack, his co-defendants acquired a controlling interest in the track. Twelve days later, the Maryland General Assembly, which had been misled by some of the defendants about the true identity of the track's new owners, overrode Mandel's veto without opposition from Mandel or his legislative aides. During the same period, some of Mandel's co-defendants secretly made an attractive real estate investment available to him. Subsequently, Mandel lobbied strenuously for the passage of a racing consolidation bill that would have benefitted Marlboro greatly. At the same time, certain co-defendants conveyed to Mandel an interest in other valuable real estate [the transaction in question in this note] and gave him generous gifts. All of this was accomplished in part through use of the mails. Id. at 1386. The defendants were convicted in the trial court. On appeal, the convictions were reversed "for trial error," id. at 1357, because the fraud aspect of the case was brought on a slightly inaccurate theory and because the jury instructions were not sufficiently detailed. Id. at 1364. The trial court acquitted the defendants of their RICO charge for transferring their interest in the real estate venture and the circuit court affirmed this acquittal. Id. at 1376.

18 591 F.2d 1347 (4th Cir. 1979). The fact developed at trial touching upon the alleged bribery of the Governor and the alleged misrepresentation and concealment of material information by appellants were essentially uncontroversial." Id. at 1354. This dispute continued even into the circuit court decision since the dissenting judge concluded that from the evidence "the jury could find beyond a reasonable doubt that the defendants . . . engaged in a scheme to defraud." Id. at 1386. Although the circuit court ruled out the possibility of the transfer in question having been made pursuant to a scheme to benefit the transferees, the wording of their decision makes it clear that even had there been a connection between the bribery and the transfer, the transfer would still not have been a violation under 18 U.S.C. 1962(c) (1977): "[T]he simple transfer of an ownership interest in that business does not constitute the conduct of the
constitute the conduct of an enterprise by means of a pattern of racketeering activity in violation of section 1962 of RICO. The court’s conclusion was based upon a questionable analysis of RICO’s language, an unjustifiably shortsighted view of the facts, and a failure to recognize the implications of the holding.

The circuit court’s opinion included a restatement of the district court’s analysis of the structure of section 1962(c). This analysis relied heavily upon the statement of purpose enacted in conjunction with the statute. Unfortunately, this analysis is not of any true value in deciding the RICO issue dealt with in *Mandel*. The district court’s examination of the structure of section 1962 results only in the court grudgingly concluding that section 1962(c) covers “the situation where a present owner or employee of a business begins to operate the business through a pattern of racketeering activity.” Comparing the statement of legislative purpose with the language of section 1962(c), the court concluded that “the words ‘operation of any enterprise’ were meant to describe the phrase ‘conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs.” Although both the district and circuit

business through a pattern of racketeering activity even if the transfer is part of an alleged payoff in a mail fraud scheme.” 591 F.2d at 1376 (emphasis added).


20 H.R. REP. No. 1549, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007. This title creates a new chapter in title 18, entitled “Racketeer Influenced and Corrupt Organizations,” which contains a threefold standard (1) making unlawful the receipt or use of income from “racketeering activity” or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce; (2) prohibiting the acquisition of any enterprise in interstate commerce through a “pattern” of “racketeering activity,” and (3) proscribing operation of any enterprise engaged in interstate commerce through a “pattern” of “racketeering activity.”

*Id.* at 4010.

21 “Most formal statements of purpose in bills or committee reports tend to be innocuous generalities designed to offend the least number of people, a fact that destroys most of their usefulness for resolving specific uncertainties of meaning.” R. Dickerson, *The Interpretation and Application of Statutes* 91 (1975).

22 See note 62 infra for a discussion of a more generous reading of the interrelation of § 1962’s subsections.

23 591 F.2d at 1375. 18 U.S.C. § 1962 (1976) provides that:

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

(b) 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.

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

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

24 See note 20 supra.

25 591 F.2d at 1375.
courts attach significance to this finding, the fact that "conducting an enterprise's affairs" under the statute must involve "operating an enterprise" simply begs the question of whether transferring an interest in an enterprise in payment for racketeering activity by a third party constitutes the operation of any enterprise through a pattern of racketeering activity in violation of section 1962(c).

The circuit court offered further analysis of the wording of section 1962(c) which likewise shed little light on the issue in *Mandel*. The court observed that "use of the word 'through' in the statute would seem to require proof of some connection between the pattern of racketeering activity and the conducting or operating of the business." This observation adds little to the discussion since, arguably, there seems to be proof of some connection between the bribery and the transfer in an interest insofar as the former was accomplished in return for the latter. The question still remains whether transferring an interest in an enterprise is an aspect of conducting or operating the enterprise.

The court cited *United States v. Nerone* as support for the proposition that a RICO offense requires a connection between the enterprise in question and the racketeering activity. On its facts, however, *Nerone* differs significantly from *Mandel*. *Nerone* involved a section 1962(c) prosecution against a mobile home park for running a gambling casino in one of the mobile homes in the park. The RICO charge against the mobile home park failed because the only connection between the mobile home park and the gambling operation was a mere "geographical juxtaposition." Since there was a direct connection between the transfer of an interest in the defendants' enterprise and the racketeering activity involved in the bribery scheme, *Mandel* involved a direct connection not present in *Nerone*. Thus, the holding in *Nerone* is simply irrelevant to *Mandel*.

