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Seize the Day: Renewed Hope for the Permissibility of In Rem Counterclaims Against the United States Government After the Fifth Circuit's Substituted Opinion in \$4,480,466.16?

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SEIZE THE DAY: RENEWED HOPE FOR THE PERMISSIBILITY
OF *IN REM* COUNTERCLAIMS AGAINST THE
UNITED STATES GOVERNMENT AFTER THE FIFTH CIRCUIT'S
SUBSTITUTED OPINION IN \$4,480,466.16?

Evan Gildenblatt

I. INTRODUCTION

In rem jurisdiction is an enduring legal fiction that continues to divide legal scholars and policymakers to this very day. Put simply, *in rem* actions are “against a thing and not a person.”¹ The concept of *in rem* jurisdiction supports the power of a court to exercise jurisdiction over and pass judgment upon a piece of property itself (rather than an individual), because the property may be deemed guilty in the eyes of the law. Rather conveniently for courts, *in rem* jurisdiction can be exercised when the owner of a piece of property is unknown to authorities, or when the owner is known, but is outside the personal jurisdiction of the court in question.² Even in situations in which a property owner is both known to authorities and within the personal jurisdiction of the court, the federal government has increasingly chosen to initiate *in rem* civil forfeiture proceedings due to the lower burden of proof and reduction in procedural hurdles.³

Because the property itself is the defendant, court cases are often captioned as such in full reporter citations,⁴ resulting in bizarre names such as *United States v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar*;⁵ *United States v. Approximately 64,695 Pounds of Shark Fins*;⁶ or *United States v. An Article of Hazardous Substance Consisting of 50,000 Cardboard Boxes More or Less, Each Containing One Pair of Clacker Balls, Labeled in Part: (Box) “ * * * Kbonger * * * It’s Fun Test Your Skill It Bounces It Flips Count the Hits * * * Specialty Mfg. Co., Seattle, Wash. * * * ”*.⁷

To make matters more complicated, the naming conventions of the

1. *In Rem*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010).

2. 20 AM. JUR. 2D *Courts* § 69 (2015) (“The *in rem* proceeding affects specific property within the jurisdiction of the court and does not adjudicate any personal claim or personal liability, meaning personal service is unnecessary for a court to obtain personal jurisdiction in such a proceeding.”).

3. See discussion, *infra* Part II.A.

4. For illustrative purposes, *in rem* cases in this Note will initially be referred to by their complete, unabridged captions. Courts and modern scholarly publications typically shorten *in rem* captions whenever possible, and some jurisdictions have done away entirely with using adversarial captions for new *in rem* proceedings.

5. 265 U.S. 438 (1924).

6. 520 F.3d 976 (9th Cir. 2008).

7. 413 F. Supp. 1281 (E.D. Wis. 1976).

United States Supreme Court call for petitioners to be listed first, leaving readers with such cases as *One 1958 Plymouth Sedan v. Pennsylvania*⁸ or *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,⁹ in which it may appear on first glance that an inanimate object came to life and initiated legal action.¹⁰

In November 2019, the Fifth Circuit Court of Appeals issued a seemingly unremarkable substituted opinion in *United States v. \$4,480,466.16 in Funds Seized from Bank of America Account Ending in 2653*.¹¹ The court's holding from its original August 2019 opinion remained unchanged; a husband and wife whose property had been seized by the federal government were barred under sovereign immunity from asserting counterclaims in the civil forfeiture proceedings against their property.¹² However, the court's substituted opinion addressed a specific question that it had initially declined to consider: whether counterclaims against the government are a procedural mechanism available to claimants of property that is the defendant in a civil asset forfeiture case.¹³

Civil asset forfeiture as a law enforcement practice has been the subject of renewed public concern—and indeed, outrage—over the course of the last decade.¹⁴ The Supreme Court has itself addressed perceived governmental abuses of the mechanism, even going so far as to rule that punitive or partly-punitive civil forfeiture runs afoul of the Eighth Amendment's Excessive Fines Clause.¹⁵ The Court, though, has not

8. 380 U.S. 693 (1965).

9. 383 U.S. 413 (1966).

10. Additionally, while federal and state governments alike still frequently utilize *in rem* jurisdiction, a governmental entity need not be part of proceedings. Private parties commonly file *in rem* actions in salvage cases or maritime shipping claims in order to gain title or effectively secure collateral for any potential judgment. *See, e.g., R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, Its Engines, Tackle, Apparel, Appurtenances, Cargo, etc., Location Within One (1) Nautical Mile of a Point Located at 41 43'32" North Latitude and 49 56'49" West Longitude, Believed to be the RMS Titanic*, 435 F.3d 521 (4th Cir. 2006); *Steel Coils Inc., v. M/V Lake Marion, Her Engines, Boilers, etc.*, 331 F.3d 422 (5th Cir. 2003).

11. 942 F.3d 655 (5th Cir. 2019) [hereinafter *\$4,480,466.16*], *cert. denied*, 141 S.Ct. 112 (2020).

12. *United States v. \$4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653*, 936 F.3d 233 (5th Cir. 2019).

13. *\$4,480,466.16*, 942 F.3d at 659-63.

14. *See, e.g., Last Week Tonight with John Oliver: Civil Asset Forfeiture* (Home Box Office broadcast Oct. 5, 2014); Michael Sallah, et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>; Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken>.

15. *See Austin v. United States*, 509 U.S. 602 (1993); *see also Timbs v. Indiana*, 139 S. Ct. 682 (2019). In *Timbs*, the Court extended *Austin* to the states by incorporating the Excessive Fines Clause; until that time, it was one of few provisions remaining in the Bill of Rights that had yet to be subject to incorporation. The scope of this Note is limited to a specific procedural question in the context of federal civil asset forfeiture, but *Timbs* and the resulting body of literature nevertheless provide considerable insight into both the larger public debate and the overall position of civil asset forfeiture in the eyes of the

specifically addressed the question of whether counterclaims against the government are permissible in *in rem* civil forfeiture actions. In 1991, the First Circuit Court of Appeals found such counterclaims to be unconditionally barred,¹⁶ and the issue has arisen infrequently since then. Albeit niche in the larger context of civil forfeiture abuses, the resolution of this question could have an outsized influence over federal law enforcement practices.

This Note examines the circuit split created by *\$4,480,466.16* and addresses whether counterclaims against the federal government are permissible in *in rem* civil forfeiture actions. Part II of this Note discusses the relevant history of both *in rem* jurisdiction and civil forfeiture, and provides a historical illustration through which civil forfeiture's endurance in the United States can be better understood. Part II also seeks to explain the reemergence of civil forfeiture and subsequent efforts to restrict its use. Finally, Part II concludes by examining the circuit court opinions representing the two major poles in the debate over *in rem* counterclaims.

Part III of this Note argues that although the First Circuit's plain language interpretation regarding the permissibility of *in rem* counterclaims may be comparatively more intuitive, it remains less compelling than the Fifth Circuit's historical and contextual analysis. Additionally, Part III examines whether the nature of modern civil forfeiture necessitates an approach that departs from those of both the First Circuit and the Fifth Circuit. This Note concludes in Part IV by assessing the current legal landscape and reasserting the need for clear, workable standards to govern the federal civil forfeiture regime.

II. BACKGROUND

In rem jurisdiction came into modern recognizable form under the English medieval law of *deodand* (from the Latin *deo dandum*: “given to god”), but its roots can be traced to legal concepts established by the ancient Israelites.¹⁷ Prevailing wisdom once held that when an object (or domesticated animal) proximately caused the death of a human being, the object was guilty of the underlying offense and should be forfeited to the Crown so that the departed soul could find peace.¹⁸ The doctrine of *in rem* jurisdiction slowly developed under English law to differentiate, albeit

Court.

16. See *United States v. One Lot of U.S. Currency (\$68,000), etc.*, 927 F.2d 30, 34 (1st Cir. 1991) [hereinafter *\$68,000*].

17. LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 7 (1996).

18. *Id.* at 10–13; ANTHONY GRAY, *PRESUMPTION OF INNOCENCE IN PERIL: A COMPARATIVE CRITICAL PERSPECTIVE* 157 (2017).

informally, between three general forms of “guilty” property: (1) “things guilty,” or those used to violate the law; (2) “things hostile,” or those belonging to an enemy; and (3) “things indebted,” or those substituted to fulfill the obligation of a debtor.¹⁹ And despite the fact that deodands have never formally existed within the bounds of American jurisprudence, it is also clear that “their underlying principles have endured to the present, constituting the foundations of the law of civil forfeiture in the United States.”²⁰

A. Federal Civil Asset Forfeiture

At its core, modern asset forfeiture is “the taking of property by the government without compensation because of the property’s connection to criminal activity.”²¹ While not all *in rem* actions are civil asset forfeiture actions, civil asset forfeiture actions are almost exclusively *in rem*.²² Notably, there exist three general categories of forfeiture under federal law: (1) criminal forfeiture; (2) civil forfeiture; and (3) administrative forfeiture.²³

Criminal forfeiture accompanies an *in personam* criminal proceeding against a defendant, and the government may only seize the property in question if a defendant is convicted of the underlying offense.²⁴ Civil forfeiture, on the other hand, is typically undertaken through an *in rem* proceeding against the property itself.²⁵ A civil forfeiture proceeding need not accompany any type of criminal action, nor is the government required to establish a property owner’s guilt. Rather, “it is enough that

19. Compare RUFUS WAPLES, A TREATY ON PROCEEDINGS IN REM 2 (1882) with Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–82 (1974) (The United States Supreme Court’s analysis organized historical forfeitures into three loosely corresponding categories: (1) deodand; (2) “[f]orfeiture . . . at common law from conviction for felonies or treason”; and (3) “statutory forfeitures of offending objects used in violation of the customs and revenue laws.”).

20. LEVY, *supra* note 17, at 19.

21. United States Department of Justice, Money Laundering and Asset Recovery Section, *Civil Asset Forfeiture: Purposes, Protections, and Prosecutors*, 67 DEP’T JUST. J. FED. L. & PRAC. 3, 6 (2019); accord DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 1 (2d ed. 2008) (“Asset forfeiture has been described as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign.”).

22. See EDGEWORTH, *supra* note 21, at 24. *But see id.* at 21 n.1 (“18 U.S.C. § 545 permits the forfeiture of smuggled goods, ‘or the value thereof’ without a criminal conviction. Therefore, the forfeiture of the smuggled merchandise would be civil *in rem*, but an action personally against the party to recover the value of the merchandise would be civil *in personam*.”) (internal citations omitted).

23. STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 15 (2d ed. 2013). This Note’s use of the term “civil forfeiture” encompasses both judicial and non-judicial mechanisms.

24. CHARLES DOYLE, CONG. RSCH. SERV., 97-139, CRIME AND FORFEITURE 5 (2015).

25. See EDGEWORTH, *supra* note 21, at 8 (Federal law enforcement agents may take advantage of civil forfeiture statutes to “immediately seize and retain possession of the property pending the resolution of proceedings,” and are even permitted by some statutes to conduct warrantless seizures “based on probable cause.”).

the property was involved in a crime to which forfeiture attaches in the manner in which statute demands,” and the property owner must then rebut a presumption of guilt.²⁶ Of particular significance is the fact that in order to succeed, civil forfeiture actions require a lower burden of proof than criminal proceedings.²⁷

Administrative forfeiture is a non-judicial mechanism by which law enforcement agencies are granted specific statutory authority to seize property during the course of an investigation.²⁸ If no ownership claim is filed during a mandated notice period, the agency enters a “declaration of forfeiture,” and the matter is effectively concluded.²⁹ Although administrative forfeiture is also a civil matter, scholars and practitioners often separate it into a distinct category in recognition of its “non-judicial” nature and the additional statutory restrictions on its use.³⁰

Due to the fact that forfeiture laws are far from a monolith, “[t]here is neither a common law of forfeiture nor a single provision authorizing forfeiture in all cases,” and “[t]he process has almost no rhyme or reason.”³¹ There exist hundreds of federal forfeiture statutes, ranging from those that cover violations of the Northern Pacific Halibut Act of 1982,³² to those that cover violations of the Trading with the Enemy Act of 1917.³³ Owing to the maritime origins of asset forfeiture, there are of course dozens of statutes governing violations at sea, including those aimed at “[p]reventing transportation of goods to aid insurrection,”³⁴ or

26. *Id.* at 6; accord Craig Gaumer, *A Prosecutor’s Secret Weapon: Federal Civil Forfeiture Law*, 55 U.S. ATTORNEY’S BULL. 21, 71 (2007) (“[Civil forfeiture] has less stringent standards for obtaining a seizure warrant. To obtain a criminal forfeiture-related seizure warrant, a prosecutor must establish probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture.” In a civil forfeiture proceeding, however, “the government may seize personal property, even prior to filing the complaint, through a seizure warrant obtained simply upon showing probable cause to believe that the property to be seized is subject to forfeiture.”).

27. EDGEWORTH, *supra* note 21, at 20. Additionally, the government is permitted to rely on hearsay evidence in establishing probable cause. *Id.*

28. CASSELLA, *supra* note 23, at 11; *Types of Federal Forfeiture*, U.S. DEP’T OF JUST., <https://www.justice.gov/afp/types-federal-forfeiture> (last updated Feb. 28, 2020) (“Property that can be administratively forfeited is: merchandise the importation of which is prohibited; a conveyance used to import, transport, or store a controlled substance; a monetary instrument; or other property [not including liquid assets] that does not exceed \$500,000 in value.”).

29. See DOYLE, *supra* note 24, at 6 (administrative forfeitures make up a majority of federal civil forfeitures and “are, in oversimplified terms, uncontested civil forfeitures”); see also S. Poverty L. Ctr., *Civil Asset Forfeiture: Unfair, Undemocratic, and Un-American* (Oct. 30, 2017), <https://www.splcenter.org/20171030/civil-asset-forfeiture-unfair-undemocratic-and-un-american> (“At the federal level, 88% of forfeitures go uncontested.”).

30. See CASSELLA, *supra* note 23, at 9.

31. *Id.* at 4.

32. 16 U.S.C. § 773h.

33. 50 U.S.C. § 4315(c).

34. 50 U.S.C. § 216.

providing for “[c]ondemnation of piratical vessels.”³⁵ Former Representative Henry Hyde, rarely at a loss for a colorful simile, pilloried the broad nature of asset forfeiture by proclaiming that “the hoary doctrines of Anglo-American civil asset forfeiture law have been resurrected, like some jurisprudential Frankenstein monster, from the dark recesses of the past century.”³⁶

The Asset Forfeiture Program within the Department of Justice officially works toward four stated goals, chief among them “[t]o punish and deter criminal activity,” and “[t]o recover assets that may be used to compensate victims.”³⁷ However, the program’s effectiveness remains the subject of considerable disagreement.³⁸ While federal civil asset forfeiture has stabilized to some degree over the course of the last five years,³⁹ its use in the preceding decades increased by orders of magnitude.⁴⁰ One 2015 analysis found that annual deposits to the Department of Justice’s Assets Forfeiture Fund surged from \$93.7 million in 1986 to \$4.5 billion in 2014—an increase of 4,667 percent.⁴¹ Civil asset forfeiture by state governments has not escaped scrutiny either. In 2019, the Supreme Court incorporated the Eighth Amendment’s Excessive Fines Clause against the states and found the protection to be

35. 33 U.S.C. § 384.

36. HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS* 1 (1995). Hyde, a highly problematic individual for reasons unrelated to the topic of this Note, was a vociferous critic of civil asset forfeiture and worked for decades to limit the seizure powers of federal law enforcement agencies. He was a driving figure behind the Civil Asset Forfeiture Reform Act of 2000, which ironically had the long-term effect of broadening federal seizure powers. *See* discussion, *infra* Part II.D.

37. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S GUIDELINES ON THE ASSET FORFEITURE PROGRAM § 9-118.200 (2019).

38. *See, e.g.*, Radley Balko, *Study: Civil Asset Forfeiture Doesn’t Discourage Drug Use or Help Police Solve Crimes*, WASH. POST (June 11, 2019), <https://www.washingtonpost.com/opinions/2019/06/11/study-civil-asset-forfeiture-doesnt-discourage-drug-use-or-help-police-solve-crimes/>; S. Poverty L. Ctr., *supra* note 29.

