

**Rethinking *In Rem*: The Supreme Court's New
(and Misguided) Approach to Civil Forfeiture**

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Civil forfeiture has enjoyed a long and varied history in both the United States and England, and has been the primary means by which government has attempted to protect its income from violations of customs¹ and revenue² laws. It has also been used as a means of enforcing consumer protection laws, most particularly those contained in various food and drug acts.³ Civil forfeiture has even played a part in furthering America's foreign policy aims, putting teeth in the nation's several attempts to enforce neutrality or embargo acts.⁴

Given the government's long reliance on forfeiture, it is somewhat surprising that the practice has only recently attracted much notice from commentators. Much of this attention focuses on various aspects of forfeiture in connection with the narcotics laws⁵ or RICO.⁶ In particular, there has been a great deal of concern about whether forfeiture proceedings violate the Eighth Amendment protections against excessive fines, the Fourth Amendment prohibition against unreasonable search and seizure, or guarantees of due process.⁷ Many have objected to the legitimacy of civil forfeiture as a law

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1. 19 U.S.C. § 1497 (1988) provides for the forfeiture of any article not declared as required by law.

2. 26 U.S.C. § 5615 (1988) provides for the forfeiture of real and personal property used in violation of internal revenue liquor laws. 26 U.S.C. § 5763 (1988) allows the forfeiture of property used to violate the tobacco tax laws. 26 U.S.C. § 7302 (1988) is a general forfeiture provision allowing for the forfeiture of property "used as an 'active aid' in the violation of the internal revenue laws." *United States v. One 1975 Pontiac Lemans*, 621 F.2d 444,447 (1st Cir. 1980)(citing *United States v. One 1968 Ford Ltd.*, 425 F.2d 1084,1085 (5th Cir. 1970)).

3. 21 U.S.C. § 334 (1988) provides for the seizure and condemnation of any article of food, drug, or cosmetic, in an adulterated or misbranded condition.

4. 18 U.S.C. § 963 (1988), *et seq.* provide various forfeiture penalties for violation of American neutrality laws. 22 U.S.C. § 401 (1988) requires the forfeiture of arms or other property exported to any country in violation of the export control laws. *See United States v. Ajlouny*, 629 F.2d 830 (2d Cir. 1980). The importation of fishery and wildlife products from countries which violate international fishery or endangered species treaties results in forfeiture pursuant to 22 U.S.C. § 1978 (1988).

5. 21 U.S.C. § 881 (1992).

6. 18 U.S.C. §§ 1961-1968 (West 1976 & Supp. 1994).

7. *See William F. Nelson, Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309

enforcement tool because of its seeming harshness; they argue that the loss of valuable property through civil forfeiture and without the constitutional protections guaranteed criminal defendants is inherently unfair.⁸ Still others contend that the relatively low burden of proof required of the government in a forfeiture proceeding puts property owners at too much of a disadvantage, and argue that the government ought to be required to do more than show mere probable cause before it is entitled to seize what might be the family home.⁹

The federal courts have also expressed growing concern about the use of asset forfeiture in both civil and criminal actions. In recent years, they have examined several of the questions raised by critics of civil forfeiture and have undertaken to limit forfeiture in cases where there is a danger that the owner's constitutional rights might be infringed. Many courts are becoming increasingly hostile to asset forfeiture as a law enforcement tool.¹⁰

The Supreme Court itself has recently entered the debate. In the past three years it rendered decisions limiting the scope of asset forfeiture in several cases where both constitutional and procedural claims were at issue. These decisions have steadily eroded the distinctions between *in rem* and *in personam* jurisdiction in a way that will have potentially damaging consequences for all *in rem* litigants. Indeed, at least one aspect of the Court's approach—that which modifies the traditional rules regarding seizure and custody—will not only complicate the seizure rules, but will increase the likelihood that courts will be in the position of rendering useless judgments.

This aspect of the Supreme Court's new approach first appears in a case where the Court overturned a long-standing rule of *in rem* practice—somewhat whimsically called the “no *res*; no case” rule—that required the continued custody of the *res* during the pendency of an action.¹¹ This rule ensured that the court would be able to transfer title effectively or provide payment for the

(1992); Alok Ahuja, *Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment*, 5 YALE L. & POL'Y REV. 428 (1987); Michael E. Herz, Comment, *Forfeiture, Seizures, and the Warrant Requirement*, 48 U. CHI. L. REV. 960 (1981).

8. See, e.g., George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653 (1991); Note, *Civil Forfeiture and the Innocent Owner Defense: United States v. 92 Buena Vista Ave.*, 16 HARV. J. L. & PUB. POL'Y 835 (1993).

9. See generally Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254.

10. See, e.g., *United States v. James Daniel Good Real Property*, 113 S. Ct. 1576 (1993) (Thomas, J., dissenting) (“I am disturbed by the breadth of the new civil forfeiture statutes . . . which subject[] to forfeiture all real property that is used, or intended to be used, in the commission, or even the facilitation, of a federal drug offense.”); *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) (“We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.”); *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992) (“[W]e are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.”), *rev'd sub nom.*, *Austin v. United States*, 113 S. Ct. 2801 (1993).

11. *Republic National Bank v. United States*, 113 S. Ct. 554 (1992).

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plaintiff's claim at the end of the suit. Dispensing with the need for the court to maintain continuous custody raises the possibility that courts may render a judgment they cannot enforce (a "useless judgment"). Since suits *in rem* may be brought without any *in personam* process, a court without custody of the *res* at the time of judgment will not have any power to force compliance with its decrees. By overlooking the purposes of the "no *res*; no case" doctrine, the Supreme Court overlooked the important distinctions between process *in rem* and *in personam*. This error was compounded a short time later when the Court held that civil forfeiture actions are subject to the Eighth Amendment prohibitions on "excessive fines."¹² It was able to reach this result only by ignoring another very important principle of forfeiture, specifically, the fact that the property itself, not its possessor or owner, is the true defendant. This decision further confuses the distinctions between *in rem* and *in personam* jurisdiction, implying that some sort of personal culpability on the part of a property owner is required for the institution of an action *in rem*.

The Court has also drastically modified the general understanding of what is commonly known as the "relation back" doctrine. The traditional rule was that the government's right to forfeit property arises immediately upon the commission of a criminal act, and no intervening transfer could be good against the government's interest. Unless modified by statute, the rule prevented wrongdoers from avoiding forfeiture simply by transferring property to a friend or relative. In allowing a donee to receive forfeitable property from a friend, however, the Court has opened the door to exactly the type of abuse the rule was designed to prevent.¹³ Thus, a woman who bought a home with the proceeds of a drug transaction given to her by a boyfriend was entitled to raise an "innocent owner" defense to forfeiture. Upholding her right to do so leaves open the possibility that anyone desiring to defeat a forfeiture—and perhaps any *in rem* claim—need only give away the property to a friend or relative.

Finally, the Supreme Court's new approach to forfeiture has also resulted in the destruction of the traditional requirement that the government actually seize the property to be forfeited at the start of the proceedings. As noted above, seizure and continuous custody were thought to be necessary to give the court jurisdiction and prevent it from rendering useless judgments. Yet the Supreme Court has now held that seizure is not necessary to obtain jurisdiction where real property is at issue.¹⁴ Based primarily on the theory that "real property will not abscond" from the jurisdiction, this holding continues the trend toward blurring the *in rem/in personam* distinction. No longer requiring seizure might seem to be responsive to due process concerns, but it does not

12. *Austin v. United States*, 113 S. Ct. 2801 (1993).

13. *United States v. 92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993).

14. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

address other, more pressing, problems, such as how the court will enforce compliance with its decrees. This decision may prove to be the most destructive yet. By requiring notice before seizure of real property, as well as questioning the need for an actual seizure in the first place, the Court has not only come very close to gutting the narcotics laws, it has quite probably succeeded in destroying the effectiveness of the government's forfeiture remedy in a wide variety of other law enforcement situations as well.

The Supreme Court has apparently overlooked the fact that the substantive and procedural law at issue in drug forfeiture cases affects a wide range of actions. The mode of proceeding in a drug case is substantially similar to that in an action brought under the customs, revenue, or food and drug laws. Moreover, the statutes authorizing forfeiture actions almost universally provide that the proceedings shall conform as close as possible to actions *in rem* in admiralty. Thus, decisions limiting or altering the substantive law of civil forfeiture in narcotics cases may have a detrimental effect on the government's ability to utilize the procedure in other areas. Changes in the procedural law will also impact on the conduct of purely civil cases between private parties when brought *in rem*. The Court, however, seems unaware of the problems inherent in overturning widely recognized precedent without taking into account the impact of such a course on other areas of the law. In its desire to right various perceived wrongs in narcotics actions, the Court has created the potential for havoc not only for civil forfeiture but for *in rem* practice in general. The result may well be that in an effort to protect the rights of claimants in narcotics forfeiture actions, it has limited the rights of others, most particularly private parties in admiralty actions.

To be sure, not all of the current difficulties with civil forfeiture are of the Supreme Court's making. Frustration with the increased use of illegal drugs and the apparent ineffectiveness of traditional law enforcement schemes has made Congress look to forfeiture as a means for combatting the drug trade. This in itself marks a departure in the law of forfeiture. Forfeiture, especially in customs and revenue cases, has traditionally been applied mainly to contraband or those items used to violate the law. In the drug context, however, forfeiture is now applied to the "proceeds" of illegal activity as well as to any item used to "facilitate" the commission of an offense, even when the connection is tentative at best. Prosecutors have thus begun to use forfeiture in very aggressive ways. In some cases, the government has moved to seize large tracts of land because a drug sale took place somewhere on the parcel.¹⁵ Abuses such as these have made civil forfeiture appear far more onerous than necessary. Since Congress has not moved to curtail these abuses—and, in fact,

15. *United States v. Two Tracts of Real Property in Bruce Township*, 665 F. Supp. 422 (M.D.N.C. 1987); *United States v. Reynolds*, 43 Crim. L. Rep. (BNA) 2463 (4th Cir. 1988).

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has acquiesced to a great degree in the aggressive tactics of government prosecutors—the courts have taken it upon themselves to limit forfeiture's reach.

This Article will first show that the Supreme Court's recent decisions in the area of civil forfeiture have, in large part, been based on an erroneous understanding of both the nature of *in rem* actions in general and of civil forfeiture in particular. It will then demonstrate some of the problems inherent in the Court's position for both civil forfeiture and other *in rem* actions. Since the measures taken by the Court appear to be in response to congressional inaction, this Article will conclude by arguing that Congress take steps to prevent the further abuse of the drug laws by providing a greater range of procedural protection to property owners. Such a move would obviate the need for the Court to resort to further innovation in *in rem* practice and procedure.

I. THE NATURE AND PRACTICE OF *IN REM* ACTIONS

A. *Some Basic Principles*

“The legal fiction of the primary responsibility of property, under certain circumstances, is the basis of all proceedings in rem.”¹⁶ This fiction assumes that the property in question, and not necessarily the owner, is liable to the plaintiff. The property itself becomes the defendant, with the owner merely receiving notice of the pending action. The owner then has the right, along with anyone else who might be interested, to appear and make a claim.¹⁷

There have traditionally been three classes of *in rem* suits: those involving “things guilty,” “things hostile,” and “things indebted.” Suits against things guilty arise when some act is done by or with them in contravention of law. Things are hostile when they are owned or controlled by an enemy in war. Things become indebted when they are made responsible for the payment of a sum of money pursuant to contract or usage.¹⁸ Examples of the three classes are routinely found in maritime law. A vessel that is used to smuggle goods into the country becomes “guilty,” and liable to seizure by customs officers. Enemy ships or cargo taken in war are hostile property, subject to condemnation in a prize proceeding. A vessel that receives supplies or necessaries in a foreign port is said to become indebted to the supplier for the amounts delivered.

All suits *in rem* are civil actions, although they are subject to certain

16. RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM 1 (1882).

17. *Id.* at 1-2. The owner is not a defendant and has no liability to the plaintiff beyond that of his interest in the thing seized.

18. *Id.*

differences in procedure.¹⁹ At bottom, however, there must be either an absolute right to title, formally referred to as *jus in re*, or an obligation for which the property is bound, a *jus ad rem*.²⁰ Things guilty or hostile implicate a *jus in re*, while things indebted create a *jus ad rem*. For example, a suit to enforce a lien for necessities, for wages due a seaman, or to foreclose on a ship mortgage, is one to vindicate a *jus ad rem*. An action seeking forfeiture of a ship or cargo for smuggling is to enforce a *jus in re*.

The existence of either a *jus in re* or a *jus in rem* is elemental to the commencement of an *in rem* action. The right to or in the thing must already have vested for there to be a cause of action. The action *in rem* does nothing more than declare the status of a preexisting right.²¹ Thus, a forfeiture proceeding does not forfeit the property per se; it merely seeks judicial recognition of the government's already existing right to forfeiture. Neither is there a suit to create a lien; the *in rem* action is designed solely for the purpose of enforcing liens previously created by law or contract.²²

The purpose of the action *in rem* is to declare status, rather than guilt in a criminal sense. The thing is not punished; instead, the court is asked to recognize a change in the status of its ownership. The intent is to enable the government to enforce its laws without the need to ascertain the identity of the owner of the goods. More importantly, the legal fiction of personality enables compensation or enforcement without regard to the guilt or innocence of the owner. The government's right to proceed against goods, vessels, or other property is independent of any *in personam* suit.²³ This is because in some cases, property may be used in a guilty way without the knowledge or consent of the owner.²⁴ The owner may have entrusted the property to an agent who uses it wrongfully. In many other cases, however, property is guilty without any personal liability of its owner because of an offense of omission, rather than commission. Thus, goods landed in violation of various customs or

19. It should be noted at the outset that the following discussion concerns actions exclusively *in rem*, and will not discuss actions strictly for attachment or those *quasi in rem*.

20. See, e.g., *The Carlos F. Roses*, 177 U.S. 655, 666 (1900): "The *jus in re* or *in rem* implies the absolute dominion,—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another." See also WAPLES, *supra* note 16, at 32: "*Jus in re* is the absolute and exclusive right to a thing. . . . *Jus ad rem* is a relative right resting upon a thing. . . . Briefly, the former is the right to property, and the latter a right in property."

21. "When property is seized and labelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful and the forfeiture incurred or not." *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 318 (1818) (Story, J.).

22. "[F]orfeiture is, the statutory transfer of right to the goods at the time the offense is committed The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but the right to them relates backwards to the time the offence was committed. . . ." *Caldwell v. United States*, 49 U.S. (8 How.) 366, 381 (1850).

23. *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

24. *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 234 (1844). This case involved a vessel seized for piracy. It seems that the vessel was fitted out by its owners for a normal commercial voyage, but along the way, the crew decided to take up piracy instead.

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navigation laws are subject to forfeiture even when the act giving rise to the violation was one of omission, such as the failure to declare all the goods on board²⁵ or make out a proper manifest.²⁶ At all events, however, it is primarily for convenience that the terms “guilt” or “offender” are applied to property or its owners.

As in a criminal prosecution against a person, the object is not to make him guilty, but to find whether he is guilty or not, so the proceeding *in rem* to enforce a *jus in re* is not to forfeit the thing but to ascertain whether it is forfeited. So, against a lien-bearing thing, [a *jus ad rem*], it is to ascertain the debt, and condemn the property to pay the liability. It is therefore true, of all proceedings *in rem*, that their object is to ascertain the *status* of the property proceeded against.²⁷

A fundamental principle of *in rem* process is that the decree of forfeiture or indebtedness is retroactive to the date when the property first became “responsible.” If a thing is guilty, the decree “relates” to the time of the commission of the offense.²⁸ In the case of a thing hostile, all the property of an enemy country becomes forfeitable *en masse* upon the start of hostilities.²⁹ Where property is found to be indebted, the decree relates to the time when the lien, whether in tort or contract, arose.³⁰ In the case of things guilty or hostile, therefore, ownership ceases to be in the former proprietor, not from the time of the decree itself, but from the date the property first became forfeitable. This is the case even if the government makes no effort to have the forfeiture declared immediately. In the case of things decreed indebted, the property is said to be encumbered from the moment the lienor’s interest became inchoate.³¹ A necessary consequence of this proposition is that all transfers of things guilty between the time of the offense and the date of decree are void as against the government.³² The right to seize and have a forfeiture

25. 19 U.S.C. § 1453 (1988) provides for the forfeiture of all goods laden or unladen from any vessel without the issuance of a customs permit. If the value of such goods exceeds the sum of \$500, the vessel itself is subject to forfeiture.

26. 19 U.S.C. § 1432 (1988) provides for the forfeiture of sea or ship’s stores found on board a vessel in excess of that listed on the manifest.

27. WAPLES, *supra* note 16, at 151-52.

28. “Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts and takes date from the wrongful acts and not from the date of the sentence or decree.” *Henderson’s Distilled Spirits*, 81 U.S. (4 Wall.) 44, 56 (1871). *See also* *Thacher’s Distilled Spirits*, 103 U.S. (13 Otto) 679 (1880).

29. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 306 (1822); *see also* *The Andromeda*, 69 U.S. (2 Wall.) 481 (1864).

30. “It will be universally conceded that when anything, in vindication of a *jus ad rem*, is judicially found and declared to be indebted in a given sum, the decree relates to the time when, by operation of law upon contract, by effect of *quasi* contract, by the legal result of tort, or by any means which may give rise to indebtedness, property responsibility became perfected. . . .” WAPLES, *supra* note 16, at 174-75.

31. Thus, where goods are smuggled in violation of some customs law, they are forfeit to the government from the time they entered the country, even though the decree confirming the forfeiture is not made until some months later. Likewise, property becomes indebted on the day the lienor’s interest arose, i.e., when the goods were supplied or when the collision occurred.

32. Whether the common law rule applied to “proceeds” of the transfer is not altogether clear, since there seem to be no cases directly addressing the point. *U.S. v. 92 Buena Vista Ave.*, 113 S. Ct.

declared is in the government alone. Thus, while a purchaser may obtain good title *vis a vis* the rest of the world, he or she cannot obtain such against the government until the time for moving to declare the forfeiture is passed.³³

In order to commence a proceeding *in rem*, there must exist some property capable of being distinguished and held separate from the person owning it. Generally, this implies some article of personal or real property; but on occasion, intangible items such as a debt or right to proceeds can be made the *res* if they are capable of being distinguished and seized as well. In the admiralty context, vessels and their cargoes are most commonly the subject of seizure. However, intangible items, such as freights due an owner for cargo carried, can be the subject of an *in rem* action as well.³⁴

An actual or constructive seizure³⁵ of the *res* is absolutely required in order for a court to have jurisdiction over the action.³⁶ Possession by the court is more important than the actual time or place of taking, however. In the case of movable property, a seizure made outside a judicial district may become the subject of an *in rem* action only when it is brought within the district and placed in the court's custody.³⁷

Seizure is the initial step in proceeding against a thing. What arrest is, in a criminal prosecution against a person, seizure is, in a prosecution against a thing. What a citation is, in a personal civil action, seizure is in the *actio in rem*, so far as it is notice to all interested. It is absolutely essential to the existence of the action, to the jurisdiction of the court, to the validity of the condemnation.³⁸

Without actual seizure of the goods concerned, the court is powerless to transfer good title or declare the validity of liens. Why this should be so can be seen from the fact that *in rem* actions proceed in the absence of the owner of the goods. If the owner has not been made a party, no jurisdiction attaches

at 1135. Modern forfeiture statutes, however, do provide for the forfeiture of "proceeds" of illegal activity. 21 U.S.C. § 881(a)(6)-(7) (1988).

33. *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 409 (1814); *The Mars*, 12 U.S. (8 Cranch) 417 (1814).

34. *United States v. The Freights of the Steamship Mount Shasta*, 274 U.S. 469, 470 (1926) ("By the general logic of the law a debt may be treated as a *res* as easily as a ship. It is true that it is not tangible, but it is a right of the creditor's, capable of being attached and appropriated by the law to the creditor's duties."); *Miller v. U.S.*, 78 U.S. (11 Wall.) 268 (1870) (seizure of company stock).

35. All seizures under the laws of the United States are made by the President, through various executive branch officials. In some cases, however, anyone may seize. This is particularly true in customs cases, where a private citizen, acting as an informant, may seize smuggled goods in exchange for a portion of the final decree. The seizure is then ratified by a customs officer, who adopts it as his own. *The Caledonian*, 17 U.S. (4 Wheat.) 100 (1819). Private citizens who seize do so at their peril, however. A wrongful seizure will subject a private party to suit for damages at common law. *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818); *The Eleanor*, 15 U.S. (2 Wheat.) 345 (1817).

36. An actual taking occurs when the property itself is taken hold of by the marshal, such as when a vehicle or vessel is removed from its owner's possession. A constructive seizure occurs when the property itself is not disturbed as when funds or securities on the books of a bank or corporation are seized. A constructive seizure is, in effect, a garnishment; the property remains in the hands of a third party, who is forbidden by court order from disposing of the property in any way.

37. Where real estate is concerned, however, only courts within the same district or state as the property may have jurisdiction *in rem*.

38. *WAPLES*, *supra* note 16, at 54. *See also* *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866).

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over him; thus, no order *in personam* can be effective. A court cannot generally order a party not privy to a judicial proceeding to enforce its decrees.

B. *Notice*

In addition to perfecting the jurisdiction of the court and providing a means by which a judgement may be satisfied, seizure also provides notice of the action to the owner of the property. Because the action is against the thing itself, and in many cases, such as smuggled goods, the ownership may not be known, seizure provides the surest means by which notice can be given to owners. The fact that the owner is not necessarily a defendant dispenses with the need for personal service. More importantly, the action *in rem* is based on the theory that the property is forfeit at the moment of the offense and is, therefore, merely one to declare the status of property.³⁹ Any right of ownership formerly existing has already been extinguished with the commission of the guilty act. The former owner now stands in the place of all other claimants and can appear or not at his or her option.

Seizure as notice is, however, limited to owners. It is based on the presumption that an owner of property is presumed to know its whereabouts.⁴⁰ This presumption applies both to real and movable property: Every owner is presumed to know whether his or her real estate is in the hands of an adverse possessor,⁴¹ while the owner of a vessel or other vehicle is assumed to know its whereabouts and to whom it is entrusted. It should be noted, however, that seizure alone is not sufficient to give notice to the whole world. A decree rendered on the basis of seizure would bind the former owner only, not all those who might claim an interest in the property. A judgement in these circumstances would be *res judicata* as to the former owner, but not to the whole world. Yet it is not possible to know, let alone personally serve, all those who might claim an interest in the thing seized. Therefore, notice is given to other potential claimants by publication. The method of publication will vary depending on the circumstances, and so today, many courts will require publication in a specialized journal or trade newspaper.⁴² At all events, however, it must be kept in mind that notice to concerned individuals is merely designed to provide an opportunity for them to set up claims. Notice

39. WAPLES, *supra* note 16, at 151-52.

40. Windsor v. McVeigh, 93 U.S. 274, 279 (1876):

The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed.

41. Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466 (1830).

42. For instance, in admiralty cases publication is often made in the more prominent shipping papers, such as the *Journal of Commerce* or *Lloyd's List*.

by publication does not give personal jurisdiction over the parties addressed.⁴³ Once seizure and notice have been effected, those cited to appear have the opportunity to claim and answer⁴⁴ on behalf of the property. The claimants come voluntarily; they have not been sued and, thus, may stay away if they so choose.⁴⁵ In fact, a claimant enters the suit more as a plaintiff than defendant, "as an asserter of ownership or of some other interest."⁴⁶ In this way, not only the former owner, but all who have some interest to protect, may come forward to defend that interest. Indeed, many claimants are indifferent to whether the property is ultimately condemned to the libellant as long as their interest is held superior.⁴⁷

If no one appears to defend on behalf of the *res*, the court enters a default judgement. The default, however, is coextensive with the extent of notice: If notice is made only by seizure, only those who should have been expected to be aware of the arrest can be defaulted; the entire world cannot be defaulted unless publication was made. Default will extinguish all rights forever, whether arising from a *jus in re* or *jus ad rem*. The allegations of the libel are, therefore, deemed admitted as to all parties who have defaulted.⁴⁸ In cases where some parties have defaulted and others have appeared, the case proceeds to trial only with respect to those who are present. If no one appears, the *res* is condemned because the "*res* cannot join issue where there is no one claiming it and helping in its defense."⁴⁹ However, because there is no jurisdiction *in personam*, default of the owners or other claimants has no effect upon them

43. WAPLES, *supra* note 16, at 99. See also *Billings v. Kothe*, 49 Iowa 34 (1878); *Belcher v. Chambers*, 53 Cal. 635 (1879).