The court also noted that "without the word 'through,' anyone who used income from a legitimate business to participate in racketeering activity would be guilty of a violation of section 1962(c)." Despite the apparent incredulity with which the court made this comment, such a reading of section 1962(c) is not entirely unthinkable. The operator of a business, insofar as he uses the profits of that business to underwrite racketeering activity, may be said to operate that business so that part, if not all, of its operations in fact constitute a pattern of racketeering activity.

The circuit court endorsed the district court's finding that the transfer of a proprietary interest by the defendants did not constitute conduct proscribed by section 1962(c). The district court had concluded that: (1) a "transfer of an in-

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26 Id.
27 See note 18 supra.
28 563 F.2d 863 (7th Cir. 1977).
29 Id. at 852. The *Nerone* court further observed that

The problem with the Government's case, however, is that the indictment charged that the affairs of the mobile home park corporation, not the casino operation, were conducted through a pattern of racketeering activity. Our examination of the record leaves us with the abiding conviction that the Government never really crystallized its theory of the case. It made no attempt to show that the proceeds of the casino operation were invested in Maple Manor, Inc. nor did it endeavor to show that gambling revenues were used by or in any way channeled into the corporation or that persons were paid out of gambling revenues to perform services for Maple Manor, Inc.

Id. at 851.
terest in a business is the antithesis of operating it”; (2) it was significant that “Mandel’s interest was purely passive” and “he was not entitled to,” nor did he possess “any management role” and, (3) “while Congress specifically outlawed acquisition of a business through a pattern of racketeering activity it did not specifically proscribe the transfer of an interest in an enterprise.”

Each of these findings is questionable.

First, transferring an interest in an enterprise is not necessarily antithetical to operating it. In a purely semantic sense, transferring ownership and control of an enterprise is perhaps the exact opposite of operating and retaining control of an enterprise. However, even were an owner to divest himself entirely of his ownership of an enterprise, it would not be unlikely that he should remain in charge of the business’s day-to-day operations. More significantly, establishing and maintaining the capital structure and control distribution of an enterprise, particularly one owned and controlled by a small number of individuals, is an essential aspect of the operation of any enterprise. Certainly a corporation transferring part interest in itself to a supplier as part of a larger transaction aimed at obtaining a more profitable arrangement between that supplier and the transferor would regard such a transaction as not only vital but perhaps absolutely essential to its continued profitability. In the same way, the transfer of an interest in the defendants’ enterprise to Mandel in return for legislative favors benefiting the defendants was arguably part of the operation of the enterprise.

Second, the fact that Mandel was ostensibly “passive” or not engaged in the “management” of the enterprise has no bearing on the charge involved. The indictment charged the transferors of the interest to Mandel with conducting the enterprise’s affairs through a pattern of racketeering activity. Mandel’s action was part of the bribery scheme which constituted a necessary part of the defendants’ conducting their business through a pattern of racketeering activity. In a determination of the validity of the court’s decision the crucial activity to be considered is the defendants’ transfer of an interest to Mandel in payment for allegedly fraudulent activity. Whether or not Mandel became an active member in the limited partnership after acquisition of his interest is irrelevant. Additionally, section 1962(c) makes no requirement that the person charged be entitled to any particular degree of managerial responsibility. The statute provides only that “any person employed by or associated with” the corrupt enterprise shall be criminally liable.

Third, in attaching undue significance to Congress’ failure to explicitly proscribe the transfer of an interest in an enterprise, the district court and the circuit court ignored a basic assumption about the meaning of words and interpretation of statutes. A statute cannot specifically and expressly indicate the proper disposition of the infinite number of possible cases arising within the statute’s scope. Determining the scope of statutes and applying them to individual fact situations inevitably requires a certain amount of deductive or in-

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30 591 F.2d at 1376.
31 Security Investments Company was owned by a number of persons in addition to Mandel and the three other defendants named in the Count.
32 591 F.2d at 1353.
ductive thought on the part of a conscientious court. Sometimes a statute may not proscribe one type of activity since it specifically proscribes another. Such situations are covered by the maxim *expressio unius est exclusio alterius.* However, the maxim is not always applicable. Certainly to say that because section 1962(a) deals specifically with the acquisition of interests, section 1962(c), which uses the general language of conduct or participation, does not include the disposition of interests, simply ignores the implied meaning of 1962(c). In short, *expressio unius est exclusio alterius* has no applicability to section 1962(c) in determining whether the statute intends a transfer of an interest to be considered a part of conducting an enterprise through a pattern of racketeering activity.

The circuit court concluded that even though an enterprise may transfer an interest in itself in payment “for unconnected criminal activity . . . this fact does not, in itself, cause the business, the interest in which is transferred to become a racketeer influenced organization proscribed by 1962(c). . . .” The court based its holding on its finding that any other reading of the statute would not be supported by “the language of the statute” or “the legislative history,” and would be “impermissibly broad.” The court’s conclusion and the assumptions upon which it is based are unsound for three reasons.