39. U.S. DEP’T OF JUSTICE, AUDIT DIV. 20-014, AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2019, *available at* <https://oig.justice.gov/reports/2019/a20014.pdf>.

40. A 2015 investigation by the Washington Post found that in the previous year, federal law enforcement agencies “took more property from American citizens than burglars did.” Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars did Last Year*, WASH. POST (Nov. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/>.

41. DICK M. CARPENTER II, ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 5 (2d ed. 2015). The debate has united individuals and causes that can usually be found opposite one another in legal battles; *see* Mary Hudetz, Associated Press, *Forfeiture Reform Aligns Conservative, Liberal Groups*, BUS. INSIDER (Oct. 15, 2015), <https://www.businessinsider.com/ap-forfeiture-reform-aligns-conservative-liberal-groups-2015-10>; Drug Pol’y All., *New Solutions Campaign: Civil Asset Forfeiture*, <https://www.drugpolicy.org/new-solutions-campaign-civil-asset-forfeiture-reform> (last visited Apr. 14, 2020) (groups as disparate as the American Civil Liberties Union and the Charles Koch Institute have become allies in the push for civil forfeiture reform).

“fundamental.”⁴²

Decades of vigorous debate and continuously escalating stakes beg the question, then: if *in rem* jurisdiction is an antiquated fiction and broad civil asset forfeiture is overwhelmingly detested by the general public, how did it come to pass that both are still entrenched fixtures of the American legal system?

B. The Liberty and the Influence of British Admiralty Law

On May 9, 1768, the sloop *Liberty*—a ship belonging to John Hancock, who was at the time one of the wealthiest men in Massachusetts—docked in Boston with a shipment of Madeira wine. One month prior, Hancock had publicly engaged with British customs officials who boarded another of his vessels, the *Lydia*, when they attempted to operate beyond the bounds of their already extensive legal mandate.⁴³ While the *Liberty*'s arrival seemed to go much more smoothly than that of the *Lydia*, an explosive conflict lurked on the horizon. On June 10, a tidewater who had inspected the *Liberty*'s cargo upon its initial approach reported that the crew had locked him in steerage while they furtively offloaded several casks of wine in an attempt to avoid customs duties.⁴⁴ Customs commissioners took swift action to impound the vessel on the same day, but were met with a “small riot” in which Bostonians smashed windows, lit fires, and “roughed up” several of the British officials.⁴⁵ Members of the mob then proceeded to the wharf where they lifted out of the water a “pleasure boat” belonging to customs collector Joseph Harrison, carried it to Boston Common, and burned it in public view.⁴⁶

42. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019).

43. CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 120–21 (1960).

44. O.M. Dickerson, *John Hancock: Notorious Smuggler or Near Victim of British Revenue Racketeers?*, 32 *MISS. VALLEY HIST. R.* 517, 521–24 (Mar. 1946). The tidewater claimed to have come forward only because the man who threatened him, Captain John Marshall (not to be confused with the future Chief Justice of the United States), had died during the intervening month and he no longer feared reprisals. *Id.*; see also THOMAS HUTCHINSON, *HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY* 188–90 (John Hutchinson ed., 1828) (to avoid arousing the suspicions of customs collectors, smugglers frequently declared and paid duties on token amounts of cargo before spiriting away the rest under cover of darkness).

45. 2 *LEGAL PAPERS OF JOHN ADAMS* 176 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereinafter *ADAMS LEGAL PAPERS*]; accord Letter from the Honorable Commissioners of His Majesty's Customs to Governor Francis Bernard (June 13, 1768) in 4 *THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–1769*, 194 (Colin Nicolson ed., 2015) (in their letter to Governor Bernard asking for protection, the customs commissioners noted that the conflagration was “[i]ncreasing to such an enormous [p]itch as to give it the [a]pppearance more of an [i]nsurrection than a [r]iot”).

46. Letter from Governor Francis Bernard to the Earl of Hillsborough, Secretary of State for the Colonies (June 11, 1768) in 4 *THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–1769*, 185–86 (Colin Nicolson ed., 2015).

Bolstered by reinforcements from the man-of-war *HMS Romney* in Boston Harbor, customs authorities eventually secured the *Liberty*, but not before being forced to flee the city with their families. As tensions simmered, Advocate General Jonathan Sewall filed an *in rem* action against the ship and her cargo.⁴⁷ The trial, however, was not to take place in a regular court, and the case would never reach a jury. Rather, it would become “one of the strangest trials ever heard in a colonial vice-admiralty court.”⁴⁸

American colonists had won a major symbolic victory when Parliament repealed the Stamp Act⁴⁹ in 1766, but its immediate replacement—the Declaratory Act—was unequivocal in asserting that the Crown possessed “full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever.”⁵⁰ The ensuing series of so-called Townshend Acts levied taxes on popular commodities such as paper, glass, and tea,⁵¹ and imparted upon British customs commissioners the legal authority to conduct what were essentially warrantless searches.⁵² To the ire of colonial merchants in particular, British courts of vice-admiralty had also been empowered for some time to hear cases of alleged customs violations in bench trials conducted by Crown-appointed judges.⁵³ The vice-admiralty courts were “objects of intense dislike among the colonists,” in no small part because their jurisdiction “was in excess of the powers which they possessed in the realm. . . .”⁵⁴

47. ADAMS LEGAL PAPERS, *supra* note 45, at 177. In preparation for another voyage, crew members had been loading barrels of oil and tar, all of which were seized. *Id.* (citing Joseph Harrison Esq. v. The Sloop Liberty, 20 Barrels of Tar, 200 Barrels of Oil, Vice Adm. Min. Bk., 22 June 1768).

48. UBBELOHDE, *supra* note 43, at 119. Few original records survive from vice-admiralty proceedings in the decade leading up to the American Revolution, but letters, notes, and other papers have allowed historians to piece together the happenings of the courts remarkably well.

49. *Duties in American Colonies for Defending, Protecting and Securing the Same Act of 1765*, 5 Geo. 3, c. 12 (Eng.)

50. *American Colonies Act of 1766*, 6 Geo. 3, c. 12 (Eng.); see Instructions of Boston to its Representatives in the General Court (June 17, 1768) in 1 PAPERS OF JOHN ADAMS 216 (Robert J. Taylor, ed., 1977) (during a town meeting in Boston to address the seizure of the *Liberty*, John Adams asserted that “the principle on which [the Stamp Act] was founded continues in full force, and a revenue is still demanded from America”).

51. See, e.g., *Indemnity Act of 1767*, 7 Geo. 3, c. 56 (Eng.). Colonial assemblies also feared that the Townshend Acts would deprive them of “the power of the purse.” JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 255 (1943).

52. *Townshend Revenue Act of 1766*, 7 Geo. 3, c. 46 (Eng.).

53. Any remaining notion of impartiality was diminished by the fact that vice-admiralty judges were “paid by percentages on the goods they condemned and by fixed fees. . . .” UBBELOHDE, *supra* note 43, at 6–7. According to Levy, “[l]ocal American juries would not likely convict a merchant, sea captain, or vessel owner for violation of the acts of trade and navigation,” but the British recognized that “[r]esort to vice admiralty courts evaded the need for grand jury indictment as well as conviction by a jury.” LEVY, *supra* note 17, at 42–43.

