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EMERGING FROM DAVY JONES' LOCKER: THE REVIVAL OF COUNTERCLAIMS AGAINST THE GOVERNMENT IN CIVIL FORFEITURE ACTIONS

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The thesis of this Article is that a claimant in a civil forfeiture proceeding can assert a counterclaim against the United States government. This assertion is based upon the scope of the Supplemental Rules and in rem jurisdiction.

In rem jurisdiction does not prohibit a claimant from asserting a counterclaim if she can meet the modern personal jurisdiction requirements. And both the purpose and history surrounding counterclaims—to allow litigants to resolve their claims before a court within one civil action—support this expedient practice. Furthermore, admiralty practice and the Supplemental Rules implicitly endorse counterclaims in forfeiture. Thus, courts should adopt the Fifth Circuit's approach.

Even though a claimant can assert a counterclaim in an in rem civil forfeiture proceeding, sovereign immunity likely serves as a mostly impregnable bulwark to his recovery. Any claims arising out of the forfeiture must coincide with the narrow grounds for recovery under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which only allows a claimant to recover attorney's fees, litigation costs, and various forms of interest. While

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this may eclipse a claimant's constitutional tort or state law tort claims, the claimant can still recover those costs as laid out in CAFRA.

This is the correct result because it balances competing interests—the FRCP's goal to provide an efficient mechanism for litigants to assert their claims and CAFRA's reform to civil forfeiture. The FRCP obviously contemplates liberal counterclaim rules that extend to civil forfeiture claimants, under both the Supplemental Rules and the history and scope of Rule 13. If the purpose of the FRCP and the Supplemental Rules are to give litigants an expedient way to dispose of all of their claims at once that they have against each other, then allowing counterclaims in a civil forfeiture proceeding that arises out of the forfeiture falls within that purpose. This result protects the FRCP's purpose and promotes judicial economy.

I. INTRODUCTION

Tyson Timbs was your average heroin dealer, making little more than $225 from dealing in the incident that led to his arrest.[1] But he lost a lot more than that when he sold heroin to two undercover police officers.[2] Quickly after arrest, the police seized his Land Rover—worth around $42,000.[3] He engaged in a lengthy legal battle that led to the Supreme Court,[4] undoubtedly costing him a great deal of expense. But what if he could have brought a claim initially when the police seized the vehicle? Perhaps strategically, could a claimant whose property the police seized attempt to recover in a civil forfeiture suit through a counterclaim? That is exactly what the Fifth Circuit held in *United States v. $4,480,466.16 in Funds Seized*.[5]

The thesis of this Article is that a claimant in a civil forfeiture proceeding can assert a counterclaim against the United States government. This assertion is based upon the scope of the Supplemental Rules[6] and in rem jurisdiction. However, while a counterclaim against the United States government may be procedurally proper in certain circumstances, sovereign immunity limits the extent to which one can assert such a counterclaim. Therefore, courts should permit counterclaims in civil forfeiture cases. Absent a statutory waiver of sovereign immunity for civil forfeiture actions, a party will likely be unable to bypass sovereign immunity for the purposes of a civil forfeiture counterclaim arising under the Federal Tort Claims Act (FTCA) or assert anything beyond the scope of section 2465. Picking up where the Fifth Circuit did not tread, in a civil forfeiture counterclaim, the claimant will only be able to seek the attorney's fees and interest that the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) permits because CAFRA explicitly states what the United States must pay and limits a civil forfeiture claimant's recovery in the event of wrongful forfeiture.

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1. Adam Liptak & Shaila Dewan, *Supreme Court Limits Police Powers to Seize Private Property*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/us/politics/civil-asset-forfeiture-supreme-court.html [https://perma.cc/KS6G-DEEC].

2. *Id.*

3. Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

4. *See* Indiana v. Timbs, 62 N.E.3d 472 (Ind. Ct. App. 2016); Indiana v. Timbs, 84 N.E.3d 1179 (Ind. 2017); Timbs v. Indiana, 139 S. Ct. 682 (2019).

5. 942 F.3d 655 (5th Cir. 2019).

