



# The Mail Fraud & RICO Racket

THOUGHTS ON THE TRIAL OF GEORGE RYAN

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**T**HE TRIAL OF FORMER Illinois governor George Ryan and his co-defendant, businessman Larry Warner, is underway. Ryan's commutation of 163 death sentences and pardon of four death row inmates before he left office led to his nomination for the Nobel Peace Prize in 2003. The exoneration of innocent death row inmates had revealed serious flaws in Illinois' criminal justice system. Ryan's own trial now reveals serious flaws in the federal criminal justice system. It shows how prosecutors use the federal mail fraud and RICO statutes to deny fair trials to defendants.

The Ryan trial began in September and is expected to continue into February or March. Over the course of this wide-ranging trial, jurors will hear every allegation of criminal and non-criminal misconduct by Ryan and Warner that prosecutors have collected by threatening their former associates (and one former associate's fiancée) with heavy mail fraud sentences of their own. The alleged misconduct will cover a twelve-year period and range from failing to register as a lobbyist, to accepting secret consulting fees from a

presidential campaign, to giving low-number license plates to campaign contributors.

At the conclusion of this trial, the jury will not announce which of the allegations of improper conduct have been proven and which have not. It will announce only whether the defendants engaged in some scheme or artifice to defraud and some conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity. If the jury decides that the prosecutors' charges weren't entirely a lie and that some of the dirt they have thrown at the wall has stuck, it is likely to find the defendants guilty of the principal charges against them. It may seem to the jurors, after months of exposure to the smoke in the courtroom, that there must have been a fire somewhere. The press will not care much about the legal niceties. Although the judge will have told the jurors that they need not find all of the prosecutors' allegations true in order to convict the defendants, she probably will treat all of the allegations as proven when she determines the defendants' sentences.

George Ryan's trial reveals why prosecu-

tors call the federal mail fraud statute “our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart.”<sup>1</sup> Although the Racketeer Influenced and Corrupt Organizations Act (RICO) may rank second to the mail fraud statute on the prosecutors’ list of all-time favorites, RICO gives them similar powers.

## Mail Fraud

### A. *The Intangible Right to Honest Services*

The Mail Fraud statute, enacted in 1872, was the first statute to “federalize” crimes against private individuals that formerly were prosecuted only by state and local authorities. This statute forbids “devis[ing] any scheme or artifice to defraud” and then placing something in the mail for the purpose of executing this scheme.<sup>2</sup> The statute was aimed at swindlers who used the mails to peddle things like phony western mining stock. As the Supreme Court recently reaffirmed, the 1872 statute did no more than incorporate traditional concepts of fraud.<sup>3</sup> Fraud consists of depriving someone of property by lying.

Federal prosecutors in the 1970s thought traditional concepts of fraud too restrictive, and they persuaded lower federal courts to hold that the mail fraud statute outlawed deprivations of “the intangible right to honest services.” One of the earliest cases was the prosecution of a former Illinois governor, Otto Kerner, by a United States Attorney who became Illinois’ longest serving governor himself, James Thompson.<sup>4</sup> Kerner al-

legedly had obtained racetrack stock at less than its value in exchange for approving additional racing days. The extra racing days, however, did not deprive the taxpayers of Illinois of money or property. To the contrary, they brought additional revenue into the state treasury. Thompson therefore charged Kerner, not with stealing state property, but with depriving the people of Illinois of the intangible right to his honest services. Kerner was convicted, served a prison term, and died eleven years before the Supreme Court rejected the theory that Thompson had used to convict him. The Court concluded that the mail fraud statute outlawed depriving people of property, not of an ill-defined “intangible right to honest services.”<sup>5</sup>

The Department of Justice then complained that the Court’s decision had deprived it of an important tool in its fight against government corruption. Although the Department could have asked Congress to enact a straightforward statute outlawing state and local bribery, it urged Congress to restore the prosecutors’ gimmick instead. Congress (which in the area of criminal justice nearly always lets the Department do its work for it) responded by adding a new section to the mail fraud statute declaring that a scheme or artifice to defraud includes a scheme “to deprive another of the intangible right to honest services.”<sup>6</sup>

No one knows what this language means. A three-judge panel of the Second Circuit held it too vague to give fair notice to defendants,<sup>7</sup> but the *en banc* Second Circuit set this ruling aside, offering its own unique

1 Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980).