54. HERBERT L. OSGOOD, 1 THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 206 (photo.

And so, the *Liberty*'s fate was sealed in the Court of Vice-Admiralty in Boston when Judge Robert Auchmuty, Jr. decreed that the ship be forfeited.⁵⁵ The *Liberty* was sold at auction in September, where it was purchased by none other than Joseph Harrison, the customs commissioner whose personal boat had just been torched in the June riot. To add insult to Hancock's injury, Harrison fitted the sloop as a revenue cutter for the customs authorities⁵⁶—a capacity in which it would serve until July 1769, when an angry mob in Newport, Rhode Island, seized the vessel and set it on fire.⁵⁷

C. Codification and Usage Post-1789

The affair surrounding the *Liberty* is but one illustration, albeit colorful, of general public sentiment toward British admiralty and customs laws in the decades immediately preceding the American Revolution. In light of the fact that the newly-enfranchised American people so despised the statutes and procedures by which the Crown seized their property, one might reach the conclusion that the founders of the fledgling nation would make a conscious effort to exclude such provisions.⁵⁸ Counterintuitively, however, that is not what happened.⁵⁹

During the first session of the First Congress in 1789, representatives

repr. 1958) (1924) (“[The vice-admiralty courts] came generally to be attacked on the ground that their existence in the colonies was a violation and deprivation of the right of trial by jury, the ancient guaranty of the liberties of Englishmen wherever they lived.”). *But see* Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL. R. 281, 292 (1994) (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. Hancock was tried *in personam* in October 1768 for charges related to illegal offloading of Madeira and incitement of a riot, but he prevailed in large part due to the savvy procedural maneuvering of his attorney, John Adams. ADAMS LEGAL PAPERS, *supra* note 45, at 177–79; UBBELOHDE, *supra* note 43, at 125–27.

56. Revenue cutters are government vessels “employed especially to enforce revenue laws.” *See Revenue Cutter*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). Until the re-establishment of the U.S. Navy in 1798, the Revenue-Marine, precursor to the modern U.S. Coast Guard, served as the only armed federal maritime force. NAT'L ARCHIVES & RECS. ADMIN., RR#517, REVENUE CUTTER SERVICE EMPLOYEES, 1790-1915 (2013).

57. ADAMS LEGAL PAPERS, *supra* note 45, at 178–80. In a strange twist, the mob initially extinguished the fire after learning that “a considerable [q]uantity of [p]owder was on board,” at which point they scuttled the ship and then proceeded to light two additional vessels on fire. BOS. GAZETTE & COUNTRY J., July 24, 1769, at 2.

58. In the midst of the *Liberty* affair, John Adams reminded his fellow Bostonians that “it is our unalterable resolution, at all times, to assert and vindicate our dear and invaluable rights and liberties, at the utmost hazard of our lives and fortunes; and we have a full a rational confidence that no designs formed against them will ever prosper.” Instructions of the Town of Boston to their Representatives (June 17, 1768) in 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 502 (Charles Francis Adams ed., 1865).

59. *See* LEVY, *supra* note 17, at 50–51 (“Parliament's 1696 act of trade and navigation . . . once regarded as an instrument of oppression, animated American civil forfeiture law.”).

established a detailed customs framework that included *in rem* civil forfeiture.⁶⁰ One is hard-pressed to believe that a majority of Congress had a change of heart or that the passage of forfeiture statutes constituted a colossal oversight on the part of everyone involved. Rather, the cash-strapped young government recognized the need for steady sources of revenue and identified *in rem* forfeiture as one possible solution. In an apparent attempt to differentiate the new statutes from the much-reviled British admiralty statutes on which they were based, Congress established notice requirements and procedures for claimants to dispute a seizure of their property.⁶¹ While some protections were subsequently diminished by statute, the system was nevertheless distinguishable from its British progenitor. And as the Court heard civil forfeiture cases, it began to establish lasting precedent,⁶² a not insignificant amount of which still stands today. Indeed, as the Supreme Court noted nearly two centuries after the first American civil forfeiture measures were codified, “[t]he enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.”⁶³

Apart from the Confiscation Act of 1862, allowing the Union to initiate “*in rem* civil proceedings to inflict punishment on rebels who possessed property in the North,”⁶⁴ the government rarely utilized civil forfeiture outside of cases at admiralty until the Court expanded its application to allow for the seizure of property used in violation of tax laws (particularly alcohol tax laws).⁶⁵ Though somewhat distinct from traditional admiralty issues, this expansion can be explained partly by the fact that prior to the Sixteenth Amendment, the federal government was dependent on other taxes—specifically those on “liquor, customs, and tobacco”—for

60. See Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39 (establishing forfeiture as a penalty for specified customs violations).

61. See Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47. Although seizure itself often serves as de facto notice to a property owner, not all property owners are present or aware of the circumstances. *Id.* Thus, the government was required to publish notices widely in the press. Harrington, *supra* note 54, at 289.

62. See, e.g., *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796) (establishing that forfeiture of vessels be tried in admiralty); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814) (establishing that the government holds claim to the title of property immediately upon seizure); *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815) (establishing the requirement that the government must have actual or constructive possession of property in order to initiate forfeiture proceedings); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (establishing that the government may seize property, regardless of whether the owner has been criminally convicted); *United States v. The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) (establishing liability for innocent owners of ships seized for piratical acts).

63. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

64. LEVY, *supra* note 17, at 51.

65. CASSELLA, *supra* note 23, at 31–32 (citing *Dobbins Distillery v. United States*, 96 U.S. 395 (1878); *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921)).

operating revenue.⁶⁶ A piecemeal expansion continued through the early and mid-twentieth century until Congress implemented a wholesale overhaul by permitting law enforcement agencies to seize not only the instrumentalities of a crime, but “the *proceeds* of the offense,” and “property used to facilitate it.”⁶⁷

D. The Re-Emergence of Civil Asset Forfeiture and Subsequent Reform Efforts

As the crime rate rose and drug trafficking reached record highs in the United States throughout the 1970s and 1980s,⁶⁸ Congress sought to take advantage of civil forfeiture in a way that it had never done before. In a 1981 report to then-Senator Joseph R. Biden, the Comptroller General of the General Accounting Office (“GAO”) claimed that despite passage of the Organized Crime Control Act of 1970 (“OCCA,” also known as the “Racketeer Influenced and Corrupt Organizations Act,” or “RICO”), “[t]he Government has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique.”⁶⁹ Congress followed some of the GAO report’s recommendations by passing the Comprehensive Crime Control Act of 1984 (“CCCA”) and the Violent Crime Control and Law Enforcement Act of 1994 (“VCCLEA”), expanding civil forfeiture into a blunt law enforcement tool capable of being wielded in a sweeping manner.⁷⁰

With this vast expansion, however, came concern from across the political spectrum that civil forfeiture was enabling law enforcement agencies to violate fundamental rights with near-impunity. As the Court sanctioned the expansion in large part and established that claimants were no longer entitled under the Due Process Clause of the Fifth Amendment to receive pre-seizure notice in civil forfeiture cases,⁷¹ successive Congresses debated how to reestablish safeguards akin to those passed by the First Congress.

These efforts culminated in the Civil Asset Forfeiture Reform Act of

66. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 60 (1993) (“In 1902, for example, nearly 75 percent of total federal revenues . . . was raised from taxes on liquor, customs, and tobacco.”).

67. CASSELLA, *supra* note 23, at 33.

68. See generally U.S. DEP’T OF JUSTICE, *Uniform Crime Reporting Statistics*, <https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm>.

69. U.S. GAO COMPTROLLER GENERAL, GGD-81-51, *ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING* ii (1981) (referencing both criminal and civil forfeiture).

70. Shawn Kantor, Carl Kitchens, & Steven Pawlowski, *Civil Asset Forfeiture, Crime, and Police Incentives: Evidence from the Comprehensive Crime Control Act of 1984* 2 (Nat’l Bureau of Econ. Research, Working Paper No. 23873, 2017), available at <http://www.nber.org/papers/w23873>; EDGEWORTH, *supra* note 21, at 24.

71. EDGEWORTH, *supra* note 21, at 55.

2000 (“CAFRA”)—a bipartisan undertaking that created a clear “innocent owner” defense, allowed successful claimants to recover interest and attorney fees, and established a four-part test which, when satisfied, waives the federal government’s protections under sovereign immunity.⁷² However, contrary to its drafters’ recognition that civil forfeiture “is a useful law enforcement tool, but one that needs to be carefully monitored,”⁷³ CAFRA, in its attempt to hold the government accountable, actually further expanded the federal government’s seizure powers in some areas.⁷⁴ Subsequent reform efforts, despite gaining across-the-board support,⁷⁵ have fallen flat and largely failed to curtail what has become an increasingly significant enforcement tool.

