Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Prevention and Control Act

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Introduction

Civil forfeiture under the Comprehensive Drug Abuse Prevention and Control Act[1] has become surrounded by much controversy, since the Reagan Administration's introduction in March 1988 of a zero-tolerance policy in the war on drugs. Since then, federal and state drug enforcement activities have included the increasing use of civil forfeiture as a means of deterring illegal drug trafficking, punishing drug dealers and users, and providing additional revenues for the war on drugs. Under the Drug Control Act, a person may forfeit any real or personal property used to facilitate the manufacture, transportation, sale, or possession of illegal drugs or property acquired with proceeds connected with drug trade.[2]

This Note will focus on federal civil procedure in cases involving forfeiture of personal property pursuant to the Drug Control Act. The issue considered is whether execution of a civil forfeiture judgment should extinguish federal courts' jurisdiction, thereby precluding a claimant from seeking relief from an adverse judgment. Personal property, especially intangibles, is of particular interest because the situs, or jurisdictional location, of such property is movable and often difficult to ascertain.

Civil forfeiture cases under the Drug Control Act traditionally have followed in rem admiralty procedures. Under admiralty rules, the court's jurisdiction continues only so long as it maintains physical control over the property. Hence, the court loses jurisdiction once it executes judgment. However, in recent years, several circuits instead have asserted in personam jurisdiction over the government as plaintiff, thereby preserving a losing claimant's right of appeal after execution of the judgment.

Civil forfeiture is a harsh remedy that deprives an owner of private property without the necessity of a criminal conviction. By requiring conformance with admiralty procedures, courts have added to this substantive harshness a layer of unnecessarily complex procedures, creating

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1. 21 U.S.C. § 881 (1988, Supp. I 1989 & Supp. II 1990).
2. *Id.* § 881(a).

an action that often results in inequity. The courts created procedural rules of admiralty in the nineteenth century to prevent ship owners from sailing out of port and leaving an injured plaintiff remediless when the court was unable to obtain personal jurisdiction over the ship's owner. However, in federal civil forfeiture actions, inequity results when the application of these rules leaves the claimant-owner remediless by denying the same right of appeal that is readily available to the losing party in nonadmiralty civil suits.

Before considering federal civil procedure in forfeiture cases brought under the Drug Control Act, it is necessary to discuss both the historical origins of admiralty procedure in civil forfeiture actions and the components of a court's jurisdiction. This Note then will examine both the traditional *in rem* admiralty rule and the modern *in personam* rule and consider statutory support for the modern rule.

I. A Brief History of Civil Forfeiture

A forfeiture is "a divestiture of specific property without compensation," and, more specifically, the "[l]oss of some right or property as a penalty for some illegal act."[3] At an early stage in its development, the English common law personified inanimate objects. This fictitious device produced the in rem action in which a complainant brought suit against the offending object. At early common law, any object causing a person's death was subject to forfeiture to the Crown in an action known as the deodand.[4]

Throughout history, seagoing vessels often have been referred to as live beings. Even today, ship owners name their vessels in a christening celebration. Therefore, it is not surprising that suits in admiralty are frequently in rem actions against the vessel. This makes even more sense when one considers that nineteenth century United States courts almost never could obtain personal jurisdiction over a foreign ship owner. Hence, the courts created procedural rules of admiralty to prevent ship owners from sailing out of port and leaving the injured plaintiff remediless.[5]

The courts superimposed admiralty rules upon the substantive concept of the deodand, creating civil forfeiture actions dissimilar to substantive admiralty law but which nonetheless utilize the procedural rules of admiralty. Federal civil forfeiture cases under the Drug Control Act

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3. Black's Law Dictionary 650 (6th ed. 1990).

4. *See* Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169 (1973).

5. *See* Oliver W. Holmes, Jr., The Common Law 23-30 (Mark D. Howe ed., 1963) (1881).

traditionally have been placed into this hybrid category of actions.[6] However, four circuits have rejected this peculiar synthesis, instead applying the Federal Rules of Civil and Appellate Procedure.[7]

II. An Overview of In Rem Jurisdiction

Jurisdiction is the power or authority of a court to act with respect to a given case.[8] To adjudicate an action a court must have jurisdiction over both the subject matter and the parties to the action.[9] One example of subject matter jurisdiction is the power of a court to review the decisions of other courts, known as appellate jurisdiction.

A. Traditional Classifications of Jurisdiction Over the Parties to an Action

Jurisdiction over the parties traditionally is divided into three types: in personam, quasi in rem, and in rem.[10] In personam jurisdiction empowers the court to issue a judgment against a person or legal entity.[11] In rem jurisdiction is jurisdiction over a thing ("res"), and the res is the defendant over which the court exercises power.[12] Quasi in rem jurisdiction is a hybrid of in personam and in rem jurisdiction. Whereas in rem actions determine the interests of all persons in the world to the res, quasi in rem actions "determine the claims of particular specified persons in the property."[13]

"The essential function of an action in rem is the determination of title to or the status of property located within the court's jurisdiction. Conceptually, in rem jurisdiction operates directly on the property[,] and the court's judgment is effective against all persons who have an interest in the property."[14] Chief Justice Holmes, in *Tyler v. Judges of the Court of Registration*,[15] noted in the opinion for the Supreme Judicial

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6. *See infra* note 35 and accompanying text.
7. *See infra* note 108 and accompanying text.
8. *See generally* Robert C. Casad, Jurisdiction in Civil Actions ¶ 1.01 (1983 & Supp. 1986).
9. *Id.* at 1-2.
10. *Id.* ¶¶ 1.01[2] & 1.01[3].
11. *Id.* ¶ 1.01[2], at 1-5.
12. *Id.* ¶ 1.01[3], at 1-7.
13. *Id.* ¶ 1.01[3], at 1-8 (footnote omitted).
14. 4 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1070, at 422 (2d ed. 1987). *See also* Restatement (Second) of Judgments § 30 (1982). "In . . . actions by the government to forfeit a thing used in violation of the revenue or other laws, . . . a court may enter a final judgment purporting to bind all persons in the world with respect to interests in the property (traditionally described as a judgment 'in rem')." *Id.* cmt. a, at 304-05.
15. 55 N.E. 812, 814 (Mass.), *writ of error dismissed*, 179 U.S. 405 (1900).

