REMARKS OF THE ATTORNEY GENERAL
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The story goes that some years ago the Department's Criminal Division received a phone call from someone who had been informed by the local United States Attorney that he was a target in an investigation of public corruption. The caller vigorously protested his innocence, asserting that he had no connection with the corruption under investigation. When asked what the allegation involved, the caller shouted, "How should I know? The police say they are investigating an enterprise of some kind, run by a guy named RICO. I don't know anyone named RICO! And I don't want to!"

As some of you might have guessed, the caller was confused -- very confused. Although he was right to say that RICO was involved, RICO was not some guy. RICO is the acronym for a federal statute whose full name is: the Racketeer Influenced and Corrupt Organizations Act.

This law is the subject of my remarks today. Enacted as Title IX of the Organized Crime Control Act of 1970, RICO culminated a decade-long quest by the national government to fashion the legal tools necessary for federal law enforcement authorities to respond effectively to the growth and power of organized crime.

Today, fifteen years later, RICO has become the most effective weapon available to law enforcement in this fight against organized crime. When used properly, no other statute is as powerful in rooting out the kind of organized criminal activity with which all law-abiding Americans ought to be concerned.

In the past five years, however, we have seen a new development with RICO. The statute also authorized a private right of action, intended to assist the law's general purpose of eradicating organized crime. Towards this end the Congress provided for treble damages and attorneys' fees for successful plaintiffs.

Of the roughly 230 private civil RICO actions reported over the past 15 years, almost all have occurred since 1980. And many of these private actions, although not all, have been directed against persons who were not the primary targets of the statute. Because the remedies

in these cases include treble damages and attorneys' fees, private civil RICO has become an extremely attractive statute upon which to base claims previously grounded in state or other federal law. Private civil RICO thus has become less an instrument of eradicating organized crime than a tool for litigation against legitimate businesses and others alleged to have engaged in criminal activities. I know that many within the private bar are concerned about the issues involving private civil RICO, and during the new Congress changes in the law will undoubtedly be proposed and debated.

Today I intend to discuss in detail the RICO statute, and the use of this law by the government and by the private bar. I intend to cover the language and purposes of RICO, the government's enforcement experience under the statute, the uses and possible misuses of private civil RICO in recent years, the judicial response to issues involving private civil RICO, and some proposals for changes in the law.

One purpose of my remarks today is to acknowledge that, to a significant extent, private civil RICO is not being used as originally intended, and to express the willingness of the Department of Justice to join in the effort to see what can be done to correct this situation.

But this is not my only purpose today. For I also want to state emphatically that no change in the law should reduce or compromise the tremendous success of law enforcement under the statute in battling organized crime. This is no time to tinker with the most important weapon in the law enforcement arsenal. All of us have a stake in making sure that any change in private civil RICO does not weaken the use of RICO by the government in criminal and civil cases.

Congress enacted the Racketeer Influenced and Corrupt Organizations Act in order to impose appropriately severe sanctions on mob criminals, to take the profit out of organized crime, to disrupt its operations, and to protect legitimate businesses from being infiltrated by crime families. Section 1962 of Title 18, the central provision of RICO, makes it unlawful to invest funds derived from a "pattern of racketeering activity" in an enterprise engaged in interstate commerce, to acquire an interest in or operate any such enterprise through a "pattern of racketeering activity," or to conspire to do so.

Under RICO, a "racketeering activity" includes such state law felonies as murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs. It encompasses violations of numerous federal criminal statutes, including the mail and wire fraud laws. And it includes fraud in the sale of securities. Under RICO, a "pattern" of racketeering activity requires commission of two or more such acts within ten years of each other.

RICO has both criminal and civil sanctions. Criminal sanctions, as revised by the Congress this past year, include a fine of up to $250,000 for individuals and up to $500,000 for organizations. They also include imprisonment for 20 years and criminal forfeiture of property. Civil sanctions take one of two forms, depending on whether the plaintiff is the government or a private party. The government may seek equitable relief such as divestiture of the violator's business interest, dissolution of the enterprise, and injunctions against future participation in similar businesses. A private plaintiff may seek treble damages and attorneys' fees. In order to recover under prevailing judicial interpretations, an injured party must prove not only a violation of section 1962, but also an injury to his business or property by reason of the section 1962 violation.

