Fordham Law Review

Volume 59 | Issue 4 Article 7

1991

Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of the Res

Paul S. Grossman

APPELLATE JURISDICTION FOR CIVIL FORFEITURE: THE CASE FOR THE CONTINUATION OF JURISDICTION BEYOND THE RELEASE OF THE RES

INTRODUCTION

For those unfamiliar with it, forfeiture[1] can be among the most confusing areas of the law.[2] Part of this confusion results from the government's use of two types of forfeiture. In one type, the criminal forfeiture action, the forfeiture is a sanction imposed after a felony conviction,[3] and therefore the action is in personam.[4] The second type of forfeiture action, civil forfeiture, is in rem—property, rather than a person, is considered to be the offending thing.[5] This Note will focus only on civil forfeiture actions.[6]

---

1. Forfeiture is defined as "the divestiture without compensation of property used in a manner contrary to the law of the sovereign." Asset Forfeiture Office, U.S. Dep't of Justice, Vol. 1, Asset Forfeiture: Law, Practice and Policy 1 (1988) [hereinafter Asset Forfeiture].

2. *See* Valukas & Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, 14 Litigation 31, 31 (1988).

3. *See* Asset Forfeiture, *supra* note 1, at 2-3; 37 C.J.S. *Forfeitures* § 1 (1943). Criminal forfeiture empowers the judge to locate and confiscate the profits and instruments of the crime when sentencing the defendant. *See* Asset Forfeiture, *supra* note 1, at Preface. Criminal forfeiture has not become widespread in this country. *See* Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 17-18 (1987). In response to the increasing problem of organized crime, however, in 1984 Congress established criminal forfeiture as a penalty for RICO violations. *See* Cloud, *supra*, at 15-16.

4. *See* United States v. Kramer, 912 F.2d 1257, 1260 (11th Cir. 1990); United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343, 346 (6th Cir. 1990); *see also* Goldsmith & Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 Duke L.J. 1254, 1254 (discussing criminal statutes authorizing forfeiture as a criminal sanction); Asset Forfeiture, *supra* note 1, at Preface ("criminal forfeiture . . . focuses on the individual committing the crime"); 37 C.J.S. *Forfeitures* § 2 (1943) (at common law, criminal forfeiture did not attach in rem but was a consequence of conviction).

5. *See, e.g.*, Day v. Micou, 85 U.S. 156, 162 (1873) ("[T]he thing condemned is considered as the offender . . . ."); The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827) ("The thing is here primarily considered as the offender . . . ."); United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 571 (7th Cir. 1987) ("[A]n in rem case . . . is . . . a case nominally against a thing . . . ."); United States v. 3 Unlabeled 25-Pound Bags Dried Mushrooms, 157 F.2d 722, 723 (7th Cir. 1946) ("The goods stand to answer."); Asset Forfeiture, *supra* note 1, at Preface (civil forfeiture "focuses on . . . the 'guilty' property . . . ."); Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 Colum. L. Rev. 390, 391 (1988) (in rem forfeiture is aimed at the property) [hereinafter Note, *Constitutional Rights*].

6. The issue involved in this Note, the continuation of jurisdiction after the disposition of the forfeited property, involves only civil forfeiture actions because criminal forfeiture actions are in personam and the location of the property is thus irrelevant.

Civil forfeiture proceedings are separate and independent from any criminal trial. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-84 (1974); Asset Forfeiture, *supra* note 1, at 3; Comment, *Civil Forfeiture and Innocent Third Parties*, 3 N. Ill. L. Rev. 323, 325 (1983) [hereinafter Comment, *Innocent Third Parties*]. In general, civil forfeiture proceedings are treated as civil

After a civil forfeiture hearing, as in every in rem proceeding, the property is not immediately transferred to the prevailing party. Rather, after the district court issues a judgment, there is an automatic stay for ten days.[7] During this period, the loser in the district court may move to stay the judgment or file a supersedeas bond[8] with the appellate court. Either of these actions will prevent the court from transferring the property to the government until an appeal can be heard.[9] If the losing party has not taken either of these actions and the ten-day stay has expired, the court may transfer the property to the government.[10] The court is not required to notify the losing party before the property is actually transferred.[11]

When the government prevails in the district court, the claimant fails

---

actions, and the burden is upon the government to prove by a preponderance of the evidence that the property has been used for illegal purposes. *See* 28 U.S.C. § 2461(a) (1988); Asset Forfeiture, *supra* note 1, at 3. The placement of the burden of proof in civil forfeiture actions is considered more fully *infra* notes 45-49 and accompanying text.

A court may carry out a civil forfeiture only when the court is authorized to do so by statute. *See* Asset Forfeiture, *supra* note 1, at 1. Currently, there are over 100 federal statutes that provide for civil forfeiture. *See, e.g.*, 15 U.S.C. § 11 (1988) (property subject to antitrust laws in interstate commerce); 15 U.S.C. § 1177 (1988) (property used in connection with illegal gambling); 16 U.S.C. §§ 65, 128, 171, 256(c) (1988) (guns and other equipment used unlawfully in national parks); 19 U.S.C. § 1594 (1988) (property used in violation of the customs laws); 21 U.S.C. § 334(a)(1) (1988) ("adulterated or misbranded" food, drugs or cosmetics); 21 U.S.C. § 881 (1988) (property used for transportation and sale of illegal substances). For a complete list of the current statutes that provide for civil forfeiture, see Asset Forfeiture Office, U.S. Dep't of Justice, Asset Forfeiture: Compilation of Civil Statutes.

The three essential elements of an in rem proceeding are the presence of the res in the jurisdiction, seizure of the res and an opportunity for the owner or claimant to be heard. *See* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 272 (1917); *see also* United States v. 66 Pieces of Jade and Gold Jewelry, 760 F.2d 970, 972-73 (9th Cir. 1985) (jurisdiction is defeated when res is removed from control of court); Alyeska Pipeline Serv. Co. v. Vessel Bay Ridge, 703 F.2d 381, 384 (9th Cir. 1983) (without seizure of the property, there can be no in rem jurisdiction), *cert. dismissed*, 467 U.S. 1247 (1984); Bank of New Orleans & Trust Co. v. Marine Credit Corp., 583 F.2d 1063, 1067-68 (8th Cir. 1978) (jurisdiction is defeated when res is removed from control of court).

7. *See* Fed. R. Civ. P. 62(a). Federal rule 62(a), in relevant part, reads: "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry."

8. A supersedeas bond is a "bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful." Black's Law Dictionary 1438 (6th Ed. 1990). Application for a supersedeas bond is made to the district court. *See* Fed. R. App. P. 8(a). The stay is not effective until approved by the court. *See* Fed. R. Civ. P. 62(d). If, however, the district court fails to approve the supersedeas bond, or application to the district court was "not practicable," application may be made to the circuit court. *See* Fed. R. App. P. 8(a).