6. The Supplemental Rules of the Federal Rules of Civil Procedure are rules that are now included with the FRCP since the Rules of Practice in Admiralty and Maritime Claims unified with the FRCP. Essentially, the Supplemental Rules codified certain remedies only available in maritime and admiralty law, including maritime in rem actions. *See* Stuart B. Bradley, *Admiralty Aspects of the Civil Rules*, 41 F.R.D. 257, 261 (1967) (listing the four admiralty procedures, including in rem actions, as "clearly admiralty procedures" unable to "be brought in state courts even where state Statutes authorize in rem actions").

Part II of this Article frames the question addressed by the paper through examining the history of civil forfeiture, including the relationship between the doctrine and maritime and admiralty law and analyzing the distinction between in rem and in personam jurisdiction and its relationship to the issue of civil forfeiture. Part III of this Article then turns to a discussion of the development of the concept of counterclaims, specifically the root of the doctrine in maritime law. Part IV of the Article discusses the development of the concept of governmental sovereignty and the impact that the doctrine has had on the ability of claimants to pursue legitimate claims against the government. Part V discusses how courts have evaluated the right of a claimant to bring a counterclaim against the government in a civil forfeiture matter. Part VI addresses the central premise of the Article, which is that in rem jurisdiction does not simply refer to jurisdiction over just the property itself. Rather, it is jurisdiction over individuals with an interest in the property. Therefore, individuals have rights at stake and claims to make within an in rem proceeding, even though the named litigant is the property. Furthermore, as a matter of policy, allowing claimants to assert counterclaims furthers the liberal purpose behind the development of the modern counterclaim rule and is supported by maritime and admiralty rules as well. Part VII concludes that while counterclaims against the government should be allowed in civil forfeiture actions, sovereign immunity still stands as a significant barrier that must be overcome to pursue such a claim.

II. FRAMING THE ISSUE

A. History of Civil Forfeiture

Civil forfeiture has a long history, most of which is beyond the scope of this Article. Originally, there were three kinds of forfeiture actions—the deodand, forfeiture upon conviction, and statutory forfeiture.[7] "Deodand" arose from the Latin phrase, *Deo dandum*, which meant "given to God."[8] It meant that an item that caused the death of a King's subject was forfeited to the crown, under the belief that the King would put the value of the item to good use through religious exculpation.[9] Convicted felons forfeited both land and chattels to the

7. Austin v. United States, 509 U.S. 602, 611 (1993) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–83 (1974)).

8. *Calero-Toledo*, 416 U.S. at 681.

9. *Id.*; *see also* United States v. 785 St. Nicholas Ave., 983 F.2d 396, 402 (2d Cir. 1993) ("The true reason for permitting forfeiture . . . was that it is part of the price a citizen must pay for breaking the social contract by violating the law." (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 289–91 (1768))); Robert B. Little, United States v. Usury *and the Abrupt End to the Extension of Double Jeopardy Protections to Civil Forfeitures*, 2 TEX. REV. L. & POL. 143, 146–49 (1997).

Crown, based on the belief that the felon abandoned his property right upon conviction.[10]

Finally, certain English statutes in the seventeenth century allowed in rem forfeiture absent a criminal conviction.[11] The most prominent statute, the Navigation Act, permitted assertion against the maritime property itself regardless of its owner's guilt or requiring his permission to institute proceedings because the English monarchy wanted to maximize benefit to British maritime commerce through penalizing foreign commerce.[12] These proceedings undertook a legal fiction that the property itself was the "guilty" party.[13]

When the United States was established, the Founders only retained statutory forfeiture.[14] The Framers abolished corruption of blood and other forfeiture provisions upon criminal conviction.[15] However, they retained the following English customs in forfeiture proceedings: the guilty property was the defendant; the owner's innocence was not a defense; and the motivation for instituting forfeiture was to amass revenue for the national government, as well as to suppress crime through the civil system.[16] Proceeding in rem, the government held a lower burden of proof and tried the case before a judge rather than a jury, even though in personam remedies remained available.[17] This meant that the fledgling government could institute maritime forfeiture claims viewing naval property as the defendant, just as their English forebears did with the Navigation Act.[18]

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10. *Calero-Toledo*, 416 U.S. at 682 (citing 3 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 68–71 (3d ed. 1927); 1 FREDERICK POLLOCK & FREDERIC MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1909)).

11. Little, *supra* note 9, at 146–47.

12. Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 96 (1996) (quoting Mitchell *qui tam* v. Torup, Parker 277, 145 Eng. Rep. 764 (1766)).