E. The Circuit Split Over In Rem Counterclaims

1. United States v. One Lot of U.S. Currency (\$68,000), etc.

On November 23, 1988, Giovanni Castiello drove his Lincoln Town Car to Boston’s Logan Airport for a meeting with his new cocaine supplier, “Joe.”⁷⁶ One week prior, Castiello had driven with Joe to a restaurant and agreed to purchase four kilograms of cocaine in exchange for \$68,000 in cash. However, when the two met to complete their transaction and Castiello presented a shoe box of \$68,000 in mixed bills, he subsequently learned that Joe was in fact Agent Joseph W. Desmond of the Drug Enforcement Agency.⁷⁷ Castiello was indicted, tried, and convicted of attempting to possess, with intent to distribute, a Schedule II controlled substance, for which the district court sentenced him to ninety-seven months in prison.⁷⁸

After exhausting his criminal appeals, Castiello then focused his attention on appealing the civil forfeiture of his cash and car, in addition

72. See generally 18 U.S.C. § 983.

73. *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. 5 (2015) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary).

74. See EDGEWORTH, *supra* note 21, at 27; see also *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. 3 (2015) (statement of Rep. F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security, and Investigations) (“It was a noble effort, but it plainly fell short. . . . Forfeiture’s only defenders seem to be its beneficiaries, the law enforcement agencies entitled to keep the proceeds of their seizures.”). By leaving the equitable sharing framework effectively untouched, CAFRA also did little to disincentivize forfeiture as a source of revenue for the government.

75. See Drug Pol’y All., *supra* note 41.

76. \$68,000, 927 F.2d 30, 32 (1st Cir. 1991).

77. *Id.* at 31–32.

78. *Castiello v. United States*, 915 F.2d 1, 6 (1st Cir. 1990).

to the “portable telephone” and “various other items of personal property” that had been inside the Town Car on the day of his arrest.⁷⁹ And while the First Circuit Court of Appeals in March 1991 focused largely upon whether Castiello’s counsel was afforded ample time to prepare for the case and whether Castiello had even met his burden of proof “that the property was not used in violation of the statute,”⁸⁰ the court also rebuffed Castiello’s “self-styled counterclaim” against the government for possession of the property that had been inside of his car.⁸¹

The court first directed its attention to the plain meaning of “counterclaim,” and noted that “[b]y definition, a counterclaim is a turn-the-tables response directed by one party (‘A’) at another party (‘B’) in circumstances where ‘B’ has earlier lodged a claim in the same proceeding against ‘A.’”⁸² Thus, because civil forfeiture actions are *in rem* and the government did not file an accompanying *in personam* civil action against Castiello, “there was no ‘claim’ to ‘counter,’” and “Castiello’s self-styled counterclaim was a nullity.”⁸³

Next, the court pointed out that the warrant and subsequent order of forfeiture against the Town Car “did not expressly extend to personal property within the vehicle,” and was therefore not even at issue (despite the fact that the car remained in government custody).⁸⁴ As a result, the court felt that Castiello ought to have sought the return of his property by administrative means, by bringing a motion in his underlying criminal

79. *See* \$68,000, 927 F.2d at 31 (the district court granted the government’s motion for summary judgment) (21 U.S.C. § 881(a)(4) empowers the government to seize “[a]ll conveyances . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances],” while 21 U.S.C. §881(a)(6) calls for the forfeiture of “[a]ll moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance . . .”).

80. *Id.* at 32 (quoting *United States v. Parcel of Land & Residence at 28 Emery St., Merrimac, Mass.*, 914 F.2d 1, 3 (1st Cir. 1990)).

81. *Id.* at 34–35.

82. *Id.* at 34.

83. *Id.* To reiterate its point, the court noted that “instead of being dragooned into the case as a *defendant*, [Castiello] intervened as a *claimant*,” and was therefore not entitled to file a counterclaim. *Id.*

84. *Id.* at 34–35 (citing *United States v. One 1978 Mercedes Benz, Four-Door Sedan, VIN: 116-036-12-004084*, 711 F.2d 1297, 1304–05 (5th Cir. 1983)). Similar to \$68,000, the car at issue in *1978 Mercedes Benz* was seized under 21 U.S.C. § 881(a)(4) after its owners were suspected of transporting cocaine. The district court found that while the government possessed probable cause to seize the car itself, it did not hold title over the property inside. The Fifth Circuit agreed and held that although the car phone was bolted down and attached to the vehicle’s main electrical system, the statute did not permit for the forfeiture of a vehicle’s “tools and appurtenances,” and there existed no legislative record from the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to indicate that Congress intended appurtenances to be included in the forfeiture of a vehicle by default. For the uninitiated, car phones were the only commercially-available mobile telephones in the United States until Motorola introduced the DynaTAC to consumer markets in 1983. Because analog cellular service was not offered to consumers until 1984, earlier car phones operated on a VHF system and required both a power source and fairly unwieldy radio antenna.

case, or by filing a separate civil action.⁸⁵ While it was far from critical to the larger holding, the court's decision to discuss and subsequently reject the availability of counterclaims as a remedy in *in rem* actions left an impression, as it came to be relied upon by district courts in the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.⁸⁶

After the First Circuit's decision in *\$68,000*, no sister circuit explicitly embraced or rejected its anti-counterclaim position until the Sixth Circuit Court of Appeals heard the case of the Zappone family.⁸⁷ On November 8, 2012, agents of the Internal Revenue Service ("IRS") executed a search warrant against the Ohio Scrap Corporation in Delta, Ohio.⁸⁸ The raid was the result of an IRS investigation into the business and its owners—Carrie and Todd Zappone—for illegal structuring under 31 U.S.C. § 5324(a)(3).⁸⁹ During the course of the search, federal agents seized a large amount of currency from a safe, and the IRS initiated a forfeiture action in April 2013 against \$1,264,000.00 in cash.⁹⁰ The Zappones filed an administrative claim for the cash, and then followed up with an amended claim asserting that the IRS had, in actuality, seized "at least" \$3,150,000.00.⁹¹ In February 2015, the IRS denied the Zappones' administrative claims from the previous year, and the Zappones responded by bringing a new action against the government under the Federal Tort Claims Act ("FTCA")⁹² and *Bivens v. Six Unknown Named*

85. *Id.* at 35; *see also* *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) ("[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner," thus a claimant is entitled to bring civil action for return of such property.).

86. *See* *United States v. Assorted Computer Equip.*, No. 03-2356V, 2004 U.S. Dist. LEXIS 6334 (W.D. Tenn. Jan. 9, 2004); *United States v. All Funds Located in Banca Popolare Friuladria Account Number 70451 in the Name of Senol Taskin*, No. 5:13-cv-1090 (GLS/TWD), 2014 U.S. Dist. LEXIS 26572 (N.D.N.Y. Mar. 3, 2014); *United States v. 8 Luxury Vehicles*, 88 F. Supp. 3d 1332 (M.D. Fla. 2015); *United States v. Various Rest. Furniture & Goods of Iranian Origin*, No. CV 15-259-GW(MRWx), 2016 U.S. Dist. LEXIS 186604 (C.D. Cal. Feb. 8, 2016); *United States v. Certain Real Prop. Commonly Known as 4512 South Drexel Blvd. Chicago, Illinois*, 381 F. Supp. 3d 1007 (E.D. Wis. 2018); *United States v. \$4,480,466.16 in Funds Seized from Bank of America Account Ending in 2653*, No. 3:17-CV-2989-D, 2018 U.S. Dist. LEXIS 70180 (N.D. Tex. Apr. 26, 2018); *United States v. Approximately \$10,128,847.42 Seized from US Bank Account No. -5234*, No. 1:18-CV-0279-SWS-MLC, 2018 U.S. Dist. LEXIS 207350 (D.N.M. Dec. 3, 2018).

87. *Zappone v. United States*, 870 F.3d 551 (6th Cir. 2017) [hereinafter *Zappone*].

88. Elizabeth Reed, *IRS Agents Raid Delta Scrap Yard*, NBC 24 NEWS (Nov. 8, 2012), <https://nbc24.com/news/local/irs-agents-raid-delta-scrap-yard?id=823015>.

89. Illegal structuring is the act of conducting banking transactions in such a way as to "avoid the creation of certain records and reports required by the Bank Secrecy Act (BSA) and/or IRC 6050L." I.R.M. § 4.26.13.1(1) (2020).