9. *See* Fed. R. Civ. P. 62(d). Federal Rule 62(d), in pertinent part, reads: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be."

10. *See* United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1574 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988).

11. *See* United States v. $79,000 in United States Currency, 801 F.2d 738, 740 (5th Cir. 1986).

to post a supersedeas bond or file a motion to stay the judgment within the ten-day period, the district court releases the property and the claimant still wishes to appeal, a controversy ensues. A number of courts have refused to hear a forfeiture appeal after the property has been transferred to the government because the release of the res terminates in rem jurisdiction.[12] Recently, however, two courts have decided to hear the appeal.[13] While these courts continued the tradition of treating forfeiture as actions in rem,[14] they have held that they have personal jurisdiction for the purposes of the appeal.[15] This Note discusses the policy arguments that support both positions in the controversy.

Part I of this Note traces the history of civil forfeiture actions, explaining the origins of the rule that forfeitures are in rem. This background is necessary to determine whether this rule should be continued. Part II discusses the policies that support the continued use of in rem jurisdiction for civil forfeiture. Part III examines the controversy surrounding the "no res, no case" rule.[16] Part IV suggests the possibility of creating an exception to the "no res, no case" rule to cover forfeiture actions. Part V analyzes the position of the courts that have asserted in personam jurisdiction over the government in order to hear the appeal. This Note concludes that an additional exception to the "no res, no case" rule should be created to grant courts jurisdiction after the res has been removed from the court's control. Alternatively, this Note argues that courts should exercise in personam jurisdiction over the government. Either of these actions would ensure that forfeiture disputes are decided correctly and justly.

I. THE HISTORY OF IN REM FORFEITURE

A. *Deodands and Forfeiture in England*

In rem forfeiture is descended from the English concept of *deodands*.[17]

12. *See One Lear Jet Aircraft*, 836 F.2d at 1574; *$79,000 in United States Currency*, 801 F.2d at 739; United States v. $57,480.05 United States Currency, 722 F.2d 1457, 1458-59 (9th Cir. 1984).

13. *See* United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990); United States v. Aiello, 912 F.2d 4, 6 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

14. The concept that the action is against the property, not the owner of the property, is referred to in this Note as the "in rem rule," not to be confused with the "no res, no case" rule. *See infra* note 16.

15. *See Aiello*, 912 F.2d at 6-7; *$95,945.18, United States Currency*, 913 F.2d at 1109.

16. The rule that the release of the res destroys in rem jurisdiction is referred to in this Note as the "no res, no case" rule. This term is from United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 571 (7th Cir. 1987).

17. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974); O. Holmes, The Common Law 23 (M. Howe ed. 1963); Comment, *Innocent Third Parties*, *supra* note 6, at 326-27. *Deodands*, in turn, have their origin in "the confluence and merger of two traditions, the biblical and pre-Christian ones." Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169, 181 (1973). According to Justice

Under this concept, the value of an object that caused the death of a person was forfeited to the King.[18] This procedure differs from forfeiture because forfeiture requires the relinquishment of the offending[19] object itself.[20] Like forfeiture, however, the proceeding was brought in rem and the object was considered to be the guilty party.[21] The English Parliament abolished the institution of *deodands* in 1846,[22] largely because the system was thought to be irrational.[23] After the abolition of *deodands*, the concept of civil forfeiture developed from a confluence of the *deodand* tradition and the belief that a wrongdoer could be denied its property.[24]

In addition to *deodands*, early English common law provided for the forfeiture of property upon conviction of a felony or of treason.[25] These actions were in personam, and as such, were dependent upon and incident to a criminal conviction.[26] Courts justified these forfeitures on the theory that a breach of the King's peace was cause to deny the defendant the right to own property.[27]

B. *Forfeiture in the United States*

The institution of *deodands* was never established in the United

---

Brennan, the biblical origins are found in Exodus 21:28, which reads: "If an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten." *See Pearson Yacht Leasing Co.*, 416 U.S. at 681 n.17. The pre-Christian origins are found in Anglo-Saxon, Roman and African tribal law. *See* Finkelstein, *supra*, at 181-82.

18. *See* O. Holmes, *supra* note 17, at 23; Comment, *Innocent Third Parties*, *supra* note 6, at 327. The justification for forfeiting the value of the property to the King was the belief that the King would use the money to provide for masses to be said for the dead person's soul. *See Pearson Yacht Leasing Co.*, 416 U.S. at 681; Comment, *Innocent Third Parties*, *supra* note 6, at 327. When the King ceased using the money for religious purposes, the justification for payment to the King was that *deodands* were a penalty for carelessness. *See Pearson Yacht Leasing Co.*, 416 U.S. at 681; O. Holmes, *supra* note 17, at 24.

19. For the purposes of *deodand*, the object is "offending" only in the sense that it caused, or was part of the cause, of the death of a person. For example, if a man or woman suffered a fatal fall from a tree, the value of the tree was paid to the King as a *deodand*. *See* O. Holmes, *supra* note 17, at 23.

20. *See supra* note 1.

21. *See* Comment, *Innocent Third Parties*, *supra* note 6, at 327.

22. *See id.* at 328; Finkelstein, *supra* note 17, at 170.

23. *See* Finkelstein, *supra* note 17, at 171. Lord Campbell, the individual who first proposed the abolition of *deodands* remarked, "the wonder was that a law so extremely absurd and inconvenient should have remained in force down to the middle of the nineteenth century . . . ." *Id.* (quoting 77 Hansard, Parliamentary Debates, 1031 (1845)).

Professor Finkelstein theorizes that Parliament abolished *deodands* in 1846 due to the effects of modern transportation. When motorized traffic increased, accidental death became a frequent occurrence. *See id.* at 171-73. Consequently, about the same time as Parliament abolished *deodands*, Parliament passed a bill that would more adequately compensate the families of accident victims. *See id.*

24. *See* Comment, *Innocent Third Parties*, *supra* note 6, at 329 n.37.

25. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974); Comment, *Innocent Third Parties*, *supra* note 6, at 328; 37 C.J.S. *Forfeitures* § 3 (1943).

26. *See Pearson Yacht Leasing Co.*, 416 U.S. at 682.

