Beyond the Mob

"Varsity Blues" and DOJ's Expanding Use of RICO to Prosecute White-Collar Crime

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It is a fact of American life that parents want their kids to go to the best schools. Sometimes wealthy parents are known to attempt to grease the skids for their children by donating large sums of money to top universities. But given the highly competitive nature of college admissions and the massive endowments at the most prestigious schools (the market value of Harvard's endowment is reported to be about $38 billion), sometimes a donation may not be enough. As seen by the recent federal charges and guilty pleas in the "Varsity Blues" Department of Justice (DOJ) takedown, enterprising parents have been tempted to break the law to ensure their children's admission by falsifying academic records, athletic accomplishments, and test scores.

But are these overzealous parents no different than mob bosses? According to DOJ, these crimes are just as bad as John Gotti's, as demonstrated by prosecutors' decision to charge the case under one of the most powerful tools in the federal law enforcement arsenal—the Racketeer Influenced and Corrupt Organizations Act (RICO). In charging some of the Varsity Blues defendants with RICO offenses, DOJ has utilized what was recently referred to as "'bare-knuckle' white collar prosecution tactics once reserved for organized crime or drug cases." But have these hardball tactics gone too far? Should the same scorched-earth criminal statute that prosecutors used to bring down notorious mobsters such as James "Whitey" Bulger and Anthony "Fat Tony" Salerno be used to prosecute parents of college-bound teenagers?

A Short History of Organized Crime in the United States

Organized crime has existed in the United States since the 19th century, but it became more sophisticated during the Prohibition era. Although organized crime was present in many communities, it was concentrated in large cities, particularly New York and Chicago. By the middle of the 20th century, criminal organizations were engaged in various illegal activities, including gambling, loan sharking, drug trafficking, extortion, gun running, prostitution, bootlegging, racketeering, money laundering, and fraud. The rules of the underworld were enforced by violence, including murder. Shortly after World War II, organized crime caught the attention of policymakers in Washington.

In 1949, the American Municipal Association, on behalf of more than 10,000 US cities, asked the federal government to take action against organized crime. In the early 1950s, a Senate committee, led by Tennessee Senator Estes Kefauver, heard testimony from more than 800 witnesses concerning organized crime. Approximately 30 million people watched the committee proceedings on television. The committee found evidence that the mob was engaged in illegal gambling and narcotics trafficking and was infiltrating legitimate businesses. On the heels of those hearings, the Justice Department encouraged federal prosecutors to investigate and prosecute organized crime, and in 1954 it formed a formal Organized Crime and Racketeering Section.

J. Edgar Hoover: "There Is No Mafia"

However, J. Edgar Hoover and the FBI remained more focused on investigations related to the Cold War. Indeed, in 1951, Hoover famously told a congressional committee, "There is no Mafia." As an illustration of the extent to which the FBI's investigative focus was elsewhere, the Bureau's New York field office in the early 1950s dedicated 400 special agents to investigate subversive activity, but only four were assigned to investigate organized crime. However, in November 1957, in a watershed moment, more than 50 members of the Mafia from across the United States were arrested in Apalachin, New York, where they had gathered in a meeting of the national criminal syndicate. Unable to avert his eyes any longer, Hoover created an initiative to fight the mob within a week.

Collective attention to organized crime continued to grow. Attorney General Robert F. Kennedy created the first federal Organized Crime Strike Forces located in cities across

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the United States. In 1963, the public first heard the term "Cosa Nostra" when legendary mob turncoat Joseph Valachi publicly acknowledged the Mafia's existence. In 1967, President Johnson's Task Force on Organized Crime, relying heavily on the Senate hearings, committees, and conferences held throughout the 1950s and 1960s, reported that law enforcement thus far had been unsuccessful in curbing the growth of organized crime. The Task Force attributed this lack of success to difficulties in obtaining proof to support charges, insufficient law enforcement resources, poor coordination among law enforcement agencies, unavailability of strategic intelligence, light sentences, and lack of public and political commitment.

Congress Passes RICO and Tough Laws to Combat the Mob

Momentum built for Congress to address organized crime. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act. Significantly, this new law allowed federal law enforcement agencies to use electronic wiretaps, an extremely useful tool that provided evidence and insight into the inner workings of organized crime. But even with these new tools, Congress believed that federal law enforcement agencies needed more ammunition to combat criminal organizations.

On October 15, 1970, as part of the Organized Crime Control Act of 1970, RICO (18 U.S.C. §§ 1961–1968) became law. The stated congressional purpose of RICO was clear and ambitious: "[T]he eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." As the US Supreme Court noted years later, "Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives." (*Russello v. United States*, 464 U.S. 16, 27 (1983).) "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." (*Id.* at 26.)