2 18 U.S.C. § 1341.

3 See *Neder v. United States*, 527 U.S. 1 (1999).

4 See *United States v. Isaacs*, 493 F.2d 1124, 1149–52 (7th Cir. 1974).

5 *McNally v. United States*, 483 U.S. 350 (1987).

6 18 U.S.C. § 1346.

7 *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002).

definition of the term “honest services.”<sup>8</sup> The Seventh Circuit similarly rejected a claim that the statutory language was unconstitutionally vague, and it provided a different, equally distinctive definition.<sup>9</sup> In the Seventh Circuit (and nowhere else), the “intangible rights doctrine” encompasses every misuse of a fiduciary relationship for personal gain. Other circuits’ definitions also emphasize the breach of a fiduciary duty.

What, then, is a fiduciary duty? Again, no one knows, but the courts seem to treat every legal duty of a public official as “fiduciary.” Five pages of the 91-page Ryan indictment are devoted to setting forth the “Laws, Duties, Policies and Procedures Applicable to” each of the defendants. None of the laws listed in this section are federal laws. They include provisions of the Illinois State Constitution, state criminal laws, non-criminal state regulations, a policy memorandum of the Illinois Secretary of State’s office, and George Ryan’s announced personal policy of not accepting gifts worth more than \$50. With occasional exceptions, the indictment’s later allegations of wrongdoing make no effort to specify which of the asserted state law duties the defendants violated.

In the Ryan case and others, prosecutors have used the intangible rights doctrine to stand federalism on its head. In effect, federal prosecutors prosecute state officials and private individuals for state crimes in the federal courts. Worse, they use the mail fraud statute to bootstrap minor state crimes and violations of non-criminal regulations into 20-year federal felonies. In the Ryan case, the prosecutors may transform even the violation of an announced personal policy into a 20-year felony. If George Ryan pledged not to accept gifts worth more than \$50 and then did so despite his pledge, did he deprive the

people of Illinois of the intangible right to his honest services? Does every broken promise by a politician (“read my lips”) now constitute mail fraud? Most of the “sweetheart deals” at the heart of the Ryan case do not appear to meet the legal definition of bribery. Nevertheless, the Ryan jury probably will be instructed to determine without substantial guidance whether these transactions deprived the state of the intangible right to Ryan’s honest services.

### *B. Mail Fraud Sprawl*

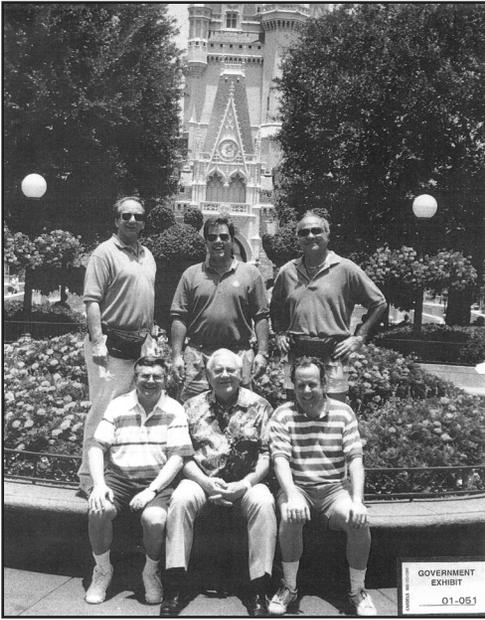
American courts ordinarily exclude “other acts” evidence. Although a defendant accused of purse-snatching may have been convicted a dozen times of purse-snatching, the jury will not learn of his prior convictions. This “character” or “propensity” evidence will be excluded on the theory that jurors should not be tempted to convict the defendant just because he appears to be a sleazy guy. They should focus only on the government’s accusation of a particular wrongful act at a particular time. The Ryan trial will depart from this vision of American justice. It will move toward the example set by Soviet trials for “hooliganism.” George Ryan and Larry Warner may be tried, in effect, for the federal crime of wheeling and dealing while sleazy (and, in Warner’s case, while rich and, in Ryan’s, while political).