44. Traditionally, an owner files both a claim and answer, the claim setting forth the owner's interest and the answer addressing the allegations made in the libel. In many cases, however, the claim and answer are joined in one document.

45. *The Merino*, 22 U.S. (9 Wheat.) 391 (1824). The exception to this rule is in prize cases where it is alleged that the property at issue belongs to an enemy. Citizens of an enemy country cannot come into court to claim for the simple fact that mere proof of citizenship would effectively establish the fact of prize.

46. WAPLES, *supra* note 16, at 101.

47. For instance, in a suit brought by a shipyard to foreclose on a lien for necessities, a bank may intervene asserting a first preferred ship mortgage. Whether the ship is ultimately sold to pay the shipyard's claim is not important so long as the bank receives priority payment from the fund. It should also be kept in mind that in a technical sense, only those claiming an ownership interest are "claimants," while those asserting some other interest, whether through tort or contract, are really "intervenor." Most often claimants assert a *jus in re* and intervenors a *jus ad rem*. A variety of intervenors are possible in admiralty matters. As noted above, seamen frequently appear as intervenors to protect their wage claims; banks appear to protect mortgages; materialmen assert liens for necessities furnished to the vessel; salvors claim salvage rights; while other parties might seek to foreclose various tort or contract liens. Courts will often simply refer to all these parties as "claimants." *The St. Jago de Cuba*, 9 Wheat. 409 (1824).

48. *The Nassau*, 71 U.S. (4 Wall.) 634 (1866); *The Mary*, 13 U.S. (9 Cranch) 126 (1815); *Miller v. United States*, 78 U.S. (11 Wall.) at 268.

49. WAPLES, *supra* note 16, at 130.

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personally.⁵⁰ If no *in personam* claim is joined or pending, the plaintiff is limited to the value of the *res* alone.⁵¹

Condemnation after publication is, therefore, conclusive against the world, *res adjudicata quoad omnes*. This is so because the entire basis of *in rem* actions would fall otherwise. If claimants could appear at a later date and attack the decree, the method of proceeding *in rem* would be useless, because the results would never be considered final. Sales of condemned property would not attract buyers if good title could not be assured. The proverbial "good faith purchaser" would not exist because every buyer at a judicial sale is on notice that title to the goods has been subject to some dispute. Perhaps even more oppressive is the fact that an acquittal would merely end the particular suit at issue; the goods or vessel could always be seized again and libelled elsewhere for the same alleged offense. To prevent such hardships, courts long ago established that the decree *in rem* could not be collaterally attacked.⁵²

C. *In Rem Practice in the United States*

Actions *in rem* have enjoyed a long and useful history in American jurisprudence. Among the first to utilize *in rem* procedure were the colonial vice-admiralty courts. These courts were created at the end of the seventeenth century primarily to enforce the various Navigation Acts.⁵³ A vessel or cargo seized by customs officers for alleged violations of the trade laws was proceeded against in the vice-admiralty *in rem*, where the case was tried before

50. In a sense, a default is a personal judgement to the extent that it deprives owners of their rights in the property. "Suits *in rem* are not only against a thing, but also against 'all persons having or pretending to have, any right, title or interest *in or to*' that thing. They are, in a sense, always personal actions, since all persons are notified, and all affected by the judgement." *Id.* at 134.

51. Where no party has appeared to claim or intervene, a hearing *ex parte* is held to ensure that the allegations of the libel are such as would make out a case for condemnation even when admitted. In most cases, such hearings are *pro forma*; the lack of a claimant results in the facts being taken as admitted. The court's only function is to apply the facts to the law. Affidavits are admitted and, on occasion, oral testimony is presented. Where a claimant has appeared to defend, discovery proceeds along the lines set forth in the Federal Rules of Civil Procedure, and the trial commences in a manner similar to a case *in personam*.

52. See *Slocomb v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817):

All persons having an interest in the subject matter, whether as seizing officers, or informers, or claimants, are parties, or may be parties to such suits, as far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons *toties quoties* for the same offense, and the claimant be loaded with ruinous expenses.

See also *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423 (1813).

53. The Navigation Acts were part of Britain's scheme to control the import and export of goods from its colonies. See generally OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* (1951); LAWRENCE A. HARPER, *THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH CENTURY EXPERIMENT IN SOCIAL ENGINEERING* (1939)

the court alone. This mode of trial allowed customs officers to not only secure the payment of fines due the Crown, but also prevented an offending vessel from being further engaged in illegal trade. *In rem* process was necessary because of the frequent impossibility of determining either ownership of the vessel or the identities of those engaged in smuggling. While the system was subject to abuse on occasion, particularly where unscrupulous customs officials seized vessels for technical violations, the vice-admiralty courts were also frequently the only place the Crown might receive justice. Actions brought at common law almost always resulted in acquittals, regardless of how strong the evidence, because colonial juries were extremely hostile to the extensive system of customs regulation.⁵⁴ It is important to note, however, that while *in rem* proceedings under the customs laws were often the subject of vigorous complaint on the part of the colonists, the use of the *in rem* form remained extremely popular in civil actions. Colonial merchants and seamen readily resorted to *in rem* seizures of vessels when prosecuting claims for wages, breach of contract, salvage, or damage to cargo.⁵⁵

Almost as soon as they were free of British rule, the various states set up admiralty courts of their own, providing each with the ability to proceed *in rem* against vessels or cargo. At first, the state admiralty courts were charged with the adjudication of prize cases resulting from the activities of American privateers in the War for Independence. Later, however, most were given a broader jurisdiction, allowing them to try civil cases as in the former vice-admiralty courts.⁵⁶ Although their docket was generally crowded with prize cases, most of the state courts continued the practice of hearing claims for cargo damage, seamen's wages, and breach of contract.⁵⁷

The creation of the federal courts under the Constitution may have marked a new era in the organization of the judiciary, but the long tradition of proceedings *in rem* continued unabated. Federal courts were given jurisdiction over civil cases traditionally falling within the jurisdiction of the vice-admiralty courts by virtue of the Article III admiralty grant.⁵⁸ Within a short time after

54. A full discussion of the controversy surrounding the vice-admiralty courts in the colonies is found in CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960).

55. The most common cases involved actions for seamen's wages, although vice-admiralty courts heard claims for breach of contract, charter party disputes, and even tort. *See, e.g.*, *Johnson v. Ship Ann* (N.Y. 1764) (wages); *Burger v. Sundry Articles from a Brigantine Ashore on Rockaway Bar* (N.Y. 1770) (salvage); *Wallace v. Sloop Ann* (N.Y. 1771) (marine insurance/cargo damage), *reprinted in* CHARLES M. HOUGH, *REPORTS OF CASES IN THE VICE-ADMIRALTY OF THE PROVINCE OF NEW YORK* (1925).

56. The creation and procedure of the state admiralty courts is discussed at length in HENRY C. BOURGUIGNON, *THE FIRST FEDERAL COURT* (1977).

57. *See, e.g.*, *Dall v. Ship Betsey* (N.Y. 1784) (seamen's wages); *March v. Sundry Goods from a Deserted Vessel* (N.Y. 1787) (salvage); *Terrasson v. Ship Diligent* (N.Y. 1785) (hypothecation), *reprinted in* HOUGH, *supra* note 55, at 243-52.

58. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1.

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starting operation, the district courts were inundated with wage, salvage, and contract claims.⁵⁹ More importantly, Congress lost no time in giving the courts jurisdiction over the same type of customs and revenue cases that had caused so much controversy before the Revolution. In setting up the lower federal courts, Congress recognized the practical need to have some way to enforce revenue and tariff acts.⁶⁰ It thus provided that federal courts were to have jurisdiction over "all seizures under laws of impost, navigation, or trade of the United States."⁶¹ One of the earliest federal statutes was one calling for the seizure of vessels involved in smuggling.⁶² Other statutes made forfeiture the penalty for fraudulent entry with customs officials⁶³ and piracy.⁶⁴ The result was that a majority of the cases heard in the early federal courts were the result of seizures made under the various revenue laws.⁶⁵

American *in rem* practice has followed, to a large extent, that of its English parent. Among the fundamental principles discussed by the Supreme Court in its early case law was that *in rem* actions are not dependent on whether any other defendant is joined *in personam*. This is the case whether the action is one brought by the government in forfeiture or one brought by a private party on a commercial claim.

The thing or object is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. . . . [T]he practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.⁶⁶

It was also established early on that seizure of property pursuant to a valid warrant was a prerequisite to jurisdiction. Moreover, once property was brought into the custody of the court, the court was expected to retain the property, or a substitute, until final decree. Failure to do so was generally thought to be fatal to continuing the action. One of the earliest cases discussing

59. See the cases reported in RICHARD PETERS, ADMIRALTY DECISIONS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE PENNSYLVANIA DISTRICT (1807).

60. WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 18 (1990).

61. Judiciary Act of 1789 § 9, 1 Stat. 73 (1789).

62. "An Act for Registering and Clearing Vessels, Regulating the Coastwise Trade, and for other purposes," Act of September 1, 1789, 1 Stat. 55 (1789).

63. Act of December 31, 1792, 1 Stat. 287 (1792).

64. "An Act to Protect the Commerce of the United States and Punish the Crime of Piracy," Act of March 3, 1819, 3 Stat. 510 (1819).

65. In the South Carolina district, it is estimated that 58% of all cases filed involved violations of the revenue laws. DAVID HENDERSON, COURTS FOR A NEW NATION 145 n.1 (1971). One scholar has estimated that between 1790 and 1840, almost 90% of the Maryland District Court's docket was taken up with admiralty actions. Of these, almost two-thirds involved seamen's wage claims. The remainder were made up of revenue cases. David Owen, *Earliest Activities as a Court of Admiralty*, 50 MD. L. REV. 45, 47 (1991).

66. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

this rule is *The Brig Ann*.⁶⁷ This case involved a seizure of a ship suspected of smuggling by a revenue cutter in Long Island Sound. She was carried into the port of New Haven, but the collector of customs permitted the vessel to depart. She was subsequently seized in New York on the same complaint. The Supreme Court dismissed the libel on the grounds that a seizure, once voluntarily abandoned, ended the jurisdiction of the court. The Court noted, however, that the jurisdiction would not be destroyed where the release was occasioned by error or fraud.

It follows . . . that before judicial cognizance can attach upon a forfeiture *in rem* . . . there must be a seizure; for until seizure it is impossible to ascertain what is the competent forum. And, if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. . . . It is not meant to assert that a tortious ouster of possession, or fraudulent rescue, or relinquishment after seizure, will divest the jurisdiction.⁶⁸

This principle, sometimes called the “no *res*; no case” rule, formed the basis of a later Supreme Court decision in *The Rio Grande*.⁶⁹ Here, a steamboat was arrested in Alabama to foreclose various maritime liens. The district court dismissed the libel, but granted leave to appeal. Because of clerical error, however, the marshal inadvertently released the vessel, and she departed the jurisdiction. Nonetheless, the appeal was heard and a decree issued from the circuit court in favor of the libellants. The vessel was later found in New Orleans, where it was libelled again to enforce the decree of the Alabama circuit court. The owners of the ship contended before the Supreme Court that the decree was invalid because neither the district nor circuit court had jurisdiction.⁷⁰ The Supreme Court held that an improper removal of the *res* from the court’s territorial jurisdiction would not destroy *in rem* jurisdiction.⁷¹

Another important principle was known as the “relation back” doctrine. The English common law had always held that title to property vested in the

67. 13 U.S. (9 Cranch) 289, 291 (1815). *See also* *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612); *The Bolina*, 3 F. Cas. 811, 813-14 (C.C.D. Mass. 1812)

68. 13 U.S. (9 Cranch) at 291.

69. *The Rio Grande*, 90 U.S. (23 Wall.) 458 (1875).

70. 90 U.S. at 459-61.

71. The Court stated:

We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. A subsequent improper removal cannot defeat such jurisdiction. . . .

We hold the rule to be that a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction.

90 U.S. at 463, 465.

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sovereign immediately upon the commission of the act giving rise to forfeiture, and no intermediate transfer or sale could be valid against the King's interest. Both Coke⁷² and Blackstone⁷³ acknowledge the doctrine in their discussions of criminal forfeiture. The only distinction made was between the sale of real and personal property; the transfer of real property could always be avoided by the Crown, while a transfer of chattel would give good title to the purchaser.⁷⁴ The relation back doctrine had the same effect under the civil law as well. Several cases brought under the Navigation Acts in the late eighteenth century used the doctrine as the basis of decision, specifically holding that title to property vested upon the commission of a violation.⁷⁵ The doctrine was

72. Sir Edward Coke writes:

[T]here is a great diversity, as to the forfeiture of land, between an attainder of felony by outlawry upon an appeal, and upon an indictment: for in the case of an appeal the defendant shall forfeit no land, but such as he had at the time of the outlawry pronounced; but in case of indictment, such as he had at the time of the felony committed. And the reason of this diversity is evident; for that in the case of appeal there is no time alleged in the writ when the felony was done, and therefore of necessity it must relate in that case only to the judgment of the outlawry; but in the case of indictment there is a certain time alleged, and therefore in that case it shall relate to the time alleged in the indictment when the felony was committed.

But in the case of the indictment there is also a diversity to be observed: for, as hath been said, it shall relate to the time alleged in the indictment for avoiding of estates, charges, and incumbrances, made by the felon after the felony was committed; but for the mean profits of the land it shall relate only to the judgment, as well in this case of outlawry as in other cases.

SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 745 (Charles Butler ed. 1826).

73. Blackstone writes:

Forfeiture is twofold,—of real and personal estates. First, as to real estates. By attainder in high treason a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown This forfeiture relates backwards to the time of the treason committed, so as to avoid all intermediate sales and encumbrances, but not those before the fact. . . . But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had. . . .

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 381-82 (1765).

74. *Id.* at *387-88 (“The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* sell any of his chattels . . . for the sustenance of himself and family between the fact and conviction; for personal property is of so fluctuating a nature that it passes through many hands in a short time; and no buyer could be safe if he were liable to return the goods he had fairly bought. . . .”).

75. In *Lockyer v. Offley*, 99 Eng. Rep. 1079 (K.B. 1786), a vessel owner brought suit against its insurer after the ship was seized for violating the customs laws. A policy of insurance provided for payment of any loss occurring between the start of the voyage and for 24 hours after arriving in port. The ship was seized one month after she arrived, but the owner contended that the loss occurred as of the date of forfeiture, i.e., the date of the violation, and was thus covered under the terms of the policy. The court recognized that “forfeiture attaches the moment the act is done . . . [so] as to prevent intermediate alienations or incumbrances. . . .” *Id.* at 1083. Nonetheless, it found for the underwriters on the grounds that “some certain and reasonable limitation in point of time” needs to be set to free them from liability. *Id.*

In one of the more interesting cases illustrating the doctrine, a vessel owner was unable to recover his ship after it had been seized by the governor of British Honduras for violating the Navigation Acts even though the governor made no effort to have the forfeiture judicially declared. Title to the ship was

also generally preserved by statute. Where a statute did not mention a specific time when title would be vested, it was assumed to vest at the time of the offense.⁷⁶

The English rule was carried to America as well. It was held very early on that title to chattel property subject to forfeiture did not vest in the United States until condemnation was declared; thus, a transfer for value could defeat the government's claim. At the same time, real property could not escape forfeiture to the government even where a bona fide sale had taken place. Courts agreed, however, that the common law rule could be modified by Congress to provide that the government's title to all property, real or chattel, vested immediately upon the commission of some illegal act.⁷⁷ Many of the early forfeiture cases thus revolved around the question of whether Congress had provided for an immediate vesting of title when it enacted a particular statute.⁷⁸

In fact, Congress did avail itself of the privilege of vesting title immediately in most of the forfeiture statutes.⁷⁹ As a result, the Supreme Court repeatedly held that title to forfeitable property vested in the government immediately upon the commission of the proscribed act and no intermediate transfer for value could defeat the government's claim. In *United States v. 1960 Bags of Coffee*,⁸⁰ a quantity of coffee was seized while in the hands of a third party for violating the Non-Intercourse Act. The claimants intervened, arguing that they had purchased the coffee from the importer and were without knowledge of its illegal source. While the Supreme Court admitted that the claimants were innocent of any fraud, it nonetheless held that the government had a superior title.

We are of the opinion that the question rests altogether on the wording of the act

lost to the owner as of the date of the violation; he could not maintain an action for detainee regardless of whether the governor ever proceeded to condemnation. *Wilkins v. Despard*, 101 Eng. Rep. 65 (1793).

Finally, in *Hennel v. Perry*, Mich. 1 Geo 3 (Nisi Prius 1760), the sale of goods from a smuggler to another was held void.

76. See, e.g., 24 Geo. III, c. 47 (1784)(forfeiture for vessels found "hovering" offshore, i.e., not coming directly in to declare their cargoes). See also *Lockyer*, 99 Eng. Rep. at 1080-81 ("And though the forfeiture of goods to the Crown for treason and felony only relates to the time of conviction, and forfeiture of lands has relation back to the time of the fact committed, yet the Acts [of Navigation] are sui generis; and the forfeiture accrues the instant the fact is committed Now when the forfeiture is incurred, nothing can purge it but the subsequent acquittal of the vessel, or the grace of the Crown in remitting it.").

77. See *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337, 351 (1806) ("Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, shall be the will of the legislature. This must depend upon the construction of the statute.").

78. *Id.*

79. See, e.g., The Non-Intercourse Act, Act of March 1, 1809, 2 Stat. 528 (1809); The Customs Act, Act of March 2, 1799, 1 Stat. 677 (1799); The Internal Revenue Act, Act of July 13, 1866, 14 Stat. 98 (1866); Internal Revenue Act, Act of February 8, 1875, Rev. Stat. 631 (1875).

80. 12 U.S. (8 Cranch) 398 (1814).

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of Congress: by which it is expressly declared that the forfeiture shall take place upon the commission of the offense. If the phraseology were such as . . . to admit of doubt, it would then be proper to resort to analogy and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. But from the view in which the subject appears . . . all assistance derivable from that quarter becomes unnecessary. . .

In this instance we are of the opinion that the commission of the offense marks the point of time on which the statutory transfer of right takes place.⁸¹

The rule in the case became the standard of judgment for all others like it. A long series of cases throughout the nineteenth century reaffirmed the principle that forfeiture vests immediate title in the government unless Congress has provided otherwise.⁸² By the latter part of the century, the doctrine was well-settled⁸³ and applied to both real⁸⁴ and personal⁸⁵ property.

The "relation back" doctrine is based upon the principle that the action being *in rem*, the thing used in violation of the law remains liable even if transferred to a good faith purchaser. Liability attaches immediately upon the commission of the proscribed act rather than at the time of condemnation because, as noted above, the condemnation proceedings do not forfeit *per se*. Instead, the court in entering a decree merely declares the already existing forfeiture, and thereby confirms the government's title, its *jus in re*, against the

81. *Id.* at 404-05.

82. See *United States v. The Brigantine Mars*, 12 U.S. (8 Cranch) 417 (1814) (vessel forfeited to the government even though bona fide sale intervened between date of offence and seizure); *Gelston v. Hoyt*, 12 U.S. (3 Wheat.) 246, 311 (1818); *Caldwell v. United States*, 49 U.S. (8 How.) 366, 381-82 (1850) ("[F]orfeiture is, the statutory transfer of right to the goods at the time the offence is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but the right to them relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation."). See also *Fontaine v. Phoenix Insurance Co.*, 11 Johns. 292 (N.Y. 1814); *Kennedy v. Strong*, 14 Johns. 128 (N.Y. 1817).

83. *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56-57 (1871) ("Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree [I]n all such cases it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property even to a bona fide purchaser for value without notice of the wrongful acts done and committed by the former owner."). See also *Thatcher's Distilled Spirits*, 103 U.S. (13 Otto) 679, 682 (1880) ("Though the claimant's counsel sets up the innocence of the present claimant in regard to the fraud or any knowledge of it, it can hardly be necessary at this day to reconsider the doctrine that when the act has been done which the law declares to work a forfeiture of the property, the right of the government to seize the property, and assert the forfeiture, attaches at once and may be pursued by the government whenever and in whose hands soever that property may be found.").

84. *United States v. Stowell*, 133 U.S. 1 (1890) (forfeiture of land on which illegal still operates); *Dobbin's Distillery*, 96 U.S. 395 (1878) (land leased to tenant who operated illegal still without owner's knowledge forfeited).

85. *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 311 (1818) (ship forfeited for violation of neutrality act); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 362 (1842) (goods imported in violation of the customs laws); *Clifton v. United States*, 45 U.S. (4 How.) 248 (1846) (fraudulent invoices prepared in connection with cloth importation results).

whole world.⁸⁶ The necessary result of this principle must be that all intermediate transfers of the forfeited property are void as against the government. In some cases, of course, the transferee may ultimately obtain good title by virtue of the fact that the government never moves to perfect its interest.

Although the rule may seem harsh at first glance, its counterpart is to be found in the general maritime law. Those furnishing supplies to, or injured by, a vessel obtain an immediate, secret lien against it which no intervening sale can extinguish. Unless the claim be barred by laches, a materialman, or injured party, may libel the vessel in whosever hands it may be found. This is because the vessel in such cases becomes immediately indebted, and a *jus ad rem* arises in favor of the lienor, upon the act of supply or the commission of the tort. The rule provides security for the merchant and a right of redress to the injured.⁸⁷ Like the plaintiff injured by a vessel, the government is, in a sense, injured by acts taken in violation of its laws. Its right to redress cannot be adequately preserved unless its title vests immediately. If a transfer could defeat the government's right, the enforcement of a wide variety of laws would be impossible.⁸⁸

American practice was also true to the principle that liability *in rem* attaches to property involved in the commission of an offense irrespective of any personal fault on the part of the owner. This doctrine found expression in a number of Supreme Court decisions over the years. One of the earliest discussions was contained in *The Brig Malek Adhel*.⁸⁹ This case involved a ship outfitted by its owner for a voyage to South America. Along the way, the crew decided to take up piracy instead. When the ship was seized by a naval vessel, the owner sought its release on the grounds that he had no personal involvement in the crew's illegal activities. The Court, however, rejected this argument:

86. Condemnation proceedings do not "forfeit" property. They declare a preexisting condition. *Gelston*, 16 U.S. (3 Wheat.) at 318. See also Comment, *Tempering the Relation-Back Doctrine: A more Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 175-77 (1990) ("The relation-back doctrine relies on deodand's fiction of 'guilty' property to claim that the property is subject to seizure from the first moment of illegal use, with its title vesting in the government at that precise moment. . . . [W]hen under the jurisdiction of a statute embodying the relation-back doctrine, a party's innocence is irrelevant if he purchased the tainted property after the date of the illegal use.").

87. *The Bold Buccleugh*, 7 Moo. P.C. 267, 284, 13 Eng. Rep. 884, 890-1 (P.C. 1851) ("[A maritime lien] is a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whosever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.").

88. This result was recognized by the Supreme Court early on. See *1960 Bags of Coffee*, 12 U.S. (8 Cranch) at 405 ("In the eternal struggle that exists between the avarice, enterprize and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature.").

89. 43 U.S. (2 How.) 210 (1844).

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The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress. . . . The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.⁹⁰

This doctrine remained unchallenged for almost two centuries and formed the basis of decision in numerous cases brought under the customs, tax, and revenue laws.⁹¹

By the end of the nineteenth century, the principles of *in rem* practice had become quite well established, especially in the forfeiture context. Beginning in the early 1970s, however, the Supreme Court began to take a harder look at the due process implications of *in rem* and *quasi in rem* actions. As noted above, the institution of an *in rem* suit begins with the issuance of a warrant of arrest, and generally, such warrants are issued *ex parte*. The Court finally considered the due process aspects of *ex parte* seizure in *Calero-Toledo v. Pearson Yacht Leasing Co.*⁹² That case involved the seizure of a yacht under Puerto Rico's drug forfeiture law. The yacht owner challenged the seizure on the grounds that the omission of provisions for pre-seizure notice and hearing constituted a denial of due process.⁹³ *Pearson* upheld the forfeiture of the yacht on the grounds that prompt seizure under Puerto Rico's drug laws without prior notice was justified in order to vindicate a significant government

90. *Id.* at 233-34.

91. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (income tax); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878) (seizure under the liquor laws).

92. 416 U.S. 663 (1974).