As I have noted, Congress designed the private right of action in order to strengthen the law enforcement effort against organized crime. In providing both public and private avenues of attacking organized crime, Congress meant to increase the potential legal pressure against organized crime.

Congress enacted RICO in 1970, but several years passed before the federal government began using the statute effectively. Only two federal RICO indictments were brought in 1972; and only six in 1973. By 1978, however, the number of RICO indictments had risen to 68. And in 1979, 66 RICO cases were filed. Since 1980, criminal RICO has enjoyed greater and greater use. To date, the government has filed more than 500 criminal prosecutions charging RICO violations, many of these against individuals involved in drug trafficking.

RICO's criminal provisions are achieving their original purposes. Law enforcement is taking more and more of the profit out of organized crime. During the first ten months of 1984, for example, federal prosecutors obtained forfeiture of nearly $205,000,000 in

racketeering profits through the use of RICO. Furthermore, the Department of Justice has used RICO to convict more and more leaders of organized crime families, thus disrupting their operations and forcing them to rely on secondary leadership. We have convicted the hierarchies of crime families in Los Angeles and Cleveland, and many top echelon figures in families located in New York City, Chicago, Philadelphia, Milwaukee, and Detroit. For example, the active leadership role of the Cleveland La Cosa Nostra ended in 1982 when its boss and two deputies were convicted of RICO offenses arising from a murder-for-hire scheme. The boss was sentenced to 17 years' imprisonment, and the two deputies to 14 years'.

Through RICO, federal prosecutors have been able to demonstrate links between seemingly unconnected crimes and then to connect crimes committed by the mob's footsoldiers to their bosses. This past fall, for example, the entire leadership of the Colombo Family of New York City was indicted on RICO and other charges covering the entire range of the family's alleged activities, which include labor racketeering, loansharking, gambling, theft, narcotics offenses, and bribery.

This same case also illustrates the principal purpose of RICO: to protect the legitimate economy from infiltration by the mob. The indictment charges that the Colombo Family controls no fewer than seven key union organizations, deeply influencing the construction and restaurant industries in New York City. According to the indictment, "The Colombo Family used its control of various labor unions to demand and receive payoffs from employers and prospective employers of members of the various unions and to steal money from the unions. Fear of violence, labor troubles, and disruption of sources of supply induced employers to pay the sums demanded."

RICO also serves to protect other legitimate areas of our society. In 1982, for example, five individuals were convicted under RICO for fixing Boston College basketball games during the 1978-1979 season. We have also convicted officials employed in the governor's offices in Tennessee and Maryland, including a former Governor of Maryland, for systematic corruption in office. And we have convicted prosecutors, sheriffs, detectives, building inspectors and others who have used public office in furtherance of illegal activities.

Fifteen years after the law was passed, criminal RICO has clearly proved a remarkable success. On the civil side, the law's injunctive remedies have also assisted the government's fight against organized crime. While the Department has filed only a few civil suits, just this past year we succeeded at the district court level in a case that may well end 30 years of mob control of one of the largest locals in the largest union in this country.

Of course, civil actions may be brought by private parties as well. Consistent with the law's purpose, some of these suits have clearly assisted the efforts of law enforcement in battling organized crime. For example, following a 1980 federal RICO prosecution of waterfront racketeering, a shipping firm brought a civil RICO suit against executives of various waterfront companies who had conspired with officials of the International Longshoremen's Association. The shipping company sought recovery of more than one million dollars lost over six years in a kickback scheme in which its employees were bribed to accept inflated bills for services never performed.

Still, not every private civil RICO suit can be characterized as helpful in the battle against organized crime. Indeed, our own review of such actions shows that only 7 percent have been brought against persons associated with organized crime or on the basis of activities commonly engaged in by organized crime, such as violent crimes, organized theft, public corruption, obstruction of justice, and labor racketeering. Almost two-thirds of the private civil RICO actions have been brought against apparently legitimate businesses or other institutions, and have been predicated on mail fraud or wire fraud, or securities fraud.

RICO not only permits these kinds of suits, it encourages them. Because RICO can be satisfied by only two acts of racketeering activity having some connection to an interstate enterprise, and because each mailing or telephone call pursuant to a fraudulent scheme constitutes a separate act of racketeering activity, a case of commercial fraud can easily enough be transformed into a treble damage action under private civil RICO.