From a federal prosecutor's perspective, the RICO statute is a powerful tool designed to effectively dismantle the heart of an organized crime violation—the criminal conspiracy. One of the principal reasons prosecutors favor RICO charges is that it allows DOJ to bring together distinct acts by different defendants into a single, overarching RICO conspiracy. Described by some as a "gift" to prosecutors, the generous definition of a RICO conspiracy—buttressed by Congress's express admonition that the statute must be liberally construed to effectuate its remedial purposes—permits seemingly unconnected acts to be woven together into one RICO conspiracy for charging purposes. Prosecutors also are attracted to the long prison sentences (up to 20 years or life for certain racketeering offenses) that may accompany convictions. Another important feature of the Organized Crime Control Act of 1970 was the introduction of the witness security program, currently known as WITSEC, which allowed prosecutors to provide enhanced safety and protection for witnesses who testified against the mob.

Recognizing the awesome power of a RICO charge, the current version of the *Justice Manual* (formerly known as the *US Attorney's Manual*) cautions prosecutors as follows: "Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application … it is the policy of the Criminal Division that RICO be selectively and uniformly used." (U.S. Dep't of Justice, *Justice Manual* § 9-110.200 (2016).) The *Justice Manual* goes even further, requiring Main Justice approval for all RICO charges and mandating that prosecutors submit a thorough prosecution memorandum and proposed indictment, information, or complaint. In addition, the Justice Manual warns prosecutors that "not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved" and that "the Criminal Division will not approve 'imaginative' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute." (*Id.*)

Due to the lengthy approval process for bringing RICO charges, some prosecutors view RICO as a last resort. Moreover, RICO jury charges are complex and lengthy, and theoretically have the potential to confuse and frustrate jurors. For example, in a 2019 case in Norfolk, Virginia, federal prosecutors charged eight alleged members of the "Mad Stone Blood" street gang with RICO violations, alleging that they engaged in attempted murder, robbery, and drug dealing. However, the jury acquitted the defendants on the RICO charges. Jurors interviewed after the verdict said the prosecution failed to prove that the alleged gang members acted in support of a RICO criminal enterprise, as opposed to "freelancing" various crimes on their own. As one commentator said afterward, "When you charge a RICO conspiracy, the jury really expects to see the Sopranos, and these guys were not the Sopranos."

The Dawn of the RICO Charging Era

To maintain the federal government's focus on the Mafia, in 1984, President Reagan created the President's Commission on Organized Crime. One year later, federal law enforcement agencies employed the broad tools Congress gave them when federal prosecutors in New York charged the heads of the notorious "five families" of the New York Mafia under RICO for participating in an unlawful racketeering enterprise. Their enterprise "included the unlawful infiltration in New York

City of legitimate businesses in the concrete construction, food manufacturing, and food distribution industries, exercise of control over unions in these and other industries, operation of illegal gambling businesses, loansharking, murder and conspiracies to murder those who would threaten the enterprise, engendering fear of the enterprise through violence and concealment of the existence of the enterprise from law enforcement authority." (*United States v. Salerno*, 631 F. Supp. 1364, 1366 (S.D.N.Y. 1986).) This prosecution resulted in convictions and substantial prison time, including a 139-year sentence for Carmine "The Snake" Persico, the head of New York's Colombo crime family. Earlier this year, Persico died in federal custody.

As President Reagan wrote in a January 1986 article in *The New York Times Magazine*, federal prosecutors were "beginning to exploit fully the statutory weapons Congress provided" with RICO. Reagan wrote that "America has lived with the problem of organized crime for far too long" and vowed to "obliterate this evil and its awful cost to our nation." (Ronald Reagan, *Declaring War on Organized Crime*, N.Y. Times Mag., Jan. 12, 1986.)

Federal prosecutors also used RICO to charge and convict Mafia bosses outside of the famed mob stomping grounds of New York. In Boston and Rhode Island, DOJ charged and convicted five "members or associates of the Patriarca Family of La Cosa Nostra," including the underboss, Gennaro Angiulo. (*United States v. Angiulo*, 897 F.2d 1169, 1175–76 (1st Cir. 1990).) The defendants were found guilty after an eight-month trial in which prosecutors presented evidence—much of which was gathered through court-authorized wiretaps and video surveillance—that they were engaged in an illegal gambling business, extortion, loansharking, and murder. In Cleveland, several defendants affiliated with the mob, including boss James T. "Jack White" Licavoli, were tried and convicted under RICO for, among other things, bombing the car belonging to the leader of a rival criminal organization. (*United States v. Licavoli*, 725 F.2d 1040 (6th Cir. 1984).)