93. *Id.* at 676-77. In *Pearson*, the yacht owner contended that the Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972), prohibited a state from seizing property without a prior hearing. *Fuentes* itself involved a challenge to the validity of Florida and Pennsylvania's replevin statutes. These laws permitted private parties to seize goods alleged to have been wrongfully detained. Under the statutes, creditors were able to obtain writs of replevin from the clerk of court on the basis of bare assertions that they were entitled to the property. Neither statute provided an opportunity for a timely hearing. *Fuentes* struck down the statutes on the grounds that they deprived debtors of property without due process. *Id.* at 80. At the same time, however, the *Fuentes* court reaffirmed the principle that, in limited circumstances, government officials may seize property without notice or a prior hearing. Those instances are confined to cases where there is an important government interest at stake combined with a special need for prompt action. *Id.* at 90-91.

interest.

The considerations that justify[] postponement of notice and hearing . . . are present here. First, seizure under the . . . statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, pre-seizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, unlike the situation in *Fuentes*, seizure is not initiated by self-interested parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes. In these circumstances, we hold that this case presents an “extraordinary” situation in which postponement of notice and hearing until after seizure did not deny due process.⁹⁴

Unlike warrants issued in cases where the plaintiff seeks a provisional remedy, such as garnishment or attachment,⁹⁵ the interest in providing an immediate remedy to both the government and civil plaintiff in an *in rem* case outweighs the need to provide a pre-seizure hearing. *Ex parte* seizure was thought valid as long as the plaintiff was entitled to a hearing within a reasonable time after the arrest.⁹⁶

Utilizing the procedures discussed above, American law enforcement officials have traditionally been free to seize and forfeit property engaged in the violation of a variety of federal laws. The extent of the government’s activities in this regard are set forth in the next section.

II. CIVIL FORFEITURE

A forfeiture is “the taking by the government of property that is illegally used or acquired, without compensating the owner.”⁹⁷ While forfeiture is now primarily designed to aid in the enforcement of criminal laws, it is carried out by means of civil process *in rem*, a paradox that becomes the source of much difficulty and confusion in determining the proper scope of forfeiture proceedings.⁹⁸

Forfeiture has had a long history in both the United States and England, providing a means by which a variety of public purposes might be achieved. In general, government has relied on two types of forfeiture proceedings,

94. 416 U.S. at 679-80.

95. *See, e.g.*, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969).

96. *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (seizure of contaminated meat); *The Dredge General Gillespie*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982) (seizure of vessel in admiralty action).

97. DAVID SMITH, *PROSECUTION AND DEFENSE OF FORFEITURE CASES* 2-1 (1991); *United States v. Eight (8) Rhodesian Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

98. SMITH, *supra* note 97, at 2-1.

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criminal and civil. In criminal forfeiture, property is seized and forfeited after conviction of a crime; the defendant must first be found guilty before his or her property can be seized. This type of forfeiture works *in personam*. Although common in England,⁹⁹ criminal forfeiture penalties were relatively uncommon in the United States until the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO)¹⁰⁰ in 1970.¹⁰¹ A decree of forfeiture in a criminal action can only be rendered after a guilty verdict on the criminal charge. Civil forfeiture, on the other hand, is an *in rem* proceeding directly against the property at issue; the property alone is the defendant and judgement does not depend on whether any criminal action is brought *in personam*.¹⁰² The most important feature of a criminal forfeiture proceeding is that title to the property is only determined against the *in personam* defendant. It does not prevent other parties from interposing claims on their own.¹⁰³ By contrast, civil forfeiture proceedings determine title to the property as against the entire world.¹⁰⁴

Since the enactment of RICO,¹⁰⁵ the use of criminal forfeiture has been

99. Common law forfeiture frequently fell upon those convicted of a felony or treason. A convicted felon forfeited his chattel property to the Crown and his lands escheated to his lord; a convicted traitor forfeited all his property, whether real or personal, to the Crown. This type of forfeiture was known as forfeiture of estate and was justified on the grounds that property was a right derived from society which was lost by violating society's laws. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *299 (1765); 4 *id.* at 382. After the revolution, many of the new states enacted criminal forfeiture laws that allowed seizure of property belonging to British Loyalists. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-1789 197-98 (1987) ("Every single state had legislated against the Tories, either confiscating Loyalist estates or imposing heavy taxes on such properties.").

100. 18 U.S.C. § 1963 (1990).

101. *Alexander v. United States*, 113 S. Ct. 2766 (1993). See also 1 CHARLES WRIGHT, FEDERAL PRACTICE AND PROCEDURE 389-91 (2d ed. 1982). In *Alexander*, Justice Kennedy asserted that criminal forfeiture penalties were "unknown in the federal system until the enactment of RICO in 1970." 113 S. Ct. at 2768. In fact, however, criminal, or *in personam*, forfeiture was well known to federal courts during the nineteenth century. See *Origet v. United States*, 125 U.S. 240 (1888); *United States v. Claffin*, 97 U.S. 546 (1878); *United States v. Mann*, 26 F. Cas. 1153, 1155 (C.C.D.N.H. 1812) (No. 15,718); *Greene v. Briggs*, 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5,764); *United States v. Mynderese*, 27 F. Cas. 50 (C.C.D.N.Y. 1870) (No. 15,850). It seems to have been gradually displaced by civil forfeiture as the preferred means of proceeding as time progressed. There are, however, virtually no reported federal cases in the twentieth century, although there are numerous state cases imposing criminal forfeiture pursuant to state law. James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 779-80 n.73 (1977). Criminal forfeiture was a feature of colonial law as well. During the Revolution, several colonies provided for the forfeiture of the estate of any person convicted of sympathizing with the Crown. 37 C.J.S. Forfeitures 3. Prior to 1970, the Confiscation Act of 1862 provided for forfeiture of property belonging to Confederate soldiers. See *Bigelow v. Forest*, 76 U.S. (9 Wall.) 339 (1869).

102. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

103. Unlike a civil forfeiture proceeding, however, parties other than the defendant may only set up their claims after the property has been forfeited to the government. See, e.g., 21 U.S.C. § 853(n) (1986), which allows third parties to assert property rights only "following the entry of an order of forfeiture."

104. See *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15.

105. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 21 U.S.C. §§ 1961-68 (West 1981 & Supp. 1993)).

greatly expanded by its inclusion in the Continuing Criminal Enterprise Act¹⁰⁶ and the Comprehensive Crime Control Act of 1984.¹⁰⁷ Because ordinary criminal sanctions had long proved ineffective in combatting organized crime, Congress sought to create a remedy that would not only punish offenders, but would attack the "economic roots" of criminal enterprise.¹⁰⁸ Although *in personam* forfeiture is now a firmly established feature of federal criminal law,¹⁰⁹ civil, or *in rem*, forfeiture remains the primary means by which government seizes property used in, or obtained by, violations of the law.¹¹⁰

The collection of government revenues has long been considered of utmost importance to the preservation of the Union.¹¹¹ Early on, forfeiture became the penalty for violations of various inland revenue or excise laws. The number of statutes providing for civil forfeiture gradually expanded, however, as the government realized its effectiveness in deterring illegal conduct. Through the years, forfeiture has been made the penalty for a wide variety of offenses. For instance, forfeiture is required for violations of many of the statutes covering the distillation and taxation of liquor¹¹² or the manufacture of cigarettes and tobacco products.¹¹³ Today, a wide range of government objectives are achieved through the use of the civil forfeiture remedy. The navigation laws,¹¹⁴ the food and drug laws,¹¹⁵ copyright laws,¹¹⁶ and immigration

106. Pub. L. No. 91-513, 84 Stat. 1266 (1970)(codified as amended at 21 U.S.C. § 848 (West 1981 & Supp. 1993)).

107. Pub. L. No. 98-473, 98 Stat. 2044 (1984).

108. *Russello v. United States*, 464 U.S. 16, 26 (1983). *See also* S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969) ("What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.").

109. Criminal forfeiture is also widely practiced under the laws of the several states. *See, e.g.*, SMITH, *supra* note 97, at 2-12 - 2-19. *See also* Comment, *The New York City Civil Forfeiture Law: Is it Going too Far?*, 5 HOFSTRA PROP. L. J. 457 (1993).

110. This article does not concern itself with criminal forfeiture except to compare some of its features with those of civil forfeiture. An excellent discussion of criminal forfeiture may be found, however, in SMITH, *supra* note 97, at chapters 13-14.

111. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352, n.18 (1977) ("The rationale underlying [*ex parte* forfeiture in revenue cases], of course, is that the very existence of government depends upon the prompt collection of the revenues."); *see also* *Springer v. United States*, 102 U.S. 586, 594 (1881) ("The prompt payment of taxes may be vital to the existence of a government.").

112. 26 U.S.C. § 5613 (1988) allows for the forfeiture of all distilled spirits found in casks or packages which are not stamped, marked or branded as required by law. 26 U.S.C. § 5607 (1988) provides for the forfeiture of real and personal property used in, or resulting from, the unlawful use, recovery, or concealment of denatured distilled spirits. *See also* 26 U.S.C. § 5615 (1988) (forfeiture of unregistered "still or distilling apparatus"); 26 U.S.C. § 5661(a)(1988) (forfeiture of all property used in an attempt to defraud the government of taxes on wine); 26 U.S.C. § 5671 (1988) (forfeiture for evasion of the beer tax).

113. 26 U.S.C. § 5763 (1988) requires forfeiture of product and property manufactured or used in an attempt to defraud the government of any tobacco tax.

114. 46 U.S.C. § 883 (1988) provides for the forfeiture of cargo transported between points in the United States by foreign vessels. 46 U.S.C. § 325 (1988) requires the forfeiture of a vessel whose license to engage in domestic commerce has been illegally transferred.

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laws¹¹⁷ all provide for forfeiture as a penalty for violating some of their provisions. Other statutes provide for forfeiture to enforce agriculture,¹¹⁸ consumer protection,¹¹⁹ conservation,¹²⁰ mining,¹²¹ treasury,¹²² telecommunications,¹²³ and antitrust laws.¹²⁴

Civil forfeiture has assumed its priority of place because it provides the government with several distinct advantages over criminal forfeiture. First, forfeiture has the potential to generate more revenue than the action costs, especially where real estate or large sums of cash or securities are concerned.¹²⁵ More importantly, civil forfeiture provides prosecutors with an edge over their target that will often prove decisive:

[C]ivil forfeiture procedure is a prosecutor's dream and a defense attorney's nightmare: the government has all the advantages. The contrast with criminal procedure, where the balance of advantage has shifted markedly in favor of the defendant in the past quarter century, is striking. Criminal defense attorneys confronting their first civil forfeiture case feel like they are in an Alice-in-Wonderland world where the property owner generally has the burden of proof, the innocence of the owner is not a defense, rank hearsay is admissible to prove that the property is "guilty," and the government's right to the property vests at the time it is used illegally rather than at the time of the forfeiture judgment.¹²⁶

Because the innocence or guilt of the property owner is immaterial, civil forfeiture allows the government to proceed against property even where there is not enough evidence to indict or convict a defendant. Indeed, acquittal of a defendant in an *in personam* criminal action has no effect whatsoever on a civil forfeiture proceeding both because there is a lower standard of proof in the latter and because the "guilt" of the property, rather than any person, is at

115. 21 U.S.C. § 334 (1988) (condemnation and seizure of adulterated or misbranded articles of food, drugs, or cosmetics); 21 U.S.C. § 467(b)(1988) (condemnation and seizure of diseased poultry); 21 U.S.C. § 673 (1988) (violation of regulations relating to meat inspection).

116. 17 U.S.C. §§ 509, 603 (1988) allow for the forfeiture of material violating the copyright laws.

117. 8 U.S.C. § 1324(b) (1988) provides for the forfeiture of any conveyance used in transporting or harboring illegal aliens.

118. 7 U.S.C. § 608 (1988) (forfeiture of produce imported in violation of Agriculture Department marketing orders).

119. 15 U.S.C. § 2071(b)(1988) (forfeiture of hazardous products).

120. 16 U.S.C. § 670(j)(c) (1988) (forfeiture of hunting gear, equipment, vehicles used to violate hunting or fishing regulations on public lands); 16 U.S.C. § 470(g) (1988) (forfeiture of artifacts, equipment, tools, etc. involved or resulting from violation of the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470(a)); 16 U.S.C. § 668b(b) (1988) (bald eagles); 16 U.S.C. § 742(j)(1988) (forfeiture of guns and aircraft used in airborne hunting).

121. 30 U.S.C. § 184 (1988) (forfeiture of mining leases, options or permits); 30 U.S.C. § 1466 (1988) (forfeiture of vessels used to violate Deep Seabed Hard Minerals Resources Act of 1980, 30 U.S.C. § 1401).

122. 31 U.S.C. § 5317 (Supp. V 1993) (failure to report transfer of monetary instruments).

123. 47 U.S.C. § 510 (1988) (unlicensed transmission or communications devices).

124. 15 U.S.C. § 6 (1988) (property used or owned by any conspiracy to restrain interstate or foreign trade).

125. Forfeiture does not always have this effect, however. The cost of seizing, maintaining and filing suit against an automobile or small boat can be enormous when compared to the final sale price at auction.

126. SMITH, *supra* note 97, at 1-5.

issue.¹²⁷ Civil forfeiture also allows the government to punish those who have fled the jurisdiction hoping to thwart prosecution because the *in rem* nature of the proceedings makes the presence of any other defendant simply irrelevant. It also penalizes those who allow their property to be used in advancing criminal activity, even though they are not themselves involved. Assistance can be deterred by the threat of confiscation without the need to prove complicity.¹²⁸ Finally, civil forfeiture provides one of the most effective, albeit controversial, tools available to law enforcement personnel in its ability to impose "user sanctions" on drug consumers.¹²⁹

III. THE DRUG FORFEITURE SCHEME

In an effort to control the rising tide of drug use and drug-related crime, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹³⁰ This legislation was designed to strengthen the government's enforcement efforts by attacking the drug trade at its roots and removing any economic incentive for drug trafficking.¹³¹ The civil forfeiture provisions of the Act, as contained in 21 U.S.C. § 881, originally authorized the Department of Justice to bring civil forfeiture actions against any contraband or property used in connection with a drug offense.¹³² In time, however, Congress realized that these provisions were meeting with little success both because the extent of property subject to forfeiture was limited and because the provisions contained several ambiguities.¹³³ As a result, Congress expanded the scope

127. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

128. SMITH, *supra* note 97, at 1-4 - 1-7.

129. *Id.* at 1-7 - 1-10. The government's attempts to forfeit drug consumers' cars, boats, or planes through a policy of "zero tolerance" proved to be somewhat of a failure, however, both in the political and criminal realms. Congress moved to restrict the practice, while prosecutors asserted that zero tolerance was not effective in deterring drug use.

130. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 881 (1988 & Supp. III 1991) (also known as the Controlled Substances Act)).

131. See S. REP. No. 225, 98th Cong., 1st Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3374 ("Clearly if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes."); 124 CONG. REC. 23,055 (1978) (statement of Sen. Nunn) ("[W]e cannot forget that profit, astronomical profit, is the base motivation of the drug traffickers."); 124 CONG. REC. 23,056 (1978) (statement of Sen. Culver) ("The purpose of the [drug forfeiture law] is to help combat the flow of illicit drugs in the United States by striking at profits from illicit drug trafficking.").

132. Abuse Prevention and Control Act, 1970 U.S.C.C.A.N. 1437, 1485-87.

133. See S. REP. No. 225, 98th Cong., 2d Sess. 191-97 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374-80. As originally enacted, the forfeiture statute was limited to illegal drugs, records, research data, materials and equipment used in the manufacture of drugs, and containers or vehicles used to transport illegal drugs. 84 Stat. at 1276. See also Damon G. Saltzburg, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217 (1992); William J. Hughes & Edward H. O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613, 614-16 (1984). In *United States v. Meinster*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 475 U.S. 1136 (1982), eight defendants were convicted of operating a drug trafficking enterprise

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of civil forfeiture in 1978 to "reach proceeds derived from drug transactions, including any assets bought with such proceeds and exchanged or intended to be exchanged for controlled substances."¹³⁴ In 1984, Congress again amended the forfeiture laws to allow seizure of real property used in facilitating a drug transaction or purchased with drug proceeds.¹³⁵ As presently enacted, therefore, civil forfeiture under the narcotics laws extends to all illegal drugs,¹³⁶ equipment or material used in the manufacture of illegal drugs,¹³⁷ containers¹³⁸ or conveyances¹³⁹ used to transport or store such drugs, and any asset given in, or resulting from, an exchange of narcotics.¹⁴⁰ Real property is subject to forfeiture when exchanged for, or derived from, drug sales, and when used to facilitate the commission of any violation of the drug laws.¹⁴¹

The government has two options when seizing property under section 881. It may institute a traditional *in rem* action pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims.¹⁴² In this case, the property at issue will be taken into custody by the U.S. Marshals Service under a warrant

that netted over \$220 million in one year. Nonetheless, the government was able to seize only \$16,000 through forfeiture.

134. Saltzburg, *supra* note 133, at 217-18. Congress amended the forfeiture provisions to include seizure of things of value furnished in exchange for a controlled substance as well as the proceeds of such exchange. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(1), 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6) (West 1981 & Supp. 1993)).

135. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 306(a), 98 Stat. 2040, 2050 (codified as amended at 21 U.S.C. § 881(a)(7) (West 1981 & Supp. 1993)). Efforts were also made to strengthen criminal forfeiture through the enactment of § 853 of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2044 (1984).

136. 21 U.S.C.A. § 881(a)(1) (West 1981 & Supp. 1993).

137. 21 U.S.C.A. § 881(a)(2) (West 1981 & Supp. 1993).

138. 21 U.S.C.A. § 881(a)(3) (West 1981 & Supp. 1993).

139. 21 U.S.C.A. § 881(a)(4) (West 1981 & Supp. 1993).

140. 21 U.S.C.A. § 881(6) (West 1981 & Supp. 1993).

141. 21 U.S.C. § 881(a)(6)-(7) (West 1981 & Supp. 1993) provides as follows:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used in or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

142. FED. R. CIV. P., Supplemental Rules for Certain Admiralty and Maritime Claims.

issued by a judge or magistrate after the filing of a verified complaint *in rem*.¹⁴³ In the alternative, property may be seized by the Attorney General without a warrant when he or she has probable cause to believe that the property is has been, or will be, used to violate the narcotics laws.¹⁴⁴ If seized in this way, proceedings for forfeiture under the customs laws must be instituted "promptly."¹⁴⁵ Under the customs laws, however, property valued at less than \$500,000 may be summarily forfeited unless the owner files a claim for the property and posts a bond to cover the government's costs.¹⁴⁶ This type of warrantless seizure has been upheld by the courts on numerous occasions.¹⁴⁷

If a condemnation proceeding is instituted, either because the government proceeded under the admiralty rules or a claimant intervened under the customs rules, the government is required to first establish probable cause for forfeiture. The government's burden in this regard is relatively light. It need only show "reasonable grounds, rising above the level of mere suspicion, to believe that certain property is subject to forfeiture."¹⁴⁸ Probable cause does not require "prima facie proof."¹⁴⁹ Instead, the government must merely demonstrate a "belief that a substantial connection exists between the property to be forfeited and the criminal activity."¹⁵⁰ However, no connection with a specific drug transaction need be shown.¹⁵¹ In meeting its burden, the government may rely on hearsay, circumstantial evidence or facts learned after

143. 21 U.S.C. § 881(b)(1) (West 1981 & Supp. 1993). See also FED. R. CIV. P., Supp. R. Adm. & Mar. Claims.

144. 21 U.S.C. § 881(b)(4) (West 1981 & Supp. 1993). The Attorney General may also seize property incident to an arrest or inspection and where he or she has reason to believe that the property is dangerous to the public health. 21 U.S.C. §§ 881(b)(1), (3) (West 1981 & Supp. 1993). At first glance, such a procedure might seem strange; but warrantless seizure has been an integral part of the customs laws for years. Contraband or smuggled goods are routinely seized by customs officers without a warrant, leaving the burden on the owner to contest the validity of the seizure.

145. 21 U.S.C. § 881(b)(4) (West 1981 & Supp. 1993).

146. Under the customs laws, the domestic value of any property subject to forfeiture must be determined before proceedings begin. 19 U.S.C. § 1606 (1988). When property is valued at less than \$500,000, the customs officer posts a notice of seizure and intent to forfeit for three successive weeks. If the officer knows of the existence of parties who appear to have an interest in the goods, written notice must be sent to them as well. 19 U.S.C. § 1607 (1988). Persons desiring to file a claim to contest forfeiture must post a bond in the amount of \$5000 or 10% of the value of the property, whichever is less. 19 U.S.C. 1608 (1988). If no one appears within 20 days after the first published notice to claim the property, the customs officer declares it forfeit and such a declaration has the same force and effect as a judicial decree. 19 U.S.C. §§ 1609(a)-(b) (1988). Where property is valued at more than \$500,000, the government must institute a suit *in rem* for judicial condemnation. 19 U.S.C. § 1610 (1988).

147. *United States v. Turner*, 933 F.2d 240 (4th Cir. 1991); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297 (5th Cir. 1983); *United States v. Bush*, 647 F.2d 357 (3d Cir. 1981); *United States v. One 1977 Milham*, 590 F.2d 717 (8th Cir. 1979).

148. *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1267 (2d Cir. 1989).

149. *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986).

150. *United States v. \$4,255,000.00*, 762 F.2d 895, 904 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

151. *United States v. Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale, Fla.*, 803 F.2d 625, 629 n.2 (11th Cir. 1986).

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the seizure.¹⁵²

Once the government establishes probable cause, the burden shifts to the claimant to prove either that the property is not subject to forfeiture because it has not been used in the manner alleged, or, if the property was used illegally, that such use occurred without the owner's knowledge or consent.¹⁵³ Until the creation of the drug forfeiture scheme, an owner's innocence was never a defense to a forfeiture action.¹⁵⁴ Property has frequently been declared forfeit regardless of whether the owner knew of, or participated in, the illegal conduct. This is because the "relation back" doctrine provided that the government's right to title in the property vested immediately upon the commission of the underlying illegal act.¹⁵⁵ Recognizing the breadth of the new drug forfeiture scheme and the potential for abuse, Congress specifically provided owners with a defense to forfeiture if they could prove that the illegal acts giving rise to the seizure took place without their knowledge or consent.¹⁵⁶ Therefore, an owner who entrusts property to another may avoid forfeiture even though unable to contest the fact that the property was used illegally. This so-called innocent owner defense provides that "no property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."¹⁵⁷

Nonetheless, claimants' burden is much higher than that of the government. First, they cannot use hearsay to prove their case.¹⁵⁸ In addition, where the owners claim lack of knowledge, they must prove by a preponderance of the evidence that whatever drug-related activity did take place occurred without their knowledge or consent.¹⁵⁹ Finally, a claimant can never simply rely on mere assertions of lack of knowledge. Where the government raises an inference that the claimant had actual knowledge of the illegal activity, the claimant must come forward with objective proof of ignorance.¹⁶⁰ If the

152. *United States v. One 1986 Chevrolet Van*, 927 F.2d 39 (1st Cir. 1991); *United States v. Four Parcels of Real Property*, 893 F.2d 1245 (11th Cir. 1990). See also Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 284-86 (1992).

153. See 21 U.S.C. § 881(a)(6)-(7) (West 1981 & Supp. 1993).

154. See, e.g., *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878).

155. See *id.* at 395 (real property declared forfeit when lessee operated illegal distillery thereon even though owner was ignorant of the conduct); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (owner of taxi cab lost property to forfeiture when driver used it to transport untaxed spirits). See also Comment, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990).

156. See 21 U.S.C.A. § 881(a)(6)-(7) (West 1981 & Supp. 1993).

157. 21 U.S.C.A. § 881(a)(6).

158. *United States v. One 1968 Piper Navaho Twin Engine Aircraft*, 594 F.2d 1040 (5th Cir. 1979). See also Stahl, *supra* note 152, at 286 n.54.

159. *United States v. 8848 S. Commercial Street*, 757 F. Supp. 871, 880 (N.D. Ill. 1990).