First, the court spoke of enterprises becoming “racketeer influenced organizations proscribed by 1962(c).” The most casual reading of section 1962(c) reveals that the section proscribes conduct and not organizations. This statement demonstrates the court’s confusion as to the statute’s actual wording, as well as the substantive nature of the change in question. Second, as discussed above, the language of section 1962 may very well proscribe the transfer of an interest as part of a pattern of racketeering activity.

Third, the legislative history cited by the court is entirely mute on the issue of whether transferring an interest in an enterprise constitutes the operation of the enterprise through a pattern of racketeering activity. Legislative history can be more vague than the statute which a court is called upon to interpret and, more often than not, there is nothing in the legislative history that deals specifically with a particular point in issue. The Organized Crime Control Act’s legislative history does contain an example of an analogous situation upon which a court could base a restrictive interpretation of the statute. In an exchange with the Act’s sponsor, Representative Sikes made clear that another section of the act, providing stiff penalties for use of explosives in interstate commerce, would not apply to farmers and amateur hunters. Had there been a similarly unequivocal exchange on the congressional floor regarding the point

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34 R. Dickerson, supra note 21, at 40-41.
35 "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." Black’s Law Dictionary 1521 (5th ed. 1979).
36 R. Dickerson, supra note 21, at 47.
37 591 F.2d at 1376.
38 591 F.2d at 1376.
39 See note 37 supra.
40 See text accompanying notes 29-36 supra.
41 See note 20 supra.
43 R. Dickerson, supra note 21, at 154.
at issue in *Mandel*, a court would be justified in restricting the scope of section 1962(c). However, since there is no specific legislative history on the question of whether transferring an interest in an enterprise is proscribed by section 1962(c), there is no merit in asserting that the legislative history either supports or negates a restrictive reading of section 1962(c).

Finally, the court’s concern that a reading of section 1962(c) proscribing the transfer of an interest in connection with racketeering activity would be “impermissibly broad” is questionable. If a court can, in good faith, find no basis for a restrictive interpretation and the wording of the statute would allow such a broad interpretation, unless such an unrestricted reading would render the statute unconstitutional in whole or in part, there is no reason for favoring a restrictive reading. Despite numerous challenges, RICO has been held constitutional by every court considering the matter. Certainly a person paying a bribe would be hard-pressed to make a valid argument that he had not been warned of the illegality of the act. Thus, since there is nothing compelling the court to make a restrictive reading of section 1962(c), the court’s insistence on such a course of action is totally unjustified. In conclusion, the Fourth Circuit’s holding that section 1962(c) does not prohibit the transfer of an interest as payment for an unconnected bribery scheme is unjustified in light of the wording of the statute and the facts of *Mandel*.

III. The *Marubeni* Decision

In *United States v. Marubeni American Corp.*[^47] the United States Court of Appeals for the Ninth Circuit held that section 1963(a)(1),[^48] providing for the forfeiture of interests acquired or maintained in violation of section 1962,[^49] does not apply to income earned by an enterprise through a pattern of racketeering activity.[^50] As in *Mandel*, the Ninth Circuit’s misreading of RICO and misuse of legislative history result in an unduly restrictive interpretation of the statute. The circuit court began its analysis by reviewing the holding on the district court level.

A. The District Court’s Ruling

In construing the statute’s forfeiture provision, the district court focused on the meaning of “interest” as used in the statute in order to determine

[^45]: R. Dickerson, supra note 21, at 200.
[^46]: Atkinson, supra note 4, at 3.
[^47]: 611 F.2d 763 (9th Cir. 1980). In *Marubeni* the Government contended that a local representative of Marubeni America Corporation, a supplier of telephone cable, bribed a local official of an Alaskan telephone utility in return for confidential bidding information on four supply contracts. Based on its bids, Marubeni and another supplier were awarded three of the four contracts worth over $8.8 million. After each award was received, the bribed official allegedly received part of the local representative’s commission. The Government charged Marubeni and the other supplier and a corporate officer of each with violations of 18 U.S.C. § 1962(c). The count at issue on appeal demanded that Marubeni and the other supplier forfeit to the Government the income derived from the illegally obtained contracts pursuant to 18 U.S.C. § 1963(a)(1). The district court dismissed the charges and the proceedings were suspended pending the Government’s appeal of that dismissal.
[^49]: See note 23 supra.
[^50]: 611 F.2d at 766.
whether "interest" could be interpreted to include "income," as well as a proprietary interest. Since section 1963(a)(1) calls for forfeiture of interests "acquired or maintained in violation of section 1962," the court concluded that the meaning of "interest" as used in section 1962 would be determinative of the matter.\textsuperscript{51} Since "interest" appears with "in an enterprise" whenever it appears in section 1962, the court concluded that when "interest" appears in 1963(a)(1), it likewise means "interest in an enterprise." Unfortunately, such a conclusion sheds little light upon the question of whether income can be an "interest" or even an "interest in an enterprise," and only begs the question.