27. *See id.*

States.[28] The concept of forfeiture, however, has been accepted in this country for a considerable time.[29] Among the first civil forfeiture laws were ones that required the forfeiture of those ships that delivered slaves from foreign countries.[30]

The Supreme Court has, from time to time, considered issues involving civil forfeiture.[31] In *The Palmyra*,[32] the Supreme Court concluded that a pirate ship could be forfeited even though the ship's owners were neither charged with nor convicted of piracy.[33] The Supreme Court has also held that evidence obtained in violation of the fourth[34] and fifth[35] amendments may not be used in forfeiture proceedings. In perhaps the most important modern forfeiture case, *Calero-Toledo v. Pearson Yacht Leasing Co.*,[36] the Supreme Court held that due process does not require the government to hold a hearing, nor to give notice, before seizing property pursuant to forfeiture statutes.[37]

II. THE POLICIES SUPPORTING IN REM CIVIL FORFEITURE

The concept of government-initiated action against specific property, rather than against an individual, still exists. There are at least two possible justifications for continuing the practice of civil forfeiture directly against property: the admiralty justification and the crime-control justification.

A. *The Admiralty Justification*

The in rem rule originated in admiralty law.[38] The rule allowed those injured by a ship to seek redress against the ship, rather than against the ship's owner, because the ship's owner often was in a foreign land and thus not subject to the jurisdiction of the United States.[39]

---

28. *See id.*

29. During the American Revolution, the colonies passed laws that required forfeiture of the estate of any individual convicted of loyalty to the King of England. *See* 37 C.J.S. *Forfeitures* § 3. Because these forfeitures were the result of a conviction for loyalty to the King, they were criminal forfeitures that attached in personam.

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

31. *See, e.g., id.* at 679 (no requirement for pre-seizure notice or hearing); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 698-99 (1965) (application of fourth amendment to civil forfeiture); Boyd v. United States, 116 U.S. 616, 633-34 (1886) (application of fourth and fifth amendments to civil forfeiture); The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (forfeiture of party's property without conviction of party).

32. 25 U.S. (12 Wheat.) 1 (1827). *The Palmyra* was the first Supreme Court case to consider in rem forfeiture. *See* Comment, *Innocent Third Parties*, *supra* note 6, at 329-30.

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

34. *See One 1958 Plymouth Sedan*, 380 U.S. at 698.

35. *See* Boyd v. United States, 116 U.S. 616, 633-34 (1886).

36. 416 U.S. 663 (1974).

37. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1974).

38. *See* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 21-23 (1960); Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 333-34 (5th Cir. 1978); Asset Forfeiture, *supra* note 1, at Preface.

39. *See Continental Grain Co.*, 364 U.S. at 23; *Treasure Salvors*, 569 F.2d at 334; O.

This justification continues to have some force today. Arguably, in rem forfeiture allows the United States government to punish foreign criminals much the same way that in rem admiralty actions allowed courts to compensate Americans injured by foreigners. For example, civil forfeiture is a particularly effective weapon against today's international drug trade.[40] The United States government could seize property used in the drug trade that belonged to Colombian drug traffickers, even though it might lack jurisdiction actually to arrest the drug traffickers.[41]

B. *The Crime-Control Justification*

Another argument for the continuation of in rem jurisdiction in forfeiture proceedings is that the threat of imprisonment is not enough to prevent crime. Forfeiture directed against the property efficiently removes the profit from crime.[42] Civil forfeiture aids in the battle against crime through two of its most important characteristics: its lower burden of proof and its in rem nature.[43]

Civil forfeiture proceedings are separate from criminal trials.[44] They generally are treated as civil actions requiring the government to prove by a preponderance of the evidence that the property has been used for some illegal purpose.[45] Some statutes specifically authorize the use of the

---

Holmes, *supra* note 17, at 26. Oliver Wendell Holmes asserted that this justification simply masked the real reason that courts allowed actions against a ship, which is the personification of ships in every day thought. *Id.* at 24-29.

40. For a discussion of the advantages the government gains in civil forfeiture proceedings by the lesser burden of proof, see *infra* notes 45-49 and accompanying text.

41. In this hypothetical scenario, the government would proceed under 21 U.S.C. § 881(a)(6) (1988). *See supra* note 6. The customs law, 19 U.S.C. § 1594 (1988), provides another instance where the admiralty justification would support the continued use of in rem forfeiture. It is quite probable that a large number of items shipped in violation of customs laws are sent by foreign corporations or foreign individuals who are not subject to the personal jurisdiction of United States Courts.

42. *See* Asset Forfeiture, *supra* note 1, at Preface.

43. The lower burden of proof and the in rem nature of civil forfeiture are not the only advantages the government gains through the use of civil forfeiture. Civil forfeiture also gives the government access to civil discovery devices, requires the claimant to establish standing to contest the forfeiture and denies the claimant eighth amendment protection from excessively high penalties. *See* Goldsmith & Linderman, *supra* note 4, at 1263 n.36 & n.37. Moreover, the government may proceed administratively in civil forfeiture actions for under $100,000, and an innocent verdict in a prior criminal proceeding concerning the same events is not binding on the civil court. *See id.* at 1263 n.37.

44. In fact, the government need not even pursue a criminal conviction. *See* Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 Fordham L. Rev. 471, 473 (1989) [hereinafter Note, *The Innocent Owner Defense*]; *supra* note 4 and authorities cited therein; *see also* United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1107 (4th Cir. 1990) (neither state nor federal government prosecuted the claimant for participating in drug transaction).

45. *See* 28 U.S.C. § 2461(a) (1988). 28 U.S.C. § 2461(a) reads, in relevant part: "Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action." In addition, the statute provides that forfeiture proceed-

customs law procedure,[46] requiring the government to show even less than in a civil trial—the government need only establish probable cause that the property was used in violation of the law. This showing then shifts the burden of proof to the party claiming the property.[47] In either case, the burden of proof is significantly less than in a criminal trial.[48] Because cases often "turn on the burden of proof," this lesser burden gives the government a large advantage.[49]

In rem forfeiture is more efficient in the battle against crime than in personam forfeiture because in rem forfeiture is not dependent upon a conviction of the individual.[50] If the government can prove that the property has been used for the advancement of crime, it need not show who used this property. Also, the government will succeed if it "can establish probable cause by showing a nexus between the property in question and the [criminal] activity, [even if] the government [cannot] connect the property to a specific [criminal] transaction."[51] Thus, law enforcement authorities are presented with a useful, efficient tool against crime.

Because civil forfeiture is such an effective weapon against crime, some courts and commentators have urged that criminal procedural safeguards be applied in civil forfeiture actions.[52] Other courts, however, continue to view the actions as primarily against property and refuse to treat civil forfeiture differently than private-party in rem proceedings.[53]

---

ings "shall conform as near as may be to proceedings in admiralty." 28 U.S.C. § 2461(b) (1988).