160. One district court has stated the claimant's burden thusly:

[I]n forfeiture actions, if a court finds it reasonable to infer from the objective evidence that the claimant had or must have had actual knowledge of the drug transaction, then the claimant

claimant is unable to establish innocence, the property is forfeit. While numerous commentators have criticized the heavier burden imposed upon the property owner, courts have generally been unwilling to tamper with the procedure as presently constituted¹⁶¹ in light of the fact that Congress has specifically provided that the burden of proof in both customs and drug forfeiture cases lie with claimant.¹⁶²

Civil forfeiture has recently become controversial because of its connection to federal laws designed to combat narcotics and organized crime. Its use in these areas has served to catapult forfeiture from relative obscurity—the domain of a few government and admiralty lawyers—to center stage in the ongoing debate over the best means to confront modern criminal enterprise. Part of the problem is that forfeiture is being used in ways for which it was never intended. Forfeiture actions under the drug laws bear little resemblance to traditional customs or revenue seizures, both as a result of congressional enactments and Supreme Court holdings. It is to this debate, and the Supreme Court's entry into it, that we now turn.

IV. THE DESTRUCTION OF THE "NO RES, NO CASE" RULE

The Supreme Court's recent difficulties with civil forfeiture began with *Republic National Bank of Miami v. United States*.¹⁶³ The issue in *Republic* was whether a federal court could retain jurisdiction over an *in rem* forfeiture action after the property which was the subject of the suit had been transferred

cannot meet his or her burden of proof in opposing summary judgment by simply asserting innocence. In other words, although courts have maintained that an innocent ownership defense turns on a claimant's *actual*, and not constructive, knowledge of the illicit activity which gave rise to the forfeiture action, if the evidence supports a "reasonable inference" of actual knowledge and the claimant fails to come forward with anything more than a make protestation that he or she really didn't know of the illicit activity, the claimant's defense of innocent ownership fails.

Id. See also Stahl, *supra* note 152, at 286-88. There is a great deal of controversy over the application of various aspects of the innocent owner defense, especially in the context of the Supreme Court's opinion in *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 689-90 (1974). Relying on this decision, some jurisdictions have read an additional requirement into the innocent owner defense to demand that an owner do all that was reasonably possible to prevent the illegal use of the property. The intricacies of this debate are outside the scope of this article. *But see* Saltzburg, *supra* note 133, at 224-28; Labit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471 (1989); David J. Fried, *Rationalizing Criminal Forfeiture*, 79 *J. CRIM. L. & CRIMINOLOGY* 328, 386 (1988); Susan J. Parcels, Comment, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 *ME. L. REV.* 435 (1982).

161. See, e.g., Stahl, *supra* note 152; Goldsmith & Linderman, *supra* note 9.

162. 21 U.S.C. § 881(d) (1988) provides that customs laws govern procedure in drug forfeiture cases. The customs statutes require that "where [forfeited] property is claimed by any person, the burden of proof shall lie upon such claimant." 19 U.S.C. § 1615 (1986). In addition, the innocent owner defenses of 21 U.S.C. §§ 881(a)(6)-(7) both require that lack of knowledge or consent be established by the owner. On the burden of proof in a criminal forfeiture case, see James D. Tolliver, Note, *United States v. Elgersma: the Burden of Proof in Criminal Forfeiture Proceedings Under 21 U.S.C. § 853*, 43 *MERCER L. REV.* 1329 (1992).

163. 113 S. Ct. 554 (1992).

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from its custody. The traditional rule had been that jurisdiction over the *res* could only be maintained as long as it, or a substitute, remained in the court's control. In spite of this rule, however, the Supreme Court ultimately held that continued possession of the *res* is not required as long as jurisdiction was properly obtained at the outset. In so doing, the Court overturned at least two hundred years of precedent, with only a cursory review of the relevant case law. Ironically, the Court in *Republic* appeared to be primarily concerned with preventing the government from taking advantage of procedural technicalities to prevent appeals. However, in attempting to create a special exception to *in rem* practice applicable to government forfeitures, it glossed over crucial distinctions between *in rem* and *in personam* jurisdiction in a way that will only further confuse proceedings not only in civil forfeiture, but in *in rem* actions in general.

The case began in 1988, when the government filed suit in the Southern District of Florida seeking *in rem* forfeiture of a single-family residence in Coral Gables, Florida. In its complaint, the government alleged that the property had been purchased with drug proceeds and was forfeit to the United States pursuant to 21 U.S.C. 881(a)(6).¹⁶⁴ While the purported owner of the property did not mount a defense to the claim, Republic National Bank, which held a mortgage on the land, sought intervention to raise an innocent owner defense.¹⁶⁵ Republic contested forfeiture of its lien rights on the grounds that it had no knowledge of the fact that the property was derived from illegal drug transactions when it made the loan. After a bench trial, the court ordered the property forfeit. It held that the government had met its burden of probable cause with respect to the forfeiture question, and that the bank failed to show innocent ownership.¹⁶⁶

164. *United States v. One Single Family Residence Located at 6960 Miraflores Avenue, Coral Gables, Florida*, 731 F. Supp 1563 (S.D. Fla. 1990).

165. The so-called "innocent owner" defense is a statutory exception to the common law relation back doctrine and provides that "no property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6). One who asserts an innocent owner defense must show that he or she was without knowledge of (or did not consent to) the alleged criminal activity. That is to say, the bank was required to show that it was unaware that the property had been purchased with the proceeds of illegal drug sales at the time it agreed to give the mortgage.

166. The property in question was owned by one Indalecio Iglesias, who was alleged to have engaged in a series of drug transactions over several years, netting him over \$ 100 million in illegal proceeds. The government alleged that these proceeds were used to purchase the property. A Panamanian holding company was listed as the registered owner. After Iglesias received word through a friend that he was being investigated by the Drug Enforcement Administration, he put the house up for sale and approached Republic about a mortgage. Republic agreed to provide a one-year note on the property, which was valued at \$1.2 million. Once the loan was approved, Republic paid the funds into Iglesias's Swiss bank account. Iglesias purchased a ticket to Geneva and fled the country. 731 F. Supp. at 1565-66. The district court denied Republic's innocent owner defense because it gave a mortgage to Iglesias even though the property was not registered in his name; it never conducted a title search; it did not ask the purpose of the loan; the borrower had no known source of funds for repayment; the loan was approved outside normal banking channels; a guarantor of the loan had no known connection with

Prior to entry of the final decree, the government and the bank filed a stipulation consenting to the interlocutory sale of the property. Under the terms of the stipulation, the proceeds of the sale were to be held by the U.S. Marshal pending a final order. All claims would attach to the proceeds without prejudice to the rights of any party.¹⁶⁷ In its final decree, the district court ordered the Marshal to dispose of the funds "in accordance with the law." Republic filed a timely notice of appeal but did not ask for a stay of execution or post a *supersedeas* bond. As a result, the marshal paid over the funds to the United States.¹⁶⁸ When the case came on appeal, the government contended that transfer of the *res* prevented the appellate court from proceeding in the matter. Because the only basis for jurisdiction over the case was the seizure of the property *in rem*, the release of the substitute *res* ended the courts' power over the "defendant." Relying on Eleventh Circuit precedent,¹⁶⁹ the Court of Appeals agreed and dismissed the appeal for want of jurisdiction.¹⁷⁰ The Supreme Court granted *certiorari* to resolve the conflicting views on this question given by the circuit courts.¹⁷¹

the borrower; the guarantor later used part of the proceeds of the loan to make expensive gifts to the bank president; and the bank ultimately paid the proceeds into a numbered Swiss bank account. *Id.* at 1571. The court ultimately held that "every fact in the record points irrefutably to Republic's knowing involvement. These facts, when considered in their totality, suggest actual knowledge, if not complicity, on the part of the lender." *Id.* at 1573.

167. *United States v. One Single Family Residence, etc.*, 932 F.2d 1433, 1434 (11th Cir. 1991). The property was sold for approximately \$1 million in 1988.

168. The funds were placed in the Asset Forfeiture Account of the United States Treasury. *Id.* at 1435.

169. The court held that *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir. 1988) (*en banc*) controlled. That court held: "We now hold that, . . . removal of the *res* from a court's territorial jurisdiction destroys that court's *in rem* jurisdiction. . . . The general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res*. . . . Where an appellant fails to file a stay of judgment or a *supersedeas* bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction. . . ." 836 F.2d at 1573 (citations omitted).

170. 932 F.2d at 1437. Republic contended that the court had personal jurisdiction over the government by virtue of the fact that it was served with a copy of the government's complaint against the property. *Id.* at 1436. The court rejected this argument on the grounds that Republic was never required to appear because it had not been properly served pursuant to Fed. R. Civ. P. 4. Instead it, along with any other potential claimant, was merely *invited* to file a claim. Republic need never have done anything at all. In a more controversial part of the opinion, however, the court also asserted that the government did not consent to *in personam* jurisdiction when it brought suit against the *res*. 932 F.2d at 1437. The court also rejected an argument that the government was estopped from contesting jurisdiction because of the stipulation of consent to interlocutory sale. Republic claimed that the "without prejudice" agreement constituted consent to continuing jurisdiction regardless of what happened to the *res*. *Id.*

171. In *United States v. One Lot of \$25,721.00 in Currency*, 938 F.2d 1417 (1st Cir. 1991), the First Circuit ruled that the loss of the *res* before appeal did not divest the court of jurisdiction. An identical result obtained in *United States v. \$95,945.18, United States Currency*, 913 F.2d 1106 (4th Cir. 1990). The Fifth, Sixth, Seventh, and Ninth Circuits adopted a rule similar to that set forth by the Eleventh Circuit in the instant case. See *United States v. \$79,000 in United States Currency*, 801 F.2d 738 (5th Cir. 1986); *United States v. Cadillac Sedan Deville*, 1983, 933 F.2d 1010 (6th Cir. 1991); *United States v. Tir's Cocktail Lounge*, 873 F.2d 141 (7th Cir. 1989); *United States v. \$29,959.00 U.S. Currency*, 931 F.2d 549 (9th Cir. 1991). The same rule was recognized, however, in *United States v. Wingfield*, 822 F.2d 1466 (10th Cir. 1987), but found inapposite on the facts. Cf. *United States v.*

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A. *The Traditional Doctrine*

The government's primary argument was dependant on the "no *res*; no case" rule.¹⁷² This rule recognizes the long-established principle that a court's jurisdiction over an *in rem* action is completely dependant on its continued control over the *res*. The loss or transfer of the property that is the subject of the suit will destroy jurisdiction because there is nothing left upon which the court's decree may operate.¹⁷³ In *Republic*, the government argued that the transfer of the sale proceeds from the Justice Department's Seized Asset Deposit Fund to another Treasury account, the Asset Forfeiture Fund, effectively worked a transfer of the *res* from the Southern District of Florida. This transfer not only deprived the court of *in rem* jurisdiction, but it also prohibited any judge from ordering the return of the funds without a congressional appropriation.¹⁷⁴ The Supreme Court dismissed the government's argument that transfer of the *res* destroyed jurisdiction by simply denying that any such rule ever existed.

[T]he Government relies on what it describes as a settled admiralty principle: that jurisdiction over an *in rem* forfeiture proceeding depends upon continued control of the *res*. We, however, find no such established rule in our cases.¹⁷⁵

While the Court's holding can be construed as being technically correct, it was able to reach this conclusion only through the most narrow reading of its own precedent. When viewed in the broader context of case law and statutory enactments, the Court's claim fails. While no Supreme Court case discusses the rule at length, it is assumed and forms the basis of decision in both *The Rio Grande*¹⁷⁶ and *The Brig Ann*.¹⁷⁷

The *Republic* Court not only ignored the numerous lower court cases, scholarly treatises, or congressional enactments giving support to the government's position, it failed to adequately explain away its own precedent. For instance, in *The Brig Ann*,¹⁷⁸ the Supreme Court held that a seizure

Aiello, 912 F.2d 4 (2d Cir. 1990); *United States v. \$1,322,242.58*, 938 F.2d 433 (3d Cir. 1991); *United States v. \$12,390.00*, 956 F.2d 801 (8th Cir. 1992).

172. *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 571 (7th Cir. 1987).

173. See *supra* notes 67-71 and accompanying text. See also Paul S. Grossman, *Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of the Res*, 59 *FORDHAM L. REV.* 679, 686 (1991) ("[T]he rule in a forfeiture proceeding that removal of the seized property from the court's control results in a loss of jurisdiction by the appellate court has wide acceptance.").

174. This part of the government's argument relied on the Appropriations Clause of the Constitution, U.S. CONST., art. I, § 9, cl. 7, which provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This article does not address the appropriations question since it is somewhat irrelevant to the issue of *in rem* jurisdiction.

175. 113 S. Ct. at 557.

176. 90 U.S. (23 Wall.) 458 (1875).

177. 13 U.S. (9 Cranch) 289 (1815).

178. 13 U.S. (9 Cranch) at 289. See also *supra* text accompanying notes 67-68.

voluntarily abandoned by the libellant before judgment destroys the court's jurisdiction. At the same time, a seizure abandoned through inadvertence, fraud, or mistake would not. What could possibly be the basis for such a ruling unless it be that a court must have possession of the *res* at the time of its decree? Why discuss the difference between a voluntary abandonment and one made through fraud or mistake if it did not really matter that the *res* was in the court's possession? The only explanation for the Supreme Court's earlier discussion of the "injustice" exception was to carve a middle ground between those cases wherein jurisdiction was preserved through continued possession of the *res* and those where it was lost because the *res* had departed the jurisdiction. Cases like *The Brig Ann* and *The Rio Grande* implicitly recognized the "no *res*; no case" rule by virtue of the fact that they were an attempt to alleviate its harsher effects. In creating an exception for inadvertent release of the *res*, the Supreme Court tried to prevent the rule from working an injustice in cases where the *res* was lost through no fault of the libellant.

To get over the problems created by these two cases, the *Republic* court adopted the narrowest possible reading of their holdings. It first dismissed *The Brig Ann* by stating that the case "simply restates the rule that the court must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated."¹⁷⁹ This is true enough, but the better reading of the case is that found in Justice Story's own words: "If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone."¹⁸⁰ Justice Story thus seems to be accounting for the "no *res*; no case" rule.

The Rio Grande also supports this argument. This case involved the inadvertent release of the *res* by the U.S. Marshal; but, rather than penalize the libellant for this error, the Supreme Court recognized an "injustice" exception, holding that jurisdiction was not lost where the release of the *res* occurred through error or inadvertence.¹⁸¹ In *Republic*, the Court took the position that *The Rio Grande* stood simply for the proposition that once jurisdiction attached, it could not be divested by release of the *res*.¹⁸² However, only the most narrow reading of *The Rio Grande* would allow such a conclusion. Surely, the case is not as simple as that. Otherwise, what is the point of its ruling? Why would the Court bother to discuss the inadvertence issue if inadvertence and voluntary release had the same effect? Moreover, why require a seizure at all? If *The Rio Grande* court did not recognize the "no *res*; no

179. 113 S. Ct. at 559.

180. 13 U.S. (9 Cranch) at 291.

181. 90 U.S. (23 Wall.) at 458. See also *supra* text accompanying notes 69-71.

182. 113 S. Ct. at 558. The Court also relied on *The Little Charles*, 26 F. Cas. at 979, and *The Bolina*, 3 F. Cas. at 811, for support.

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case” rule, there would have been no need for an opinion.¹⁸³

Most importantly, the Court’s sleight of hand in *Republic* overlooks the simple fact that it was not addressing the question for the first time. The issue of whether a court could have jurisdiction in a case where the *res* was no longer in its possession was exactly the point of both *The Brig Ann* and *The Rio Grande*. Indeed, *The Rio Grande* presents a fact situation analogous to *Republic* in that the *res* was released between the time of the filing of the appeal and the hearing in the appeals court. The Supreme Court recognized long before *Republic* that continuous control of the *res* was required to preserve jurisdiction.

Republic’s insistence that the “no *res*; no case” rule did not exist must certainly have come as some surprise to lower courts and Congress. Lower courts have repeatedly understood the traditional rule to be that the loss of the *res*, in the absence of fraud or some impropriety, will deprive a court of jurisdiction of an *in rem* action.¹⁸⁴ Moreover, this rule is not an historical oddity found in the older admiralty cases alone. It has been recognized in both customs and food and drug cases as well.¹⁸⁵ The Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have all advanced this view in recent years.¹⁸⁶

183. See Grossman, *supra* note 173, at 691 (“The oldest exception to the ‘no *res*, no case’ rule is the improper removal exception. Under this exception, an appellate court retains jurisdiction after the release of the *res* if the release occurred accidentally, improperly or fraudulently.”) (citations omitted).

184. See *American Bank of Wage Claims v. Registry of the Dist. Court of Guam*, 431 F.2d 1215, 1219 (9th Cir. 1970) (“While the court may compel the return of a vessel accidentally, fraudulently or improperly removed from its jurisdiction . . . no such or even similar facts here appear . . . Here, no stay of execution was in effect when the funds . . . were completely disbursed . . . and appellants have failed to allege any other facts which would give rise to the accident, fraud, or impropriety mentioned in the *Rio Grande*.”); *Canal Steel Works v. One Drag Line Dredge*, 48 F.2d 212, 213 (5th Cir. 1931) (“By the failure of the appellant to obtain a supersedeas, the seizure was released, and there is now one subject-matter upon which the judgement of this court could operate and give relief to appellant.”). See also *Parks v. B.F. Leaman & Sons, Inc.*, 279 F.2d 529 (5th Cir. 1960); *Martin v. The Bud*, 172 F.2d 295, 296-97 (9th Cir. 1949); *The Manuel Arnus*, 141 F.2d 585 (5th Cir. 1944); *The Denny*, 127 F.2d 404 (3d Cir. 1942).

185. *United States v. 66 Pieces of Jade and Gold Jewelry*, 760 F.2d 970, 973 (9th Cir. 1985)(customs); *United States v. Articles of Drugs Consisting of 203 Paper Bags*, 818 F.2d 569, 571 (7th Cir. 1987) (food and drug forfeiture). In both these cases, however, jurisdiction was not destroyed because there was continuing *in personam* jurisdiction. Some courts have also claimed that the rule should no longer have validity because it stems from the admiralty fiction that ships have a legal personality, a legal construct of “dubious validity.” *United States v. Aiello*, 912 F.2d 4, 6 (2d Cir. 1990). But contrary to *Aiello*’s assertions, the personification of the ship remains a vital part of admiralty law. See also Alex T. Howard, *Personification of the Vessel: Fact or Fiction?*, 21 J. MAR. L. & COMM. 319 (1990).

186. *Stevadoring Services of America v. Ancora Transport*, 941 F.2d 1378 (9th Cir. 1991)(attachment); *Folkstone Maritime Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir. 1989); *Teyseer Cement Co. v. Halla Maritime Corp.*, 794 F.2d 472, 475 (9th Cir. 1986) (“Removal of the *res* from the court’s control generally terminates the court’s jurisdiction over that *res* because nothing remains before the district court on which to impose a decision.”); *Farwest Steel Corp. v. Barge Sea-Span 241*, 769 F.2d 620, 621 (9th Cir. 1985) (“Under the prevailing rule, the release or removal of the *res* from the control of the court will terminate jurisdiction, unless the *res* is released accidentally, fraudulently, or improperly.”); *L.B. Harvey Marine v. M/V River Arc*, 712 F.2d 458 (11th Cir. 1983) (“In a maritime case, where the *res* is no longer before the court, its *in rem* jurisdiction is destroyed. . . .”); *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982) (“[W]here the *res* is no longer

Therefore, while the “no *res*; no case” rule may not have been explicitly stated in any Supreme Court opinion, it was the basis for several important early decisions on the question. It was also widely understood to be the rule by the lower courts for almost two hundred years.

Congress, too, must have been somewhat at a loss when it found out that much of its legislation in the area of *in rem* jurisdiction was based on a false premise. Congressional statutes repeatedly evidence a recognition of the “no *res*; no case” rule. The very first Judiciary Act shows that the presence of the *res* in the judicial district where the trial was to be held was a necessary part of jurisdiction.¹⁸⁷ In statutes authorizing forfeiture, Congress allowed jurisdiction to attach only in the judicial district where the seizure was made or where the vessel or cargo had been brought.¹⁸⁸ Moreover, Congress has provided that the trial of forfeiture cases should “conform as nearly as may be to proceedings in admiralty.”¹⁸⁹ The rules which govern civil forfeiture actions all reflect the principle that continued control over the *res* is an absolute requirement for continued judicial jurisdiction. For instance, Rule C, which provides for the institution of an *in rem* action in both admiralty and forfeiture actions, requires that the clerk issue process to seize the property at issue and bring it into court.¹⁹⁰ In admiralty cases, once arrested, a vessel or cargo may only be released upon the posting of adequate security in the form of a bond or stipulation.¹⁹¹ If the “no *res*; no case” rule did not exist, the rather detailed provisions in Rule E governing the nature, extent, and amount of security would not make sense.

That Congress understood the traditional rule to be that jurisdiction cannot continue after the *res* is lost is clearly seen in the several statutes wherein it makes specific exceptions to the rule. In the Food, Drug and Cosmetic Act, Congress provided that forfeiture proceedings were to be tried in the district

before the court, its *in rem* jurisdiction is destroyed, and any appeal from its decision is rendered moot.”); *Bank of New Orleans v. Marine Credit Corp.*, 583 F.2d 1063 (8th Cir. 1978) (“Generally, removal of the *res* from a court’s jurisdiction, or distribution of a substitute *res* deposited in the registry of the court, destroys *in rem* jurisdiction.”); *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148, 1151 (5th Cir. 1977) (“Cases in this court have found jurisdiction destroyed when the *res* was released from the court’s control.”).

187. Act of September 24, 1789, ch. 20, § 9, 1 Stat. 77: “The district courts shall have . . . [jurisdiction] of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation or trade of the United States, where the seizures are made . . . within their respective districts”

188. See Act of Mar. 3, 1819, ch. 77, § 4, 3 Stat. 513.

189. 28 U.S.C. § 2461(b) (1993). See also 21 U.S.C. § 881(b) (1988).

190. Fed. R. Civ. P., Supp. R. Adm. & Mar. Claims. Rule B of the Supplemental Rules governs the issuance of process of attachment in a proceeding *quasi in rem*.

191. Rule E(5)(a) (“Except in cases of seizures for forfeiture under a law of the United States, whenever . . . process *in rem* is issued, the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court.”)

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wherein the article is found;¹⁹² but an action may be moved to another district if there are multiple cases pending involving the same claimant without destroying judicial jurisdiction.¹⁹³ Even more striking is Congress's treatment of seizures made under the customs laws. The Tariff Act of 1930¹⁹⁴ provided that seized goods must "remain in the . . . district in which the seizure was made to await disposition according to law."¹⁹⁵ In 1954, however, this provision was amended to allow storage of seized items in the most convenient place, "whether or not the place of storage is within the judicial district," and storage outside the district "shall in no way affect the jurisdiction of the court."¹⁹⁶ The legislative history of this amendment cites *The Brig Ann* and *The Rio Grande* for the proposition that seized items must remain in the judicial district in order for the court to proceed to adjudication.¹⁹⁷ Congress, therefore, clearly understood that it needed to alter the traditional rule in order to allow the removal of seized goods from the district having jurisdiction.¹⁹⁸

Congress's understanding of the rule can also be seen in the very statute underlying the forfeiture at issue in *Republic*. In 21 U.S.C. § 881(c), Congress provided that property seized for forfeiture under the narcotics laws could be removed to an "appropriate location" by the Attorney General or the General Services Administration.¹⁹⁹ If, as the Supreme Court contends in *Republic*, no restrictions are placed upon the location of the *res*, and if jurisdiction continues without regard to whether it remains in the judicial district, the provision cited above is meaningless.

Finally, congressional understanding of the "no *res*; no case" rule is most clearly demonstrated by one of the provisions of the Housing and Community Development Act of 1992.²⁰⁰ That act significantly amended 28 U.S.C. § 1355 to provide as follows:

In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment [of the district court] or . . . pending appeal or requiring the prevailing party to post an appeal bond.²⁰¹

192. 21 U.S.C. § 334(a) (1988).

193. 21 U.S.C. § 334(b) (1988).

194. Act of June 17, 1930, 46 Stat. 590 (1930).

195. 19 U.S.C. § 1605 (1988).

196. *Id.*

197. S. Rep. No. 2326, 83d Cong., 2d Sess. at 7 (1954).

198. H.R. Rep. No. 2453, 83d Cong., 2d Sess. at 10-11 (1954). See *One Lear Jet*, 836 F.2d at 1575.

199. 21 U.S.C. §§ 881(c)(2)-(3) (1988).

200. Act of October 28, 1992, 106 Stat. 3672 (1992). This act was signed into law when *Republic* was on appeal. While the Supreme Court did not decide its applicability to the case, it did refer to its provisions in a footnote to its opinion. See 113 S. Ct. at 560 n.5.