The district court asserted that since section 1962(a) speaks of racketeering "income," the legislature could not have intended to include "income" within the meaning of "interest as used in 1963(a)(1)." Significantly, since section 1962(a) provides, in pertinent part, that "[i]t shall be unlawful for any person who has received any income derived, directly . . . from a pattern of racketeering activity . . . to use . . . such income, in . . . the . . . operation of any enterprise . . .,"\textsuperscript{52} section 1962(a) evidences a congressional intent that the use of racketeering income for operating an enterprise is a violation of section 1962. Further, section 1962(b) provides, in pertinent part, that "[i]t shall be unlawful for any person through a pattern of racketeering activity . . . to . . . maintain . . . any interest in . . . any enterprise."\textsuperscript{53} To the extent that both of these subsections evince an intent to prevent the operation and maintenance of enterprises through racketeering activity, any interest so maintained or operated seems clearly forfeitable as an interest under 1963(a)(1).

B. Construing the One-Percent Investment Exception

The court further argued that racketeering income is not forfeitable under 1963(a)(1) by analyzing the second sentence of section 1962(a), which the court terms the "1% Exception."\textsuperscript{54} The court described section 1962(a) as no more than "the general prohibition against investing income derived, directly or indirectly, from a pattern of racketeering activity."\textsuperscript{55} This description of the first sentence of section 1962(a) is, at best, inaccurate. In its entirety, the first sentence of section 1962(a) provides:

\begin{quote}
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.\textsuperscript{56}
\end{quote}

As is evident from even a casual reading, in addition to proscribing the invest-

\textsuperscript{51} Id.
\textsuperscript{52} 18 U.S.C. § 1962(a) (1976).
\textsuperscript{54} See text accompanying notes 56 and 58.
\textsuperscript{55} 611 F.2d at 766.
ment of racketeering income, the statute also proscribes the use of such income in the "establishment or operation of any enterprise." Thus, section 1962(a) has a broader purpose than the court incorrectly assessed. Section 1962(a) procribes the use of racketeering income in: (1) the acquisition of interests in enterprises, (2) the establishment of enterprises, or (3) the operation of enterprises.

In the light of the broader coverage of section 1962(a) the impact of the so-called one percent exception can be more readily ascertained. The second sentence of section 1962(a) provides that:

A purchase of securities on the open market for the purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Clearly, the second sentence of section 1962(a) provides an exception to only one aspect of section 1962(a) coverage. Nevertheless, the court asserted that section 1962(a) "tells racketeers they may not invest illegal income in enterprises unless they purchase corporate stock without the intent or ability to influence the issuer." Thus, the court construed the exception as a "safe harbor" rule for racketeers building a portfolio of publicly traded stock. The court was unwilling to admit that this construction is incongruous with the rest of a statute intended to proscribe various aspects of criminal enterprises.

The one percent exception is susceptible to a different interpretation. Assume a racketeer uses racketeering income to acquire, establish or operate an enterprise. Prior to RICO, the racketeer could have been convicted on the basis of various discrete criminal charges involved in the generation of income from the enterprise. The racketeer was fined and incarcerated. During his stay in prison, the enterprise continued to operate the convict's illegally acquired and operated enterprise. Upon his release from prison, the now ex-convict returned to his enterprise, which remained intact and prospered during his absence under the management of others. Under RICO's forfeiture provision, this sequence of events is less likely since, under the forfeiture provision, the racketeer's interest in the enterprise must be forfeited to the United States. Section 1963(a)(2) provides, in pertinent part, that "[w]hoever violates any provision of section 1962 . . . shall forfeit to the United States . . . any interest in [or] security of . . . any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

This provision seems directed at not only penalizing the individual racketeer, but also seeks to penalize his corrupt enterprise as well by requiring it to forfeit

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57 Id. (emphasis added).
58 Id.
59 611 F.2d at 767.
to the government that share of its equity attributable to the racketeer's ownership and involvement. This intention is explicit in section 1964 which provides for the possibility of a court requiring a total dissolution of the enterprise.\textsuperscript{61} This forfeiture would be an effective and valuable tool for stunting the continued growth of corrupt enterprises during as well as after an individual racketeer's imprisonment. The threat of such forfeiture would, however, be a great inconvenience for large, publicly traded corporations whose contact with the racketeer is attributable to only an insignificant ownership of stock. Thus, the one percent exception seems to be directed at preventing unnecessary disruption of publicly held legitimate enterprises.

The court is unjustified in implying that since the one percent exception is intended to provide racketeers a means to invest in public securities it is indicative of congressional unwillingness to require the forfeiture of racketeering income. The one percent exception seems more likely intended to protect public corporations and the securities markets from the disruptive effect of government-required forfeitures of \textit{de minimus} holdings by racketeers or their affiliates. Additionally, since the one percent exception is applicable to only a single aspect of the triple proscription section of 1962(a), the exception's provisions should not be applied to section 1962(a) in its entirety.

\textbf{C. The Relationship Among Section 1962's Prohibitory Provisions}

In construing section 1962 as a whole, the court asserted that "[i]f racketeering income were a forfeitable interest," such a reading would not only defeat the one percent investment exception but would render subsections 1962(a) and (b) redundant because there is "no meaningful distinction between monetary income and income in the form of an ownership interest in or control of an enterprise."\textsuperscript{62} The court concluded that congress did not write "§ 1962(a) and (b) only to make both extraneous by imposing forfeiture for 1962(c) violations. . . ."\textsuperscript{63} The court's conclusion is unjustified in that it misconstrues both section 1962 and section 1963(a).