The Ryan-Warner indictment alleges nine counts of mail fraud – all of them mailings in furtherance of one fraudulent scheme. Under the statute, mailings can be innocuous, and prosecutors usually can multiply the number of counts indefinitely. The indictment alleges that the fraudulent scheme continued from the time George Ryan was elected Secretary of State of Illinois until he left the Gover-

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8 United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003).

9 United States v. Hausmann, 345 F.3d 952 (7th Cir. 2003).



Government Exhibit 01-051: Governor George Ryan (front row center) poses in happier times with some of his pals. The group before the Cinderella Castle in the Magic Kingdom of Disney World includes Ryan's co-defendant, businessman and lobbyist Larry Warner (top row left), and the principal cooperating Government witness, Ryan's former chief-of-staff Scott Fawell (top row center).

nor's office twelve years later. It then offers 128 numbered paragraphs (about 40 pages' worth) that begin with the words "it was a part of the scheme" or "it was a further part of the scheme."

All of these paragraphs allege conduct by Warner, Ryan, or both that, if proven, is unlikely to endear them to jurors. Warner allegedly threatened contractors with a loss of state business unless they hired him as a lobbyist. Ryan allegedly shared non-public information with Warner, encouraged a reluctant employee of the Illinois Secretary of State's office to return Warner's phone calls, and made decisions that benefited Warner's clients. Ryan allegedly heard complaints about Warner's conduct and promised to investigate, but continued to include Warner

in government decision-making. Ryan allegedly accepted free vacations from people who rented property to the state. Ryan allegedly took consulting fees from Senator Phil Gramm's presidential campaign and concealed them. Ryan allegedly allowed Warner to arrange low-number license plates for friends, including some who had contributed to Ryan's electoral campaign. Ryan allegedly was present when one of his associates told Secretary of State employees to "clean up" departmental records in anticipation of a grand jury investigation. The indictment contains a lot more. Many of its allegations do not appear to describe criminal conduct, but all of them sound sinister.

To anyone who uses the word "scheme" in the ordinary way, the allegations spread over 40 pages of the Ryan indictment do not appear to constitute a unitary scheme or plot. Nevertheless, when defense lawyers objected to the "multiplicity" or "duplicity" of the mail fraud charge (note that "duplicity" is a word with two relevant meanings), the trial judge ruled that the indictment appropriately alleged one scheme. She wrote, "Ryan and Warner are charged with misusing State of Illinois resources for personal gain, a scheme they carried out in a variety of ways."<sup>10</sup> Perhaps every crime a criminal commits over the course of his lifetime is part of a single scheme to enrich himself with money he should not have.

Breaking the fraudulent scheme alleged in the Ryan indictment into smaller components would have required the jury to reach a verdict on each charge rather than lump them all together in one amorphous mass. It also would have allowed the court to sever some charges from others rather than try them all at the same time. Severance would have been appropriate if the judge concluded that there were too many financial transactions for ju-

<sup>10</sup> United States v. Warner, 2004 U.S. Dist. LEXIS 15727 at \*67 (N.D. Ill.).

rors to keep straight (as there surely are in the Ryan case). Severance also would have been appropriate if the judge concluded that the prosecutors' piling-on of charges would prejudice the defendants (as it surely will). Indeed, the judge probably would have discovered that, under the applicable federal rules, many of the charges could not be lawfully joined in a two-defendant trial. The "severance" option disappears, however, when all of the charges are treated as parts of one big, long-lasting fraudulent scheme.