90. *Ohio Scrap Corp. v. United States (Dep't of the Treasury, IRS)*, No. 3:14 CV 535, 2014 U.S. Dist. LEXIS 142156, at *2 (N.D. Ohio Aug. 27, 2014); *United States v. \$1,264,000.00 in U.S. Currency*, No. 3:13-cv-905, 2018 U.S. Dist. LEXIS 49566 (N.D. Ohio Mar. 26, 2018).

91. *See Ohio Scrap Corp.*, 2014 U.S. Dist. LEXIS 142156, at *2.

92. 28 U.S.C. § 2671, et seq.

*Agents of Federal Bureau of Narcotics.*⁹³

The district court granted summary judgment in favor of the government and named federal employees,⁹⁴ and the Zappones filed an appeal with the Sixth Circuit asserting, in part, that the district court erred by choosing not to equitably toll their otherwise time-barred FTCA claim.⁹⁵ In affirming the district court's holding, the Sixth Circuit noted that a civil forfeiture action "is a suit *in rem* against the *res*," and is therefore "brought against property, not people."⁹⁶ Then, by way of affirming the district court's ruling that the Zappones could not have pursued a *Bivens* claim in a civil forfeiture proceeding to begin with, the court cited \$68,000 to reiterate that "while the purported owner of the property may intervene in the action, he may not assert counterclaims against the United States."⁹⁷

Although the issue of *in rem* counterclaims was nearly infinitesimal in the scheme of the *Zappone* cases, district courts in the Seventh and Tenth Circuits nevertheless relied upon the Sixth Circuit's dicta to bar such claims in accordance with the First Circuit's original interpretation.⁹⁸ The First Circuit, meanwhile, has continued to utilize variants of the \$68,000 standard in such high profile cases as *United States v. One-Sixth Share of James J. Bulger in All Present & Future Proceeds of Mass Millions Lottery Ticket No. M246233, Registered in the Name of Michael Linskey*, a dispute over lottery winnings initially forfeited by notorious mob boss Whitey Bulger.⁹⁹

93. 403 U.S. 388 (1971). The Court in *Bivens* held that individuals whose constitutional rights are violated by federal agents have an implied right of action against said agents. However, the doctrine has been significantly restricted and sparingly applied in the years since.

94. *Zappone v. United States*, No. 3:15 CV 2135, 2016 U.S. Dist. LEXIS 113083, at *12–*13 (N.D. Ohio Aug. 24, 2016).

95. *Zappone*, 870 F.3d 551, 561 (6th Cir. 2017).

96. *Id.* (quoting *United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 Banco Espanol de Credito, Spain*, 295 F.3d 23, 25 (D.C. Cir. 2002)).

97. *Id.* (citing \$68,000, 927 F.2d 30, 34 (1st Cir. 1991)).

98. See *United States v. Certain Real Prop. Commonly Known as 4512 South Drexel Blvd. Chi., Ill.*, 381 F. Supp. 3d 1007 (E.D. Wis. 2018); *United States v. Approximately \$10,128,847.42 Seized from US Bank Account No. -5234, No. 1:18-CV-0279-SWS-MLC*, 2018 U.S. Dist. LEXIS 207350 (D.N.M. Dec. 3, 2018).

99. 326 F.3d 36, 40 (1st Cir. 2003) ("Because civil forfeiture is an *in rem* proceeding, the property subject to forfeiture is the defendant. Thus, defenses against the forfeiture can be brought only by third parties, who must intervene."). Bulger was a long-time Boston mob boss and criminal informant who disappeared in 1994, shortly before federal agents planned to unseal an indictment against him for racketeering. Upon his capture in 2011, Bulger was tried and convicted of numerous crimes, including eleven murders, and sentenced to two life terms. In 2018, he was murdered in prison. See Robert D. McFadden, *Whitey Bulger is Dead in Prison at 89; Long-Hunted Boston Mob Boss*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/obituaries/whitey-bulger-dead.html>.

2. United States v. \$4,480,466.16 in Funds Seized from Bank of America Account Ending in 2653

Throughout September and October 2017, law enforcement officials from United States Department of Veterans Affairs—as part of an ongoing effort in the decades-long fight against benefits fraud¹⁰⁰—obtained multiple seizure warrants for property and bank accounts belonging to Jon and Tess Davis, the owners of Retail Ready Career Center (“RRCC”) in Garland, Texas.¹⁰¹ RRCC was a for-profit vocational training center that hosted six-week HVAC certification programs, and the VA Inspector General had suspected for months that the company was in violation of the so-called “85-15 Rule.”¹⁰² As a result of an “aggressive sales pitch,” ninety percent of RRCC students were veterans, and in 2016 alone the company received \$28,858,494 in VA education benefits.¹⁰³ After federal agents executed the first seizure warrants against RRCC on September 20, the Texas Veterans Commission—the state agency responsible for accrediting educational and vocational programs that receive VA education benefits—revoked RRCC’s approval.¹⁰⁴ Shortly thereafter, RRCC closed its doors.¹⁰⁵

The seizures from RRCC included the contents of a Bank of America account containing \$4,480,466.16 (the named defendant); hundreds-of-thousands of dollars more spread across six accounts at Bank of America, Capital One, Charles Schwab, Wells Fargo, and the Bank of Utah; a 2014 Lamborghini Aventador; a 2016 Ferrari 488; a 2017 Bentley Continental GT V8; a 2017 Mercedes-Benz AMG S63; a 2016 Mercedes-Benz G63; a 2016 Dodge Ram 2500; a 2016 BMW Alpina; real property at 14888

100. See, e.g., David Whitman, *Report—The Cycle of Scandal at For-Profit Colleges, Truman, Eisenhower, and the First GI Bill Scandal*, THE CENTURY FOUND. (Jan. 24, 2017), <https://tcf.org/content/report/truman-eisenhower-first-gi-bill-scandal/>.

101. See Government’s Response to Motion for Immediate Release of Seized Property at PageID 417-20, *United States v. \$4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653*, No. 3:17-CV-2989-D, 2018 U.S. Dist. LEXIS 70180 (N.D. Tex. Dec. 26, 2017).

102. 38 C.F.R. § 21.4201(a). Initially codified in 1952, the 85-15 Rule holds that the VA may not disburse additional educational benefits to students in an approved program if more than eighty-five percent of the students already in the program are veterans receiving federal student aid.

103. Eva-Marie Ayala, *Hundreds of Veterans Scramble After Garland For-Profit College Closes*, DALL. MORNING NEWS (Sept. 28, 2017), <https://www.dallasnews.com/news/education/2017/09/28/hundreds-of-veterans-scramble-after-garland-for-profit-college-closes/>.

104. *Statement on Retail Ready Career Center Closure*, TEX. VETERANS COMM’N (Sept. 20, 2017), <https://www.tvc.texas.gov/statement-on-retail-ready-career-center-closure/>.

105. Noelle Walker, *Garland Vocational School Abruptly Closes Leaving Students and Staff Wondering Why*, NBC 5 DFW (Sept. 27, 2017), <https://www.nbcdfw.com/news/local/garland-vocational-school-abruptly-closes-leaving-students-and-staff-wondering-why/40653/>; Kevin Cokely, *Investigators Seize Millions in Assets from Vocational School Owner*, NBC 5 DFW (Nov. 2, 2017), <https://www.nbcdfw.com/news/local/investigators-seize-millions-in-assets-from-vocational-school-owner/45151/>.