201. 106 Stat. at 4062-63.

There seems to be no other explanation for the above-cited statute other than that Congress understood that it was necessary to create exceptions to the “no *res*; no case” rule to prevent the loss of jurisdiction over *in rem* actions where the removal of the *res* was necessary or desirable. Thus, if the Supreme Court is correct that the rule did not exist prior to the decision in *Republic*, Congress must have been unaware of that fact.

The primary reason for the rejection of the “no *res*; no case” rule in *Republic* was the Court’s hostility to the idea that the government could defeat a party’s right to appeal simply by removing the *res* from the territorial jurisdiction of the district court.²⁰² The Court noted that the fiction of *in rem* jurisdiction was developed “primarily to expand the reach of the courts and to furnish remedies for aggrieved parties . . . not to provide a prevailing party with a means of defeating its adversary’s claim for redress.”²⁰³ While the departure of a ship without the tender of a stipulation or substitute *res* might make a judgment useless, the government’s continued presence in the district would negate the possibility of the courts’ rendering useless judgments.²⁰⁴ The government would always be available to answer for any judgment entered against it irrespective of whether the *res* was still in the district.

In reaching its conclusion, however, the Supreme Court betrayed a lack of understanding about the nature and purposes of *in rem* jurisdiction. While recognizing that the primary purpose of the *in rem* fiction was to (1) expand the reach of the courts and (2) furnish remedies for aggrieved parties, the Court claimed that “[n]either interest depends absolutely upon the continuous presence of the *res* in the district.”²⁰⁵ In fact, both interests are almost completely dependent on continuous control of the *res*. *In rem* process expands the reach of the courts by dispensing with the need for an *in personam* defendant. If the *res* disappears, there is no one left—no person and no *res*—upon whom any order or decree can be effectual. The court is then in the

202. In a concurring opinion, Justice White was explicit on this point:

[T]he Government argues that because the Appropriations Clause bars reaching the funds transferred to the Treasury’s Assets Forfeiture Fund, the case is either moot or falls into the useless judgment exception to appellate *in rem* jurisdiction. I am surprised that the Government would take such a transparently fallacious position . . . The case is obviously not moot. Nor should the Government suggest that a final judgment is useless because the United States may refuse to pay it. Rather, it would be reasonable to assume that the United States obeys the law and pays its debts and that in most people’s minds a valid judgment against the Government for a certain sum of money would be worth that very amount. This is such a reasonable expectation that there is no need in this case to attempt to extract the transferred *res* from whatever fund in which it is now held.

113 S.Ct. at 563-64 (White, J., concurring).

203. 113 S. Ct. at 559 (citations omitted).

204. *Id.* An abandonment of a seizure prior to decree would also deprive the court of jurisdiction and make the case moot.

205. 113 S. Ct. at 559.

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position of rendering a “useless” judgement.²⁰⁶ The disappearance of the *res* also affects the court’s ability to furnish a remedy to an aggrieved party. Because the *res* alone is answerable for any potential judgment, the party seeking redress is left with nothing upon which to execute. Even if a court were to enter a decree under such circumstances, the aggrieved party would still have to seek out the *res* in a new jurisdiction, have it arrested, and initiate proceedings anew. In other words, the court that suffers the departure of the *res*, without providing alternate security, does the plaintiff no favor.

B. *Alternative Holdings*

One of the most disconcerting aspects of the *Republic* decision is that the Supreme Court could have achieved its objectives in several, less disruptive ways. Clearly, it was unhappy with the fact that the losing party in the case would be denied a right to appeal if the government’s removal of the *res* was found to destroy jurisdiction.²⁰⁷ The decision thus seems calculated to produce a desired result, irrespective of the legal precedent. If that is really what the Court was aiming at—and the comments of the Justices inescapably lead one to that conclusion²⁰⁸—then it should have simply declared that removal of the *res by the government* in a forfeiture action would not destroy jurisdiction. While such a holding might seem a bit contrived, it would actually have been in line with congressional policy. As noted above, Congress has already made several exceptions to the “no *res*; no case” rule.²⁰⁹ Indeed, Congress expressed itself on the point at issue in *Republic* by amending the drug forfeiture laws to preserve appeal.²¹⁰ The Supreme Court could have achieved its ends by simply taking Congress’s cue and creating a special, limited exception for drug forfeiture actions.²¹¹

Another way to uphold jurisdiction would have been to declare that funds in Treasury accounts “remain” in every judicial district. The government

206. See *The Little Charles*, 26 F. Cas. at 982: “If, in proceedings in rem, the vested jurisdiction of the court could be divested by the loss of the thing, the reason must be, that as the thing could neither be delivered to the libellants, nor restored to the claimants, the sentence would be useless, and courts will not render judgments which can operate on nothing.”

207. The Supreme Court’s protection of the bank, as losing party below, is a bit overzealous. After all, the bank had ten days after entry of the final decree in which to request a stay of the judgment pending appeal. FED. R. CIV. P. 62(a). It could also have posted a supersedeas bond to stay the release of the proceeds. It did neither. The government was, therefore, entitled to take the *res* out of the jurisdiction. It seems, then, that the Supreme Court was more vigilant of the bank’s rights than its own attorneys.

208. See *supra* note 202.

209. See *supra* notes 192-201.

210. See *supra* text accompanying notes 200-01.

211. One commentator has suggested an exception to the rule for forfeiture cases only because “the criminal nature of civil forfeiture dictates that every procedural safeguard be used to ensure that courts produce a fair result.” While the rule would continue to be valid in other contexts, the government would not be able to defeat a claimant’s right to appeal by a removal of the *res*. Grossman, *supra* note 173, at 694.

argued that jurisdiction was destroyed because the *res* had been removed from the district. In this case, that meant that the funds representing the sale proceeds had been transferred from the Treasury's Seized Asset Deposit Fund to the Asset Forfeiture Account.²¹² What the government never adequately explained, however, is why one Treasury account, the Seized Asset Deposit Fund, should exist in Florida, while another, the Asset Forfeiture Account, only exists in Washington, D.C. Funds held in an account are not like tangible property whose location can be specifically pinpointed. If the United States government is present nationwide, funds in its hands should be considered so as well.²¹³ There does not seem to be any reason for treating some accounts as being present in Washington, while others exist elsewhere.²¹⁴ Such a holding would have obviated the need for an extended discussion of the Appropriations Clause²¹⁵ and the destruction of the "no *res*; no case" rule.

C. *Blurring the Distinctions Between In Rem and In Personam Jurisdiction*

The Court could also have preserved the right to appeal by holding that the institution of an *in rem* suit *by the government* subjects it to a court's *in personam* jurisdiction. This would no doubt be problematic, since it involves considerations of sovereign immunity. It would also constitute a completely new theory of jurisdiction, one for which there is little precedent. Essentially, the argument goes like this: Having instituted suit to enforce a right against property, the government remains liable to any order or decree rendered throughout the pendency of the action, even orders to replace a *res* removed prior to appeal. Such a holding would not seem unduly burdensome since the Supreme Court has already held that a plaintiff seeking redress from a court may be available for all purposes which justice requires.²¹⁶ On the other

212. 113 S. Ct. at 557.

213. See *United States v. \$1,322,242.58*, 938 F.2d at 437-38 ("[W]e do not think that rules concerning physical location can be applied in any meaningful sense to an incorporeal *res* The *res* at issue here is merely an entry in a Justice Department account with the United States Treasury. In other words, the *res* is an obligation on the part of the Treasury to disburse the specified sum to the Department of Justice. Deeming this obligation to be located at any particular place within the United States would be a complete fiction. If we are compelled, however, to determine where this obligation is 'located,' we cannot say that the obligation does not exist in every part of the country. . . .").

214. If there is no reason for the accounts to be treated differently, then they must either both exist in Washington, or they both exist in every district. Even if they were both considered to exist in Washington alone, however, there would still be no loss of jurisdiction. A transfer of the funds at the outset to the Seized Asset Deposit Fund would merely be considered a transfer under 21 U.S.C. § 881(c), which permits the Attorney General to remove seized property to a convenient place while preserving jurisdiction.

215. 113 S. Ct. at 560-61.

216. *Adam v. Saenger*, 303 U.S. 59, 67 (1937) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.").

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hand, the Supreme Court could have held that where the plaintiff prevails and removes the *res* from the jurisdiction after trial, it can be ordered to reconstitute or return it on appeal.²¹⁷

The Supreme Court's unwillingness to be explicit on this point reveals the magnitude of the problem posed by the decision in *Republic*. In refusing to clarify the status of parties other than the *in rem* defendant, the Court has needlessly blurred the distinction between *in rem* and *in personam* jurisdiction. If the case does not stand for the proposition that the government submits itself to a court's *in personam* jurisdiction when it brings an *in rem* action, then what is the basis for ordering it to reconstitute a *res* removed from the district? Moreover, if the holding is to apply to any party bringing an *in rem* action, the difficulties abound. For instance, in a case where the libellants have been successful and the *res* distributed before appeal, the proceeds can only be reconstituted by ordering the parties to return. Such an order might not pose a problem for parties otherwise present and doing business within the district, but for those whose only connection with the forum is the fact that they were forced to appear to protect their interests,²¹⁸ such *in personam* orders might seem unfair.²¹⁹ Indeed, subjecting a party, who is not a voluntary claimant, to *in personam* orders after the *res* has been distributed would constitute a complete destruction of the distinction between *in personam* and *in rem*

217. See *One Lear Jet*, 836 F.2d at 1579 (Vance, dissenting) (“[T]he United States has done more than intervene in an existing *in rem* action. The United States instigated the action. Having submitted itself to the jurisdiction of the court, the government should not be allowed to escape . . . claimant’s appeal.”). See also Grossman, *supra* note 173, at 695 (“[T]he inference must be that when a plaintiff brings an *in rem* action, the plaintiff consents to *in personam* jurisdiction for counterclaims.”).

218. This situation occurs frequently in admiralty. If a vessel is arrested by a bank to foreclose a mortgage in a particular jurisdiction, all other claimants are required to appear to interpose their claims regardless of whether they have any contacts with the forum. In essence, the first libellant makes a forum selection to which all others are subject. A claimant who fails to appear, preferring to wait instead until the vessel is in a forum of his choice, runs the risk of having his interest extinguished by a judicial sale.

219. See *American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970). This case involved a vessel seized in Guam to foreclose various liens. After judgment for certain creditors, the funds were disbursed, without a stay of execution or supersedeas being sought by the losing party. It was contended on appeal that the district court had continuing jurisdiction to order the parties to return the funds. The Ninth Circuit held as follows:

[T]he *res* in the present case was a fund of monies, distributed to many parties, rather than a single vessel. . . . If remanded to the district court to recover the “*res*,” that court would become entangled in an elaborate exercise in tracing, identifying, recovering and then redistributing any recovered monies to no less than seven contentious litigants—an effort caused solely by appellants’ failure to take timely and legal steps to prevent the final disbursement.

The district court is not now obligated so to act, nor are we inclined or required to order it. Furthermore, even if ultimately the distributee were successfully determined and located, nevertheless ordering repayment of funds into the Registry would, under the circumstances of this case, implicitly erase the distinction between *in personam* and *in rem* jurisdiction and work an unprecedented extension of the latter.

431 F.2d at 1219 (footnotes omitted).

jurisdiction.²²⁰ On its face, the opinion places courts in the unenviable position of having to make distinctions between voluntary plaintiffs, those who initiate *in rem* actions and are thus subject to *in personam* jurisdiction, and involuntary claimants forced to appear to protect their interests and who should not be subject to *in personam* jurisdiction.

In the case where the *res* is returned to the claimant-owner, ordering its return becomes even more problematic. Unless the court has *in personam* jurisdiction over the owner under the terms of *International Shoe*,²²¹ and an *in personam* claim has been joined with the *in rem* claim, the owner is not before the court for any purpose save to mount a defense on behalf of the *res*. The Supplemental Rules specifically provide that a restricted appearance may be entered by an owner which "shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available."²²² Thus, the release of the *res*, where no stay been granted or *supersedeas* posted, effectively leaves the court without the ability to order its return. A reversal by an appeals court would be the quintessential "useless judgment" since the owner would presumably be long gone. Unless the Supreme Court holds that all parties involved in an *in rem* action are subject to continuing *in personam* jurisdiction, the ability to restore or recreate a *res* removed from the district will depend on whether the libellant or claimant removed it. Such a holding only seems possible if the Court truly intends to destroy any distinction between *in rem* and *in personam* jurisdiction.²²³

Given the problems posed by the traditional distinctions between *in rem* and

220. See *66 Pieces of Jade*, 760 F.2d at 973 ("Because forfeiture proceedings are *in rem*, the court's subject matter jurisdiction is dependent on its continuing control over the property . . . [O]nce the property is released from the court's control, the court is powerless to effectuate a remedy because it lacks personal jurisdiction to order the persons holding the property to return it.").

221. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

222. Rule E(8), FED. R. CIV. P., SUPP. R. ADM. & MAR. CLAIMS.

223. Some courts have attempted to resolve this problem by finding a "substitute basis of *in personam* jurisdiction." In effect, these courts have dispensed with a strict application of the *in rem* rule when "a legal fiction which exists solely to effectuate the adjudication of disputes is invoked for the opposite purpose." *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 982 (5th Cir. 1984). The Fifth Circuit (which does recognize the traditional "no *res*; no case" rule) has most frequently applied this exception. Starting with *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148, 1152 (5th Cir. 1977), the court held that a party may be required to restore or replace property removed before appeal where there is an "interface" of *in personam* and *in rem* jurisdiction, i.e., where the parties had brought *in personam* claims against each other. The Fifth Circuit went further in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 335 (5th Cir. 1978), holding that a party who appeared in an *in rem* case to actively contest the plaintiff's claims may be treated as though it had been brought into court by personal process. This was the case even though no *in personam* claims were pending.

The Supreme Court failed to take note of this line of reasoning in *Republic*, even though it might have provided a means of resolving the problem short of an outright destruction of the distinctions between *in rem* and *in personam* jurisdiction. In the cases cited above the *res* in question was owned by a party actually before the court. A problem would still remain, however, where the property is owned by a nonparty over whom the court never had personal jurisdiction. See *Farwest Steel Corp. v. Barge Sea-Span*, 769 F.2d 620, 622 (9th Cir. 1985).

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in personam jurisdiction, the Supreme Court apparently believed it had no choice but to ignore a rule whose existence had been assumed and acted on by the courts and Congress for almost two hundred years. Ironically, the Court accurately noted that the primary reason for the insistence on the rule was to avoid rendering useless judgments and advisory opinions.²²⁴ But the Court cannot now overcome the problems created by *Republic* unless it is willing to hold that all parties who appear in an *in rem* action are automatically subject to the court's *in personam* jurisdiction.²²⁵ The distribution of a *res* before appeal will always result in the possibility that a useless judgement will be forthcoming.

V. A NEW VERSION OF THE RELATION BACK DOCTRINE

In 1982, Joseph Brenna, a reputed drug trafficker,²²⁶ gave his girlfriend, Beth Ann Goodwin, approximately \$216,000 to purchase a house in Rumson, New Jersey. Although Goodwin maintained "an intimate personal relationship" with Brenna for over six years, she claimed to have no knowledge of his drug activities or the origins or the money. During that period of time, Brenna supported Goodwin and her children even though he had no visible source of income.²²⁷ Goodwin and the children lived in the house until the government moved to forfeit the property pursuant to 21 U.S.C. 881 §§ (a)(6) and (a)(7).²²⁸

Goodwin asserted that the property in question was not subject to forfeiture because she was an "innocent owner." She claimed to have no knowledge that the funds used to purchase the premises were traceable to drug sales, that the premises were used to facilitate drug sales, or that Brenna had a record of

224. 113 S. Ct. at 558.

225. The Supreme Court itself hints at the problem when it notes that "[j]urisdiction over the person survives a change in circumstances." 113 S. Ct. at 559. It argues that jurisdiction over a person is not destroyed by the removal of the defendant from the district, *Leman v. Krentler-Arnold*, 284 U.S. 448, 454 (1932); or that diversity jurisdiction is not defeated by a party's midsuit change of residence or a reduction in the amount of controversy. *Louisville, N.A. & C.R. Co. v. Louisville Trust Co.*, 174 U.S. 552, 566 (1899) (midsuit change in citizenship); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938) (amount in controversy). It then claims that "[n]othing in the nature of *in rem* jurisdiction suggests a reason to treat it differently." 113 S. Ct. at 559. Clearly the fact that no *in personam* defendant is before the court should be at least one reason. More importantly, however, the Court's assertion that there is no reason to treat *in rem* jurisdiction differently can only be true if there is no distinction between the two. That is to say, there is no distinction as long as a court retains the ability to issue orders to persons. As noted in the text above, however, this cannot be the case if the owner of the property is not before the court.

226. On or about April 13, 1990, a grand jury sitting in the Southern District of Florida returned an indictment against Brenna for violations of 21 U.S.C. §§ 848 and 853. The government alleged that Brenna had been involved in a scheme to import marijuana into the United States from 1982 through 1986. *United States v. 92 Buena Vista Avenue*, 738 F. Supp. 854, 857-58 (D. N.J. 1990)

227. Neither Brenna nor Goodwin filed federal income tax returns for the years 1978 through 1985. Mrs. Goodwin "explain[ed] her failure to file tax returns by stating that she ha[d] not been shown to have had any income other than that obtained from Mr. Brenna." 738 F. Supp. at 858.

228. See *supra* note 141.

violating any laws.²²⁹ Relying on the relation back doctrine incorporated in the drug forfeiture statute,²³⁰ the government argued that Goodwin was prevented from raising the innocent owner defense because all right and title to the property had vested in the United States as of the date of the criminal acts giving rise to forfeiture—in this case Brenna's illegal drug sales. As a result, Goodwin could not have acquired an interest in the property. The proceeds of those sales became instantly forfeitable, regardless of the form they later assumed.²³¹ No transfer of property could be good against the government until the time for declaring a forfeiture had expired.²³²

The district court rejected Goodwin's defense on two grounds. First, it held that Goodwin was prevented from raising an innocent owner defense because the proceeds used to purchase the property were a gift. The innocent owner defense "may only be invoked by those who can demonstrate that they are bona fide purchasers for value."²³³ In addition, the court agreed with the government's argument that the innocent owner provision in the statute was directed to owners who acquired their interest in the property before the acts giving rise to forfeiture took place.²³⁴ Since Goodwin's interest had not arisen until after Brenna's criminal conduct—and because her interest could only have arisen because of those illegal acts—she was unable to claim the status of an innocent owner.²³⁵

While recognizing that the district court's analysis had a certain "appeal," the Third Circuit nonetheless reversed.²³⁶ Relying on what it said was the

229. Goodwin also challenged the forfeiture on the grounds that seizure of the house without prior notice was unconstitutional, that the complaint was based on immunized testimony, and that the government unduly delayed in seeking forfeiture. 738 F. Supp. at 856.

230. "All right, title, and interest in property described in [21 U.S.C. § 881(a)] shall vest in the United States upon commission of the act giving rise to forfeiture" 21 U.S.C. § 881(h) (1988).

231. 738 F. Supp. at 859.

232. See *supra* text accompanying notes 72-88. The statute of limitations on most forfeitures is generally considered to be five years after the government discovers the criminal act. See *United States v. \$116,000 in U.S. Currency*, 721 F. Supp. 701 (D. N.J. 1989) (statute of limitations in customs actions applicable to actions brought under statutes incorporating customs laws and procedures). Thus, because Goodwin herself claimed that the government did not become aware of Brenna's criminal activity until 1986, the court rejected her claim that the case was barred by the statute of limitations. 738 F. Supp. at 862.

233. 738 F. Supp. at 860.

234. "In particular, the 'innocent owner defense' at issue provides that 'no property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission . . . committed or omitted without the knowledge or consent of that owner.'" 21 U.S.C. § 881(a)(6) (1988) (emphasis added). This language implies that the acts or omissions giving rise to forfeiture must be committed after the third party acquires a legitimate ownership interest in the property. In addition, "if the drug trafficker purchases property with drug proceeds and thereafter conveys it as a gift, there is no reason for the drug trafficker to have obtained the consent of the transferee, and there is no incentive for the transferee to inquire as to the legitimacy of the transaction since no investment is being made." 738 F. Supp. at 860.

235. *Id.*

236. *United States v. 92 Buena Vista Avenue*, 937 F.2d 98 (3d Cir. 1991). The district court certified four questions for an interlocutory appeal to the Third Circuit pursuant to 28 U.S.C. § 1292(b). These included all of the issues raised in Goodwin's original motion for dismissal of the forfeiture

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plain language of the statute, the court held that limiting the term “owner” to a bona fide purchaser for value, thereby excluding a recipient of a gift, would contravene the express legislative intent that the term be interpreted broadly.²³⁷ The Third Circuit also rejected the government’s relation back argument. More importantly, the court read the innocent owner provision in 21 U.S.C. § 881(a)(6) as being applicable first to determine whether property was, in fact, forfeitable. If a claimant could prove innocent ownership, the property should be acquitted, and the relation back provision would be inapplicable.²³⁸

A. *Relation Back and the Innocent Donee*

The Supreme Court, in a plurality opinion, rejected completely the idea that a donee is prevented from raising the innocent owner defense, holding instead that the language of 21 U.S.C. 881(a) is “sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers.”²³⁹ The Court stated that “[u]nder the terms of the statute, [Goodwin’s] status would be precisely the same if, instead of having received a gift of \$240,000 from Brenna, she had sold him a house for that price and used the proceeds to buy the property at issue.”²⁴⁰

The Court also dismissed the government’s relation back argument. Relying on its decision in *United States v. Grundy*,²⁴¹ the Court held that the common law relation back doctrine did not operate to vest forfeiture in the government until some act had been taken to declare the forfeiture. Although uncertain that the common law rule would apply to the proceeds of illegal activity, the Court nonetheless asserted that title could not vest in any property until the government sought forfeiture.²⁴² Until that time, “someone else owns the property. That person may therefore invoke any defense available to the owner before the forfeiture is decreed.”²⁴³

The Supreme Court also noted that in a case where, as here, a statute

complaint. 937 F.2d. at 100.

237. 937 F.2d at 102. *See also* *United States v. A Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989). The court also compared 21 U.S.C. § 881(a)(6) to similar provisions in the criminal forfeiture statute, which does limit defenses to forfeiture to transferee for value, and concluded that Congress’s omission of a similar provision in the civil statute reflected a desire to increase the class of persons who might be able to raise an innocent owner defense. 937 F.2d at 101, 102.

238. *Id.*

239. 113 S. Ct. at 1134.

240. *Id.*

241. *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-51 (1806)(“It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense . . .”).

242. “We conclude, however, that neither the amendment [21 U.S.C. § 881(h)], nor the common-law rule makes the Government an owner of property before forfeiture has been declared.” 113 S. Ct. at 1134.

243. *Id.* at 1136.

provided for the forfeiture, Congress could alter the common law doctrine. In providing an innocent owner defense, Congress apparently intended to immunize certain property from forfeiture. However, because the relation back provision of section 881(h) is applicable only to property that is forfeitable under section 881(a) courts must first determine whether property is forfeitable before the relation back provision could be applied.²⁴⁴

[W]hen Congress enacted this innocent owner defense, and then specifically inserted this relation back provision into the statute, it did not disturb the common-law rights of either owners of forfeitable property or the Government. The common-law rule had always allowed owners to invoke defenses made available to them before the Government's title vested, and after title did vest, the common-law rule had always related that title back to the date of the commission of the act that made the specific property forfeitable. Our decision denies the Government no benefits of the relation back doctrine. The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. And it cannot profit from the statutory version of that doctrine in § 881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense.²⁴⁵

The Court, therefore, concluded that Goodwin should have been permitted to assert the innocent owner defense before the government could obtain forfeiture.²⁴⁶

In dissent, Justice Kennedy strongly criticized the plurality, claiming that its opinion "leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess."²⁴⁷ Kennedy's argument was based on his contention that once the case left the district court, "the appellate courts

244. *Id.* at 1136-37.

245. *Id.* at 1137. The Supreme Court adopted in large part the Third Circuit's reasoning, which went as follows:

[W]e must read the plain language of the statute as Congress must have intended it by the words and structure it carefully chose. Section 881(h) vests title in the United States *in that property described in subsection (a)*. Subsection (a) sets forth that property which is subject to forfeiture and it also provides for "innocent owner" defenses. Consequently, the property referred to in subsection (a) does *not* include property that has been exempted from forfeiture by means of an innocent owner defense. Logically then one must first ascertain whether the property at issue is not forfeitable because of an innocent owner defense before applying section 881(h).