Court of Massachusetts that "[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected."[16] Examples of in rem actions include actions to quiet title to real property, actions under land registration statutes, in rem libels in admiralty, and probate court decisions.

B. Elements of Jurisdiction over the Parties to the Action

Jurisdiction over the defendant (whether the defendant is a person or a thing) is based upon two elements: basis and process.[17] Process relates to service of process for in personam actions and to attachment or seizure of the res in quasi in rem and in rem actions.[18]

Historically, the basis of jurisdiction over the defendant in any action was the physical presence of the defendant within the court's territorial domain.[19] However, for in personam actions, although physical presence is still a valid basis for jurisdiction,[20] the focus has shifted during the last fifty years toward the existence of minimum contacts between the forum and the defendant.[21] A similar shift has occurred in quasi in rem actions.[22] However, the basis of presence still governs traditional in rem admiralty cases,[23] because the court's in rem power derives entirely from physical control over the res.[24] This divergence between the bases of minimum contacts for in personam and quasi in rem actions and presence for in rem actions has elicited much commentary.[25]

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16. 55 N.E. at 814.

17. CASAD, *supra* note 8, ¶ 1.01[2][a], at 1-5.

18. For a discussion of process, see *id.* ¶ 2.03.

19. McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . . ."); Pennoyer v. Neff, 95 U.S. 714 (1878).

20. Burnham v. Superior Court of Cal., 495 U.S. 604 (1990).

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

22. Shaffer v. Heitner, 433 U.S. 186 (1977).

23. The [U.S. Supreme] Court has not yet addressed specifically the question of whether minimum contacts [instead of presence] also should be the controlling standard in true in rem cases, but the structure of the *Shaffer* opinion strongly suggests that it is intended to apply to true in rem as well as quasi-in-rem cases.

4 WRIGHT & MILLER, *supra* note 14, § 1073, at 446 (footnote omitted). However, even if the Court intended *Shaffer* to apply to all in rem actions, lower courts typically have refused to apply it in admiralty cases. George Arceneaux III, Note, *Has Shaffer v. Heitner Been Lost at Sea?*, 46 LA. L. REV. 141 (1985).

24. Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917) (action by husband challenging seizure of bank account to satisfy decree for alimony). *See generally* 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 9.01[5] (1991 & Supp. June 1991).

25. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) (citations omitted):

Distinctions between actions in rem and in personam are ancient and

III. Pretrial Procedure in Civil Forfeiture Actions Under the Drug Control Act

"Attorneys commit fatal procedural errors more often in civil forfeiture cases than in any other category of civil litigation."[26] This may be due to the highly complex nature of the procedure governing such cases.[27] At the onset of a federal civil forfeiture action, a federal agency, either the Drug Enforcement Agency (DEA) or Federal Bureau of Investigation (FBI), will notify the owner of the impending forfeiture. The owner may seek administrative remedy by filing a petition for remission within thirty days of receipt of notice.[28] However, the agency's decision on the petition for remission does not address the merits[29] and is "virtually unreviewable" by a court.[30]

Federal law grants the federal district courts original, exclusive subject matter jurisdiction over civil forfeiture proceedings arising under federal law.[31] To obtain judicial review, the property must have an appraised value in excess of $500,000.[32] In addition, the claimant must file a claim and bond with the federal agency within twenty days after receipt of notice.[33] The agency then will transfer the case to the appropriate trial court. Because federal civil forfeiture cases under the Drug Control Act

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> originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification.
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> [W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally . . . .

But see Hanson v. Denckla, 357 U.S. 235, 246 (1958) ("The basis of [in rem] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.") (citations omitted).

26. Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It with You*, Litig., Winter 1988, at 31.

27. For a detailed discussion of this procedure, see United States v. United States Currency in the Amount of $103,387.27, 863 F.2d 555 (7th Cir. 1988). *See also* Thomas J. Schoenbaum, Admiralty and Maritime Law § 20-3 (practitioner's ed. 1987).

28. 21 C.F.R. § 1316.79-.81 (1992).

29. The agency will consider the good faith or lack of knowledge of the petitioner but not whether the property is properly subject to forfeiture. 28 C.F.R. § 9.5 (1991).

30. United States v. United States Currency in the Amount of $2,857.00, 754 F.2d 208, 214 (7th Cir. 1985). *See, e.g.*, United States v. One 1973 Buick Riviera Auto., 560 F.2d 897 (8th Cir. 1977).

31. 28 U.S.C. §§ 1345, 1355 (1988).

32. 19 U.S.C. § 1607 (1988 & Supp. II 1990); 21 C.F.R. § 1316.77-.78 (1992).