Lake Forest Drive in Dallas, Texas; and real property at 195 North 200 West and 1408 West 2125 South in Logan, Utah—all belonging to Jon and Tess Davis personally or through incorporated entities.¹⁰⁶ Prosecutors alleged that in total, Jon and Tess Davis, through RRCC, received “more than \$67 million from the VA,” to which they were not entitled.¹⁰⁷

Citing an ongoing criminal investigation, the government asked the district court to stay the forfeiture proceedings¹⁰⁸ and also requested that the court dismiss RRCC’s counterclaims.¹⁰⁹ The district court denied the government’s motion to stay the proceedings but granted it leave to file a second amended complaint, setting in motion a timeline of separate legal proceedings that have yet to be concluded at the time of publication for this Note.¹¹⁰

RRCC’s two constitutional counterclaims alleged an unreasonable seizure in violation of the Fourth Amendment and a violation of Fifth Amendment due process rights. Its argument centered largely around the ideas that “as a matter of historical practice, an owner of arrested property can bring suit against the government in actions *in rem*,” and that counterclaims are permissible under the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.¹¹¹ Further, RRCC asserted that because the Fifth Circuit had never explicitly held *in rem* counterclaims to be impermissible and the First Circuit did not cite authority for its position on counterclaims in *\$68,000*, the government could point to no solid basis for its motion. Unpersuaded, the district court held that “absent binding Fifth Circuit authority to the contrary . . . as a claimant in an *in rem* civil forfeiture action, RRCC cannot bring a counterclaim.”¹¹²

After the district court entered a final judgment to dismiss RRCC’s counterclaims, RRCC appealed to the Fifth Circuit. Without addressing the categorical bar on *in rem* counterclaims, however, the court promptly affirmed the district court’s dismissal of the claims due to “a more fundamental reason”: the government had not waived sovereign

106. United States’ Third Amended Verified Complaint for Forfeiture at PageID 1299-1303, *United States v. \$4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653*, No. 3:17-CV-2989-D, 2018 U.S. Dist. LEXIS 70180 (N.D. Tex. Sept. 25, 2018); the basis for forfeiture included wire fraud, mail fraud, theft of government funds, and conspiracy to commit any specified unlawful activity.

107. *Id.* at PageID 1304.

108. A court may stay forfeiture proceedings if it “determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.” 18 U.S.C. § 981(g)(1).

109. *United States v. \$4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653*, No. 3:17-CV-2989-D, 2018 U.S. Dist. LEXIS 70180, at *2 (N.D. Tex. Aug. 28, 2018).

110. *Id.* at *22.

111. *Id.* at *19.

112. *Id.* at *21–22 (the court took advantage of the opportunity to point out that RRCC also did not cite binding authority for its counterclaim argument).

immunity, and the district court, therefore, lacked subject matter jurisdiction from the beginning.¹¹³ Although RRCC contended that the government's sovereign immunity had been waived under CAFRA's 2000 amendments to 28 U.S.C. § 2680(c)(1)–(4), the court held that such a waiver does not extend to constitutional torts.¹¹⁴ RRCC also attempted to argue that “simply by ‘initiat[ing] an *in rem* proceeding,’” the government waived sovereign immunity.¹¹⁵ The court labeled RRCC's argument “grandiose” and noted that such a precedent was only applicable “to admiralty cases allowing a limited cross-libel against the United States when the United States sues another vessel for collision damages.”¹¹⁶

In response to the Fifth Circuit's ruling, RRCC filed a petition for a panel rehearing which the court denied in November 2019. The opinion denying RRCC's request, however, contained something far less common than the cursory denial of a petition for panel rehearing: the court withdrew the opinion it had published only three months prior and substituted it with an opinion addressing *in rem* counterclaims—the very issue it had initially declined to review.¹¹⁷ For reasons that remain unclear, the same Fifth Circuit panel maintained its original position that RRCC's counterclaims were barred by sovereign immunity, but “declin[ed] to endorse” the position that *in rem* counterclaims against the government are categorically impermissible, thereby creating a circuit split:

[T]he fact that a forfeiture proceeding is “*in rem*, not *in personam*” does not determine a claimant's rights in the proceeding. The forfeiture rules allow a claimant to take numerous actions respecting the seized property, even though the proceeding is “*in rem*.” To begin with, a claimant may “file a claim” to protect his interests in the property. He may also file: (1) an answer to the government's complaint, Supp. Rule G(5)(b); (2) a Rule 12 motion, *id.*; (3) objections to government interrogatories, Supp. Rule G(6)(b); (4) a motion to suppress use of the seized property as evidence, Supp. Rule G(8)(a); and (5) a motion raising a defense under the Excessive Fines Clause of the Eighth Amendment, Supp. Rule G(8)(e). . . . And the civil forfeiture statute lets claimants do other things, such as: (1) raise and prove an “innocent owner” defense, 18 U.S.C. § 983(d); (2) move to set aside the forfeiture for lack of notice, *id.* § 983(e); and (3) seek immediate release of seized property, *id.* § 983(f). The point being: If a claimant can do all this in *in rem* forfeiture proceedings, it cannot be that he is barred from filing counterclaims simply because forfeitures are “*in*

113. *United States v. \$4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653*, 936 F.3d 233, 234 (5th Cir. 2019).

114. *Id.* at 237–38 (citing *Spotts v. United States*, 613 F.3d 559, 565 n.3 (5th Cir. 2010)).

115. *Id.* at 238.

116. *Id.* at 238–39.

117. *\$4,480,466.16*, 942 F.3d 655, 656 (5th Cir. 2019).

rem and not *in personam*.”¹¹⁸

While the court did make note of the practically identical nature of Rule 13 intervenors to claimants in a civil forfeiture proceeding (“[i]n \$68,000 itself, the First Circuit said Castiello ‘intervened as a claimant’”), it staked its argument primarily on the panoply of rights available to claimants, as well as longstanding practice in admiralty cases to allow cross-libels.¹¹⁹ The latter seemed especially persuasive to the court, because civil asset forfeiture is largely rooted in Anglo-American admiralty law and procedure in such cases is governed to this day by the same set of supplemental rules to the Federal Rules of Civil Procedure.¹²⁰ Ultimately, the court held that claimants should not be universally barred from filing counterclaims against the government in a forfeiture proceeding simply because the property, and not the claimant, is the defendant.¹²¹

III. DISCUSSION

When the Fifth Circuit “respectfully reject[ed] the First Circuit’s broad rationale for barring counterclaims in *in rem* civil forfeiture proceedings,” it cast doubt over a precedent that had been relied upon by federal courts across the nation for nearly three decades.¹²² The fact that a vast majority of civil forfeitures are uncontested,¹²³ coupled with the availability of additional remedies,¹²⁴ means that the question of *in rem* counterclaims rarely arises. However, the circuit split created by *\$4,480,466.16* has both procedural and substantive implications, and federal courts are now left to resolve irreconcilable holdings with little to no input from the Supreme Court or other circuits.

Part A of this Section explores the theory on which the First Circuit rested its unconditional bar on *in rem* counterclaims against the government, and illustrates why that theory is insufficient to address the matter at hand. Part B surveys the Fifth Circuit’s reasoning and concludes that the court employed a more comprehensive and effective means of analysis than the First Circuit. Finally, Part C argues that the modern application of *in rem* civil forfeiture has proliferated far beyond its intended uses, and thus, no longer serves the interests of justice.

118. *Id.* at 659–60.

119. *Id.* at 661. A cross-libel in admiralty is the functional equivalent of a counterclaim. *See Cross Libel*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010).

120. *\$4,480,466.16*, 942 F.3d at 661–63 (considering contextual clues in the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Actions, “it would seem anomalous to say that counterclaims are always out-of-bounds in *in rem* proceedings”).

121. *Id.* at 663.

122. *Id.* at 660.

123. *See* S. Poverty L. Ctr., *supra* note 29.

124. *See generally* *\$4,480,466.16*, 942 F.3d at 659–60.

A. The First Circuit's reliance solely on plain meaning interpretation failed to account for significant historical factors, thereby diminishing the reliability of its opinion.

The First Circuit in *\$68,000* deemed Castiello's attempted counterclaim "a nullity," and relied solely on a plain meaning interpretation to find an unconditional bar on *in rem* counterclaims against the government.¹²⁵ Likewise, *\$68,000*'s progeny have also failed to unearth binding precedent or provide substantial additional support for a blanket prohibition on counterclaims.¹²⁶ While a strict plain meaning interpretation may seem the most intuitive—after all, an inanimate object clearly lacks the agency necessary to initiate a counterclaim—it critically fails to take into account how the doctrine in question was shaped.