First, the separate functions of sections 1962(a), (b) and (c) are more obvious than the court made them appear. Rather than being concerned with various types of income, the three subsections are intended to deal with the various component aspects of the operation of a criminal- or racketeer-influenced enterprise.\textsuperscript{64} The activities can be most properly viewed as parts of a continuum. Section 1962(a) concerns itself directly with the use of racketeering income in the acquisition, establishment or operation of an enterprise. Section 1962(b) concerns itself directly with the use of racketeering techniques in the

\textsuperscript{61} 18 U.S.C. § 1964(a) (1976) provides that:

\begin{quote}
The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
\end{quote}

\textsuperscript{62} 611 F.2d at 767.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} Significantly, the section is entitled "Prohibited activities."
acquisition or maintenance of an interest in, or control of, an enterprise. Section 1962(c) further broadens the entire section’s scope by proscribing the operation of an enterprise by an employee or an associate of the enterprise by means of racketeering activities. Thus, the various subsections of section 1962 are aimed at insuring that the statute’s proscriptive effect is broad enough to include the entire range of activities of individual racketeers and corrupt organizations.

Second, to imply, as did the court, that section 1963(a)(1) forfeitures may only occur in cases of section 1962(a) violations, is a flagrant misreading of section 1963(a)(1). The statute provides simply that “[w]hoever violates any provision of section 1962 . . . shall forfeit to the United States . . . any interest he has acquired or maintained in violation of section 1962.” Section 1963(a)(1) simply does not restrict forfeiture to any one subsection of section 1962. Thus, there is no reason why a violation of 1962(c) should not trigger forfeiture of an interest in any form.

Thus, a court may look to section 1962(a) or section 1962(b) to ascertain other proscribed racketeering activities, or to ascertain what interests are forfeitable, given the construction of section 1962 and the wording of section 1963(a)(1). Nevertheless, there is no validity to the assertion that requiring forfeiture of income on the basis of a section 1962(c) violation would make “surplusage” of section 1962(a) and section 1962(b).

D. Construing RICO’s Legislative History

The court discussed three documents of RICO’s legislative history to support its holding that forfeiture of racketeering income cannot be demanded under section 1963(a)(1) since only interests in an enterprise are forfeitable. The court first referred to the differences between two bills introduced in Congress, only one of which was ultimately enacted as RICO’s final version. Although the court only engaged in consideration of this legislative history to conclude again that “interest” as used in the statute means only “interest in an enterprise,” this conclusion shed little light on the issue of whether income is forfeitable. Even the practice of comparing an enacted statute against the form it took as a bill is questionable. In Justice Holmes’ words, “[i]t is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage.”

The court also referred to an excerpt from a letter on RICO’s constitutionality, written by then-Deputy Attorney General Richard Kleindienst, to reinforce their belief that “interest” means only an “interest in an enterprise.” The remarks of a deputy attorney general on a tangential matter should have little bearing on a court’s attempt to determine a statute’s meaning.

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67 611 F.2d at 767-68.
68 See text accompanying note 51 supra.
69 Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922).
70 611 F.2d at 768.
and its applicability to a particular situation. The deputy attorney general’s understanding of the statute should not influence the court’s determination of the congressional intent in enacting RICO.

The court referred to the House and Senate reports to again underscore the notion that “interest” only means interest in an enterprise.\(^7\)Ironically, the quote from the Senate report only emphasizes the subjectivity inherent in a court’s attempt to assign a specific meaning to an ambiguous scrap of legislative history.\(^7\)The Senate report speaks of “interest” as an “interest of any type in the enterprise.”\(^7\)A court attempting to argue that income is a forfeitable interest could have emphasized the words “of any type” to support their belief that “interest” should include “income.” Nevertheless, the court quoted further from the Senate report, emphasizing the statement that “where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture....”\(^7\)From this statement, the court concluded that “Congress plainly imposed criminal forfeiture to separate racketeers from the enterprises they owned, controlled or operated and not to attack racketeering broadsides.”\(^7\)In a footnote, the court continued, asserting that:

\[\text{We believe anyone who reads the legislative history must be struck by the single-mindedness with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of the influence of organized crime. This purpose must be the linchpin of any construction of RICO.}\]\(^7\)

This statement raises a number of disturbing doubts about the court’s process of interpreting RICO. Although the court speaks of the “single-mindedness” with which Congress drafted RICO, one commentator notes that the “folly of any attempt to conjure up a legislative intent has been asserted so often that many respectable scholars refuse to recognize the concept.”\(^7\)Further, “[e]ven if a unanimous legislative intent were knowable, it would be powerless to bind the courts, because the legislators’ function is not to impose their respective wills but to ‘pass statutes.’”\(^7\)In short, the court’s reliance upon its speculation as to what the legislative history reveals as to the intent of the statute creates too great an area for impermissible subjectivity. The court is not entitled to conclude from the legislative history, rather than the statute, that the congressional intent was “not to attack racketeering broadsides.” Although the court makes every effort to appear faithful to its constitutionally mandated role as an interpreter of statutes rather than lawmaker, the court’s\(^7\)

\(^{72}\) See text accompanying note 42 supra.
\(^{73}\) 611 F.2d at 768 (the court’s emphasis).
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) R. DICKERSON, supra note 21, at 68, and authorities cited therein.
\(^{78}\) Id.
\(^{79}\) Id., at 7.