33. 21 C.F.R. § 1316.75-.76 (1992).

traditionally have been placed into the category of actions that are governed by the procedural rules of admiralty,[34] the action proceeds according to the Supplemental Rules for Certain Admiralty and Maritime Claims. The government serves a verified complaint and seizes the property (if it has not already done so). The claimant must file a verified claim within ten days and an answer within twenty days after service.[35]

IV. Post-Trial Procedure in Civil Forfeiture Actions Under the Drug Control Act: The Traditional Rule

Under traditional in rem admiralty rules, upon receiving an unfavorable judgment, the claimant must file not only a timely notice of appeal,[36] but also a motion to stay execution of the judgment before the expiration of the automatic ten-day stay afforded by the Federal Rules of Civil Procedure, Rule 62(a). According to admiralty law precedent, the res is no longer jurisdictionally before the court once the court releases it to the prevailing party.[37] Therefore, the losing party must obtain a stay of execution of the adverse judgment to preserve its right to appeal or to seek a new trial. Furthermore, one court even has held that, if the trial court denies the motion to stay execution, the would-be appellant must seek and obtain a stay from the appellate court to preserve in rem jurisdiction.[38] Only by filing a supersedeas bond may the claimant-appellant obtain a stay as of right.[39]

The traditional admiralty rule posits that execution of the judgment results in removal of the res from the court's jurisdiction, because the court's power derives entirely from control over the res.[40] In *Pennington v. Fourth National Bank*,[41] the United States Supreme Court held that "[t]he only essentials to the exercise of the State's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard."[42] This traditional rule was more recently confirmed by the Court of Appeals for the Ninth Circuit, which said:

> The strong weight of authority . . . has held that in an *in rem* admiralty proceeding where a vessel is the *res* and no stay

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34. *See infra* note 44 and accompanying text.
35. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C.
36. Fed. R. App. P. 4(a)(1).
37. *See infra* notes 40-43 and accompanying text.
38. Taylor v. Tracor Marine, Inc., 683 F.2d 1361 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1012 (1983).
39. Fed. R. Civ. P. 62(d).
40. *See supra* note 24 and accompanying text.
41. 243 U.S. 269 (1917).
42. *Id.* at 272.

> of execution has been applied for, the release or removal of the vessel from the jurisdiction of the court destroys *in rem* jurisdiction and renders moot any appeal from decisions of the trial court concerning the vessel.[43]

This rule relating to seagoing vessels has been transmogrified onto land and applied by four circuit courts of appeal to civil forfeiture proceedings.[44] *United States v. One Lear Jet Aircraft*,[45] a six-to-five en banc decision of the Eleventh Circuit, is the leading case. It involved a forfeiture proceeding under the federal statute prohibiting importation of illegal aliens.[46] Leybda Corporation intervened as claimant to the defendant airplane. After a trial, the court rendered a judgment of forfeiture to the government. Upon expiration of the automatic ten-day stay of judgment, the plane was moved outside the Eleventh Circuit. Leybda filed a timely notice of appeal but did not seek a stay of the judgment or file a supersedeas bond.[47]

The majority based its decision upon admiralty precedent, dismissing the appeal for lack of in rem jurisdiction because the res was absent from the territorial jurisdiction of the court at the time of the appeal.[48] Furthermore, the majority rejected the argument that the court had in personam jurisdiction over the parties because the government subjected itself to the court's jurisdiction when it brought the forfeiture action as the plaintiff.[49] Rather, the court held that "the action was solely *in rem*."[50]

The United States Supreme Court has recognized an exception to the traditional rule: When the court releases the res through "accidental or fraudulent or improper removal," in rem jurisdiction is not destroyed.[51]

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43. American Bank of Wage Claims v. Registry of Dist. Court of Guam, 431 F.2d 1215, 1218 (9th Cir. 1970) (footnote omitted). *Accord, e.g.*, Bank of New Orleans & Trust Co. v. Marine Credit Corp., 583 F.2d 1063 (8th Cir. 1978).

44. United States v. Tit's Cocktail Lounge, 873 F.2d 141 (7th Cir. 1989) (per curiam); United States v. $10,000 in United States Currency, 860 F.2d 1511 (9th Cir. 1988); United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir.) (en banc) (6-5 decision), *cert. denied*, 487 U.S. 1204 (1988); United States v. $79,000 in United States Currency, 801 F.2d 738 (5th Cir. 1986).

45. 836 F.2d 1571 (11th Cir.), *cert. denied*, 487 U.S. 1204 (1988).

46. 8 U.S.C. § 1324(b) (1988).

47. 836 F.2d at 1572-73.

48. *Id.* at 1577.

49. *Id.* at 1576-77.

50. *Id.* at 1577.

51. The Rio Grande, 90 U.S. (23 Wall.) 458, 465 (1874) (illegal removal of steamboat from district court's territorial jurisdiction pending appeal did not destroy appellate jurisdiction). *Cf. The Brig Ann*, 13 U.S. (9 Cranch) 289, 290-91 (1815) (dictum) (tortious or fraudulent removal will not divest jurisdiction).

The majority in *One Lear Jet* acknowledged this exception but held that the facts of *One Lear Jet* did not fall within it.[52] Although this exception to the traditional rule may appear relatively straightforward, "the correct application of the test to particular facts is far from self evident."[53]

In *United States v. $10,000 in United States Currency*,[54] the trial court entered a default judgment of forfeiture against the defendant cash, which had been seized by the United States Customs Service when the claimant failed to report the sum as required upon leaving the United States.[55] The district court denied the claimant relief from the default on the grounds that the forfeited cash had already been released to the government, and, therefore, the court lacked in rem jurisdiction.[56]

The court of appeals recognized the possibility that *Shaffer v. Heitner*[57] might require the application of the minimum contacts standard in in rem actions.[58] However, the court in *$10,000* refused to address the issue of whether the government becomes subject to the court's in personam jurisdiction when it brings a civil forfeiture action as the plaintiff.[59] Instead, it reversed and remanded for further consideration of whether the case fell within the "accidental or fraudulent or improper removal" exception to the traditional admiralty rule.[60] Therefore, the court did not categorically reject the modern in personam rule; it merely decided to dispose of this case on other grounds.