The private civil RICO provisions have generated claims against such respected and legitimate businesses. Even a government has been a defendant in a private civil RICO action. Recently the patrolmen's benevolent association in Suffolk County, New York,

alleged that the county had deprived police officers, charged with unlawful conduct, of their rights to a fair trial. The association threw in among its nine causes of action a violation of civil RICO based on allegations of fraud. The county had used the United States mail to communicate with the association regarding its complaints about a fair trial, and the association said that the statements in the county's letters were fraudulent. The association eventually withdrew its RICO claim, but the judge in the case commented in a footnote: "It defies credulity to believe that Congress intended to encompass within the provisions of the Racketeering Influenced Corrupt Organizations statutes a County Attorney and members of his staff in the discharge of their professional responsibilities."

Private civil RICO also encourages complaints predicated on fraud in the sale of securities. It does so because it provides plaintiffs with an attractive alternative to the traditional course of basing claims on the federal securities laws themselves, which impose standing restrictions that do not apply under RICO. In some cases, plaintiffs have even attempted to add civil RICO counts to a complaint brought under the Securities Exchange Act -- simply because of the treble damages available under the law.

In one such case, purchasers of interests in oil and gas leaseholds sued the sellers of the leaseholds charging violations of the Securities Exchange Act. Eight months passed, and they asked the court for permission to amend the complaint to allege a RICO violation as well. But the judge in the case rejected their request, stating that the plaintiffs' "sole justification for the eight-month delay in bringing the RICO claims is that they had not previously thought of them" and concluding that Congress "in drafting [civil RICO] did not intend to provide an additional remedy for an already compensable injury."

The questions raised by misuses of private civil RICO are obvious. Should a substantial number of individuals who are not organized criminals and who were not intended to be caught in the net of a law aimed at organized crime be nonetheless ensnared by it? Must the law sweep so broadly? Can the law be changed so that it does not sweep so broadly? And, if changed, can it retain whatever deterrent power it currently possesses?

Fifteen years ago Congress faced similar questions. It deliberately chose a very broad approach,

designing a fine net that it hoped would catch primarily members of organized crime, but which it realized would ensnare others as well. Today, we have the benefit of experience. We know that the preponderance of private civil RICO actions are brought against individuals who are not organized crime figures.

Furthermore, today we have a body of growing case law addressing the issues raised by private civil RICO. Courts generally have sought to narrow the scope of the available remedy. But many argue that this judicial effort has not been wholly satisfactory.

Some courts have required that plaintiffs demonstrate the defendant's tie to organized crime. These courts claim to find in RICO's underlying objectives support for limiting civil liability in this manner. It seems, however, that Congress specifically chose not to require an affiliation with organized crime. A number of legislators feared that such a qualification would cast doubts on the constitutionality of the statute, since a direct proscription on "organized crime" could be subject to challenge as overly vague.

Instead of proscribing criminal association, Congress sought to reach organized criminals by imposing sanctions for the types of activities in which they generally engage. In making liability dependent upon conduct, rather than status, Congress recognized that RICO would reach beyond the narrow confines of organized crime.

Another limiting effort was undertaken in a recent court of appeals case. The court held that a prerequisite to a private treble damages action under RICO is that the defendants already have been convicted of the underlying predicate offenses. A criticism of this approach is that it would eliminate almost all private actions, because very few defendants have already been convicted of the offenses in question. Congress faced this issue 15 years ago when writing the law; it was deeply concerned about the ability of criminals to evade prosecution by suppressing evidence of their unlawful connections with organized crime.

A third example of judicial efforts to limit RICO's private right of action are interpretations holding that the statute protects against only a specific kind of injury. For example, one federal district court held that, to state a cause of action for treble damages under RICO, a complaint must affirmatively demonstrate a

"competitive injury" from the illegal advantage gained by the defendant. More recently, a court of appeals held that proof of "racketeering injury" is required.

There is a question whether either of these interpretations of RICO is satisfactory. Some have argued that these interpretations are inconsistent with the language of the statute and the intent behind it. These interpretations, it is said, provide protection only for those individuals indirectly injured by a violation of the law, but the purpose of the law was to protect those directly injured.

Here, then, is the situation with civil RICO today. More and more claims traditionally based on state or other federal law are being brought under civil RICO, against persons and for purposes that were not the primary concern of the enacting Congress. To correct this situation, some courts have narrowly interpreted RICO and others have read into RICO new requirements. While these courts have accurately perceived problems raised by some uses of private civil RICO, the solutions they offer have troubled many observers, leading them to argue against judicial restriction of RICO.