The first assumption [of the process of judicial interpretation] is that the general powers of government
subjectivity is most evident in its closing remarks. Noting that the government contends that "forfeiture is the only effective penalty against corporate racketeers," the court disagreed and concluded that, "if corporate officers are fined, imprisoned and divested of their interests in the enterprise, their successors are unlikely to imitate their misconduct." Clearly, the most challenging aspect of the prosecution of organized crime, and the aspect of organized crime to which RICO is most specifically addressed, is organized crime's ability to continue to function without interruption despite the removal of one of its members. RICO, contrary to the Marubeni court's blithe assumption, is predicated upon the finding that fine, imprisonment and divestiture of any single individual is unlikely to have any substantially adverse effect upon the corrupt enterprise or its members. Thus, by taking an unjustifiably restrictive view of the language of the statute, and by unnecessarily and carelessly resorting to legislative history, the Marubeni court reached a decision which is arguably diametrically opposed to the intent of the statute.

IV. The Sutton Decision

In United States v. Sutton, the United States Court of Appeals for the Sixth Circuit, marking a split of opinion on the issue with other circuits, held that as it is used in section 1962(c), the term "enterprise" includes only legitimate enterprises. Thus, in the Sixth Circuit's opinion, RICO proscribes only racketeer infiltration of legitimate enterprises and is powerless against "merely" illegitimate criminal enterprises.

A. The Statute Itself

The court began its analysis "with the language of the statute," quoting section 1962(c) and paraphrasing the definitions of "racketeering activity" and "pattern of racketeering" appearing in section 1961. The court stated the

are constitutionally allocated among the three central branches in such a way that, although it does not have an exclusive power to make substantive law, the legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches." Id. and authorities cited therein.

80 611 F.2d at 769.
81 Id. at 264.
82 605 F.2d 260 (6th Cir. 1979).
84 605 F.2d at 270.
85 Id. at 264.
86 605 F.2d at 262.

"Racketeering activity" is defined in section 1961(1) as including numerous federal offenses involving murder, kidnapping, gambling, arson, robbery, extortion or drugs punishable under state law by imprisonment for more than one year. A "pattern or racketeering activity" is defined by section 1961(3) as requiring at least two acts of racketeering committed within ten years of each other.
government’s argument as consisting of three parts. First, the statute does not distinguish between legitimate and illegitimate enterprises, expressly referring to "any enterprise." Second, the definition of enterprise in the statute is a broad one. Third, since the appellants were an enterprise under the statutory definition and had met the statutory requirement for a pattern of racketeering activity, they were guilty of a RICO offense. Although it considered the government’s approach to the meaning of "enterprise" deceptively literal and no more than a "guise of rigorous fidelity to the text," the court, contradicting itself, admitted that “[o]f course, it is beyond dispute that the statute must be read to cover ‘any enterprise.’”

Despite the court’s insistence that their discontent with the Government’s argument is based upon a reading of the wording of the statute, it seems clear that the court’s reading of the statute was clouded by a preconception of the impact of the legislative history on the matter. Although there are several explanations for why federal courts resort so avidly to legislative history in construing statutes, the statutory text should be read, at least initially, without benefit of legislative history. Apparently convinced that the legislative history provides that RICO is intended only to include infiltration of legitimate enterprises, the court was evidently intent on finding various problems with the wording of the statute itself. This fact is most evident in the very strained analysis the court makes of section 1962.

The court expressed its belief that "the statutory definition [of enterprise] is silent regarding the attributes or activities these units must assume or undertake before they may be deemed an ‘enterprise’ in any meaningful sense.” Asserting that individuals and groups do not become ‘enterprises’ except in relation to something they do,” the court concluded that the definition of enterprise in section 1964 (1) is “incomplete because it does not tell us what that something is.” The Government’s obvious answer to the artificial problem raised by the court was that racketeering activity is what the statute determines to be the level of activity necessary to make an enterprise an enterprise. The court rejected this sound answer and maintained that a reading of the statute

87 Id. at 264 (the court’s emphasis).
88 18 U.S.C. 1961 (4) (1977) provides that “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”
89 The government’s evidence showed both a significant heroin distribution business and a large-volume stolen property fencing operation. They were centered in the Cincinnati, Ohio, area and involved many of the same figures. . . . It was the government’s theory of the case that these were not discrete criminal ventures but were merely separate departments of a unitary “criminal enterprise” under the management and control of [Sutton and another defendant].
90 605 F.2d at 263.
91 See text accompanying notes 107-25 supra.
92 One reason is the belief that [legislative history] improves [the court’s] access to actual legislative intent. Supporting this belief is the assumption that the authors of statutes somehow communicate more successfully outside statutes than inside them. Another reason is that many courts feel a higher fidelity to legislative intent than they do to the official, constitutional vehicles for expressing that intent.”
93 Id. at 265.
94 605 F.2d at 265.
95 Id.
which requires racketeering as the only prerequisite for a covered enterprise "renders the 'enterprise' element of the crime wholly redundant and transforms the statute into a simple proscription against 'patterns of racketeering activity.'" The court based its conclusion largely on their belief that since the wording of section 1962(c) is "so complex a formulation," a "straightforward prohibition against engaging in 'patterns of racketeering activity' would have sufficed, and there would have been no need for a reference to 'enterprise' of any sort."