In *United States v. Tit's Cocktail Lounge*,[61] the Seventh Circuit endorsed the traditional rule. Because the claimants-appellants failed to file timely claims, the court entered default judgments against them. The judgment was not stayed, and most of the forfeited property, consisting of real estate and businesses located thereon, was then sold.[62] The court of appeals dismissed the appeal as to those properties already sold.[63]

However, the facts of this case are rather limiting. The res in *Tit's Cocktail Lounge* consisted primarily of real property. Hence, this case leaves unanswered the question of whether the Seventh Circuit has adopted the traditional rule in cases involving personal property; that

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52. 836 F.2d at 1574 n.2.

53. 1 SMITH, *supra* note 24, ¶ 9.01[5][c], at 9-20. *See, e.g.*, United States v. $10,000 in United States Currency, 860 F.2d 1511 (9th Cir. 1988).

54. 860 F.2d 1511.

55. 31 U.S.C. § 5316 (1988).

56. 860 F.2d at 1513.

57. 433 U.S. 186 (1977).

58. *See supra* notes 22-23.

59. 860 F.2d at 1513.

60. *See supra* notes 51-53 and accompanying text.

61. 873 F.2d 141 (7th Cir. 1989) (per curiam).

62. *Id.* at 142-43.

63. *Id.* at 144.

is, whether an in rem action against real estate differs fundamentally from one against personalty because the situs of real property for jurisdictional purposes is immutably fixed.[64]

Furthermore, although the Seventh Circuit cited the traditional rule as justification for its decision,[65] the court dismissed the appeal only as to those properties already sold at the time of appeal. Under the traditional rule as described above, the court should have held that it lost jurisdiction over all of the property, without regard to whether it had been sold to a third party. Hence, the decision in *Tit's Cocktail Lounge* is strikingly similar to *United States v. Aiello*,[66] in which the Second Circuit adopted the modern rule, upholding jurisdiction as to funds over which the government still retained control, but dismissing the appeal as to forfeited property already sold.

Lastly, the court's discussion in *Tit's Cocktail Lounge* centers on procedural distinctions between civil and criminal forfeiture actions concerning notice and hearing requirements.[67] The court did not explain why the government was not subjected to the court's in personam jurisdiction because it brought the civil forfeiture action as the plaintiff.

In *United States v. $79,000 in United States Currency*,[68] the Fifth Circuit also endorsed the traditional rule. However, the claimants in this case did not argue that the government was subject to the court's in personam jurisdiction. Rather, they asserted that the government acted in bad faith when it released the defendant cash to United States Customs after expiration of the automatic ten-day stay, even though the claimants did not attempt to obtain a stay of execution.[69] Because the facts of the case clearly did not fall within the "accidental or fraudulent or improper removal" exception to the traditional admiralty rule, the court dismissed the appeal.[70] Not surprisingly, the court did not address *sua sponte* the controversial issue of personal jurisdiction over the government;[71] hence, this case does not necessarily preclude future debate over the modern in personam rule in the Fifth Circuit.

Overall, the appellate decisions supporting the application of traditional in rem admiralty rules in civil forfeiture proceedings have limited precedential value as persuasive authority. Although the majority opinion

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64. *See* United States v. Certain Property Belonging to Hayes, 943 F.2d 1292, 1295 (11th Cir. 1991).

65. 873 F.2d at 143.

66. 912 F.2d 4 (2d Cir. 1990); *see infra* notes 125-28 and accompanying text.

67. 873 F.2d at 143-44.

68. 801 F.2d 738 (5th Cir. 1986).

69. *Id.* at 739.

70. *Id.* at 740.

71. *Id.*

in *One Lear Jet* is well-reasoned,[72] the en banc court was split and the dissenting opinions have been heavily relied upon by other circuits in later decisions.[73] The Ninth Circuit in *United States v. $10,000 in United States Currency* expressly declined to address the issue of personal jurisdiction over the government.[74] Instead, it disposed of the case on the grounds that the facts might fall within the "accidental or fraudulent or improper removal" exception to the traditional admiralty rule. *Tit's Cocktail Lounge* addressed only the issue of jurisdiction over real property that had already been sold to a third party.[75] Lastly, because the claimants-appellants in *United States v. $79,000 in United States Currency* failed to raise the issue of personal jurisdiction over the government, the Fifth Circuit did not expressly reject the modern rule.[76]

V. Criticisms of the Traditional Rule

The traditional in rem admiralty rule is inequitable, illogical, and outdated. The dissenting judges in *One Lear Jet* denounced the traditional rule, and even the United States Supreme Court has questioned the validity of fictitious personification of inanimate objects.[77] Furthermore, the traditional rule often leads to results that lack facial validity when procedure takes priority over substance.

A. The One Lear Jet *Dissenters*

Three separate dissents were filed by the five-judge minority in *One Lear Jet*.[78] Subsequent decisions in other circuits have relied on these opinions in formulating the modern rule discussed in Section VII below. All of the dissenters urged the court to reject the traditional in rem admiralty rule.

The late Judge Vance criticized the majority opinion as effectively eliminating the right of appeal in many civil forfeiture proceedings.[79] He asserted that financial ability to post a bond should not determine whether an unsuccessful claimant has the right to appeal an adverse judgment, particularly because ordinary civil judgments may be appealed

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72. *See supra* notes 45-50 and accompanying text.

73. *See infra* text accompanying notes 121 & 127.

74. *See supra* notes 54-60 and accompanying text.