46. *See, e.g.*, 16 U.S.C. § 3374(a)(2) (1988) (forfeiture of instruments used to illegally transport fish and wildlife); 17 U.S.C. § 509(b) (1988) (forfeiture of records produced in violation of copyright laws); 18 U.S.C. § 512(b)(1) (1988) (forfeiture of motor vehicles that have had their identification numbers altered); 21 U.S.C. § 881(d) (1988) (forfeiture of controlled substances).

47. *See* 19 U.S.C. § 1615 (1988). This section reads: "[I]n all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, . . . the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court . . . ." (emphasis in original).

48. *See* Note, *The Innocent Owner Defense*, *supra* note 44, at 474.

49. Goldsmith & Linderman, *supra* note 4, at 1261 n.31.

50. *See supra* notes 4 & 44 and authorities cited therein.

51. Note, *Shouldn't the Punishment Fit the Crime?*, 55 Brooklyn L. Rev. 417, 419 (1989) [hereinafter Note, *Shouldn't the Punishment Fit the Crime*].

52. *See, e.g.*, United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1109-10 (4th Cir. 1990) (refusing to end jurisdiction by applying "no res, no case" rule because civil forfeiture gives government a large advantage); United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1578 (11th Cir.) (en banc) (Vance, J., dissenting) (same), *cert. denied*, 487 U.S. 1204 (1988); Note, *Shouldn't the Punishment Fit the Crime*, *supra* note 51, at 437-38 (arguing that eighth amendment should be applied to civil forfeiture).

53. *Cf. One Lear Jet Aircraft*, 836 F.2d at 1573-74 (deciding forfeiture jurisdiction question on basis of previous decisions in private-party in rem proceedings); United States v. $79,000 in United States Currency, 801 F.2d 738, 739-40 (5th Cir. 1986) (same).

III. THE APPELLATE JURISDICTION CONTROVERSY

A. *"No Res, No Case"*

Conceptually, civil forfeiture is an action against the property of an individual instead of directly against the individual. Accordingly, the rule in a forfeiture proceeding that removal of the seized property from the court's control results in a loss of jurisdiction by the appellate court has wide acceptance.[54]

Among the courts that have refused to hear an appeal on this ground, the leading case is *United States v. One Lear Jet Aircraft*.[55] *One Lear Jet Aircraft* involved a civil forfeiture proceeding against an airplane used by persons who had made material misrepresentations on their visas.[56] Leybda Corporation intervened as a claimant, and after a trial, the district court concluded that the plane should be forfeited.[57] During the automatic ten-day stay, Leybda took no action.[58] Once the automatic stay expired, the government moved the plane to a warehouse outside the appellate court's jurisdiction.[59] The Court of Appeals for the Eleventh Circuit, sitting en banc, concluded that it lacked jurisdiction to hear Leybda's appeal.[60]

The court reasoned that "[t]he general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res*."[61] Because the plane was properly removed from the jurisdiction,[62] the court no longer had control of the plane, destroying in rem jurisdiction.[63] The court reasoned that because in rem jurisdiction was

54. *See* United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1574-75 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988); United States v. $79,000 in United States Currency, 801 F.2d 738, 739 (5th Cir. 1986); United States v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 717 (7th Cir. 1985); United States v. 66 Pieces of Jade and Gold Jewelry, 760 F.2d 970, 972-73 (9th Cir. 1985); Bank of New Orleans & Trust Co. v. Marine Credit Corp., 583 F.2d 1063, 1067-68 (8th Cir. 1978).

55. 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988).

56. *See One Lear Jet Aircraft*, 836 F.2d at 1573.

57. *See id.*

58. *See id.* During the automatic stay period, Leybda could have filed a motion to stay the judgment or filed a supersedeas bond with the appellate court. *See supra* notes 7-9 and accompanying text. Leybda, however, may not have had sufficient funds for a bond. *See One Lear Jet Aircraft*, 836 F.2d at 1574 n.1.

59. *See id.* at 1574. The government took the plane from the control of the district court in the Southern District of Florida, which is in the Eleventh Circuit, and moved it to a warehouse in Missouri, which is in the Fifth Circuit. *See id* at 1573.

60. *See id.* at 1573. The case actually has a more complicated procedural history. Originally, a panel of the Eleventh Circuit Court of Appeals concluded that it had jurisdiction and heard the appeal. The panel affirmed the judgment of forfeiture. *See* United States v. One Lear Jet Aircraft, 808 F.2d 765, 767 (11th Cir. 1987). The full court then vacated this opinion and ordered en banc consideration of the jurisdictional issue. *See* United States v. One Lear Jet Aircraft, 831 F.2d 221, 221 (11th Cir. 1987).

61. *One Lear Jet Aircraft*, 836 F.2d at 1573.

62. The Supreme Court has created an exception to the "no res, no case" rule that allows for the continuation of jurisdiction when the res is improperly removed. *See infra* notes 102-105 and accompanying text.

63. *See One Lear Jet Aircraft*, 836 F.2d at 1574.

no longer available, it could hear the appeal only if it had in personam jurisdiction over the claimant.[64]

The court examined 28 U.S.C. sections 1345[65] and 1355,[66] which grant original jurisdiction for forfeiture cases to the district court. The court concluded that these statutes conferred upon the district court only subject matter jurisdiction and were not meant to change the traditional "no res, no case" rule.[67] The court rejected the claim that the government, simply by bringing the action, consented to in personam jurisdiction.[68] The court reasoned that "[t]o hold that the government 'consented' to *in personam* jurisdiction would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding. This does not comport with the traditional analysis of *in rem* jurisdiction."[69] Finally, the court distinguished this case from a binding Fifth Circuit case, *Inland Credit Corp. v. M/T Bow Egret*,[70] that had held a claimant consented to in personam jurisdiction when he appealed a lower court decision that was brought both in personam and in rem.[71]

The court in *One Lear Jet Aircraft* reasoned that denying jurisdiction

64. *See id.* at 1574-75.

65. 28 U.S.C. § 1345 (1988) reads: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

66. 28 U.S.C. § 1355 (1988) reads: "The district court shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title."

67. *See*, United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1575 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988). The court reached this conclusion by examining the legislative history of 19 U.S.C. § 1605, a part of the customs law. The legislative history of this section, which allows property, usually perishable goods, to be stored outside the jurisdiction with no effect on jurisdiction, said the section was necessary to change the in rem rule that requires the court to have control of the res. *See id.* Because 28 U.S.C. sections 1345 and 1355 existed when Congress passed 19 U.S.C. section 1605, the court reasoned that this part of 19 U.S.C. section 1605 would have been unnecessary had Congress intended to change the in rem rule by enacting sections 1345 and 1355. *See id.*

68. *See id.* at 1576.