One can understand why prosecutors cherish wide-ranging trials with endless charges the jury will never be required to resolve, but it is difficult to understand why judges allow them. One doubts that these judges enjoy five-month trials, and limiting prosecutors to a reasonable number of accusations would benefit taxpayers at the same time it afforded fairer trials to defendants.

When judges permit "kitchen sink" trials, prosecutors may increase the pressure on defendants in other cases to plead guilty. The system cannot give everyone a five-month trial. Other authorities – the Justice Department, Congress, and the U.S. Sentencing Commission – may approve harsher penalties whose main, albeit unavowed, function will be to give the prosecutors greater leverage. To accommodate "mail-fraud sprawl" in cases like George Ryan's, 97 percent of the defendants convicted in the federal courts will wind up with no trials at all.

When judges allow lengthy "one scheme" trials, they often voice confidence that the jury will be able to sort everything out in the end. It would, however, take a special verdict form stretching from the courthouse in Chicago to the Governor's Mansion in Springfield to sort the issues in the Ryan trial. With respect to each of the acts alleged to be "parts of the scheme," this form might

require the jurors to determine (a) whether the act occurred; (b) whether Ryan and/or Warner participated in it; (c) whether the defendant or defendants who did participate did so with fraudulent intent; (d) whether the act violated any of the state law duties set forth in the indictment and, if it did, which ones; (e) whether this act deprived anyone of money, property, or the intangible right to honest services and, if it did, which ones; and (f) whether the means of depriving the victim of money, property, or the intangible right to honest services included a false statement, a false promise, or a material omission and, if so, which one. Of course no jury will be required to complete a verdict form like this, and of course no jury would be likely to go through such a picky analysis of every factual allegation. At the end of a long trial, however, the jury may have heard enough bad things about George Ryan and Larry Warner to want to convict them of devising a scheme or artifice to defraud, whatever that language might mean. The rule of law won't have much to do with the trial's outcome.

## RICO

Like the mail fraud statute, the Racketeer Influenced and Corrupt Organizations Act<sup>11</sup> lends itself to wide-ranging trials in which jurors may wind up judging the person rather than the charge. When Congress enacted this statute in 1970, its purpose was to address only one problem – the infiltration of legitimate businesses by organized crime. The very acronym RICO is an ethnic slur. Supporters expected the most frequently used provisions of the statute to be those forbidding (a) the investment of income derived from a pattern of racketeering activity in an enterprise and (b) the acquisition of an interest in an enterprise through a pattern

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<sup>11</sup> 18 U.S.C. §§ 1961–1968.

of racketeering activity. The statute, however, was barely used at all in its early years.

Prosecutors then awoke to the unrealized potential of a third section of the statute – one making it a crime to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. “Racketeering activity” meant any of a number of enumerated crimes including, most notably, mail fraud. A “pattern of racketeering activity” require[d] at least two acts of racketeering activity.”

In an effort to limit RICO’s scope, the Supreme Court held in 1993 that only “operators or managers” of an enterprise could participate in the conduct of the enterprise’s affairs.<sup>12</sup> According to the Court, the statute was aimed at big guys, not little guys. As both Secretary of State and Governor, George Ryan undoubtedly qualified as an “operator or manager” of the State of Illinois (the allegedly racketeer influenced and corrupt organization<sup>13</sup>). Larry Warner, however, who held no office, appeared to be a little guy.