75. *See supra* notes 61-67 and accompanying text.

76. *See supra* notes 68-71 and accompanying text.

77. *See* Shaffer v. Heitner, 433 U.S. 186, 205-07, 212 (1977); Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23-26 (1960).

78. The dissenting opinions were authored by Judges Vance, Clark, and Edmondson, respectively. *See United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1577-84 (11th Cir.) (en banc) (6-5 decision), *cert. denied*, 487 U.S. 1204 (1988).

79. 836 F.2d at 1577 (Vance, J., dissenting).

without a bond. Judge Vance further asserted that it defies "ordinary common sense" for the United States, which initiated the action, to be able to defeat the jurisdiction of a United States court by moving the res from one United States district to another.[80] He also criticized the majority opinion as a misapplication of admiralty precedent, agreeing with the other dissenters that the court obtained in personam jurisdiction over the government when it initiated the suit.[81]

Judge Clark contended in his dissent that "[b]inding precedent compels the conclusion that the court is obligated to hear this appeal."[82] The admiralty fiction of personifying a ship originated to preserve the court's jurisdiction by permitting the suit to proceed when in personam jurisdiction over the ship's owner could not be obtained.[83] Judge Clark argued that there was no support in admiralty precedent for using this fiction to defeat rather than to preserve a court's jurisdiction.[84] Rather, both he and Judge Edmondson maintained that the appeal should be heard because the court had in personam jurisdiction over the government.[85]

B. Fictional Personification of the Res

Even courts adhering to the traditional admiralty rules have recognized that "[j]urisdiction *in rem* is predicated on the 'fiction of convenience' that an item of property is a person against whom suits can be filed and judgments entered."[86]

In *Continental Grain Co. v. Barge FBL-585*,[87] the United States Supreme Court noted that "[t]he fiction relied upon has not been without its critics even in the field it was designed to serve [admiralty]."[88] The Court in *Continental Grain* observed that the fiction had been called "archaic," "an animistic survival from remote times," "irrational," and "atavistic."[89] In *Shaffer v. Heitner*,[90] a quasi in rem action, the Court echoed these criticisms, reasoning that:

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80. *Id.* at 1578.

81. *Id.*

82. *Id.* at 1580 (Clark, J., dissenting).

83. *Id.* at 1580-81 (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23-24 (1960)).

84. *Id.* at 1581.

85. *Id.* at 1583-84 (Clark & Edmondson, JJ., dissenting).

86. United States v. $10,000 in United States Currency, 860 F.2d 1511, 1513 (9th Cir. 1988) (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 22-23 (1960)).

87. 364 U.S. 19 (1960).

88. *Id.* at 23.

89. *Id. See also* The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959) (5-4 decision) (Harlan, J., dissenting) (asserting that the purpose of a distinction between in personam and in rem actions "is impossible to grasp").

90. 433 U.S. 186 (1976).

> [T]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.[91]

C. Procedure Taking Priority over Substance

After the res is released from the court's custody to the prevailing party, either it remains within the district court's territorial jurisdiction, or it is removed. The outcome of several cases in jurisdictions adhering to the traditional rule has hinged upon this factual distinction, thereby conditioning the existence of in rem jurisdiction on the caprice of the prevailing party.[92]

In *United States v. Four Parcels of Real Property*,[93] the United States government sought forfeiture of a dozer purchased by J.C. Pate, Jr., a convicted drug dealer. The claimant, Donald Daniel, asserted that Pate purchased the dozer as Daniel's agent with money from Daniel's legitimate logging business. The district court granted summary judgment in favor of Daniel. The dozer then was released to Daniel after he "filed an affidavit promising that he would keep the dozer within the territorial jurisdiction of the district court so long as any proceedings in the case were pending."[94]

On an appeal taken by the government, the Court of Appeals for the Eleventh Circuit considered "whether the release of the res from custody deprives [the appellate court] of in rem jurisdiction over an appeal concerning the res when the res remains within the territorial jurisdiction of the court."[95] In two earlier cases, the court reached different results in answering similar questions, and the court in *Four Parcels* declined to resolve the conflict between these two binding cases.[96] The court in *United States v. One 1983 Homemade Vessel Named "Barracuda,"*[97] had held that it retained in rem jurisdiction so long as the res remained within the court's territorial jurisdiction, even though

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91. *Id.* at 212.

92. United States v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991); United States v. One 1983 Homemade Vessel Named "Barracuda," 858 F.2d 643 (11th Cir. 1988); The Manuel Arnus, 141 F.2d 585 (5th Cir.), *cert. denied*, 323 U.S. 728 (1944).

93. 941 F.2d 1428 (11th Cir. 1991).

94. *Id.* at 1435 (footnote omitted).

95. *Id.*

96. *Id.* at 1436.

97. 858 F.2d 643 (11th Cir. 1988).

the final judgment had been executed and the res, a fishing boat, had been sunk by the government.[98] The court in *The Manuel Arnus*[99] held that in rem jurisdiction was defeated as soon as the res was released from the custody of the court, even though the res remained within the court's territorial jurisdiction.[100] Rather than resolving this conflict, the court in *Four Parcels* distinguished these two cases, by holding that Daniel's affidavit preserved in rem jurisdiction over the appeal.[101]

These three cases exemplify the unnecessary legal convolutions which courts adhering to the traditional rule have undertaken.[102] In *Four Parcels*, the court, although attempting to avoid an obsolete geographical distinction, conditioned the existence of appellate jurisdiction upon the stipulation of the prevailing party. However, federal subject matter jurisdiction[103] cannot be conferred, nor its absence waived, by the parties' consent.[104] The unfortunate results of these esoteric distinctions are that the merits of the case get short shrift and the process of litigation is unnecessarily prolonged.