In the context of modern *in rem* civil forfeiture, it is insufficient to frame a counterclaim merely as "a turn-the-tables response directed by one party ('A') at another party ('B') in circumstances where 'B' has earlier lodged a claim in the same proceeding against 'A.'"¹²⁷ Apart from customs and tax violations, *in rem* forfeiture was useful in the early days of the Republic for seizing property when an owner was unknown or outside the reach of the court. Now, however, the government rarely finds occasion to seize active pirate ships and is more than capable of ascertaining the identity and whereabouts of a given property owner. Moreover, the First Circuit's remarks in *\$68,000* on *in rem* counterclaims took up just two paragraphs and could easily be construed as dicta.¹²⁸ Despite its shortcomings, however, the *\$68,000* rule was widely applied by courts across the country when addressing this issue.

An *in rem* claimant likely holds title to the property in question; to impose an unconditional bar on *in rem* counterclaims against the government risks elevating form over substance, and tramples on the rights of owners and claimants in the process. There is some scholarly support for the argument that by bringing an *in rem* civil forfeiture action, the government consents to potential counterclaims from owners because jurisdiction for the counterclaim itself is not *in rem*.¹²⁹ But even without

125. See *\$68,000*, 927 F.2d 30, 34 (1st Cir. 1991). Notably, the court also did not cite any judicial authorities to support its position.

126. See discussion, *supra* Part II.E.1.

127. *\$68,000*, 927 F.2d at 34.

128. See *\$4,480,466.16*, 942 F.3d at 660; *\$68,000*, 927 F.2d at 34.

129. See, e.g., 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, 695 (1991) ("Jurisdiction for the counterclaim is not *in rem* because *in rem* jurisdiction is asserted against property, not an individual. Therefore, the inference must be that when a plaintiff brings an *in rem* action, the plaintiff consents to *in personam* jurisdiction for counterclaims."). As was the case in *\$4,480,466.16*, the government may still be able to validly invoke sovereign immunity, but the waivable nature of sovereign

a general rule of consent, a pure plain meaning interpretation with no precedential support is unable to stand on its own.

B. The Fifth Circuit's normative interpretation is a more accurate reflection of both historical precedent and the current legal realities.

In addressing the question of whether counterclaims against the government are permissible in *in rem* civil forfeiture cases, the Fifth Circuit took a more comprehensive approach that considered existing legal precedent and historical context, in addition to plain meaning. While the First Circuit's interpretation was certainly neither unreasonable nor illogical, the Fifth Circuit took exception to it on three main grounds: (1) the procedural rules governing forfeiture actions provide a claimant with a plethora of options, and this fact "sits uneasily with the notion that a claimant can never bring counterclaims in those proceedings"; (2) the strong similarities between intervenors and claimants would seem to contravene "a blanket rule barring claimants' counterclaims in forfeiture proceedings"; and (3) admiralty law has "long entertained counterclaims (or their equivalents) in *in rem* proceedings."¹³⁰

The first prong of the Fifth Circuit's analysis rested on the notion that "the answer to this puzzle does not lie in the brute fact that, in a forfeiture proceeding, '[t]he property is the defendant.'"¹³¹ Rather, the court outlined five uncontested mechanisms by which claimants can assert their interests in a civil forfeiture proceeding, and alluded to the possibility that a claimant's best option to preserve a property interest may well lie in a counterclaim.¹³² Perhaps more substantively, the court identified striking similarities between a claimant who intervenes and one who attempts to file a counterclaim. Examining the fact that "[u]nder federal law, an intervenor of right is treated as he were an original party and has equal standing with the original parties,"¹³³ the court found nothing in "the kinship between 'claimants' and 'intervenors'" to support an unconditional bar on counterclaims.¹³⁴

Most compelling from a procedural perspective, however, is the final prong of the court's analysis: "adopting the First Circuit's reasoning in *\$68,000* would conflict with practice in admiralty cases," to which civil

immunity also means that it alone cannot be seen to impose a uniform bar on counterclaims against the government.

130. *\$4,480,466.16*, 942 F.3d at 660–61.

131. *Id.* at 660 (quoting *\$68,000*, 927 F.2d at 34).

132. *Id.*

133. *Id.* (quoting *Brown v. Demco*, 792 F.2d 478, 480–81 (5th Cir. 1986)) (internal quotations omitted).

134. *Id.* at 660–61.

asset forfeiture is still strongly linked.¹³⁵ Although the court looked only to *in rem* actions filed by private parties against the property of other private parties (providing a differentiating factor to actions that the government has initiated), it nevertheless clearly rebutted the First Circuit's blanket prohibition. The Fifth Circuit also cited a case in which the government itself "intervened in [a] plaintiffs' *in rem* action as a party defendant and filed a counterclaim asserting a property right [to a disputed seventeenth-century shipwreck off the Florida coast]."¹³⁶

The 2000 Advisory Committee Note for the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Action, while not explicitly addressing the permissibility of *in rem* counterclaims, also clarifies that plaintiffs are required to put up security against any counterclaim in an *in rem* action "when the counterclaim is asserted by a person who has given security to respond in damages in the original action."¹³⁷ If *in rem* counterclaims were not permissible, one would be hard-pressed to find a reason for the Advisory Committee's clarification, or indeed, the very presence of a requirement to put up security against a counterclaim in the first place.¹³⁸

Until now, courts have accepted the government's formalistic analysis that claimants are not only *not defendants*, but also *not full parties* to *in rem* civil forfeiture actions. Putting aside for a moment that such an analysis does not comport with the history discussed above, it potentially leaves owners and claimants without a course of action that suitably guarantees their rights.¹³⁹ Therefore, it seems clear that the Fifth Circuit's reasoning in *\$4,480,466.16* was correct and should be adopted by lower courts and sister circuits, unless or until the Supreme Court takes up the matter or Congress significantly amends the relevant statutes.

C. Modern legal realities necessitate a renewed examination of the procedure governing in rem claims.

Three interconnected explanations illustrate why *in rem* counterclaims

135. *Id.* at 661; *accord supra* note 122.

136. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, Her Tackle, Armament, Apparel and Cargo Located Within 2500 Yards of a Point at Coordinates 24.31.5' North Latitude and 82.50 West Longitude*, 569 F.2d 330, 335 (5th Cir. 1978).

137. FED. R. CIV. P. SUPP. R. E(7)(a) advisory committee's note to 2000 amendment.

138. To be clear, counterclaims may still be barred for other reasons.

139. *See, e.g., Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 5 (1999) (statement of Sen. Patrick J. Leahy) ("We put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. And if the citizen proves inept in proving his innocence, in effect, the government may keep the property without ever having to justify or explain its actions.").

against the government continue to command so little attention: (1) until the latter part of the twentieth century, *in rem* civil forfeiture remained a mechanism that was fairly limited in scope and application;¹⁴⁰ (2) since *in rem* civil forfeitures are overwhelmingly uncontested,¹⁴¹ there is little opportunity for disputes to rise through the court system; and (3) because the First Circuit's \$68,000 precedent stood alone for decades and *in rem* civil forfeiture procedures allow a claimant to take any number of actions aside from a counterclaim (as the Fifth Circuit explained in \$4,480,466.16), claimants may have consistently deemed it more prudent to undertake an alternative legal strategy.

If, however, "proceedings *in rem* are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding,"¹⁴² it then seems reasonable to assume that *in rem* civil forfeiture cannot stand as it currently is while also respecting procedural rights. The government possesses a great deal of power when it initiates *in rem* civil forfeiture actions, and the \$68,000 rule does not provide suitable remedies for owners or claimants.

IV. CONCLUSION

Although an admittedly miniscule component of the larger public debate over asset forfeiture, the question of whether counterclaims against the government are permissible in federal *in rem* civil forfeiture actions is more than an exercise in semantics. The lines between *in rem* and *in personam* jurisdiction have been sufficiently blurred to the point that Congress must seriously consider a comprehensive restructuring of civil forfeiture law that establishes clear safeguards based on modern realities. The present circuit split is but one result of a failed system that has proliferated far beyond its mandate and no longer adequately serves the purposes it was intended to serve.

140. See, e.g., discussion *supra* Part II.C.

141. See *supra* note 29; see also Michael van den Berg, *Proposing a Transactional Approach to Civil Asset Forfeiture*, 163 U. PA. L. REV. 867, 893 (2015) ("[M]ost [mid- to low-value chattel] are not economically valuable enough to merit a defense, absent a blanket right to counsel.").

142. CASSELLA, *supra* note 23, at 34.