937 F.2d at 102.

246. Justice Scalia concurred in the judgement, but not in its reasoning. He argued that § 881(h) merely codified the common law relation back doctrine; it added nothing to the determination whether a particular party was an "owner" entitled to raise a defence under subsection (a). The word "owner" in 21 U.S.C § 881(a)(6) does not necessarily include anyone who held title prior to the decree of forfeiture. He compared the relation back provisions of the civil forfeiture statute with the analogous provisions in those statutes providing for criminal forfeiture. Criminal forfeiture statutes only protect a transferee for value; there is no "innocent owner" defense. *See, e.g.*, 21 U.S.C. § 853(c). Thus, Congress's use of the term "owner" in 881(a)(6) indicates a desire to protect anyone having an interest in the property, even if acquired after the acts giving rise to the forfeiture. 113 S. Ct. at 1138-42 (Scalia, J., concurring in the judgment).

247. 113 S. Ct. at 1145 (Kennedy, J., dissenting). The Chief Justice and Justice White also joined in the dissent.

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and all counsel began to grapple with the wrong issue.”²⁴⁸ Rather than concerning itself with whether a donee is entitled to assert an innocent owner defense, the Supreme Court should have asked “whether a wrongdoer holding a forfeitable asset, property in which the United States has an undoubted superior claim, can defeat the claim by a transfer for no value.”²⁴⁹ Relying on what he called “settled principles of property transfers, trusts and commercial transactions,” Kennedy answered with a resounding “no.” Because the proceeds used to purchase the property were derived from illegal drug activity, Brenna could not have created a better title in Goodwin without a bona fide transfer for value.

We need not address the donee’s position except to acknowledge that she has whatever right the donor had, a right which falls before the Government’s superior claim. In this case, forfeiture is determined by the title and ownership of the asset in the hands of the donor, not the donee. The position of respondent as the present holder of the asset and her knowledge, or lack of knowledge, regarding any drug offenses are, under these facts, but abstract inquiries, unnecessary to the resolution of the case. . . .

As against a claimant with a superior right enforceable against the donor, a donee has no defense save as might exist, say, under a statute of limitations. The case would be different, of course, if the donee had in turn transferred the property to a bona fide purchaser for full consideration. The voidable title in the asset at that point would become unassailable in the purchaser, subject to any heightened rules of innocence the Government might lawfully impose under the forfeiture laws.²⁵⁰

The result, therefore, must be that Goodwin could only have what title Brenna had, that is, a voidable title, inferior to that of the government.

B. *The Traditional Relation Back Doctrine*

The fundamental problem with the plurality’s opinion in *92 Buena Vista Avenue* is that it badly misconstrues the logic and history of the relation back doctrine. The Court rejected the government’s argument that the doctrine prevented Goodwin from having title to the property on the grounds that such a theory would “result in the forfeiture of property innocently acquired by persons who had been paid with illegal proceeds for providing goods or services to drug traffickers.”²⁵¹ This led the Court to declare—quite erroneously—that “[t]he common-law rule had always allowed owners to invoke defenses made available to them *before* the Government’s title vested.”²⁵² It also claimed that its decision “denies the Government no benefits of the relation back doctrine.”²⁵³

The plurality’s assertion that title does not vest in the government until

248. *Id.* at 1143 (Kennedy, J., dissenting).

249. *Id.*

250. *Id.* at 1143.

251. 113 S. Ct. at 1135.

252. *Id.* at 1137.

253. *Id.*

condemnation is somewhat startling.²⁵⁴ The Court could only have reached this conclusion by ignoring a long line of cases—some of which it actually cited.²⁵⁵ While the common law had allowed innocent purchasers for value to prevent forfeiture of movable property, such a defense was not available when real property was at issue. More importantly, the Court in *92 Buena Vista Avenue* overlooked the fact that Congress had the power to alter the common law rule and provide for an immediate vesting of title in the government upon the commission of a proscribed act, in which case no intervening transfer, whether of real or personal property, could be valid against the government's title.²⁵⁶ Contrary to the Court's assertions, early cases did not question the validity of the relation back doctrine; rather they were concerned with whether Congress had intended to provide for the immediate vesting of title.²⁵⁷

The first question for the Court in *Buena Vista*, therefore, was whether the relation back clause of 21 U.S.C. § 881(h) was a modification of the common law rule, providing for the immediate vesting of title in the United States. The clause is explicit on this point, clearly stating that title to all property and proceeds used in, or derived from, any violation of the narcotics act vests immediately in the government. Admittedly, this leaves a problem of statutory interpretation; but whether the relation back provision operates to vest title immediately is not really as difficult a problem as the Court pretended. If title vests pursuant to 21 U.S.C. § 881(h), the innocent owner is given an opportunity to defend and retain the property by way of 21 U.S.C. § 881(a)(6). The practical effect seems to be the same as determining innocent

254. 113 S. Ct. at 1134-37.

255. *Grundy*, 7 U.S. (3 Cranch) at 337; *Stowell*, 133 U.S. at 1. See also *Florida Dealers & Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960); *Wingo v. United States*, 266 F.2d 421, 423 (5th Cir. 1959); *Weathersbee v. United States*, 263 F.2d 324, 326 (4th Cir. 1958); *United States v. Rod and Reel Fishing Co.*, 660 F. Supp. 483, 487 (S.D. Miss. 1987); *United States v. 1314 Whiterock*, 571 F. Supp. 723, 725 (W.D. Tex. 1983).

256. *Henderson's Distilled Spirits*, 81 U.S. at 57-58.

257. *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-51 (1806) is one of these. In that case Chief Justice Marshall stated that "in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense . . ." In *92 Buena Vista Avenue*, the plurality used this comment to argue that "forfeiture does not automatically vest title to property in the Government." 113 S. Ct. at 1135. The plurality missed the point, however. *Grundy* involved a merchant who made a false declaration to the collector of customs in order to secure an American registry for his ship. Congress had earlier provided that when any person makes a false oath to obtain a registry, the vessel or its value would be subject to forfeiture. Act of December 31, 1792, 1 Stat. 287. The question at issue, therefore, was whether the statute provided for an immediate vesting of title in the government. The Court ruled that title did not vest immediately because the government had an option to seize the vessel or sue for the value. 7 U.S. (3 Cranch) at 351-53. Nonetheless, the Court clearly recognized Congress's right to provide for an immediate vesting of title. *Id.* at 352.

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ownership first and excluding the property from forfeiture.²⁵⁸ Indeed, given the history of the relation back doctrine, it seems that the relationship between §881(h) and §881(a)(6) is analogous to the innocent “transferee” defense in the criminal forfeiture scheme.²⁵⁹ The statutory rule has generally been to vest title immediately, even when there was a transfer for value.²⁶⁰ However, because forfeiture in the context of illegal drug activity has the potential to involve a greater number of innocent property owners, Congress appears to have provided a limited exception to the rule for those who could show that they lacked knowledge of the illegal activity.²⁶¹

The ultimate question for the Court in *Buena Vista*, therefore, was whether a donee was the type of individual Congress intended to protect. Unfortunately, this was the one question the plurality glossed over. Contrary to the Court’s assertions, it is not really an answer to simply say that the term “owner” includes donees because it is “unqualified” in the statute.²⁶² Even agreeing that Congress intended the term to have its broadest possible meaning, such as to include those with legal and equitable interests, mortgagees, lienholders, or even tenancies by the entirety, ownership need not include donees if the purpose of the statute is to “remove the incentive to engage in the drug trade and deny drug dealers the use of their ill-gotten gains.”²⁶³ While recognizing congressional intent to have the term “owner” interpreted broadly, the Court overlooked Congress’s intent to keep crime from paying. This objective can only be achieved if criminals are prevented from transferring their assets to others. Thus, while there are provisions in other forfeiture statutes for allowing purchasers for value to set up a defense to forfeiture,²⁶⁴ there seems to be no precedent for allowing someone who receives a gift from a criminal to retain

258. “Because the success of any defense available under 881(a) will necessarily determine whether 881(h) applies, 881(a)(6) must allow an assertion of the defense *before* 881(h) applies.” 113 S. Ct. at 1137.

259. 21 U.S.C. §853(c) (1988) provides a defense to forfeiture for an innocent purchaser for value: All right, title, and interest in property described in subsection (a) [describing property subject to forfeiture] of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

260. See *supra* text accompanying notes 72-85.

261. Another way around the problem is to view the title of property subject to forfeiture as being voidable, rather than void. This way a person who obtains property from a drug trafficker may be able to obtain good title against the government through an innocent owner defense. While such a holding would still be a modification of the relation-back doctrine, it at least has the attraction of preventing drug criminals from transferring property through sham transactions. See Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 187-88.

262. 113 S. Ct. at 1134.

263. *United States v. 2600 Harden Boulevard*, 710 F. Supp. 792, 794 (S.D. Fla. 1989).

264. 21 U.S.C. §853(c) (1988).

it because he or she did not participate in the alleged illegal activity.²⁶⁵ Moreover, in holding that the government takes property subject to liens existing prior to the criminal acts giving rise to forfeiture, courts have held that "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure."²⁶⁶ Certainly, a donee who has not given value should be in no better position. As a result, Justice Kennedy's argument that a drug dealer should not be able to insulate ill-gotten gains from forfeiture by making a gift to a donee, even where the donee is himself or herself without knowledge of the source, seems to be the correct approach.²⁶⁷ Any other makes the effective enforcement of the drug laws impossible.²⁶⁸

The Court also seemed completely unaware that the abrogation of the relation-back doctrine as contemplated in *Buena Vista* would complicate the already confused state of the law concerning at least one aspect of the interpretation of the innocent owner defense. The wording of the statute might be considered ambiguous since it allows a party to prevent forfeiture when it is shown that the illegal acts took place "without the knowledge or consent of that owner."²⁶⁹ As a result, some courts have held that an owner must show a lack of both knowledge and consent,²⁷⁰ while others have held that the owner must merely show a lack of one or the other.²⁷¹ The Supreme Court's rejection of the traditional relation-back doctrine compounds the problem to the point of absurdity. It might be argued that allowing a party to keep property used in drug activities even when the owner knew of the illegal use but did not consent to that use violates congressional intent to attack the drug trade vigorously. However, such a result does not seem terribly unreasonable where

265. Even Justice Story, who wrote a vigorous dissent in the coffee case, arguing that a bona fide transferee should have title against the government, made an exception for those who receive forfeitable property from "voluntary gift or collusive transfer." *1960 Bags of Coffee*, 12 U.S. (8 Cranch) at 407. See also Jankowski, *supra* note 262, at 187 ("Under common law, if one were to equate the owner of forfeitable property to a thief, even a bona fide purchaser would be unable to take good title from him."). But see Note, *Civil Forfeiture and the Innocent Owner Defense: United States v. 92 Buena Vista Ave.*, 16 HARV. J. L. & PUB. POL'Y 835, 844-48 (1993) (arguing that donees should have right to raise innocent owner defence); Michael J. Wietzychowski, Note, *Civil Forfeiture—Protecting Innocent Donees Under 21 U.S.C. § 881(a)(6)*, 65 TEMPLE L. REV. 245 (1992).

266. *In re Metmor Fin.*, 819 F.2d 446, 448-49 (4th Cir. 1987).

267. 113 S. Ct. at 1143-46 (Kennedy, J., dissenting). The plurality's assertion that Mrs. Goodwin's status is the same "if, instead of having received a gift of \$240,000 from Brenna, she had sold him a house for that price and used the proceeds to buy the property at issue" overlooks one important fact. In the posited scenario, Goodwin would have transferred something of value, her house, for the proceeds. She would have become, in a sense, a purchaser for value. This is a decidedly different case from that of one who merely receives a gift without an exchange of any sort. See 113 S. Ct. at 1134.

268. *Id.* at 1146.

269. 21 U.S.C. § 881(a)(6). Almost identical language is contained in the real property forfeiture provision of 21 U.S.C. § 881(a)(7).

270. *United States v. One Parcel of Land at Lot 111-B*, 902 F.2d 1443 (9th Cir. 1990).

271. *United States v. One Single Family Residence Located at 15603 85th Ave. N.*, 933 F.2d 976 (11th Cir. 1991); *United States v. 141st St. Corp.*, 911 F.2d 870 (2d Cir. 1990); *United States v. A Parcel of Property Known as 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989).

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the aim is to prevent a knowledgeable, but relatively powerless, person from suffering loss of a long-held property interest. One example might be the married person whose spouse is using the family home to engage in drug trafficking.²⁷² On the other hand, the Supreme Court's position creates an entirely new absurdity, one wherein a transferee who receives property used in, or obtained from, the drug trade gets to keep the item even though he or she was well aware of the illegal taint. This is because the transferee can probably always show that he or she did not have the opportunity—let alone the right—to consent to the illegal activity at the time of the offense.

Jettisoning the relation back doctrine thus not only allows a donee to avoid the loss of ill-gotten gains by transferring them to third parties, it also creates the absurd result of allowing the transferee to accept the property with full knowledge of its use in illegal activity.

VI. THE EIGHTH AMENDMENT AND CIVIL FORFEITURE

In 1990, Richard Lyle Austin was arrested after selling a government informant two grams of cocaine. Search warrants executed at the time of the arrest led to the discovery of various quantities of drugs in Austin's mobile home and auto body shop.²⁷³ Austin eventually pled guilty to one count of possessing cocaine with intent to distribute and was sentenced by the state court to seven years' imprisonment. A few months later, the United States filed an *in rem* action in the federal district court, seeking forfeiture of Austin's mobile home and body shop under 21 U.S.C. §§ 881(a)(4)-(7). The district court granted the government's motion for summary judgment and declared the property forfeit.²⁷⁴

Austin appealed the forfeiture, arguing that the seizure of his property violated the Eighth Amendment's prohibition against excessive fines.²⁷⁵ Austin complained that the district court should have conducted a "proportionality analysis" to determine whether the value of the property forfeited was disproportionate to the extent of illegal activity occurring on them.²⁷⁶ The government, however, contended that the *in rem* nature of civil forfeiture proceedings made a proportionality analysis inappropriate. The Eighth Circuit

272. This raises, of course, the additional question of whether the spouse should be required to show that he did "everything reasonably possible," perhaps even to the point of calling the police and turning his spouse in. *U.S. v. One Single Family Residence*, 933 F.2d at 982.

273. The search of the body shop uncovered a .22 caliber revolver, some marijuana, \$3300 in cash, a piece of mirror, a small white tube, and a razor blade. The search of the mobile home resulted in the discovery of an electronic scale, a small bag of cocaine, \$660 in \$20 bills, and a "bundle" of cocaine. *United States v. 508 Depot Street*, 964 F.2d 814, 815-16 (8th Cir. 1992).

274. 964 F.2d at 816.

275. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

276. See *Solem v. Helm*, 463 U.S. 277 (1983) (principle of proportionality should be applied in civil actions that result in harsh penalties).

“reluctantly” affirmed, stating that it was forced to reject Austin’s appeal because of its belief that the Constitution did not require proportionality in civil forfeiture proceedings:

We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government’s view that *any* property, whether it be a hobo’s hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction. . . . In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding *in personam* and *in rem* actions, together with the clear court decisions that the Constitution does not require proportionality—at least not in civil proceedings for the forfeiture of property.²⁷⁷

This was only the second time in its history that the Supreme Court had the opportunity to consider the Eighth Amendment’s excessive fines clause.²⁷⁸ It had held earlier that the clause does not limit the award of punitive damages to a private party in a civil suit when the government has not prosecuted the case and is not entitled to a share of the proceeds.²⁷⁹ Relying on the history of the Amendment and its predecessor in the English Bill of Rights, the Court held that the Amendment was “intended to prevent *the government* from abusing its power to punish.”²⁸⁰ Until *Austin*, however, the Court had never considered whether the excessive fines clause was limited to criminal cases.²⁸¹

The government argued that the Eighth Amendment did not apply to a civil action “unless the challenged government action, despite its label, would have been recognized as a *criminal* punishment at the time the Eighth Amendment was adopted.”²⁸² The Supreme Court, however, compared the text and origins of the Amendment with that of other constitutional guarantees, such as those in the Fifth and Sixth Amendments, and concluded that the lack of restrictions on the excessive fines clause meant that it was not limited to criminal cases alone.²⁸³ *In rem* proceedings raise a separate consideration. Since the Framers’ goal was to limit the government’s power to punish, the real question is not whether forfeiture is civil or criminal, but rather, whether it was understood as punishment when the Eighth Amendment was adopted. In

277. 964 F.2d at 818. The court concluded by requesting that Congress reconsider the drug forfeiture statute and consider “injecting some sort of proportionality requirement into the statute, even though the Constitution does not mandate such a result.” *Id.*

278. 113 S. Ct. at 2804 (“Austin contends that the Eighth Amendment’s Excessive Fines Clause applies to *in rem* civil forfeiture proceedings. . . . We have had occasion to consider this Clause only once before.”). The Supreme Court granted *certiorari* to resolve a conflict with the Second Circuit. *See United States v. Certain Real Property*, 954 F.2d 29, 35, 38-39 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992).

279. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

280. *Austin v. United States*, 113 S. Ct. 2801, 2804 (1993).

281. *Id.* at 2804.

282. Brief for the United States at 16, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073).

283. 113 S. Ct. at 2805.

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the context of Austin's suit, more specifically, the question became whether §§ 881(a)(4)-(7) can be understood today as punishment.²⁸⁴

The Court reviewed the history of civil forfeiture in England and the United States and concluded that statutory *in rem* forfeiture should be regarded as punishment. Forfeiture has traditionally been justified on two theories. The first of these is that the property itself is "guilty" of the offense charged;²⁸⁵ the second is that the owner of the property can be held accountable for the wrongs of those to whom he or she entrusts it.²⁸⁶ At bottom, however, both theories rest on the assumption that the owner has been negligent in the use of the property. Forfeiture becomes, then, the penalty by which government punishes that negligence.²⁸⁷ When considered in light of earlier forms of statutory forfeiture, the provisions of §§ 881(a)(4)-(7) seemed to the Supreme Court to look even more like punishment. The inclusion of the innocent owner defense in these sections reveals a "congressional intent to punish only those involved in drug trafficking."²⁸⁸

The government also argued that the statutes are not punitive but instead remedial in at least two respects. First, they remove the instruments of crime from the community.²⁸⁹ Second, forfeiture compensates the government for the expense of law enforcement activity and its expenditures on societal problems related to the drug trade.²⁹⁰ The Court dismissed the first argument on the grounds that much of the property forfeited under the statute, particularly houses, boats and cars, is not contraband *per se*; possessing them is not inherently criminal.²⁹¹ The Court found the second argument equally unpersuasive because the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) have "no correlation to any damage actually sustained by society or to the cost of enforcing the law."²⁹²

284. *Id.* at 2806.

285. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921); *United States v. The Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

286. *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *Brig Malek Adhel*, 43 U.S. (2 How.) at 234 ("[T]he acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.").

287. 113 S. Ct. at 2808-2810.

288. 113 S. Ct. at 2811.

289. 113 S. Ct. at 2811. *See also* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

290. 113 S. Ct. at 2811. *See also* *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (value of goods forfeited for customs violation serving as a "reasonable form of liquidated damages").

291. 113 S. Ct. at 2811 (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("There is nothing even remotely criminal in possessing an automobile.")).

292. 113 S. Ct. at 2811. *See also* *United States v. Ward*, 448 U.S. 242, 254 (1980). *See also* David J. Stone, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eight Amendment*, 73 B.U. L. REV. 427, 440 (1993) ("Civil suits should only make the aggrieved party whole, and 'remedial' recovery must roughly equal the harm caused by the

The Court thus concluded that forfeiture under the provisions at issue constituted “payment to a sovereign as punishment for some offense . . . and, as such, is subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.”²⁹³

A. *Personal Accountability and In Rem Actions*

Several problems arise in connection with both the Court’s reasoning and the effect of the decision. The first difficulty comes from the Court’s apparent disregard of the distinction between forfeitures *in rem* and those *in personam*. In its rush to discover a “unified theory” of forfeiture, it purported to find a consistent theme of punishment running through the case law.²⁹⁴ The theory goes something like this: “Forfeiture has traditionally been justified on the grounds that the property owner has been guilty of negligence—either by using the property wrongly himself, or by allowing someone else to use it so. Thus, forfeiture is punishment.”²⁹⁵ But this theory overlooks the fact that forfeiture is primarily based on a legal fiction, the personification of things. The *actio in rem* proceeds against property without regard to its ownership. The property itself is “guilty” the moment it is used in connection with an illicit act. Part of the rationale for the rule is certainly that forfeiture must serve a remedial purpose, but removal of the offending thing is the primary object. Even more important is the fact that *in rem* forfeiture is designed to expand the reach of courts, doing away with the need to locate an absent defendant while providing compensation.²⁹⁶ *Austin’s* insistence that forfeiture depends on the guilt of the property owner overlooks the fact that many forfeitures proceed where there is no corresponding penalty *in personam*.²⁹⁷ It thus sets up a false premise, that forfeiture is punishment because the property owner is, at bottom, guilty

defendant.”). *But see* *United States v. 40 Moon Hill Road*, 884 F.2d 41, 44 (1st Cir. 1989) (“The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance . . .”).

293. 113 S. Ct. at 2812 (Scalia, J., concurring in part and concurring in judgment), *quoting* *Browning-Ferris*, 492 U.S. at 265.

294. 113 S. Ct. at 2815 (Kennedy, J., concurring in part and concurring in judgment).

295. *See* 113 S. Ct. at 2808-10.

296. *The Brig Malek Adhel*, 43 U.S. (2 How.) (1844) at 234 (“The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof . . . upon the general policy of that law, which looks to the instrument itself, used as the means of mischief, as the best and surest pledge for the compensation and indemnity to the injured party.”).

297. *See, e.g., The Palmyra*, 25 U.S. (12 Wheat.) at 14-15 (forfeiture for piracy without penalty *in personam*). *See also* 7 U.S.C. § 1595 (1939) (forfeiture of mislabeled agricultural seed); 16 U.S.C. § 3606(c) (1983) (forfeiture of vessel used for salmon fishing in proscribed waters); 18 U.S.C. § 512 (1984) (forfeiture of motor vehicles and motor vehicle parts whose identification numbers have been altered); 18 U.S.C. § 2274 (1984) (forfeiture of vessel used in violating the international obligations of the United States); 19 U.S.C. § 1453 (1970) (forfeiture of vessel unloading cargo without customs permit).

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of some offense.

The underlying problem with the *Austin* theory of personal accountability is that by requiring some form of culpability on the part of the owner, it casts doubt on the legitimacy of the entire civil forfeiture regime, not just the drug laws themselves.²⁹⁸ After all, forfeiture is based almost completely on the premise that the property, not any person, is “guilty.”²⁹⁹ A theory of forfeiture that relies on personal culpability has no place in the civil context; it is, instead, the basis for forfeiture *in personam*, a completely different animal. This type of forfeiture, most commonly found in the criminal context, requires a finding of guilt on the part of the owner before condemnation can take place.³⁰⁰

A finding of actual fault on the part of the owner of property cannot be a factor in civil forfeiture unless one is content to separate civil forfeiture from its *in rem* roots entirely. This would not only have the effect of blurring distinctions between criminal and civil forfeiture, but would also disrupt the enforcement of a wide variety of laws, completely unconnected with the “war on drugs.” The protection of a number of important governmental interests is frequently made possible only because the government retains the right to forfeit property in the absence of an *in personam* suit against its owner. The government must, without regard to the guilt or innocence of the owner, be able to forfeit property which is used to violate the law or which poses a danger to public safety. It would be impossible to control smuggling, stem the manufacture of illegal liquor, or prevent the distribution of adulterated food or drugs if the government had to seek out the owners of such goods before it could condemn the property. The customs laws would be reduced to a mere shell if customs officers were required to locate and serve process on the owner of smuggled goods before proceeding to confiscation. Navigation and shipping regulations could easily be avoided if the presence of the vessel owner in the jurisdiction were required.

More importantly, the Court’s musings about personal culpability in *Austin* reflect an excessively literal understanding of the concept of “guilt” when applied to property. While it is often said that the property itself is “guilty” of the offense, the property should not, and cannot, rightfully be regarded as a defendant in the way that term is understood in the criminal context. It is more accurate to say that the offense attaches to the property so that it becomes a

298. See also Ron Champoux, *Real Property Forfeiture under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HAST. CONST. L.Q. 247, 265 (1992) (“Seizure of property should be limited to those cases where the property owner was ‘directly involved’ in the drug felony offense”).