13. *See* United States v. U.S. Coin & Currency, 401 U.S. 715, 719 (1971) (citing Dobbins's Distillery v. United States, 96 U.S. 395, 399–401 (1878); The Palmyra, 25 U.S. 1, 8–9 (1827)).

14. Boudreaux & Pritchard, *supra* note 12, at 94–97 (rejecting and providing evidence against the conclusion that modern civil forfeiture laws arose from the deodand); Little, *supra* note 9, at 146–47; *see also* Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition,* 61 MO. L. REV. 593, 594–99 (1996).

15. Boudreaux & Pritchard, *supra* note 12, at 96–97.

16. *Id.* at 97; *see also* Day v. Micou, 85 U.S. 156, 162 (1873) ("[T]he thing condemned is considered as the offender . . . ."); Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1466–68 (2019).

17. Arlyck, *supra* note 16, at 1479–80.

18. *See* United States v. La Vengeance, 3 U.S. 297, 300 (1796) ("The principles regulating Admiralty and Maritime jurisdiction in this country, must be such as were consistent with the common law of *England*, at the period of the revolution.").

But these claims went beyond maritime claims. Over time, they included government confiscation of Confederate property, leading to modern day civil forfeiture from criminal enterprises.[19] Civil forfeiture has garnered much attention and criticism, stemming mostly from its increased usage during the War on Drugs.[20] This prompted notable reforms to combat the government's aggressive use of civil forfeiture.[21]

In particular, modern forfeiture actions shifted substantially with the enactment of CAFRA,[22] which Congress passed to respond to the overwhelming amount of criticism that civil forfeiture had received over the years.[23] For example, CAFRA shifted the burden of proof from the property owner to the government in future civil forfeiture actions, requiring the government to prove that the property is subject to forfeiture.[24] CAFRA further reduced the power of a civil forfeiture claim because it provided for an innocent owner defense, when the owner did not know of the conduct giving rise to the forfeiture.[25] Yet, forfeiture remains statutory under 18 U.S.C. § 981, which provides for property forfeiture stemming from criminal actions.[26]

But despite modern forfeiture statutes, it is important that modern civil forfeiture proceedings arose from English admiralty forfeiture and still share many characteristics of an admiralty claim.[27] For a time, admiralty procedure and civil procedure remained separate, with the Supreme Court promulgating

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19. Boudreaux & Pritchard, *supra* note 12, at 99–106.

20. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L. J. 1, 13 (2012); Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES (June 8, 2011), http://www.forbes.com/2011/06/08/property-civil-forfeiture.html [https://perma.cc/D352-84FF] ("Civil forfeiture laws represent one of the most serious assaults on private property rights in the nation today. Under civil forfeiture, police and prosecutors can seize your car or other property, sell it and use the proceeds to fund agency budgets—all without so much as charging you with a crime.").

21. Pimentel, *supra* note 20, at 15–17.

22. 18 U.S.C. § 983.

23. *See* CIVIL ASSET FORFEITURE REFORM ACT OF 2000, 146 CONG. REC. 1753, 1760–62 (2000) (statement of Sen. Leahy).

24. 18 U.S.C. § 983(c); *see also* Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Application of Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 195 A.L.R. FED. 349 (2004) (noting the court split between whether the government's burden is by a preponderance of the evidence or must show a "substantial connection" between the property and the commission of a criminal offense).

25. 18 U.S.C. § 983(d).

26. 18 U.S.C. § 981.

27. *See* United States v. $5,372.85 U.S. Coin & Currency, 283 F. Supp. 904, 905 (S.D.N.Y. 1968) (citing The Schooner Hoppet & Cargo v. United States, 11 U.S. 389 (1813); The Emily, 22 U.S. 381 (1824)); *see also* United States v. La Vengeance, 3 U.S. 297, 300 (1796); Bradley, *supra* note 6, at 260–61.