69. *Id.* at 1577.

70. 552 F.2d 1148 (5th Cir. 1977). Because the Eleventh Circuit was created by dividing the Fifth Circuit, cases decided by the Fifth Circuit prior to 1981 are binding on the Eleventh Circuit. *See* The Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

71. *See* United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1576 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988). The court distinguished this case by claiming that *Inland Credit* held that a party to an in rem action consents to in personam jurisdiction when he appeals a decision that is both in rem and in personam. Because this case did not present "an interface of in rem and in personam jurisdiction," the action by the government did not amount to consent to in personam jurisdiction. *See One Lear Jet Aircraft*, 836 F.2d at 1576 (citing *Inland Credit*, 552 F.2d at 1152). For a discussion of *Inland Credit* as an exception to the "no res, no case" rule, see note 108 and accompanying text.

was fair because various procedural safeguards, such as a supersedeas bond and a motion to stay the judgment, should prevent a claimant who seeks an appeal from being denied that opportunity.[72] Moreover, the court claimed, this holding is less strict and, therefore, more fair than holdings of other courts that have placed an affirmative duty upon a claimant to seek a bond or to move to stay when filing an appeal.[73]

Most courts that have supported this view do not examine the issue in as much detail as the court in *One Lear Jet Aircraft*. Rather, the other courts that have supported the traditional rule that the presence of the res is required throughout the litigation have generally done so by merely indicating the existence of the general rule with little or no discussion.[74]

---

72. *See One Lear Jet Aircraft*, 836 F.2d at 1573-74. The court disputed the dissent's claim that Leybda could not afford the supersedeas bond. *See id.* at 1574 n.1.

73. *One Lear Jet Aircraft*, 836 F.2d at 1574. The court listed Bank of New Orleans v. Marine Credit Corp., 583 F.2d 1063, 1068 (8th Cir. 1978), and United States v. $57,480.05 United States Currency, 722 F.2d 1457, 1458-59 (9th Cir. 1984), as cases that have imposed such a duty upon losing claimants. *See id.*

74. *See* United States v. $79,000 in United States Currency, 801 F.2d 738, 739 (5th Cir. 1986); United States v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716-17 (7th Cir. 1985).

The Ninth Circuit adopted the "no res, no case" rule and then proceeded to find other impediments to jurisdiction. In United States v. $57,480.05 United States Currency, 722 F.2d 1457, 1458-59 (9th Cir. 1984), for example, the forfeiture had been executed and the funds had been paid to the United States Treasury. *See id.* at 1458. The court found that under these circumstances, aside from the "no res, no case" rule, there were two additional impediments to jurisdiction. First, a judgment for the claimant would require "an impermissible payment of public funds not appropriated by Congress." *Id.* at 1459. These payments would not be allowable due to the Constitution's appropriations clause. *See* U.S. Const. art. I, § 9, cl. 7. Second, the court found that "[e]nforcing a constructive trust on the Government would violate sovereign immunity in the absence of statutes or regulations clearly establishing fiduciary obligations." *$57,480.05 United States Currency*, 722 F.2d at 1459.

In United States v. $10,000 in United States Currency, 860 F.2d 1511 (9th Cir. 1988), the Ninth Circuit Court of Appeals seemed to move away from the holding in *$57,480.05 United States Currency*. The court asserted that the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (1988), gives district courts the right to hear any case against the United States for $10,000 or less when the claim is based upon an act of Congress. Further, the court argued, any claim asserting a wrongful forfeiture is a claim under the Little Tucker Act. *See $10,000 in United States Currency*, 860 F.2d at 1514. As for the constitutional problem, the court stated that the appropriations clause is not applicable where the money in question is under a constructive trust. *See id.* If, as the claimant had asserted, the res was released improperly, a constructive trust would be possible. *See id.*

The court, however, did not overrule *$57,480.05 United States Currency* because in that case the claim was for more than $10,000, thus the little Tucker Act did not apply. In addition, the claimant in *$57,480.05 United States Currency* did not assert that the court had released the res improperly, so a constructive trust was not possible. *See $10,000 in United States Currency*, 860 F.2d at 1514.

Other courts have not followed the holding in *$57,480.05 United States Currency*. Rather, they have characterized the situation as "analogous to a suit for the refund of erroneously paid taxes or to recover for a wrongful levy," United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1110 n.4 (4th Cir. 1990), or have held that the appropriations clause only involves funds that " 'arise[] from taxes, customs, etc.' " United States v. Aiello, 912 F.2d 4, 7 (2d Cir. 1990) (quoting Varney v. Warehime, 147 F.2d 238, 245 (6th Cir. 1945)), *cert. denied*, 111 S. Ct. 757 (1991).

B. *Breaking from the "No Res, No Case" Rule*

The first case to break entirely from the "no res, no case" rule[75] was *United States v. Aiello*.[76] This case involved property that was allegedly purchased with money gained from[77] and property used in[78] the sale of narcotics.[79]

In *Aiello*, the court heavily criticized "the concepts of continuing territorial presence and control in forfeiture actions."[80] The court noted that these concepts are derived from "the admiralty fiction of a ship's personality, a legal construct of dubious validity."[81] Moreover, the court reasoned that because these concepts are "diminishing in admiralty," they should not be "routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government."[82]

The court, however, did not hold that in rem jurisdiction could continue beyond the release of the res.[83] Instead, the court concluded that it could exercise in personam jurisdiction over the government[84] on the theory that the United States submitted itself to in personam jurisdiction simply by bringing a suit against the property.[85]

Similarly, in *United States v. $95,945.18, United States Currency*,[86] the Fourth Circuit Court of Appeals also heard an appeal after the res had been released from the court's control. The case involved cash that was allegedly used to purchase narcotics.[87] The claimant, Lee Baxter, lost in the district court and failed to file a supersedeas bond or to move to stay the judgment.[88] After the expiration of the automatic ten-day stay, the

75. The rule has been limited for some time, however, by a few exceptions. *See infra* notes 98-109 and accompanying text.

76. 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

77. The government commenced these forfeiture proceedings against this property under 21 U.S.C. § 881(a)(6) (1988), which calls for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance" and "all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation" of the controlled substance law. *Id.*

78. The government commenced these forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(7) (1988), which calls for the forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate" the use of controlled substances.

79. *See Aiello*, 912 F.2d at 5.

80. *Id.* at 6.

81. *Id.*

82. *Id.* at 6-7.

83. *Cf. id.* at 6 ("At most, these propositions concern *in rem* jurisdiction and do not necessarily determine whether an appellate court, asked to review a forfeiture judgment, may do so in the exercise of *in personam* jurisdiction.").