First, they say, as the Supreme Court has clearly affirmed, Congress intended that the Racketeer Influenced and Corrupt Organizations Act would federalize designated areas of state law. The need for court deference to broad congressional action should caution against restricting RICO's private right of action.

Second, these observers argue that in restricting the scope of RICO, courts have assumed the mantle of the legislative branch. With virtually no basis in either RICO's statutory language or legislative history, they argue, the courts have engrafted limitations on the scope of the statute. While the policy result of limiting federal jurisdiction over fraud may be desireable, they believe that considerations of judicial restraint should be paramount. And if the doctrine of judicial restraint is to have meaning, they say, it must be adhered to in all instances -- even those in which the policy results are regarded as favorable.

Third, these observers say, recent judicial limitations on RICO seem to advance somewhat contrary policy interests. In their view, the organized crime and prior conviction limitation works to restrict RICO to defendants who have a tie with organized crime. The "competitive injury" and "racketeering enterprise injury"

restrictions, however, work to permit some defendants who are in fact affiliated with organized crime to escape liability. For these observers, this inconsistency points to the inadequacy of the judiciary to make policy and supports their belief that in a democracy this task properly belongs to the legislature. If there is to be any change in RICO, they conclude the job should fall to Congress.

One is left, then, with a broadly written statute that, on the civil side, is less than satisfactory. The private civil remedies are being used, not primarily to advance the fight against organized crime, but primarily in other ways and with possibly undesireable consequences. If these uses of RICO (and some say they are abuses) should be changed, they should be changed by the Congress.

Currently, the Supreme Court is reviewing two cases involving private civil RICO. While I appreciate the fact that the Court must decide the cases properly brought before it, as these have been, I share the judgment of many that the Congress, not the judiciary, is the proper arena for policy change. Furthermore, I recognize that if there is no change, we may continue to see common law fraud federalized, and the policies underlying our federal securities laws undermined. And meanwhile, the cost to legitimate businesses and institutions of defending against private RICO claims may well continue to mount.

Life is full of mixed results, and perhaps with RICO one should be satisfied that the statute has proved to be a powerful tool for federal law enforcement authorities in countering organized crime. This is, after all, a substantial and very important achievement. Furthermore, the law of unintended consequences may work as dramatically on any revision of RICO as it has on RICO itself; for example, a dozen years from now, one might regret the effects of an amended RICO if the revision reduces the effectiveness of law enforcement against organized crime. Plainly, there is a case to be made for living with RICO as it was written.

But just as plainly there may also be a case for legislative change of private civil RICO, and the new Congress is expected to consider a variety of alternatives. Several competing concerns would need to be balanced. These include: maintaining the vitality and utility of the statute's criminal provisions; providing effective civil remedies for systematic illegality that

can serve as a useful complement to criminal prosecutions; avoiding unfairness to defendants who are not organized criminals and whose conduct does not amount to systematic illegality; and avoiding unnecessary federalization of fraud cases and erosion of the structure of federal securities law restrictions.

Several modifications of civil RICO have been suggested. One is that Congress specify with greater precision the offenses that constitute racketeering activity. The idea here would be to make sure that the predicate acts for a RICO violation are those in which organized crime is most commonly engaged. Another suggestion is that Congress redefine "pattern" to encompass more frequent criminal activity than the current requirement of at least two such acts within ten years of each other. Yet another is that Congress require a plaintiff to predicate a private RICO action on a prior determination of liability in a criminal or civil proceeding brought by the government. And, finally, Congress could even abolish the private action for damages and replace it with a combination of damage actions by the federal government and parens patriae actions by the states.

We have not endorsed any of these suggestions. We are ready, however, to work with the Congress as it considers the need for legislative change, so long as it does so in the context of preserving the present RICO statute for use by the government in criminal and civil cases brought to eradicate organized crime. We recognize that failure to confine civil RICO actions within reasonable bounds may not only be unfair to defendants and unduly burdensome for the federal courts, but may also encourage judicial interpretations in civil suits that could have adverse consequences for criminal prosecutions. For it is the current effectiveness of the law on the criminal side that all of us have an interest in seeing maintained. Legislative change of RICO must not impair the utility of the law's criminal provisions or the deterrent potential of the civil remedy, when sought by the government, in the fight against organized crime.

I appreciate the opportunity to visit with you today. Thank you very much.