VI. Evolution of the Modern Rule

Several circuits have recognized a second exception to the traditional admiralty rule: "[W]here there is an 'interface of *in rem* and *in personam* jurisdiction,' a court may properly exercise broad *in personam* power over the parties to the *in rem* action."[105] This exception does not apply when the in personam action against the owner is criminal, because,

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98. *Id.* at 647.

99. 141 F.2d 585 (5th Cir.), *cert. denied*, 323 U.S. 728 (1944). *The Manuel Arnus* was binding precedent because the Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981." *Four Parcels*, 941 F.2d at 1436 n.16.

100. *The Manuel Arnus*, 141 F.2d at 586.

101. 941 F.2d at 1436.

102. Complicating matters further, the Eleventh Circuit recently held that in rem jurisdiction over real property is defeated when the res is sold pursuant to a judgment of forfeiture, even though real property obviously must remain within the court's territorial jurisdiction. United States v. Certain Property Belonging to Hayes, 943 F.2d 1292, 1294 (11th Cir. 1991).

103. Appellate jurisdiction is a type of subject matter jurisdiction. Casad, *supra* note 8, ¶ 1.01[1], at 1-3.

104. Mitchell v. Maurer, 293 U.S. 237, 244 (1934); People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880). *See also* Schoenbaum, *supra* note 27, § 20-3, at 621 ("Despite some authority to the contrary, the parties ought not be able to confer *in rem* jurisdiction by agreement.") (footnote omitted).

105. United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1576 (11th Cir.) (en banc) (6-5 decision) (quoting Inland Credit Corp. v. M/T Bow Egret, 552 F.2d 1148, 1152 (5th Cir. 1977)), *cert. denied*, 487 U.S. 1204 (1988). *Accord* United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 982-84 (5th Cir. 1984).

"even though criminal and civil forfeiture proceedings are often brought in conjunction, they remain independent of each other. Consequently, the in personam criminal action does not provide personal jurisdiction in the in rem civil action."[106]

The main point of contention under this exception is whether the court in a civil forfeiture action has in personam jurisdiction over the government because it subjects itself to the court's jurisdiction when it brings a forfeiture action as the plaintiff. If the court does have in personam jurisdiction, arguments about the situs of the res and the physical power of the court over the res then become irrelevant. The relevant question becomes whether the United States government has established minimum contacts with the district in which the action is tried. As discussed in Section VII below, the First, Second, and Fourth Circuits have held that, merely by bringing suit, the government does establish sufficient minimum contacts to sustain an assertion of personal jurisdiction.

When this exception is narrowly construed, it does little to expand the court's jurisdiction; in personam jurisdiction will exist only when the government simultaneously commences an in rem action against the res and a civil in personam action against its owner. However, when broadly construed, this exception essentially engulfs the entire rule. Merely by bringing a civil forfeiture action, the government becomes subject to the court's in personam jurisdiction, even if the owner is not subject to the court's in personam jurisdiction because the action was commenced only in rem against the res.[107]

VII. Application of the Modern Rule

The modern rule is a rejection of the ancient admiralty precepts, allowing the claimant to challenge or appeal a judgment regardless of whether it filed a supersedeas bond or motion for stay of execution, so long as it filed a timely notice of appeal or motion to set aside the judgment. Four circuits have adopted the modern rule, repudiating the judicial fiction of in rem jurisdiction,[108] particularly when the government

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106. United States v. 1447 Plymouth, S.E., 702 F. Supp. 1356, 1359 (W.D. Mich. 1988) (citation omitted). *See also* 1 Smith, *supra* note 24, ¶ 2.03, at 2-10 ("'[T]he proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*.'") (quoting The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827)).

107. *See One Lear Jet*, 836 F.2d at 1580-84 (Clark, J., dissenting).

108. United States v. One Lot of $25,721 in Currency, 938 F.2d 1417 (1st Cir. 1991); United States v. $1,322,242.58, 938 F.2d 433 (3d Cir. 1991); United States v. $95,945.18, United States Currency, 913 F.2d 1106 (4th Cir. 1990); United States v. Aiello, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

retains control of the res throughout the proceedings and after execution of judgment.

In two recent cases, *United States v. One Lot $25,721 in Currency*,[109] and *United States v. $1,322,242.58*,[110] decided within days of each other, the First and Third Circuits, respectively, rejected the traditional rule and adopted the modern rule. Both cases involved the forfeiture of cash proceeds from illegal drug trade. After reviewing prior cases on the subject, the First Circuit concluded that "[t]here is no good reason government should be allowed to insulate itself from the appellate process by wrapping itself in the mantle of an admiralty fiction designed at an earlier time to meet a problem totally unrelated to present day civil forfeiture proceedings."[111]

In *$25,721*, the claimant, John Mele, did not obtain a stay of execution of a summary judgment that awarded the defendant currency to the government. After the expiration of the automatic ten-day stay, the judgment was executed and the funds were deposited in the United States Department of Justice Asset Forfeiture Fund.[112] Mele appealed the forfeiture. Before affirming the summary judgment, the court considered whether it had jurisdiction to hear Mele's appeal. The court held that:

> [I]n a currency forfeiture case the government has subjected itself to the court's *in personam* jurisdiction and execution of the judgment by the government does not extinguish appellate jurisdiction if a timely appeal has been filed and the filing of a timely appeal makes the filing of a request for a stay of the district court judgment and the posting of a supersedeas bond unnecessary for jurisdictional purposes.[113]

In *$1,322,242.58*, the United States seized funds alleged to have resulted from illegal money laundering of drug proceeds by Reginald Whittington. Mr. Whittington and Road Atlanta, Inc. (a corporation in which Whittington owned a majority interest) intervened in the forfeiture proceeding. The trial court dismissed the claims of both Whittington and Road Atlanta for failure to comply with discovery orders. After the dismissal was entered, the funds were transferred from the Justice Department's Seized Asset Deposit Fund to the Justice Department's Asset Forfeiture Fund. Timely notices of appeal were filed by both Whittington and Road Atlanta.[114]

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109. 938 F.2d 1417 (1st Cir. 1991).
110. 938 F.2d 433 (3d Cir. 1991).
111. *$25,721*, 938 F.2d at 1419-20. *See generally* CASAD, *supra* note 8.
112. 938 F.2d at 1418.
113. *Id.* at 1420.
114. 938 F.2d at 435-37.