84. *See id.* at 7.

85. *See id.*

86. 913 F.2d 1106 (4th Cir. 1990).

87. *See id.* at 1107. The government pursued the forfeiture pursuant to 21 U.S.C. § 881(a)(6) (1988). *See id.* at 1110.

88. *See id.* at 1107.

government transferred the money into the United States Marshal's Service Asset Forfeiture Fund.[89]

The opinion in *$95,945.18, United States Currency* began by pointing out that courts, relying on *Continental Grain Co. v. Barge FBL-585*,[90] have begun to depart from the rule requiring the res to be in the jurisdiction.[91] The court held that the "invocation of the *in rem* rule is particularly inapposite to defeat jurisdiction in a government-initiated civil forfeiture action."[92] Thus, unlike the *Aiello* court, the court in *$95,945.18, United States Currency* held that the "no res, no case" rule did not apply to forfeiture actions, thereby creating a new exception to the "no res, no case" rule.[93] The court based its holding on two rationales. First, forfeiture provides a very harsh remedy while imposing a comparatively low burden of proof on the government.[94] Second, the in rem rule was developed to provide a forum for litigants.[95] In this instance, the government was attempting to use the rule to deny a forum for disputes and thus for the opposite purpose for which the rule was created.[96]

In addition to its in rem ruling, the court held that the government had consented to in personam jurisdiction by bringing the action.[97] Although both *Aiello* and *$95,945.18, United States Currency* held that the government consents to in personam jurisdiction by bringing the ac-

89. *See id.* Congress created the Assets Forfeiture Fund through 28 U.S.C. § 524(c)(1) (1988), which states: "There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund . . . ." The fund's assets come from "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice . . . ." *id.* § 524(c)(4). The Justice Department may then use the funds to finance expenses involved in prosecuting other forfeiture actions. *See id.* § 524(c)(1)(A)-(H).

90. 364 U.S. 19 (1960). In *Continental Grain*, the Supreme Court was very critical of in rem jurisdiction. *See id.* at 25-26; *infra* note 121 and accompanying text.

91. *See* United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990). The court identified United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 982 (5th Cir. 1984), Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 334 (5th Cir. 1978), and Inland Credit Corp. v. M/T Bow Egret, 552 F.2d 1148, 1152 (5th Cir. 1977), as cases that began the process of departing from the in rem rule. *See $95,945.18, United States Currency*, 913 F.2d at 1109.

92. *$95,945.18, United States Currency*, 913 F.2d at 1109.

93. Several exceptions to the rule already existed. *See infra* notes 98-109 and accompanying text.

94. *See $95,945.18, United States Currency*, 913 F.2d at 1109. For more about the burden of proof, see *supra* notes 45-49 and accompanying text.

95. *See supra* notes 38-41 and accompanying text.

96. *See $95,945.18, United States Currency*, 913 F.2d at 1109. The court also concluded that a stay of execution or the filing of a supersedeas bond were not necessary in these cases. *See id.* Because a supersedeas bond is designed to protect the interests of the party that prevailed in the district court, and because the assets, which were in the hands of the United States government, were unlikely to disappear, obtaining a bond was unnecessary. *See id.*

97. *See $95,945.18, United States Currency*, 913 F.2d at 1109.

tion, neither case went so far as to hold that civil forfeiture actions could only be pursued in personam.

IV. THE IN REM THEORY

A. *The "No Res, No Case" Exceptions*

By refusing to apply the "no res, no case" rule in civil forfeiture proceedings, the court in *$95,945.18, United States Currency*, effectively created an exception to that rule. Before this case, courts allowed in rem[98] jurisdiction to continue despite the loss of the res in at least three other instances: when the res is removed improperly from the jurisdiction,[99] when there is an "interface" of in rem and in personam jurisdiction,[100] and when convenience dictates that the res be stored outside the jurisdiction.[101]

The oldest exception to the "no res, no case" rule is the improper removal exception.[102] Under this exception, an appellate court retains jurisdiction after the release of the res if the release occurred accidentally, improperly or fraudulently.[103] Although this exception is the oldest and most frequently mentioned exception,[104] very few courts have actually held that a res was removed accidentally, improperly or fraudulently.[105]

Another exception to the "no res, no case" rule is the "interface" ex-

98. In United States v. Aiello, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991), the Court of Appeals for the Second Circuit suggested that when a court exercises jurisdiction in a forfeiture proceeding despite the absence of the res, the court actually might be exercising in personam jurisdiction. *See id.* at 6 n.2. This idea, however, is contrary to most cases, which discuss the continuation of jurisdiction as an exception to the in rem rule. *See, e.g.*, United States v. $10,000 in United States Currency, 860 F.2d 1511, 1513 (9th Cir. 1988) ("The general rule is that, in an in rem action, removal of the res ends the jurisdiction of the court. But *exceptions* exist." (emphasis added)); United States v. $79,000 in United States Currency, 801 F.2d 738, 739 (5th Cir. 1986) ("The Supreme Court . . . created an *exception* . . . that courts do not lose jurisdiction if the res . . . is released . . . ." (emphasis added)); United States v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716 (7th Cir. 1985) ("The claimant has . . . point[ed] out . . . the *exception* to this general rule . . . ." (emphasis added)).

99. *See infra* notes 102-105 and accompanying text.

100. *See infra* notes 106-108 and accompanying text.

101. *See infra* note 109 and accompanying text.

102. *See* The Rio Grande, 90 U.S. (23 Wall.) 458, 465 (1874).

103. *See id.* The Supreme Court in *The Rio Grande* also held that giving the property to the prevailing claimant in exchange for security does not result in a loss of in rem jurisdiction. *See id.* This holding may appear at first to be another exception to the "no res, no case" rule, but the court is actually acting on a substitute res and therefore is not proceeding in rem without a res.

104. *See, e.g.*, United States v. $10,000 in United States Currency, 860 F.2d 1511, 1513 (9th Cir. 1988) (mentioning exception); United States v. $79,000 in United States Currency, 801 F.2d 738, 739 (5th Cir. 1986) (same); United States v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716 (7th Cir. 1985) (same).