299. See *The Malek Adhel*, 43 U.S. (2 How.) at 233.

300. See notes 100-109, *supra*.

pledge liable to recompense or remedy the alleged wrong.³⁰¹ Moreover, the very idea that there remains some question as to whether property can be forfeited in the absence of some fault or neglect on the part of the owner is simply incorrect.³⁰² This issue has been long settled. Property is forfeitable upon the commission of the illegal act, and the guilt or innocence of the owner is irrelevant. The principle that the Court finds so curious in *Austin* was settled in *The Malek Adhel*³⁰³ and *Dobbins's Distillery*.³⁰⁴

B. *Forfeiture as a Form of Strict Liability*

Perhaps the real question is whether modern notions of justice can suffer the condemnation of property in cases where the owner is without personal fault. If not, then courts must be willing to call the entire civil forfeiture regime into question. That is what the Supreme Court seemed to be doing in *Austin*; and it does seem a little odd in this day and age to find the Court questioning the doctrine of liability without fault. As noted above, the fiction of personification which underlies *in rem* forfeiture is itself based on the principle that "every owner knows his own property and also knows what use is made of it and what obligations rest upon it."³⁰⁵ This is fundamentally a principle of liability without fault, no less different than that which underlies the modern doctrines of strict and vicarious liability. The law has moved in the direction of imposing liability without fault in the area of tort because of the

301. For instance, the Court in *The Brig Malek Adhel* stated:

It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws. . . In short, the acts of the master and crew. . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.

43 U.S. at 233-34.

302. 113 S.Ct. at 2808-10. Cf. *U.S. v. Stowell*, 133 U.S. 1, 14 (1890):

[P]ersons who entrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws.

303. "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . Nor is there anything new in a provision of this sort." 43 U.S. (2 How.) at 233.

304. "Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to [thing seized] . . . without any regard whatsoever to the personal misconduct or responsibility of the owner . . ." *Dobbins's Distillery*, 96 U.S. (6 Otto) 395, 401 (1877). See also *United States v. The Little Charles*, 26 F.Cas. 979, 982 (C.C. Va. 1818) (No. 15,612) (Marshall, J.) ("[T]his is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner.").

305. *Stowell*, 133 U.S. at 14.

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presumption that some social benefit would be achieved if certain persons were held absolutely liable for whatever damage was caused by their activities.³⁰⁶ Thus, a manufacturer may be held strictly liable for damage caused by its product even though it “did all that could reasonably be done” to make the product safe.³⁰⁷ Likewise, operators of certain enterprises can be held liable for the torts of their agents, regardless of whether they are themselves at fault. This theory of vicarious liability results from a deliberate allocation of risk. The employer, having engaged in a business or enterprise for its own gain, should bear the costs of any damage caused by its employees. The employer is, after all, better able to absorb or reallocate the costs.³⁰⁸

The question of whether *in rem* forfeiture can be sustained in the absence of personal fault is answered by Supreme Court decisions upholding the traditional understanding of the personification of the offending thing. It is, on the one hand, a question of *stare decisis* whether the long line of cases forfeiting property without regard to the personal culpability of the owner are legitimate. Even finding this argument wanting does not mean that *in rem* forfeiture is invalid. As shown above, modern tort law has adapted quite comfortably to the notion that some individuals may be held liable for damage caused without any fault of their own. If a modern justification for forfeiture is needed, one need only look there for an analogue. Forfeiture is, in a very real sense, a form of liability without fault. The owner of property, who is presumed to “know[] his own property and also . . . what use is made of it,” should be held accountable for crimes committed with it. The owner is, therefore, either strictly or vicariously liable, as a result of which his or her property is subject to seizure.

Another problem created by the *Austin* decision is whether civil forfeiture can now be regarded as punitive in a way that implicates the Double Jeopardy Clause of the Fifth Amendment.³⁰⁹ Relying on *United States v. Halper*,³¹⁰ the Court in *Austin* held that civil forfeiture has both remedial and retributive

306. WILLIAM PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 536 (1984):

[T]he last hundred years have witnessed the overthrow of the doctrine of “never any liability without fault,” even in the legal sense of a departure from reasonable standards of conduct. It has seen a general acceptance of the principle that in some cases the defendant may be held liable, although he is not only charged with no moral wrongdoing, but has not even departed in any way from a reasonable standard of intent or care.

307. Three policy justifications have traditionally been accepted for imposing strict liability: The costs of damage resulting from defective products can best be borne by manufacturers because they have the capacity to distribute the costs of defects from the few to the many. The cause of accident prevention will be enhanced by the elimination of the necessity for proving negligence. The difficulty in proving negligence can be too great, and thus, there are institutional reasons (costs of litigation) why proof of negligence should be abandoned. *Id.* at 692-93. See also David G. Owen, *Rethinking the Policies of Strict Liability*, 33 *VAND. L. REV.* 681 (1980).

308. PROSSER AND KEATON, *supra* note 306, at 500.

309. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .” U.S. CONST., amend. V.

310. 490 U.S. 435 (1989).

purposes. The *Halper* Court held, however, that “under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.”³¹¹ If, as the *Austin* Court said, civil forfeiture in the drug context is not only remedial but also serves retributive purposes, then it is hard to understand why the Double Jeopardy Clause would not apply. While a number of lower courts have held that the Double Jeopardy Clause did not apply to civil forfeiture actions because such actions were not punishment,³¹² it would appear that these cases cannot survive *Austin*.

Applying *Austin* in this latter context leads to the conclusion that the statutory *in rem* forfeiture of real or personal property that is not itself contraband, based upon the property’s mere use in drug or other criminal offenses, constitutes “punishment” for purposes of double jeopardy analysis, and that, under *Halper*, the government cannot both convict and punish an individual in a criminal proceeding and, in a separate civil proceeding, obtain the forfeiture of noncontraband property used by that individual in connection with the same criminal activity.³¹³

Finally, there appear to be several important practical problems with the *Austin* decision. Foremost among these is the question of whether the decision applies to all actions in civil forfeiture or just those brought under 21 U.S.C. § 881. If the opinion is to be interpreted more broadly, there is a lot of work to be done to determine whether particular statutes are “solely remedial” or whether they serve retributive and deterrent purposes as well. Moreover, the Court has not provided any guidance on what factors are to be taken into consideration when deciding whether a statute has more than remedial aims. Do customs statutes calling for the confiscation of cargoes landed without a permit serve a compensatory or deterrent purpose? Further, because the *Austin* Court refused to give any guidance as to what type of fines are “excessive,”³¹⁴ courts are now placed in the position of having to determine whether a particular forfeiture violates the Eighth Amendment. Thus, will the forfeiture of a vessel for failing to have a proper manifest be considered excessive in view of the particular act of omission? Will the forfeiture of a cargo of over one million dollars be sustained where the duty evaded was far less than that amount? If so, the effective enforcement of a wide variety of forfeiture laws may now be impaired.

311. *Id.* at 448-49.

312. *See, e.g.*, *United States v. Borromeo*, 995 F.2d 23, 27 (4th Cir. 1993); *United States v. McCaslin*, 959 F.2d 786, 788 (9th Cir. 1992); *United States v. Cunningham*, 943 F.2d 53 (6th Cir. 1991) *cert. denied*, 113 S. Ct. 382 (1992).

313. David S. Rudstein, *Civil Penalties and Multiple Punishment under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587, 596 (1993).

314. 113 S. Ct. at 2812.

VII. THE REAL PROPERTY EXCEPTION TO *EX PARTE* SEIZURE

An *in rem* action is generally commenced by the filing of a complaint or libel against the offending property. A court of competent jurisdiction will then hold an *ex parte* hearing to consider the sufficiency of the complaint. If satisfied that the complaint states a valid claim on its face, the court will issue a warrant directing the U.S. marshal to seize the property. As noted above, seizure of the *res* serves two purposes: It perfects the court's jurisdiction over the *res*,³¹⁵ and it gives notice of the action to the owner.³¹⁶

Over the years, a number of challenges have been made to the *ex parte* arrest of property. Owners of seized property have repeatedly made the argument that seizure of property without prior notice in an *in rem* action is a violation of the Due Process Clause of the Fifth Amendment.³¹⁷ Yet, for many years, the Supreme Court upheld the constitutionality of seizure without notice.³¹⁸ Indeed, the Court addressed the subject at some length in *Calero-Toledo v. Pearson Yacht Leasing Co.*,³¹⁹ where it stated that "immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible" in forfeiture cases.³²⁰

The Supreme Court recently reconsidered the validity of *ex parte* seizure and determined that where the arrest of real estate is at issue, the government must provide an owner with an opportunity to be heard before the property can be taken into custody. In *United States v. James Daniel Good Real Property*,³²¹ the Court heard the case of a man who pled guilty to violating Hawaii's drug laws. During a search of the man's home, police uncovered about eighty-nine pounds of marijuana, marijuana seeds, vials containing hashish oil, and

315. See *Republic Nat'l Bank*, 113 S. Ct. at 557.

316. "It is a presumption of law that every owner knows his own property and also knows what use is made of it and what obligations rest upon it by his character or acts, or his expressed or implied contracts; and he, (if not an enemy,) is privileged to appear, claim his property and defend for it against the charges." *WAPLES*, *supra* note 16, at 22.

317. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

318. Seizure without notice in revenue and other forfeiture cases was approved in *United States v. Von Neumann*, 474 U.S. 242, 249 n.7, 251 (1986)(customs); *United States v. \$8,850*, 461 U.S. 555, 562 n.12 (1983) (pre-seizure notice and hearing "would make customs processing entirely unworkable"); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *Windsor v. McVeigh*, 93 U.S. 274, 279 (1876) (state revenue forfeiture). Lower courts have routinely held that seizure without notice or hearing in admiralty cases is constitutionally permissible. See *Maine Nat'l Bank v. F/V Explorer*, 833 F.2d 375 (1st Cir. 1987); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528 (11th Cir. 1985)(*en banc*); *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Merchants Nat'l Bank of Mobile v. The Dredge General G.L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981); *Amstar Corp. v. Steamship Alexandros T.*, 664 F.2d 904 (4th Cir. 1981).

319. 416 U.S. 663 (1974).

320. *Id.* at 678.

321. 114 S. Ct. 492 (1993).

drug paraphernalia. Four and one-half years after the drugs were found, the United States, acting under 21 U.S.C. § 881(a)(7), sought forfeiture of the house and the four-acre parcel of land on which it was situated.³²² A federal magistrate held an *ex parte* hearing on the government's application for a warrant of arrest *in rem*. After concluding that there was probable cause for seizure, the magistrate issued a warrant of arrest. The government seized the property without notice to the owner or the opportunity for an adversary hearing. At the time of the arrest, the house had been rented to several tenants. The government allowed the tenants to continue occupying the premises, but directed that all future rental payments be paid to the U.S. Marshal.³²³ The property owner contended that the government's seizure of the house without prior notice deprived him of his property without due process of law. The district court rejected this argument, but the court of appeals reversed.³²⁴

The Supreme Court began by recognizing the general rule that the Due Process Clause requires that individuals be given notice and an opportunity to be heard before the government deprives them of a property interest.³²⁵ Although the government did not contest the rule as stated, it contended that James Good had been given all the process required by the Constitution. It first argued that the Fourth Amendment alone determines what procedures suffice in the civil forfeiture context. It also argued that seizure of property under the drug laws constitutes an exception to the usual due process requirements of pre-seizure notice and hearing.³²⁶

Relying on the Court's holdings in *Gerstein v. Pugh*³²⁷ and *Graham v. Connor*,³²⁸ the government asserted that compliance with the warrant requirement of the Fourth Amendment provides the "full measure" of process due under the Fifth Amendment. The Court rejected this claim on the grounds that the Fourth Amendment is not the "sole constitutional provision in question when the Government seizes property subject to forfeiture."³²⁹ The Court asserted that the seizure of property in a forfeiture action implicates at least two separate constitutional provisions, the warrant requirement of the Fourth Amendment and the Due Process requirement of the Fifth.³³⁰ Moreover, the

322. 21 U.S.C. §881(a)(7) (1992) provides for the forfeiture of real property "used, or intended to be used, in any manner or part, to commit, or to facilitate" the commission of a drug-related crime.

323. 114 S. Ct. at 497-98.

324. 971 F.2d 1376 (9th Cir. 1992). Cf. *United States v. Premises & Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2d Cir. 1989); *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625 (11th Cir. 1986).

325. See *Fuentes v. Shevin*, 407 U.S. 555 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950).

326. 114 S. Ct. at 498-99.

327. 420 U.S. 103 (1975).

328. 490 U.S. 386 (1989).

329. *Id.* at 499.

330. *Id.*, citing *Soldal v. Cook County*, 113 S. Ct. 538, 548 (1992).

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Court held that “[e]xclusive reliance on the Fourth Amendment is appropriate in the arrest context . . . because the Amendment was ‘tailored explicitly for the criminal justice system,’ and its balance between individual and public interests always has been thought to define the ‘process that is due’ for seizures of person or property in criminal cases.”³³¹ But, the Court reasoned, while the Fourth Amendment places restrictions on the government’s ability to seize property, it does not provide the sole measure of protection required by the Constitution. Even assuming that the Fourth Amendment’s requirements have been satisfied, there remains a question as to whether *ex parte* seizure under the forfeiture laws satisfies the requirements of the Due Process Clause.³³²

When the *Good* Court reviewed the *Pearson* decision, it claimed that *Pearson* was primarily based on the fact that a yacht was the type of property that could be moved or destroyed if prior notice of seizure was given: “The ease with which an owner could frustrate the Government’s interests in the forfeitable property created a ‘special need for very prompt action’ that justified the postponement of notice and hearing until after the seizure.”³³³ However, the Court ruled that the same considerations were not present where real property was concerned. Therefore, the government had to give owners of real property notice and an opportunity to be heard before seizure.³³⁴

The Court concluded that forfeiture of real property did not constitute an “extraordinary situation” requiring the postponement of notice and hearing. This conclusion was primarily based on two factors: First, real property does not implicate the same concern for prompt action as was the case in *Pearson*. The Court drew a distinction between property capable of being sold or destroyed prior to a forfeiture judgement and that which cannot abscond. Second, the need to obtain jurisdiction over the *res* by seizure was not implicated in the same way it would be with movable property because “the

331. 114 S. Ct. at 499, quoting *Gerstein*, 420 U.S. at 125 n. 27 (internal quotation marks omitted).

332. *Id.* at 500.

333. *Id.* (quoting *Fuentes*, 407 U.S. at 91).

334. The *Good* Court arrived at this decision by applying the three-part Due Process analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to civil forfeiture. The *Mathews* analysis requires a consideration of (1) “the private interest affected by the official action;” (2) “the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards;” and (3) “the Government’s interest, including the administrative burden that additional procedural requirements would impose.” 114 S. Ct. at 501. Analyzing the facts of *Good*’s case in light of the *Mathews* test led the Court to conclude that *Good*’s control over his home was “a private interest of historic and continuing importance,” weighing “heavily” in the *Mathews* balance. Second, the Court held that the practice of *ex parte* seizure creates “an unacceptable risk of error” and affords little or no protection to the innocent owner. The Court was particularly exercised by the fact that the magistrate need only consider whether there is probable cause to believe the property in question was connected with a drug offense before issuing the warrant. In addition, the “Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have.” Moreover, while a claimant is entitled to a post-seizure hearing, such a hearing may come many months after the fact so that even the release of the property “would not cure the temporary deprivation that an earlier hearing might have prevented.” *Id.* at 501-02.

appropriate judicial forum may be determined without actual seizure."³³⁵ Thus, the Court declared that where real property is concerned "[t]here is no reason to take the additional step of asserting control over the property without first affording notice and an adversary hearing."³³⁶

A. *The Constitutional Challenge to Ex Parte Seizure*

The decision in *Good* represents an almost complete departure from *in rem* practice as it has been traditionally understood. In carving out this new procedure, the Court has apparently paid little attention to the effect of its new rule on other types of forfeiture actions. If followed closely, it could be the source of much mischief. More to the point, however, is the fact that much of the reasoning in the decision is simply flawed.

Initially, it must be noted that the Court was faced with some very inconvenient precedent in the area of forfeiture of real property. Earlier Supreme Court decisions had repeatedly permitted the seizure of real property without prior notice.³³⁷ In order to overcome this difficulty, therefore, the Court invented a theory of "executive urgency."³³⁸ It claimed that earlier cases involving seizure of real property without notice were justified by the fact that they were brought under various revenue acts and that the prompt payment of taxes was "vital to the existence of a government."³³⁹ Thus, owners of property could have their land seized without prior notice where government revenues were at issue.

The first, and most glaring, problem with this analysis is that it seems to make Due Process rights turn on whether the government has an urgent need for money. The lofty sentiments concerning an individual's right "to be free from governmental interference"³⁴⁰ are undercut by reasoning that allows government's need for revenue to determine the extent of constitutional guarantees of liberty.

335. *Id.* at 503.

336. *Id.* at 504.

337. "The general rule, of course, is that absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that seizure is justified But we have previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture." *United States v. \$8,850.00*, 461 U.S. 555, 562 n.12 (1983) (*italics in original*). *See also* *Phillips v. Commissioner*, 283 U.S. 589 (1931) (seizure of real property without prior hearing does not violate due process); *United States v. Stowell*, 133 U.S. 1 (1890); *Springer v. United States*, 102 U.S. 586 (1881); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *Murray's Lessee et. al. v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (seizure of property belonging to customs official for debt owing to government upheld even though undertaken by warrant issued by treasury, rather than judicial, officer).

338. 114 S. Ct. at 504. *See also* *Id.* at 507 (Rehnquist, C.J., concurring in part and dissenting in part) ("[T]he Court does not work on a clean slate in the civil forfeiture context involved here. It has long sanctioned summary proceedings in civil forfeitures.")

339. *Id.* (quoting *Springer*, 102 U.S. at 594).

340. 114 S. Ct. at 501.

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The *Good* decision presents numerous other difficulties as well. Its Fourth Amendment analysis is weak at best. It avoids entirely the government's argument that the Amendment provides all the process that is due an individual before property is seized. While it recognizes that the Fourth Amendment has applications in the civil context,³⁴¹ the Supreme Court's holding that seizures of property must be considered separately under the *Mathews* analysis creates an interesting dichotomy between criminal defendants and property owners. The Court had earlier rejected similar claims by criminal defendants, holding in *Gerstein v. Pugh*³⁴² that the Fourth Amendment defines the "'process that is due' for seizures of person or property in criminal cases."³⁴³ *Gerstein* held that a suspect in a criminal case may be detained and held for trial even though he does not have the opportunity for an adversarial hearing.³⁴⁴ As noted by Chief Justice Rehnquist in his dissent in *Good*, "[i]t is paradoxical indeed to hold that a criminal defendant can be temporarily deprived of liberty on the basis of an *ex parte* probable cause determination, yet respondent *Good* cannot be temporarily deprived of property on the same basis."³⁴⁵ Chief Justice Rehnquist also correctly notes the other cases where the Supreme Court sanctioned *ex parte* seizure of real and personal property in forfeiture actions.³⁴⁶

The Court's Due Process analysis is similarly flawed. Even assuming *Mathews* is the appropriate balancing test,³⁴⁷ the Court's application can only be sustained through a strained reading of its precedent. Contrary to the assertions made in *Good*, the forfeiture of the yacht in *Pearson* was upheld not merely because movable, rather than real, property was at issue. The *Pearson* Court also found that forfeiture under the drug law at issue served "significant governmental purposes" and the seizure at issue was undertaken by government

341. 114 S. Ct. at 500. See also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railway employees may be subjected to urine and blood tests without a warrant or probable cause); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (warrant required for search of residences for safety inspections).

342. 420 U.S. 103 (1975).

343. *Id.* at 125 n.27 (emphasis added).

344. *Id.* at 120.

345. 114 S. Ct. at 508 (Rehnquist, C.J., concurring in part and dissenting in part).

346. *Id.* at 509 (Rehnquist, C.J., concurring in part and dissenting in part). See also 114 S. Ct. at 511 (O'Connor, J., concurring in part and dissenting in part) ("My first disagreement is with the Court's holding that the Government must give notice and a hearing before seizing *any* real property prior to forfeiting it. That conclusion is inconsistent with over a hundred years of our case law. We have already held that seizure for purpose of forfeiture is one of those 'extraordinary situations' . . . in which the Due Process Clause does not require predeprivation notice and an opportunity to be heard [Earlier] cases reflect the common-sense notion that the property owner receives all the process that is due at the forfeiture hearing itself.")

347. *Mathews* involved a due process challenge to administrative procedures used to deny Social Security benefits. It was, therefore, "conceived to address due process claims arising in the context of modern administrative law." 114 S. Ct. at 507 (Rehnquist, C.J., concurring in part and dissenting in part). Moreover, the Court had earlier rejected the use of the *Mathews* test for every due process claim. *Medina v. California*, 112 S. Ct. 2572 (1992).

officers, rather than private parties. It clearly made a distinction between seizure under the drug laws and state law replevin or garnishment actions.³⁴⁸ Thus, *Pearson* found that forfeitures such as that at issue were an “extraordinary situation” allowing seizure without notice.³⁴⁹ Although *Good* involved real property, the result should have been the same. The seizure at issue in *Good*, like that in *Pearson*, was the type of extraordinary situation that should not have required notice and a hearing.³⁵⁰ It was meant to serve a significant government objective; it was undertaken by government officers; and there was a need for prompt action. The distinctions made by the Court are specious.

B. *Seizure as a Means of Perfecting Jurisdiction*

What is perhaps most startling about the opinion in *Good* is its denial of the principle that a seizure of the property must be effected before jurisdiction may attach *in rem*—a principle affirmed only twelve months earlier in *Republic National Bank*.³⁵¹ Seizure of the *res* has traditionally been required in forfeiture actions for two reasons. First, it is necessary to obtain jurisdiction over the *res*. Second, it prevents the owner from removing the property from the jurisdiction so that there is security for the claim. These two factors have been repeatedly stressed in Supreme Court opinions throughout the years.³⁵² In *Good*, however, the Court claimed that seizure of the *res* was unnecessary: “Because real property cannot abscond, the court’s jurisdiction can be preserved without prior seizure.”³⁵³ It argued that “the *res* may be brought within the reach of the court simply by posting notice on the property and leaving a copy of the process with the occupant.”³⁵⁴ But such a “seizure” would not really comport with the concept of arrest. As noted above, courts take possession of property to prevent the possibility of their issuing “essentially useless judgements.”³⁵⁵ Posting a notice on real property—if indeed such

348. The problem with the statutes in *Fuentes* was that they allowed seizure by private parties for purely commercial gain. 407 U.S. at 93. See also *Pearson*, 416 U.S. at 678-79.

349. 416 U.S. at 679-80.

350. See *Fuentes*, 407 U.S. at 90.

351. 113 S. Ct. at 559. See also Grossman, *supra* note 173, at 679 n.6 (“The three essential elements of an *in rem* proceeding are the presence of the *res* in the jurisdiction, seizure of the *res* and an opportunity for the owner or claimant to be heard.”)

352. See *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815) (“In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the Court.”); *Dobbins’s Distillery*, 96 U.S. at 396 (“Judicial proceedings *in rem*, to enforce a forfeiture, cannot in general be properly instituted until the property inculcated is previously seized by the executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process.”). See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

353. 114 S. Ct. at 503.

354. *Id.*

355. See *Yokohama Specie Bank v. Chengting T. Wang*, 113 F.2d 329, 330 (9th Cir. 1940); *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (“If in proceedings *in rem*, the vested jurisdiction of the court could be divested by the loss of the thing, the reason must be, that as the thing

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notice could be placed with ease—without taking any real steps to restrain the owners will not alleviate the traditional concern that the *res* be available to satisfy a judgement when ultimately issued.

The Court also claims that instituting *in rem* actions without arrest is already provided for in Rule E(4)(b) of the Admiralty Rules, which govern seizures under 21 U.S.C. § 881.³⁵⁶ This rule allows a person making a seizure to take constructive possession of property that cannot be taken into custody easily. But if that is true, then it is hard to see how the opinion in *Good* makes any sense at all. If a constructive seizure under Rule E(4) does not really restrain the owner of property, then why was there any Due Process claim?³⁵⁷ On the other hand, if the Court is not proposing anything more than that already given in the Rules, what has it benefitted *Good*? Although not requiring the actual taking of property into court, a seizure under Rule E(4) has always been understood to deprive an owner of its property. Moreover, such a seizure does not require notice or hearing. Thus, if the *Good* Court really offers nothing more than the procedure already provided for in the rules, it has not offered much. In point of fact, however, the discussion of Rule E(4) does nothing more than demonstrate either a willingness to be disingenuous or a complete lack of understanding of the nature of *in rem* seizure, especially that taken under the admiralty rules.