The prosecutors knew how to get around this obstacle. A fourth provision of the statute makes it a crime to conspire to commit any other RICO violation. The prosecutors therefore charged Warner and Ryan with conspiring to commit Ryan’s violation, and Ryan was a big guy. Through the magic of a conspiracy charge, Warner, the little guy, could be transformed into a big guy himself. The court of appeals in Chicago had upheld this gambit prior to the Ryan/Warner pros-

ecution.<sup>14</sup>

Although a pattern of racketeering activity requires the commission of two predicate racketeering acts, prosecutors may allege as many predicate acts as they like. These acts may extend over two or three decades. They may include crimes on which the statute of limitations has run, crimes that could not themselves be prosecuted in a federal court, crimes that could not be joined with one another in separate prosecutions, crimes of which the defendant already has been convicted and for which he has been punished, and even crimes of which he has been acquitted in a state court. By breaking an alleged mail fraud scheme into separate components and then severing some charges from others, the courts have the ability to limit mail fraud sprawl, but they cannot prevent RICO sprawl while remaining faithful to the statute. As one law professor who is now a federal judge noted, RICO creates “the crime of being a criminal.”<sup>15</sup>

One might suppose that a RICO conspiracy indictment would accuse the defendants of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity and then specify each of the predicate acts alleged to constitute the pattern. Like most RICO conspiracy charges, however (and unlike most other RICO charges), the Ryan/Warner indictment identifies the predicate racketeering acts only as “multiple acts” (unspecified) indictable under the mail fraud and other federal and

12 *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

13 Ryan’s lawyers argued that the federal government may not brand an entire state a racketeer influenced and corrupt organization. This argument had prevailed 30 years earlier in the case of Governor Marvin Mandell of Maryland, see *United States v. Mandell*, 415 F. Supp. 997 (D. Md. 1976), but many subsequent cases have treated smaller governmental units, including governors’ offices, as RICO enterprises. Because the prosecutors in the Ryan case alleged a conspiracy encompassing Ryan’s 12 years as both Secretary of State and Governor, neither of his offices alone would have served their purposes. Only the State of Illinois was sufficiently encompassing, and the trial judge upheld specification of the state as the RICO enterprise. Warner, 2004 U.S. Dist. LEXIS 15727 at \*39–51.

14 *E.g.*, *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000).

15 Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661 (1987).

state statutes. The trial judge ruled before trial that the prosecutors were not required to supply more detail.<sup>16</sup>

The indictment, however, supplies many details about other things. Every paragraph of a section headed “Means and Method of the Conspiracy” begins with the words “it was part of the conspiracy” or “it was further part of the conspiracy.” (As a taxpayer, I hope there is a word processor in the United States Attorney’s Office that types the words “it was part of the [scheme], [conspiracy], [corrupt endeavor]” with only one key stroke.)

After its introductory phrase, each of the “Means and Method” paragraphs alleges conduct by Ryan and/or Warner that may or may not be criminal but that certainly sounds awful: “It was further part of the conspiracy that the defendant RYAN knowingly permitted defendant WARNER and certain Associates to participate in the governmental decision making process, and provided WARNER and certain Associates with access to material, non-public information relating to governmental decisions. With RYAN’s authority and concurrence, WARNER and certain Associates converted the participatory status and information provided by RYAN into financial

benefits for themselves, defendant RYAN and third parties.”

The prosecutors will not be required to establish that any particular allegation of the “Means and Method” section is true. By alleging “Means and Method,” the Ryan prosecutors extend RICO sprawl even beyond the sprawl built into the statute. Someone once defined a conservative as a liberal who has been mugged – and a liberal as a conservative who has been RICO-ed.

Although George Ryan’s emptying of Illinois’ death row led to his nomination for the Nobel Prize, I would not give it to him. If even a small portion of the allegations of the government’s indictment are true, I would not give him a medal for good government either. Ryan may be guilty of serious crimes. I do not know whether he is or not.<sup>17</sup> But the mail fraud and RICO statutes unfairly stack the deck against him. Congress, the Justice Department, the U.S. Attorney’s Office, and the courts have all taken a hand in firing-up the locomotive that may run him over. The United States will not give George Ryan a fair trial in which prosecutors must prove a precisely defined act of corruption beyond a reasonable doubt. *gB*

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16 Warner, 2004 U.S. Dist. LEXIS 15727 at \*60–63.

17 In addition to the charges discussed in this article, Ryan is charged with making false statements to federal investigators and with tax offenses.