105. *See $10,000 in United States Currency*, 860 F.2d at 1513. In fact, according to the Ninth Circuit Court of Appeals, this exception had not actually been applied since *The Rio Grande*. *See id.* In *$10,000 in United States Currency*, however, the court remanded the case for a trial court determination of whether the res had been disposed of properly. *Id.* at 1514. Since *$10,000 in United States Currency*, the same court has had the oppor-

ception.[106] This exception provides that when in rem and in personam proceedings are brought in the same overall action, the in rem proceeding may be transferred with the in personam action, via the forum non conveniens statute.[107] The in rem proceeding is thus held in a district court that does not have physical control of the res. The exception for an "interface" of in personam and in rem jurisdiction has been extended beyond forum non conveniens so that an appellate court can continue to use its in personam jurisdiction to correct errors in a lower court's in rem ruling.[108]

Congress created a final exception to the "no res, no case" rule by statute. At least two statutes authorize the government to remove seized property from the jurisdiction without affecting jurisdiction when it is convenient for storage purposes.[109]

B. *The Policies Behind the "No Res, No Case" Exceptions*

Each of the exceptions to the "no res, no case" rule is supported by the same general policy considerations. These considerations include the desire to reach a fair and correct result,[110] the desire to use a legal fiction only for the purpose for which it was created,[111] and the desire to ensure that the law produces a sensible result.[112]

The in rem fiction originated as a remedy, when one might not otherwise exist, for those injured by a ship.[113] A few courts have stated that this fiction should not be used to deny people their day in court because it was developed to ensure the opposite purpose, to create a forum for litigants.[114] Therefore, one policy behind the exceptions is to prevent the in rem legal fiction from being used for a purpose other than that for which it was created.

The oldest exception, which allows for continuing jurisdiction despite the accidental, improper or fraudulent release of the res, was established to preserve the right of appeal. Had the Supreme Court refused to create this exception in *The Rio Grande*,[115] the court would have denied a claimant the opportunity to appeal an adverse decision, and the Supreme

---

tunity to apply the exception. *See* United States v. $84,740.00 United States Currency, 900 F.2d 1402, 1406 (9th Cir. 1990).

106. *See* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960).

107. *See id.* at 23. The *Continental Grain* court conducted the transfer pursuant to 28 U.S.C. § 1404(a) (1988), which allows for transfer when it is "[f]or the convenience of parties and witnesses" and "in the interest of justice."

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

109. *See* 19 U.S.C. § 1605 (1988); 21 U.S.C. § 881(c)(2) (1988).

110. *See infra* notes 115-118 and accompanying text.

111. *See infra* notes 113-114 and accompanying text.

112. *See infra* note 119 and accompanying text.

113. *See* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960); *supra* notes 38-41 and accompanying text.

114. *See Continental Grain Co.*, 364 U.S. at 23; United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 983 (5th Cir. 1984).

115. 90 U.S. (23 Wall.) 458 (1874).

Court would have lost a chance to hear the merits of the case.[116] Therefore, a second policy underlying the exceptions to the "no res, no case" rule is the preservation of the right to appeal and to ensure that cases are decided correctly.

A third policy behind the exceptions to the "no res, no case" rule is that courts recognize that forfeiture is a very harsh remedy.[117] Judge Vance, echoing the Supreme Court, wrote in his dissent to *One Lear Jet Aircraft*: " 'Forfeitures are not favored; they should be enforced only when within both [the] letter and spirit of the law.' "[118]

A final policy behind the exceptions, as evidenced by the storage exception created by Congress, is a desire to keep the law procedurally efficient and within the bounds of common sense.[119] For example, if there is no place to store seized goods inside the jurisdiction, Congress intended to allow courts to move the goods outside the jurisdiction.

Most courts that have applied the "no res, no case" rule have simply applied the facts to the already existing exceptions to determine whether these facts fit an existing exception. They have not examined the policies behind the exceptions, nor have they made an effort to determine whether new exceptions should be created.[120] Had these courts examined the policies behind the exceptions, they might have concluded that a new exception should be created. Specifically, the policies underpinning the existing exceptions support the creation of another exception that would continue jurisdiction when the government removes the res after a forfeiture hearing. In other words, while the "no res, no case" rule would continue to be valid in other in rem proceedings, the rule would not be valid in forfeiture proceedings.

C. *The Argument for a "No Res, No Case" Exception for Forfeiture*

This new exception to the "no res, no case" rule would further the policies of the already existing exceptions by allowing appellate courts to ensure that disputes were decided correctly and that litigants received

116. *See The Rio Grande*, 90 U.S. (23 Wall.) at 460.

117. For examples in which courts ordered forfeiture despite the fact that the punishment was more severe than the corresponding criminal action, see *infra* note 126 and accompanying text.

118. United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1578 (11th Cir.) (en banc) (quoting United States v. One 1936 Model Ford, 307 U.S. 219, 226 (1939)), *cert. denied*, 487 U.S. 1204 (1988).

119. *See* S. Rep. No. 2326, 83rd Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 3,900, 3,906 (1954).

120. *See, e.g., One Lear Jet Aircraft*, 836 F.2d at 1574 n.2 (dismissing claim of improper release of res in a footnote with no discussion of policy behind exception); United States v. $79,000 in United States Currency, 801 F.2d 738, 739 (5th Cir. 1986) (dismissing claim of improper release with one sentence and without inquiry into policy behind the exception); United States v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716-17 (7th Cir. 1985) (distinguishing facts from *The Rio Grande* with no discussion of the policy behind exception created by that case).

their full day in court. In addition, it would protect litigants from the harsh penalty of forfeiture.

Moreover, a new exception to the "no res, no case" rule is justified because in rem forfeiture is an idea in decline. The Supreme Court labelled the idea of forfeiture based on in rem jurisdiction "an ancient salt-water admiralty fiction."[121] The Court also noted that the fiction has been called " 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' "[122] This rule also has been highly criticized by commentators.[123] Litigants should not be denied an appellate forum based on such a legal fiction. As one judge has stated, "[a]s the doctrine of personification . . . loses force, so should the rules which rest on it."[124]

Finally, and most importantly, the criminal nature of civil forfeiture dictates that every procedural safeguard be used to ensure that courts produce a fair result. Civil forfeiture actions are "civil" in name only. As the Supreme Court has noted, "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[125] Civil forfeiture penalties are often harsher than those that attach to the corresponding criminal action.[126] In addition, the procedural rules for civil forfeiture favor the government to such a degree that forfeiture actions rarely go to trial.[127] In fact, forfeiture actions are so analogous to criminal actions that the Supreme Court has held that evidence obtained in violation of the fourth and fifth amendments may not be used in these actions.[128]

One could argue, of course, that denial of jurisdiction supports a policy of judicial economy. Moreover, claimants have ten days to file a bond or to move for a stay in order to preserve their right to an appeal, and if they fail to take these procedural precautions than they should not have a right to appeal.

Nonetheless, in light of the excessive penalties that often result from

121. Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960).

122. *Id.* (footnote omitted).

123. *See* G. Gilmore & C. Black, The Law of Admiralty 616 (2d ed. 1975); Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L.J 1111, 1112-13 (1988).