specific admiralty rules governing forfeiture.[28] Pleadings initiating forfeiture were known under common law as an "information."[29] Over time, statutes controlled pleading requirements, but still required claimants to file claims to commence forfeiture in admiralty, now as a "libel of information."[30] However, the Federal Rules of Civil Procedure (FRCP), when enacted, quickly usurped this once long-standing practice.[31] Briefly, forfeiture remained out of admiralty, with the FRCP governing the forfeiture process.[32] However, amendments took effect on July 1, 1966, unifying the FRCP and admiralty procedures, after decades of commentators voicing their weariness of the pointless separation.[33] In doing so, the Supplemental Rules to the FRCP emerged as a codification of those practices unique to maritime and admiralty claims.[34]

These rules had some exceptions governing unique maritime and admiralty claims, but also dealt with in rem proceedings because these proceedings were analogous to maritime claims.[35] But the Supplemental Rules only governed that which it expressly mentioned—all else fell under the FRCP's reach.[36] Sometimes, this led courts to abandon traditional maritime practices and remedies.[37] For example, courts in admiralty were long unable to grant equitable relief.[38] Courts are no longer fettered to this rule because the unification between the FRCP and admiralty rules meant that the federal rules

28. 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1014 (4th ed. 2020).

29. *$5,372.85 U.S. Coin & Currency*, 283 F. Supp. at 905.

30. *Id.*

31. *Id.* at 906.

32. *Id.*; *see also* Four Hundred and Forty-Three Cans of Frozen Egg Product v. United States, 226 U.S. 172, 183–84 (1912) (finding that forfeiture action was rooted in law, did not totally take on the characteristics of an admiralty proceeding, and did not apply admiralty rules and procedures).

33. *See* William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35 (1922) ("[T]here is no reason why . . . so far as actual practice is concerned . . . suits in law, in equity and in admiralty, should not be conducted in the form of one civil action . . . ."); 6 WRIGHT & MILLER, *supra* note 28, § 1014; FED. R. CIV. P. SUPP. (A)(G).

34. *See* Bradley, *supra* note 6, at 259–61.

35. 6 WRIGHT & MILLER, *supra* note 28, § 1014 (noting admiralty and maritime claims treat third-parties, depositions, jury trials, interlocutory appeals, and venue distinctly).

36. 12 WRIGHT & MILLER, *supra* note 28, § 3201 (citing United States v. One 1966 Chevrolet Pickup Truck, 56 F.R.D. 459, 461–62 (E.D. Tex. 1972) (applying Rules 55 and 60 to in rem forfeiture proceeding)).

37. The Eclipse, 135 U.S. 599, 608 (1890).

38. *See id.* ("While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity.").

pertaining to equitable judgment applied where the Supplemental Rules were silent on the subject.[39]

As mentioned, Supplemental Rule A(1)(B) applies the Supplemental Rules to "forfeiture actions in rem arising from a federal statute."[40] The Federal Rules confirm this, as per Rule 9(h), which recognizes that admiralty or maritime claims, including civil forfeiture actions analogous to these types of claims, shall be treated as such "whether or not so designated."[41] These Supplemental Rules led to some unique and interesting twists on traditional procedural steps. Notably, Congress amended these rules in 2000 to affirm that these rules applied in civil forfeiture cases, despite perceived differences between civil forfeiture cases and maritime and admiralty cases.[42] Furthermore, statutes governing civil forfeiture proceedings expressly require that forfeiture proceedings "conform as near as may be to proceedings in admiralty."[43] Thus, the courts will look to Supplemental Rule G first to solve issues arising in a civil forfeiture action, but the courts will also look to admiralty law because the forfeiture action is analogous to admiralty.[44]

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39. *See* Farrell Lines, Inc. v. Ceres Terminals, Inc., 161 F.3d 115 (2d Cir. 1998); Triton Container Int'l Ltd. v. Di Gregorio Navegacao LTDA, 440 F.3d 1137 (9th Cir. 2006); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 894–96 (6th ed. 2019).

40. FED. R. CIV. P. SUPP. A(1)(B). Some courts have recognized alternative procedures for civil forfeiture, although these will not affect the analysis for a forfeiture claim governed by the Supplemental Rules, as the other procedures involve questions of criminal procedure and criminal law.

> The government has three options when it institutes a civil forfeiture in rem proceeding: (1) file a complaint pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, which triggers the issuance of a summons and warrant by a court clerk without requiring a certification of exigent circumstances; (2) request the issuance of a seizure warrant in the manner provided for in Fed.R.Crim.P. 41 that requires a finding of probable cause ex parte by a judicial officer; or (3) "when the Attorney General has probable cause to believe the property is subject to civil forfeiture," seize it following applicable customs law as set forth in § 881(d).