The Heyday of RICO: The Mob Is Prosecuted Out of Business

In the 1980s and early 1990s, DOJ's RICO mob prosecutions were a resounding success. Between 1981 and 1992, DOJ convicted 23 mob bosses under RICO. Scores of Mafia underbosses and captains also were convicted under the statute. Federal law enforcement effectively wiped out La Cosa Nostra in cities across the country, including Boston, Cleveland, Denver, Milwaukee, New Orleans, Philadelphia, Pittsburgh, and Tampa. Thanks in large part to RICO prosecutions, the Mafia's power and influence have waned since the early 1990s. The Justice Department's Organized Crime Council, which creates domestic organized crime policy, did not even meet between 1993 and 2008.

DOJ Repurposes RICO to Combat Public Corruption and Violent Street Gangs

With the mob neutralized, federal prosecutors deployed the muscular RICO statute to disrupt other large-scale conspiracies, from public corruption to violent street gangs. For example, former Illinois Governor Rod Blagojevich was charged under RICO (among other statutes) as prosecutors alleged that he conspired to "auction" a US Senate seat vacated when Barack Obama was elected president. A jury failed to reach a verdict on the RICO counts, and the government dismissed them before retrying Blagojevich (he was ultimately convicted of more than a dozen non-RICO offenses).

Additionally, many violent street gangs have been prosecuted under RICO. Various US Attorney's Offices around the country, as well as Main Justice's Organized Crime and Gang Section, regularly bring RICO cases against gang members from national gangs such as MS-13, the Aryan Circle, the United Blood Nation, Gangster Disciples, as well as many lesser-known local street gangs. For example, in Chicago, dozens of members of the Latin Kings street gang were charged and convicted under RICO for a criminal organization that engaged in fraud and violence.

9/11 Brings New Law Enforcement Priorities and the Declining Use of RICO

After September 11, 2001, the FBI's number-one priority became protecting the United States from terrorist attacks. Fewer FBI agents were assigned to organized crime squads and investigations, which DOJ's Office of the Inspector General acknowledged to be the result of prioritizing counterterrorism over organized crime.

To illustrate this shift in priorities, in 2000, the FBI opened 433 organized crime investigations, but by 2004, that figure had fallen dramatically to just 263, according to a Congressional Research Service report. The number of organized crime cases referred to federal prosecutors fluctuated in the 2000s, with a high of 317 in 2000 and a low of 156 in 2006. In 2010, the number of referrals was 300, almost the same as a decade earlier.

But in the post-9/11 world, DOJ again repurposed the RICO statute—this time to prosecute terrorism. In 2001, federal prosecutors in North Carolina filed cigarette smuggling and tax evasion charges under RICO against defendants with connections to Hezbollah. The indictment was later superseded, adding a charge for conspiracy to provide material support to Hezbollah, and all defendants were convicted. In 2004, prosecutors in Chicago charged defendants with supporting Hamas, which prosecutors identified as a RICO enterprise.

RICO Rises Again: Unconventional Uses of RICO in the Post-Mob Era—FIFA, Insys, Varsity Blues, and R.

Activities Prohibited by RICO—18 U.S.C. § 1962

Under RICO, it is unlawful for any person:

(a) "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 … 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";
(b) "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) "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"; or
(d) "to conspire to violate any of the provisions" above

Sentencing Under RICO—18 U.S.C. § 1963(a)

A defendant convicted of a RICO violation "shall be fined … or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both."

Forfeiture Under RICO—18 U.S.C. § 1963(a)

A convicted defendant also must forfeit to the government:
(1) "any interest the person has acquired or maintained in violation of section 1962";
(2) "any interest in; security of; claim against; or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962"; and
(3) "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

Kelly

Recent high-profile cases demonstrate that, in the post-mob era, DOJ has not shied away from using RICO outside the traditional organized crime setting. Notable examples in the past few years include the FIFA and R. Kelly cases in Brooklyn and the Insys Therapeutics and "Varsity Blues" prosecutions in Boston.

In 2015, the US Attorney's Office for the Eastern District of New York captured international news headlines with a massive, 27-defendant indictment of international soccer officials and executives associated with FIFA. The EDNY used RICO to charge the $200 million conspiracy, which spanned more than 24 years and included many disparate acts, most of which occurred outside the United States. The defendants challenged the RICO charges, claiming that the statute was being pushed too far afield from its original purpose of fighting organized crime, and that the government was using RICO to get around Federal Rule of Evidence 403 to bring in unfairly prejudicial evidence. However, their arguments failed to gain legal traction with the court.