First, the court held that the admiralty rules regarding the geographic location of the res do not apply to an incorporeal res such as cash.[115] The court reasoned that geographic location is meaningless with regard to an incorporeal res: "[W]e cannot say that the obligation [to disburse the sum on deposit] does not exist in every part of the country."[116] Alternatively, the court held that, "[e]ven if all Treasury accounts are deemed by some fiction to be located at a place outside [this] District, . . . the *res* in this case left the District . . . when it was deposited into the Seized Asset Deposit Fund prior to forfeiture."[117] This removal of the res would be a proper shipment and would not destroy jurisdiction.[118]

In another case involving forfeiture of cash allegedly used to finance an illegal drug transaction, the Fourth Circuit rejected "an aquatic and dated legal fiction" in favor of the modern rule.[119] After the district court granted summary judgment for the government, the defendant funds were deposited into the United States Marshals Service Asset Forfeiture Fund. The claimant, Carlton Lee Baxter, appealed but did not obtain a stay of execution nor file a supersedeas bond.[120]

The court of appeals "agree[d] with the dissenters in *United States v. One Lear Jet Aircraft*[121] that by initiating the forfeiture proceeding in the district court, the government has subjected itself to [the] court's in personam jurisdiction."[122] The court reasoned that it would be inequitable to allow the government to escape the claimant's appeal after it had availed itself of the district court to seek a remedy from the defendant property.[123]

As the [U.S.] Supreme Court put it (in a different context), "The plaintiff having, by his voluntary act in demanding justice from the

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115. *Id.* at 437-38.

116. *Id.* at 438.

117. *Id.*

118. The Drug Control Act departs from traditional in rem procedure by permitting storage of the defendant property outside the district.

> (c) Whenever property is seized under any of the provisions of this title, the Attorney General may—
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> . . . .
>
> (2) remove the property to a place designated by him; or
>
> (3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

21 U.S.C. § 881(c) (1988 & Supp. I 1989). *See generally* 1 SMITH, *supra* note 24, ¶ 9.01[3].

119. United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1110 (4th Cir. 1990).

120. *Id.* at 1107.

121. *See supra* notes 78-85 and accompanying text.

122. 913 F.2d at 1109.

123. *Id.* (citing Inland Credit Corp. v. M/T Bow Egret, 552 F.2d 1148, 1152 (5th Cir. 1977)).

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."[124]

The Second Circuit in *United States v. Aiello*[125] has adopted the modern rule, at least in cases in which the government retains control of the res after execution of judgment. In a case involving forfeiture of property allegedly purchased with illegal drug proceeds, the trial court entered summary judgment for the government. After expiration of the automatic ten-day stay, the government made preparations to dispose of the forfeited property. The claimant then filed a motion in the district court for a stay, which was denied. "Several months later, during which no motion for a stay was made in [the appellate] Court, the Government sold two of the forfeited properties. After hearing oral argument, [the court of appeals] granted a stay pending disposition of the appeal."[126]

The court of appeals upheld jurisdiction as to those properties that had not been sold. Agreeing with the dissenters in *One Lear Jet*, the court observed:

> [T]he concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. With the force of those concepts diminishing in admiralty, they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government.[127]

The court in *Aiello* rejected the government's argument that the court had lost power over the forfeited funds that had been deposited into the United States Treasury, because the government still retained control over those funds. However, the court agreed that "a sale of forfeited property, in the absence of a stay of the forfeiture judgment, destroys appellate jurisdiction as to the sold property."[128]

The decisions of the First, Second, and Fourth Circuits[129] that in a civil forfeiture action the government has subjected itself to the court's

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124. *Inland Credit*, 552 F.2d at 1152 (quoting Adam v. Saenger, 303 U.S. 59, 67-68 (1938)).

125. 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

126. *Id.* at 5.

127. *Id.* at 6-7 (citations omitted).

128. *Id.* at 7 (citing United States v. Tit's Cocktail Lounge, 873 F.2d 141, 144 (7th Cir. 1989) (per curiam)).

129. United States v. One Lot of $25,721 in Currency, 938 F.2d 1417 (1st Cir. 1991); United States v. $95,945.18, United States Currency, 913 F.2d 1106 (4th Cir. 1990); United States v. Aiello, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

in personam jurisdiction are especially compelling in cases in which the res is intangible personal property, such as cash, because upon execution of the judgment the cash is merely transferred from one government account to another. Further, as held by the Third Circuit,[130] it is untenable to condition the existence of jurisdiction upon whether the situs of an incorporeal res is within the court's territorial jurisdiction, because geographic location is meaningless with regard to such a res.