Finally, the Supreme Court seems rather quick to dispose of a procedure Congress specifically provided for.³⁵⁸ This is especially disconcerting in view of the fact that the Supreme Court considered forfeiture procedures in real property cases on numerous occasions and repeatedly recognized Congress's prerogative in this area.³⁵⁹ Indeed, the Court's rather cavalier dismissal of the need for forfeiture seems even more egregious in light of the opinion in

could neither be delivered to the libellants, nor restored to the claimants, the sentence would be useless, and courts will not render judgments which can operate on nothing.”).

356. 114 S. Ct. at 503. Rule E(4)(b) provides:

If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent.

357. Although the record does not show it, seizure of *Good*'s property was probably effected pursuant to Rule E(4). In fact, most admiralty seizures, whether of movable property or not, take place under this rule. This is because large vessels, such as oil tankers, cannot be easily taken into the marshal's custody. When large ships are seized, the marshal will merely post a notice on the vessel and leave it in the hands of a keeper, who might even be the ship's master or agent. Service of process in this manner has always been understood to effect a complete seizure and restrain the rights of the property owner. See Manual for United States Marshals 6.3-12, reprinted in 1987 AMC 1041, 1052-53 (1987).

358. 21 U.S.C. § 881(d) (providing that the customs laws relative to seizure are applicable in civil forfeiture proceedings).

359. See *Tyler v. Defrees*, 7 U.S. (11 Wall.) 331, 346 (1871) (“Unquestionably, it was within the power of Congress to provide a full code of procedure for these cases, but it chose to [adopt], as a general rule, a well-established system of administering the law of capture.”). See also *Dobbins's Distillery*, 96 U.S. at 396.

Republic National Bank.³⁶⁰ As noted above, the *Republic* case dealt with a seizure of real property under the same section at issue in *Good*. In *Republic*, the Court stated that "it long has been understood that a valid seizure of the res is a prerequisite to the initiation of an *in rem* civil forfeiture proceeding."³⁶¹ Yet, only one year and a day later, the Supreme Court in *Good* denied a principle it had claimed was firmly established.

C. *Seizure to Preserve the Res*

The other reason property is seized is to preserve the *res* until final judgment. In *Good*, the Supreme Court discounts this concern for preservation, stating that the government has various means for protecting its interest short of seizure. Sale of the property can be prevented by filing a notice of *lis pendens*; a restraining order can be obtained if there is evidence that the owner or occupant will destroy the property; further illegal activity on the premises can be prevented with search and arrest warrants "obtained in the ordinary course."³⁶² The course of action proposed by the Court here substantially increases the government's administrative burden. *Lis pendens* may be one way to give notice to a prospective purchaser, but state laws will ultimately determine the effectiveness of the remedy. Moreover, *lis pendens* may give notice to a bona fide purchaser for value, but it may not give notice to a donee. Since the *Buena Vista* Court had already allowed a donee to assert an innocent owner defense,³⁶³ the government's legitimate right to forfeiture could be prevented by the claim of a family member or friend who received the property as a gift, without knowledge of the pending action. Requiring the government to obtain a restraining order to prevent the destruction of the property by the owner or occupant would also require the filing of an additional action. After all, the forfeiture proceeding is *in rem*; the owner is not necessarily a party. Relying on a search or arrest warrant to prevent further wrongdoing also means that the government will need to maintain constant watch over the property in a way that would be unnecessary if it were taken into custody and a substitute custodian appointed. While the Supreme Court makes much of the idea that the government often leaves occupants in possession of the premises during the pendency of a forfeiture action, it ignores the fact that the government at least has the option to determine who may occupy the property under seizure. The government may remove a tenant or custodian if it is at all uneasy about whether the occupant will destroy the property. If there is no seizure, the government is forced to accept the continued presence of the alleged

360. 114 S. Ct. at 554.

361. *Id.* at 557.

362. *Id.* at 504-05.

363. 113 S. Ct. at 1126.

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wrongdoer. Contrary to the Court's assertions, therefore, the possibility of destruction of the asset is not minimized simply because real property is at issue.

The requirement that a property owner be given notice and an opportunity to be heard prior to seizure also creates unnecessary administrative burdens in other ways. Requiring an adversary hearing prior to the issuance of the warrant does nothing more than add an unnecessary step to the process. Moreover, the Supreme Court had earlier held that postponing a hearing in cases where property rights were at issue did not violate due process.³⁶⁴ Since the government need only show probable cause for seizure, a hearing would generally accomplish little. Once probable cause is established, the warrant should be issued. The property owner's protestations of innocence would not prevent seizure—unless the opinion is taken to mean that the government must establish its case on the merits before the issuance of the warrant of arrest. This result is not only contrary to traditional *in rem* practice, but defies congressional intent as well.³⁶⁵ The opinion in *Good* is, thus, essentially a holding that the government may not seize property prior to a final judgement of forfeiture.³⁶⁶ If this is the case, the Court has effectively declared a large part of the revenue and customs laws invalid.

VIII. POLICY IMPLICATIONS

A. *How Did We Get Here?*

It is plain that the Supreme Court has begun to veer from past precedent in the area of civil forfeiture. Forfeiture is undoubtedly an effective tool, but as currently practiced, its use as a weapon in the "war" against drugs has the appearance of being arbitrary and extreme. As a result, the High Court has attempted to soften the impact of forfeiture by subjecting it to closer scrutiny, both from a constitutional and procedural standpoint. The problem, however, is that in so doing the Court has ignored the impact its rulings have on other settled, and more legitimate, uses of the forfeiture remedy.

How did we reach this point? How has forfeiture, a relatively uncontroversial proposition for many decades, suddenly become the bane of so many courts and commentators? How is it that a remedy which now seems so oppressive and violative of due process escaped judicial notice for so long? To find the answers to these questions one need look no further than the United

364. *Phillips*, 283 U.S. at 596-97:

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.

365. See 21 U.S.C. § 881(d); 19 U.S.C. § 1615.

366. 114 S. Ct. at 516 (Thomas, J., dissenting).

States Congress. In its zeal to wage a "war on drugs," Congress has taken a remedy which was traditionally confined to a limited sphere of operations and expanded it beyond recognition. Motivated by an electorate apparently frustrated by drug-related violence in American society, Congress undertook to increase both the penalties for drug trafficking and the remedies available to law enforcement officials.³⁶⁷ Congressional proposals ranged from longer prison sentences for offenders to the creation of "an American Gulag" in the Arctic Penitentiary Act.³⁶⁸ Included in many of these proposals were provisions to increase the use of asset forfeiture as a means of combatting the economic basis of the drug trade. Forfeiture provisions were thus first incorporated in the Comprehensive Drug Abuse and Prevention and Control Act of 1970, and later expanded in 1978.³⁶⁹

Although civil forfeiture had been available to the government in a wide variety of contexts prior to 1970, particularly in the revenue and customs laws, the drug forfeiture statutes went further than almost anything that had gone before. Traditionally, forfeiture was confined to contraband goods. This includes property that is inherently dangerous, actually used to commit a crime, or the ownership of which is made illegal by statute. Thus, tainted meat, sawed-off shotguns, and uncustomed goods are subject to forfeiture because their ownership poses a hazard to the community. Similarly, vessels used to smuggle goods into the country or stills used to produce unstamped liquor are seized because they are used directly in the commission of an offense. In the drug forfeiture statutes, however, Congress has created a new category of property subject to forfeiture, that of "derivative contraband."³⁷⁰

The original drug forfeiture statute looked much like other forfeiture laws; it merely reached contraband or property used to commit a drug offense. In 1978, Congress amended the statute to allow forfeiture of money or property used to "facilitate" a drug crime. At first glance, this provision seems quite like those authorizing the forfeiture of ships used to smuggle goods; however, it has been given a much more expansive reading. Using this new authority, federal officials have seized property that has, at best, only an incidental connection with a crime. Not satisfied with even this weapon, however, Congress added the authority to seize land used "in any manner or part, to commit, or to facilitate" a crime.³⁷¹ While revenue laws occasionally

367. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L. J. 889, 895-907 (1987) (detailing the numerous legislative attempts to get tough on drug offenders in the 1970s and 1980s).

368. H.R. 7112, 97th Cong., 2d Sess., 128 CONG. REC. 7088 (1982).

369. See *supra* text accompanying notes 130-41.

370. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. LAW & CRIMINOLOGY 275, 317 (1992).

371. See *supra* text accompanying notes 132-33.

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provided for forfeiture of land on which illegal stills had operated,³⁷² customs laws did not provide for the forfeiture of warehouses or land on which smuggled goods were stored. The reason for this is made plain by the problems inherent in attempting to define what it means to “facilitate” a crime. The use of the real estate forfeiture provisions in the drug laws are a perfect example of the type of abuse that is possible.

The concept of derivative contraband is at the heart of the confusion in the drug forfeiture scheme. Broadly construing the words “in any manner” has led to the forfeiture of property that had little to do with the actual commission of a crime. Armed with this new weapon, prosecutors have frequently been unwilling to exercise restraint. Thus, a man who received a telephone call at his house during which a drug sale was negotiated saw the house forfeited, even though the actual sale took place elsewhere.³⁷³ Another found her car forfeited because of the presence of four marijuana cigarette butts in the ashtray. There was no evidence that the car had been used to transport the illegal drugs.³⁷⁴ Still another car was forfeited because its owner had driven a friend to a house for a drug buy. The car was not used to transport the drugs.³⁷⁵ In one of the more bizarre applications of the law, a house and an adjoining twenty-six acres of land were forfeited because the owner sold a small quantity of drugs near the house. The house and five acres, however, were entirely separated from the remaining twenty-one acres by a road. In addition, the town taxed the land as two separate parcels, and the government admitted that no sales occurred on the twenty-one acres.³⁷⁶ Finally, a condominium was forfeited after the owner sold a drug agent cocaine valued at \$250. This was the case even though the owner had requested that the sale take place at another location; it was the drug agent who insisted that the sale take place in the home.³⁷⁷ Other, similar cases abound.³⁷⁸

Permitting the forfeiture of “proceeds” of drug activity has led to comparable results. Zealous prosecutors have used the drug laws to attack real and personal property in the hands of parties with no connection to a drug sale, other than the fact that the drug dealer had transferred an interest in property to them. Thus, banks, mortgage companies, and other owners find their property rights contested by the government even though they might otherwise

372. *Stowell*, 133 U.S. at 1.

373. *United States v. 916 Douglas Avenue*, 903 F.2d 490 (7th Cir. 1990).

374. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978).

375. *United States v. One 1974 Cadillac Eldorado*, 548 F.2d 421 (2d Cir. 1977).

376. *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989).

377. *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173 (E.D.N.Y. 1990).

378. *United States v. 42450 Highway 441*, 920 F.2d 900 (11th Cir. 1991) (house and acre of land forfeited because negotiations for drug sale took place there, but no actual sale ever occurred); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983) (car forfeited after transporting people to drug sale; no cash or contraband transported by car); *United States v. 1977 Cadillac Coupe De Ville*, 644 F.2d 500 (5th Cir. 1981) (same).

be considered "innocent owners" under the statute.

Expanding the scope of property subject to forfeiture in the drug context is a departure from both the theory and practice of earlier forfeiture law. Following derivative contraband or proceeds into the hands of third parties is an innovation bound to cause confusion and create opportunities for abuse. Permitting the forfeiture of property only fortuitously involved in a drug sale imposes an even more onerous burden on generally accepted concepts of fairness. Keep in mind that the government enjoys some significant procedural advantages in forfeiture actions.³⁷⁹ Thus, a weapon that is relatively uncontroversial when used in revenue or customs cases, where the property subject to forfeiture is relatively limited, quickly appears to be an instrument of oppression when wrenched from its traditional foundations.

B. *Why Have Civil Forfeiture at All?*

A number of commentators have complained about the way in which forfeiture law has developed under the war on drugs, leading at least one to note that there seems to be a "drug exception" to the Bill of Rights.³⁸⁰ The most common complaint is that the protections of the Due Process Clause and the Eighth Amendment have been completely gutted by both legislative and judicial treatment of forfeiture under the drug laws. These complaints have been heard by the courts, to the point where a number of judges have openly criticized the belief that anything, "whether it be a hobo's hovel or the Empire State Building,"³⁸¹ is subject to forfeiture simply because it is somehow involved in a drug transaction. Forfeiture, however, is not really the issue. Instead, the real difficulties have arisen because Congress has abused the remedy. This, in turn, led the courts to mitigate the harsher effects of drug legislation by carving out exceptions to well-settled *in rem* practice and procedure. The problem with this effort is that it failed to take into consideration the fact that decisions limiting *in rem* actions in the drug context will have far-reaching and adverse effects on other *in rem* actions, including those brought by the government for forfeiture and those brought by private parties injured by others. Therefore, rather than concentrating on the "drug exception" to the Bill of Rights, we should concentrate on perhaps fashioning a "drug exception" to forfeiture law.

In rem actions serve a valuable role in Anglo-American jurisprudence. In their traditional form, they have enabled the government to prevent a wide variety of offenses by removing harmful items from circulation. These include

379. See *supra* text accompanying notes 149-63.

380. Wisotsky, *supra* note 367, at 889-90.

381. *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

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tainted meats, illegal drugs, and misbranded products. When found, such goods may be immediately removed from circulation, without the need to locate an owner and begin an *in personam* action. Admittedly, even this type of seizure has always seemed to be at least a technical violation of the Due Process Clause, but courts have countenanced such violations on the grounds that public health concerns outweigh individual rights in exigent circumstances.³⁸² The protection of the nation's revenue has also been found to justify immediate seizure of illegal stills, uncustomed goods, and other property used to violate the revenue laws.³⁸³ In addition, immediately seizing the instrumentalities of crime has the effect of preventing their use in future violations of the law. Thus, ships, cars, and other property used to aid smugglers are subject to forfeiture to stop their owners from abetting violations of the law. In this last case, forfeiture occurs even where the owner is not personally guilty of the offense on the grounds that the owner has a responsibility to exercise care when entrusting property to others. Although forfeiture has expanded beyond the revenue and customs areas over the years, its traditional purposes have remained the same. Copyright law allows the seizure of material violating a registered copyright on the grounds that it would be difficult, if not impossible, in many cases to ascertain the identity of the violator. Unlicensed transmission or communications devices are subject to forfeiture to protect the integrity of the public airwaves.

In the purely private realm, *in rem* actions allow persons injured by the conduct of another, not readily identifiable or not present within the jurisdiction, to obtain some means of redress. This is particularly the case with those involved in foreign trade. Identifying, locating, and obtaining jurisdiction over an entity located in a foreign country may prove to be next to impossible in many cases. Even where identifying offenders may be possible, the costs of pursuing them overseas may be prohibitive. *In rem* actions thus provide both a means of obtaining jurisdiction and a fund from which to satisfy any judgement.

As with any legal fiction, the concept of the personality of things, which underlies all *in rem* actions, may be subject to attack on a variety of grounds. It is not enough, however, to simply argue that *in rem* actions, and forfeiture in particular, should be abandoned because they are remnants of an earlier day. American law tolerates a number of legal fictions and devices designed to ease the administration of justice. These include class actions, shareholder derivative suits, and almost any fiction that relies on consent, such as that which contends that a corporation or individual consents to suit in a particular jurisdiction simply because it has engaged in a transaction likely to have an impact on the

382. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

383. Springer v. United States, 102 U.S. 586 (1881).

state concerned. Indeed, the whole concept of charging an individual with "constructive knowledge" depends on drawing nice distinctions between what one should or need not have known. Thus, the real question is not age or unfamiliarity, but whether the fiction still serves a useful purpose within the context of ensuring fairness to the various parties concerned. *In rem* process outside the lines of the "war on drugs" does that.

C. *Choices for the Future*

It is plainly in the area of drug forfeiture as developed by Congress that *in rem* procedure appears oppressive. By extending forfeiture to "proceeds" and then to "derivative contraband," Congress has gradually eroded forfeiture's *in rem* foundations. Under the drug laws, Congress has expanded the concept of "guilty property" to include not only the illegal drugs and the equipment used to manufacture them, but also property only tangentially related to violations of the law.

The essence of civil forfeiture statutes in the drug context is clearly the punishment of individual persons. Congress recognized as much when it declared its intent to attack the economic bases of crime; it clearly wanted to attack criminals, not just remove harmful or illegal property. Having made individuals, rather than property, the focus of forfeiture, Congress has eroded forfeiture's *in rem* foundations.

Much has been written about the forfeiture's civil/criminal dichotomy, especially in connection with the extent to which claimants should have the benefit of certain constitutional protections. While some constitutional rights have been denied claimants on the grounds that forfeiture is a civil proceeding, forfeiture claimants have been entitled to the benefit of the Fifth Amendment guarantee against self-incrimination and the Fourth Amendment right against unreasonable search and seizure because forfeiture has been considered "quasi-criminal."³⁸⁴ Under the drug laws, however, it is probably better to speak of forfeiture as being "quasi-civil," since by its own admission Congress seeks to punish individuals in the first instance, rather than merely to seize property used illegally. Forfeiture is being used against guilty people, not merely guilty property. As a result, it has become, in many respects, a criminal statute masquerading as a civil action.³⁸⁵

But, if *stare decisis* is at all operative anymore, the path taken by the Supreme Court in recent terms will prove entirely unsatisfactory. This is because the Court, in attempting to undo the damage caused by congressional overzealousness, has apparently set itself upon a course of blurring the

384. *Boyd v. United States*, 116 U.S. 616 (1886).

385. See George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 655 (1991).

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distinctions between *in rem* and *in personam* actions. It has engaged in a practice of results-oriented jurisprudence, the effect of which is to avoid existing precedent when convenient in order to lessen the harsh effects of congressional legislation. The result is a clumsy brand of judicial legislation. The due process concerns that have been brought to center stage by Congress's abuse of the forfeiture remedy were addressed satisfactorily by the Court long ago. Quite simply, the Supreme Court does not work on a clean slate in the area of forfeiture. The forfeiture remedy has been around for generations and has functioned fairly and efficiently. Yet, the Court's desire to temper forfeiture's effects in the drug context has unintended and harmful implications for other *in rem* actions. Altering rules concerning arrest and seizure of the *res* has an impact, not only on customs and revenue actions, but on *in rem* actions between private parties as well. More importantly, the erosion of the principle that forfeiture acts *in rem*, without regard to the status of persons, calls into question the legitimacy of all *in rem* actions, not just those involving drug crimes.

The need to overcome the obvious unfairness of the current drug forfeiture scheme must be faced squarely by the Court—and by Congress. The expansion of forfeiture's reach in the drug context might properly be regarded as illegitimate, but the Court must face up to the fact that the piecemeal approach it has taken thus far has bred inconsistency and confusion. Perhaps it is time to overturn forfeiture entirely, including seizures under the customs and revenue laws, and leave Congress to fashion a new enforcement tool. On the other hand, it may be more appropriate, given the apparent lack of controversy surrounding forfeiture in admiralty, excise, and customs actions, for the Court to carve out a "drug exception" to *in rem* procedure. Since Congress has moved in the direction of using a civil remedy to punish crime, thereby forcing it to work more directly *in personam*, the Court seems justified in making it clear that drug forfeitures are something other than traditional forfeiture actions, and as such, procedure and protections offered in drug cases must be scrutinized with an eye toward incorporating *in personam* protections. In so doing, the Court should be clear about the distinctions, and it should allow traditional *in rem* actions, when brought both by the government and private parties, to proceed apace.

The four cases discussed in this Article are obviously a direct attempt on the part of the Court to right a wrong where Congress seems unwilling. The principle of the separation of powers seems clearly to leave the primary responsibility for formulating policy with Congress. However, where Congress is distracted from its policymaking role, the job necessarily falls to the Court.³⁸⁶ Thus, the Court has taken upon itself the job of mitigating the

386. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 259-65 (1991).

adverse effects of an ill-considered regime. Congress, however, must be persuaded to modify some of the provisions of the drug forfeiture statutes to prevent any further innovations on the part of the Court. Congress has already demonstrated its ability to rework the forfeiture regime where hardship has been shown to result. In amendments to the Housing and Community Development Act of 1992,³⁸⁷ Congress provided that a removal of property from the jurisdiction during the pendency of an appeal would not deprive the courts of jurisdiction.³⁸⁸ On its face, this provision effectively prevents the situation faced by the Supreme Court in *Republic* from arising again.³⁸⁹

One of the most egregious aspects of the current drug forfeiture scheme is its apparent lack of proportionality. Forfeitures of large areas of land or expensive cars where only small amounts of drugs are involved seems overly harsh to some. The Supreme Court's decision in *Austin*³⁹⁰ reflects that concern. One solution may be the enactment of a "proportionality statute," whereby property may be forfeitable only (1) when it has been used in a direct and substantial way during the commission of an offense; and (2) limited to the extent necessary to compensate the government for its direct damages, such as investigative and prosecutorial expenses.³⁹¹ Such a statute would, to some extent, relieve courts of the duty to determine whether a particular forfeiture proceeding is sufficiently punitive so as to implicate an extended Eighth Amendment analysis. Nonetheless, even putting aside the proportionality analysis, reining in federal prosecutors by clearly defining the extent to which property has been used to "facilitate" a drug offense would go a long way toward restoring some measure of fairness to the process.

On the other hand, Congress could also clarify the provisions of the innocent owner defense in such a way as to prevent criminals from avoiding forfeiture by a transfer to a donee. It should make clear that the defense applies only to transfers for value without notice. In addition, Congress would eliminate a number of problems by resolving the continuing controversy over whether an innocent owner is required to show merely a lack of knowledge and refusal to consent, or whether an innocent owner should be required to show that he did all that was reasonably possible to prevent the illegal use of the property.³⁹² This would not necessarily mean a scaling down of the relation back doctrine. Instead, clearing up the confusion would bring uniformity to the

387. Act of October 28, 1992, 106 Stat. 3672.

388. 28 U.S.C. § 1355(c) (1993).

389. This does not mean, however, that the *Republic* decision is now of no moment. Because the decision did not limit its discussion to drug, or even civil forfeiture, cases, the problems discussed in this article are not rendered moot by the congressional enactment.

390. 113 S. Ct. 2801 (1993).

391. See Stacy J. Pollock, Note, *Proportionality in Civil Forfeiture: Toward a Remedial Solution*, 62 GEO. WASH. L. REV. 456, 479-84 (1994).

392. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974).

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different circuit court approaches to the question. The doctrine of relation back would continue in effect, requiring diligence on the part of owners who entrust their property to others and preventing wrongdoers from avoiding forfeiture by transferring property to a donee. At the same time, truly innocent owners would be able to retain possession of their property.

The foregoing suggestions are not meant to be exhaustive, but are designed to show the relatively minor steps that might be taken by Congress to create a more equitable—and ultimately more efficient—drug forfeiture regime. In so doing, it will reduce the pressure on the courts to embark further on their own damage control operation, mitigating perceived abuses through judicial legislation. It will also reduce the possibility that such decisions will have an adverse, albeit unintended, impact on other *in rem* actions. In the event Congress fails to act, it is likely that further confusion in the area of *in rem* jurisdiction will result.

IX. CONCLUSION

The fundamental problem with civil forfeiture under the drug laws is that it bears little resemblance to traditional forfeiture schemes. In its attempt to make a vigorous assault on drug crime, Congress has created a regime that makes punishment of persons possible through forfeiture. Increasing uneasiness about the scope and aims of drug forfeiture has led the Supreme Court to attempt to carve out a “drug exception” to traditional *in rem* forfeiture law. Unfortunately, this rather piecemeal approach has thus far been ill-considered and incomplete. The Court’s most recent decisions will only serve to further confuse the issue, while throwing *in rem* practice in the civil arena into disarray. Clearly, forfeiture has an important part to play in law enforcement, while *in rem* actions in general are vital to the prosecution of certain private causes of action, particularly those in admiralty. But half measures will suffice for only so long. The Court must face up to the fact that the nation’s current drug forfeiture scheme is either illegitimate because it has no basis in the law governing *in rem* actions, or it is so fully “criminal” in intent and scope that claimants must be entitled to the full array of constitutional protections available in criminal actions.