Rather than "purposeless circumlocution," the structure of section 1962(c) is a product of that section's relationship to the other sections of 1962. The concept of enterprise is essential to all of the subsections of section 1962. Subsection 1962(a) deals with the use of racketeering income to acquire an interest in an enterprise or to establish or operate an enterprise. Subsection 1962(a) proscribes the acquisition or maintenance of an enterprise by means of racketeering activity. Subsection 1962(c) prohibits the operation of an enterprise through a pattern of racketeering activity in the following terms:

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

Given the centrality of "enterprise" to all of the subsections of section 1962, subsection 1962(c)'s double use of the word "enterprise" is hardly redundant. Arguably, the wording of section 1962(c) has a number of complementary functions. First, assuming, arguendo, that an enterprise within RICO's coverage may be either entirely illegitimate or legitimate but racketeer influenced, subsection 1962(c), as worded, takes both possibilities into account. For example, if an "employee" of an entirely illegitimate enterprise conducts the illegitimate enterprise's affairs through a pattern of racketeering activity, his conduct is proscribed. In this case, the term "such enterprise" serves simply as an explicit reference to the enterprise referred to earlier in the subsection. On the other hand, if the employee is associated with a largely legitimate enterprise and the employee conducts some of the legitimate enterprise's affairs through racketeering activity, the term "such enterprise" refers to the legitimate enterprise which, in the court's words, has an identity conceptually distinct from any pattern of racketeering activity.

Second, the use of the term "such enterprise" helps tie subsection 1962(c) to the rest of the subsections of section 1962 by emphasizing the fact

96 Id. at 265-66. All other courts considering the matter have come to the conclusion that section 1962 is in fact a proscription against "patterns of racketeering activity." See note 82 supra.
97 605 F.2d at 266.
98 Id.
99 See text accompanying note 61 supra for a discussion of the subsections of 1962 in terms of their respective impacts upon the entire section's proscriptions of various activities.
101 Id.
103 605 F.2d at 266.
that the racketeer operation of any enterprise dealt with throughout section 1962 is proscribed by subsection 1962(c). Nevertheless, the court concluded that "[c]ommon sense" and "the plain meaning of the words in context" indicate that "the reference to 'enterprise' was included to denote an entity larger than, and conceptually distinct from, any 'pattern of racketeering activity' through which the enterprise's 'affairs' might be conducted."

Significantly, the court admitted that "the text [of the statute] is no help" in "determining when racketeers have crossed the line to become a 'criminal enterprise.'" Since the statute does not even hint at what the standard should be, it seems logical to conclude that the only standard the statute requires is racketeering activity. Nevertheless, the court rejected the observations of another court on the nature of enterprises within RICO's coverage, and turned to RICO's legislative history for guidance despite the fact that, by the court's own startling admission, "unfortunately, [the legislative history does] not solve the problem. . . ."

B. The Legislative History

The court's review of RICO's legislative history centered on various statements of purpose, endorsements from the Justice Department, committee reports and floor debates. Each of these sources are of limited value in resolving a specific problem of statutory construction. Formal statements of purpose tend to be "innocuous generalities designed to offend the least number of people, a fact that destroys most of their usefulness of resolving specific uncertainties of meaning." The Justice Department's perception of the statute can have no logical connection with what Congress intended the statute to mean. Floor debates are, finally, the "least reliable" source for interpreting statutes. From the legislative history, the court concluded "that RICO was enacted in response to the growing subversion of our society's legitimate institutions of business and labor by organized crime" and not merely "crime for crime's sake." According to the court, "RICO's evident purpose was to single out racketeering activity undertaken in connection with the subversion of legitimate institutions."

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104 Id.
105 Id.
106 In United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), cert. denied sub nom. Delph v. United States, 439 U.S. 953 (1978), the Fifth Circuit had observed that "criminal enterprise" in RICO could include "an ameba-like infrastructure that controls a secret criminal network" Id. at 897-98.
107 605 F.2d at 267.
108 Id. at 267-68.
109 See note 21 supra. "A court should not automatically assume. . . that a purpose clause precisely and comprehensively records the actual legislative intent of the statute." R. Dickerson, supra note 21, at 99. "A judge would lose little if he closed his eyes entirely to the materials of legislative history, which he is institutionally entitled to do except in those rare instances where specific materials might achieve the status of context." Id. at 175.
110 See text accompanying note 70 supra.
111 R. Dickerson, supra note 21, at 156.
112 605 F.2d at 268.
113 Id.
The court’s use of legislative history to reach this conclusion is questionable for a number of reasons. First, since the court itself questions the usefulness of the legislative history in resolving the perceived ambiguity in the statute, the reference to the legislative history seems totally unwarranted.\footnote{114} Further, it is possible to read section 1962 in such a way that it can be understood to proscribe the infiltration of legitimate enterprises as well as the establishment or operation of totally illegitimate enterprises.\footnote{115} Second, the fact that Congress may have evinced a particular legislative purpose does not mean that they specifically ruled out any other concomitant purpose. “Even a particular subclass of events is not excluded from a broad legislative intent merely because the [legislature] did not specifically advert to it.”\footnote{116} Thus, the court is unjustified in asserting that because Congress expressed its intention to rid legitimate enterprises of the interference of organized crime, Congress did not intend to attack the purely illegitimate organizations which are a prerequisite to infiltration. Finally, the court’s construction of the legislative intent does not take into account some remarks which hint at a broader purpose for RICO. For example, in discussing the object of the entire Organized Crime Control Act, of which RICO was one title, Congressman Poff observed that people mistakenly speak of organized crime as if it were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.\footnote{117}

Although this comment is directed neither specifically at RICO nor the issue of enterprises covered by RICO, it raises serious doubts as to the validity of the court's conclusion that the only purpose of Congress in enacting RICO was proscription of those racketeers actively infiltrating otherwise legitimate enterprises.