124. United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1579 (11th Cir.) (en banc) (Vance, J., dissenting), *cert. denied*, 487 U.S. 1204 (1988).

125. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

126. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), for example, the Supreme Court upheld the forfeiture of a yacht which had single marijuana cigarette aboard when the criminal penalty would have been far less. *See* Valukas & Walsh, *supra* note 2, at 36; *see also One 1958 Plymouth Sedan*, 380 U.S. at 700-01 (forfeiture of car worth $1,000 when criminal penalty would be a maximum fine of $500); United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4-5 (2d Cir. 1988) (upholding forfeiture of Mercedes and $2,710 when remains of one marijuana cigarette were found in ashtray).

127. *See* Valukas & Walsh, *supra* note 2, at 34; *see also supra* note 43 and accompanying text (discussing government's procedural advantages).

128. *See One 1958 Plymouth Sedan*, 380 U.S. at 698; Boyd v. United States, 116 U.S. 616, 633-34 (1885).

forfeiture laws[129] and the comparatively low burden of proof associated with these laws,[130] courts should not relinquish the ability to hear an appeal in an attempt to lighten their dockets. Rather, courts should determine whether the failure to file a bond or move to stay is a result of carelessness or of a genuine inability[131] to take appropriate action within the specified time. If the court determines that the failure to act is a result of carelessness, the court should refuse to hear the appeal. If, however, the failure to act is a result of a genuine inability to act, then the court should apply the "no res, no case" rule.

IV. THE CONSENT TO IN PERSONAM THEORY

Alternatively, courts could hear the appeal by finding that the United States has consented to in personam jurisdiction. The theory that the United States is subject to in personam jurisdiction is based on the idea that by seeking the relief of the court, the United States has agreed to be bound by a decision made by that court system.[132] This idea is not unusual. Many courts have held that by taking an action, or by failing to take an action, a litigant submits himself to in personam jurisdiction.[133] At least one court has held that the United States, simply by intervening as a claimant and filing a counterclaim, had consented to in personam jurisdiction.[134] In a forfeiture proceeding, the United States has done more than intervene as a claimant—the United States has initiated the proceeding and should therefore be subject to jurisdiction.[135]

Moreover, the Federal Rules of Civil Procedure allow counterclaims in in rem proceedings.[136] Jurisdiction for the counterclaim is not in rem because in rem jurisdiction is asserted against property, not an individual.[137] Therefore, the inference must be that when a plaintiff brings an in rem action, the plaintiff consents to in personam jurisdiction for counter-

129. *See supra* note 126 and accompanying text.

130. *See supra* notes 45-49 and accompanying text.

131. One example of a genuine inability to take action would be an inability to afford a supersedeas bond. *See, e.g.*, United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1574 n.1 (11th Cir.) (en banc) (record does not clearly state that corporation could not afford a supersedeas bond), *cert. denied*, 487 U.S. 1204 (1988).

132. *See id.* at 1578 (Vance, J., dissenting).

133. *See, e.g.*, Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 709 (1982) (jurisdiction imposed as a sanction for failure to reply to discovery request); Petrowski v. Hawkeye-Security Co., 350 U.S. 495, 496 (1956) (a defendant may stipulate to jurisdiction); Adam v. Saenger, 303 U.S. 59, 67 (1938) (court may impose in personam jurisdiction upon plaintiff when plaintiff files cross-action).

134. *See* Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 331, 335 (5th Cir. 1978).

135. *See One Lear Jet Aircraft*, 836 F.2d at 1579 (Vance, J., dissenting).

136. *See* Fed. R. Civ. P. 13; Supp. Fed. R. Civ. P. E(7).

137. *See* Pennoyer v. Neff, 95 U.S. 714, 734 (1877); J. Friedenthal, M. Kane, & A. Miller, Civil Procedure 114 (1985). *But see* Shaffer v. Heitner, 433 U.S. 186, 207 (" 'jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing" (quoting Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971)).

claims. If a court can impose in personam jurisdiction on a plaintiff for counterclaims, the court should be able to impose in personam jurisdiction entirely.

The requirement that a court have personal jurisdiction in order to issue an effective holding is a function of the due process clause.[138] As a result, the requirement protects "an individual liberty interest."[139] In light of the origins of the in personam limitation of a court's power, courts should be less hesitant to impose jurisdiction on the government than on private individuals for two reasons. First, because the United States is the paramount sovereign, and not an individual, it has no Constitutional interest in being free of in personam jurisdiction. Second, the United States would have minimum contacts everywhere in the United States, and imposing in personam jurisdiction on the government for the purpose of the appeal would therefore "not offend 'traditional notions of fair play and substantial justice.' "[140]

In *United States v. One Lear Jet Aircraft*,[141] the court opined that to hold that the government consented to in personam jurisdiction would violate the concept of in rem jurisdiction.[142] The court's argument is flawed analytically because it fails to consider the position of the party denying the court's jurisdiction. In the typical in rem case involving a res that has been removed from the court's control, the issue before the court is whether the plaintiff can impose in personam jurisdiction on the defendant.[143] It is axiomatic that a plaintiff cannot assert in rem jurisdiction over a *defendant* when the res is not before the court.[144] In the cases considered in this Note, however, the plaintiff government has already asserted jurisdiction over a res, and now, as a *plaintiff*, is denying that the court has jurisdiction. To hold that the government is subject to in personam jurisdiction in this instance does not in any way offend the concept of in rem proceedings.

Courts should hold, therefore, that the government consents to in personam jurisdiction simply by bringing the action against the property.[145] Such a holding would allow appellate courts to hear an appeal in every instance.

---

138. *See* Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

139. *Id.*

140. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

141. 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988)

142. *See id.* at 1576-77.

143. *See id* at 1579 (Vance, J., dissenting).

144. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1877); J. Friedenthal, M. Kane & A. Miller, *supra* note 137, at 114.

145. Such a holding would not be necessary in non-forfeiture, in rem actions because the situation is different. Plaintiffs other than the government have a constitutional interest in being free from in personam jurisdiction, and therefore courts should be more reluctant when imposing jurisdiction on them.

CONCLUSION

The in rem fiction for forfeiture actions should not be used to deny losing claimants a chance to appeal district court decisions. The policies behind the already existing exceptions to the rule that the res must be present in the jurisdiction support the creation of a new exception to allow continued jurisdiction after the United States possesses the res. In addition, courts should hold that the United States has impliedly consented to in personam jurisdiction by instituting a forfeiture action. Either approach would allow appellate courts to ensure that forfeiture disputes are decided accurately and justly.

Paul S. Grossman