However, the appellate decisions rejecting the traditional in rem admiralty rules in civil forfeiture proceedings have broader applicability. These cases support a conclusion that the court has personal jurisdiction over the government in all civil forfeiture cases in which the government initiated the proceeding and retained control over the res after execution of the judgment. Whether the res is tangible or intangible, it is unreasonable to permit the government to bring suit and then defeat the court's jurisdiction merely by moving the res. However, as was recognized by the court in *Aiello*, equitable considerations may prescribe a different outcome once the res is sold to a third party after the claimant has failed to obtain a stay of execution of the judgment.[131]

VIII. Statutory Support for the Modern Rule

The general venue provision for most federal civil forfeiture actions limits proper venue to the district in which the property is located or arrested.[132] However, Congress "radically altered [by expansion] the scope of territorial jurisdiction (venue)"[133] in subsection (j) of the Drug Control Act.[134] Several courts have held that this subsection (j) implicitly au-

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130. United States v. $1,322,242.58, 938 F.2d 433, 437-38 (3d Cir. 1991).

131. 912 F.2d at 7.

132. (b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.
(c) A civil proceeding for the forfeiture of property seized outside any judicial district may be prosecuted in any district into which the property is brought.
(d) A proceeding in admiralty for the enforcement of fines, penalties and forfeitures against a vessel may be brought in any district in which the vessel is arrested.
28 U.S.C. § 1395(b)-(d) (1988).

133. 1 Smith, *supra* note 24, ¶ 9.01[7], at 9-32.

134. In addition to the venue provided for in section 1395 of title 28, United States Code, . . . in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.
21 U.S.C. § 881(j) (1988 & Supp. I 1989).

thorizes nationwide service of process.[135] Furthermore, the Drug Control Act, contrary to traditional in rem procedure, permits storage of the defendant property outside the district in which the case is tried.[136]

Although the statutory provisions discussed above relate to venue and to storage of the res, they indicate a general legislative intent to broaden the procedural scope of actions under the Drug Control Act. Because it would effect an expeditious trial on the merits, this interpretation of congressional intent complements the announced policy of the United States Department of Justice to increase dramatically the number of such actions which are brought.[137] Furthermore, "Congress clearly has the power to dispense with the traditional jurisdictional requirement that the res be physically present within the district."[138] Therefore, it may be inferred that Congress intended appellate jurisdiction to survive execution of a judgment that results in removal of the res from the court's territorial jurisdiction.

IX. Conclusion

Unlike other civil suits, the claimant, not the government, carries the burden of proof in federal civil forfeiture actions under the Drug Control Act. "Once the government shows probable cause to believe that the property is subject to forfeiture, the claimant must establish by a preponderance of the evidence that the property is 'innocent' or otherwise not subject to forfeiture."[139] Much has been written about the

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135. United States v. Parcel I, 731 F. Supp. 1348, 1351-52 (S.D. Ill. 1990); United States v. 2050 Brickell Ave., 681 F. Supp. 309, 314 (E.D.N.C. 1988). *Contra* United States v. 11205 McPherson Lane, 754 F. Supp. 1483, 1487 (D. Nev. 1991) ("In the absence of Congressional legislation so providing, we cannot write into the statute a nationwide service of process provision."). The district court in *Parcel I* also held that "the venue statute controls territorial jurisdiction." 731 F. Supp. at 1351. However, this view has not gained widespread acceptance. *See 11205 McPherson Lane*, 754 F. Supp. at 1488.

136. *See supra* note 118.

137. *See Oversight of "High Risk" Asset Forfeiture Programs at the Justice Department and the Customs Service: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. 114-24 (1990) (published in U.S. Department of Justice, Federal Forfeiture of the Instruments and Proceeds of Crime: The Program in a Nutshell).

138. 1 Smith, *supra* note 24, ¶ 9.01[7], at 9-33 (citing 19 U.S.C. § 1605 (1988); United States v. One 1974 Cessna Model 310R Aircraft, 432 F. Supp. 364, 367-68 (D.S.C. 1977)). *Cf.* United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1575 n.4 (11th Cir.) (en banc) (6-5 decision) (agreeing that "Congress could modify the requirement that the *res* be within the court's territorial jurisdiction" but criticizing the court's conclusion in *One 1974 Cessna Aircraft* that Congress had so done), *cert. denied*, 487 U.S. 1204 (1988).

139. 1 Smith, *supra* note 24, ¶ 11.03, at 11-10 (footnote omitted).

constitutional implications of the substantive law of civil forfeiture.[140] Altogether, civil forfeiture is a harsh and often inequitable remedy, which severely penalizes the owner of the forfeited property.

By adding to this substantive harshness a layer of complicated and obscure procedure, the courts have created an action that often results in inequity. However, as Judge Vance noted in his dissent to *One Lear Jet*: "'Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.'"[141] Courts should not erect inequitable procedural barriers which prevent appellate review of the merits of a case, especially in civil forfeiture actions in which the government is dispossessing an owner of private property. Furthermore, these procedural issues have become critical because drug enforcement agencies have increased dramatically since 1988 the use of civil forfeiture as a weapon in the war on drugs.

Procedural rules of admiralty were created in the nineteenth century to prevent ship owners from sailing out of port and leaving the plaintiff remediless. This underlying rationale for the existence of these rules is wholly inapplicable to civil forfeiture. Frequently, the application of these rules in civil forfeiture cases leaves the claimant-owner remediless by denying the same right of appeal that is readily available to the losing party in other nonadmiralty civil suits. As persuasively argued by Judge Vance, principles of fairness, common sense, and logic support the conclusion that admiralty procedure has no place in civil forfeiture actions.[142] It is time for this nineteenth century fiction to be dry-docked.

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140. *See, e.g.*, John Brew, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461 (1988); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Michael Schecter, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990).

141. 836 F.2d at 1578 (Vance, J., dissenting) (quoting United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939) (citation omitted by court)).

142. *Id.* at 1577.