Like the Marubeni court, the Sutton court misstated the meaning of the so-called one percent exception to subsection 1962(a).\footnote{118} The court incorrectly assumed that subsection 1962(a) applies only to investment in legitimate enterprises, and ignored the statute's prohibition against establishing or operating an enterprise. The court concluded therefore, that subsection 1962(b) and (c) must likewise apply only to legitimate enterprises infiltrated by racketeers. The court buttressed its reading of RICO by referring to two canons of judicial interpretation. First, the court asserted that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”\footnote{119} The soundest rationale for such a rule is that all potential violators are entitled to

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\begin{itemize}
\item \footnote{114} "Apart from constitutional considerations, belief in the existence and significance of legislative intent involves no commitment to examining any specific kind of evidence . . . . There is certainly no constitutional obligation to consult inappropriate evidence," R. Dickerson, supra note 21, at 84.
\item \footnote{115} See text accompanying notes 98-104 supra.
\item \footnote{116} McCallum, Legislative Intent, 75 YALE L. J., 754, 772 (1966).
\item \footnote{118} See text accompanying notes 54-60 supra.
\item \footnote{119} 605 F.2d at 269, citing Rewis v. United States, 401 U.S. 808, 812 (1971).
\end{itemize}
fair warning. Those crimes involving acts that are wrong only because they have been officially proscribed (malum prohibitum) require independent warnings and should be strictly construed against the state. However, since RICO's predicate crimes are acts generally assumed to be antisocial (malum in se), in which a warning tends to inhere in the act itself, there seems little point in exploiting every semantic or syntactic uncertainty of the statute against the state.

Second, the court asserted that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." The court seemed to indicate that it was concerned with the right of individual states to enforce their own criminal laws. However, in light of states' continued ability to prosecute RICO violators for the predicate offenses constituting the pattern of racketeering activity, the actual impact of the superimposition of a federal penalty seems minimal at best. Also, the court's admission that Congress could doubtless exercise such power seems to render the issue insignificant.

To conclude, the Sutton court's reading of both the statutory language and legislative history of RICO is inadequate and results in an unnecessary and ill-conceived restriction upon RICO's scope.

V. Conclusion

The Mandel, Marubeni and Sutton decisions threaten both RICO's viability as a weapon against criminal enterprises and the constitutionally mandated separation of powers between Congress and the courts. Under Mandel, if a corporation is transferred to racketeers in return for unconnected racketeering activity, the transferors are able to gain the benefits of racketeering activity without coming within the scope of RICO. Under Marubeni, an enterprise may successfully retain its racketeer acquired income while a parade of lower-level functionaries go to jail, buoyed by the prospect of returning to an enterprise which remained intact and prospered during their enforced absence. Under Sutton, as long as a totally illicit enterprise is able to destroy a legitimate competitor by totally illegal means, the illicit enterprise is immune from RICO.

More significantly, the Mandel, Marubeni and Sutton courts each base their restrictive readings of RICO on interpretations of RICO's legislative history rather than open-minded readings of the statute itself. When a court finds a statute ambiguous, the court should consult specific discussions of that ambiguity in the legislative history to resolve the matter. In Mandel, Marubeni, and Sutton, however, the courts have gone directly to the legislative history before trying to discern the statute's meaning from its language. The courts also failed

120 Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 758-59 (1935).
121 R. Dickerson, supra note 21, at 209.
123 R. Dickerson, supra note 21, at 211.
124 605 F.2d at 220.
125 See, e.g., United States v. Aleman 609 F.2d 298, 306 (7th Cir. 1979) cert. denied, 46 U.S.L.W. 3611 (U.S. March 25, 1980) (No. 79-1009), in which a convicted RICO offender was sentenced in a state court for a predicate offense of robbery.
to establish that the statute is ambiguous or that the legislative history deals with that ambiguity in a sufficiently specific manner. There is simply no discussion by Congress of whether payment for unconnected racketeering by means of an interest in an enterprise is proscribed (Mandel), whether racketeering income is a forfeitable interest (Marubeni) or whether purely illegitimate enterprises (Sutton) are within RICO's scope.

Arguably, the courts first created an uncertainty not apparent on the face of the statute and then "resolved" that uncertainty by referring to a legislative history which in no way addresses the particular issues. In so doing, the courts, in effect, substituted their judgment on these issues for that of the Congress. The continued use of such haphazard procedures by the courts in construing RICO threatens the statute's continued viability as well as the separation of powers between Congress' duty to enact statutes and the judiciary's duty to apply those statutes as written.

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