In May 2019, in *United States v. Babich*, the Insys Therapeutics criminal health care fraud case, a federal jury in Boston convicted five former Insys executives of a RICO conspiracy. Despite the defense's repeated efforts to convince the judge to dismiss the RICO charges, claiming that they represented "prosecutorial overreach," were "inflammatory" in a corporate health care fraud case, and made the defendants look like drug dealers, the government went to trial and won. Although the jury deliberated for a lengthy 15 days, according to post-conviction juror interviews, the jury viewed it as an "open and shut case," and during deliberations took the time to identify documents linking each defendant to the predicate acts of the RICO conspiracy. In other words, a jury in the infamous mob town of Boston had no difficulty or trepidation about applying the RICO statute to a health care fraud case.

In March 2019, the US Attorney's Office in Boston brought the Varsity Blues case, charging ringleader William Rick Singer with a racketeering conspiracy "to facilitate cheating on college entrance exams; to facilitate the admission of students to elite universities as recruited athletes, regardless of their athletic abilities; and, to

enrich [defendant] and his co-conspirators personally." Other defendants in this case have also been charged with conspiracy to commit racketeering, some of whom have pled guilty and agreed to cooperate with the government along with Singer. A law professor recently commented, "This is a new generation of applying RICO-like litigation strategy to non-organized crime. It feels like tactics that are used for the Whitey Bulgers of the world, people who are hardened criminals and threats to society."

In July 2019, the EDNY charged R&B singer R. Kelly under RICO alleging a pattern of racketeering activity that consisted of sexual exploitation of minors, kidnapping, forced labor, and Mann Act violations. The purpose of the RICO enterprise, according to the indictment, was to recruit women and girls to engage in sexual activity with R. Kelly. The allegations are disturbing, but it remains to be seen whether DOJ's decision to charge R. Kelly with a substantive RICO offense will result in victory for the prosecution.

These highly significant cases may only embolden federal RICO prosecutions outside the organized crime context.

Prosecutorial Overreach or the New Normal?

Misgivings about RICO's reach have been common since before the statute was enacted. Opponents recognized its scope and "complained that it provided too easy a weapon against 'innocent businessmen' and would be prone to abuse." (*Sedima v. Imrex Co.*, 473 U.S. 479, 498 (1985).) Even during RICO's heyday in the 1980s, some expressed unease about using the statute to prosecute criminals outside the context of organized crime. (*See id.* at 499 ("Instead of being used against mobsters and organized criminals, it has become a tool for cases brought against 'respected and legitimate enterprises.'").) And some feared that the expansion of RICO could prompt Congress to limit the statute's reach. Concerns about RICO's scope persist to this day.

Nonetheless, the use of RICO to prosecute non-organized crime white-collar defendants is well-established and has been upheld repeatedly by the courts. (*See, e.g., Jackson v. Sedgwick Claims Mgmt. Servs.*, 731 F.3d 556, 563 (6th Cir. 2013) (noting that "courts have frequently rejected arguments that RICO should be given constructions that prevent it from reaching conduct that Congress may not have intended it to reach").) But the policy question, as reflected in the Justice Manual, remains whether DOJ should rein in RICO prosecutions outside the traditional organized crime context. The Justice Manual implores prosecutors to restrict RICO charges to effectuate the congressional purpose of the law, which was to combat organized crime. Prosecutorial discretion is of paramount importance in ensuring the statute is used for appropriate purposes. Using RICO to prosecute street gangs and terrorist groups seems to fall well within Congress's intent, as those groups are similar to the mob: organized, violent, and engaged in various illegal activities, from drug dealing to murder.

But what DOJ once used exclusively as a tool to bring down sprawling criminal enterprises engaged in heinous acts of violence and intimidation is now being employed to prosecute less severe crimes involving nonviolent offenders. The Varsity Blues defendants are a far cry from mob bosses and murdering hitmen (or even street gangs and corrupt politicians), and using RICO—including its threat of severe penalties—is a bit like using a sledgehammer to pound a nail.

But DOJ did not go directly from using RICO only to prosecute mobsters smuggling vast quantities of heroin and cocaine in cases such as "The Pizza Connection" in the 1980s to deploying it against less severe conduct as in the Varsity Blues case. From the mob to street gangs to public corruption and terrorist organizations—and now to white-collar prosecutions—the evolution of DOJ's use of RICO has been long and slow. The trend, however, is unmistakable: So long as prosecutors have a broad and flexible tool like RICO, they will find new ways to use it. ■

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