United States v. 785 St. Nicholas Ave., 983 F.2d 396, 402 (2d Cir. 1993) (italicization omitted) (citing United States v. 4492 S. Livonia Road, 889 F.2d 1258, 1262–67 (2d Cir. 1989)).

41. FED. R. CIV. P. 9(h).

42. 12 WRIGHT & MILLER, *supra* note 28, § 3241.

43. 28 U.S.C. § 2461.

44. As Wright & Miller notes:

> Rule A also provides that the Supplemental Rules apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. The reference here is apparently to the statutory provision that, unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on land the forfeiture may be enforced by libel, which must conform as near as may be to proceedings

Forfeiture actions follow particular guidelines and arise under Supplemental Rule G.[45] Congress added it in 2006 to reflect the procedures contained in CAFRA.[46] Notably, while Rule G's drafters believed that civil forfeitures must have their own unique rules rather than attempting to simply squeeze civil forfeiture into admiralty, they retained several key provisions from the FRCP.[47] Rule G gives claimants the opportunity to file claims asserting an interest in the property to be seized.[48] However, the Rule states that the rest of the FRCP applies if the Rule does not address something.[49]

Furthermore, nothing limits the right of other parties in an in rem proceeding from asserting claims, such as an intervenor who satisfies the procedures in FRCP 24.[50] And in the Fifth Circuit, claimants in a forfeiture proceeding are generally referred to as "intervenors."[51] Intervention generally extends from the recent American legal concept that everyone who has a stake in a particular action should be able to assert it if it is pertinent after someone files the initial suit.[52] Courts construe intervention liberally, just like they must do with each of the other Federal Rules of Civil Procedure.[53]

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in admiralty.

12 WRIGHT & MILLER, *supra* note 28, § 3201 (citing 28 U.S.C. § 2461(b)); United States v. One 1970 Buick Electra, 57 F.R.D. 185 (N.D. Ohio 1972); United States v. $5,372.85 U.S. Coin & Currency, 283 F. Supp. 904, 906 (S.D.N.Y. 1968)).

45. FED. R. CIV. P. SUPP. G.

46. 18 U.S.C. § 983.

47. FED. R. CIV. P. SUPP. G. advisory committee's note.

> As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

Id.

48. FED. R. CIV. P. SUPP. G(5)(a)(i).

49. FED. R. CIV. P. SUPP. G(1).

50. *See* Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 861 F.3d 1278, 1293 (11th Cir. 2017); *see also* United States v. 60 Automotive Grilles, 799 F. App'x 693 (11th Cir. 2020) (contemplating whether a claimant could intervene in a forfeiture proceeding); Reedsburg Bank v. Apollo, 508 F.2d 995, 1000 (7th Cir. 1975) (discussing intervention in in rem proceeding).

51. United States v. An Article of Drug, 725 F.2d 976, 981 (5th Cir. 1984); United States v. 110 Bars of Silver, 508 F.2d 799, 801 (5th Cir. 1975) (per curiam) ("This forfeiture proceeding stems from intervenor's conviction for melting down United States coins . . . .").

52. *See* 7C WRIGHT & MILLER, *supra* note 28, § 1901.

53. *See* Kane Cnty. v. United States, 928 F.3d 877, 890 (10th Cir. 2019); Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 799 (7th Cir. 2019) (quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972)); Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011).

Supplemental Rule G(5) governs intervention in a civil forfeiture case, where a claimant files a claim and an answer.[54] Without following these specific requirements, a claimant has no standing to challenge a forfeiture.[55]

B. In Rem and In Personam Distinction

Necessarily, any analysis of civil forfeiture is incomplete without examining in rem and in personam jurisdiction.[56] At common law, courts needed actual, physical power over a person to issue a judgment against her, otherwise, that judgment was invalid.[57] Thus, a state's boundaries limited a court's jurisdiction.[58] To align with the Fourteenth Amendment's Due Process Clause, states needed this crucial element of control over the person to exercise its judgment.[59] Furthermore, state sovereignty was the "fundamental concept" guiding personal jurisdiction—linking the doctrine to a state's physical control over the parties.[60]

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54. United States v. $133,420.00 in U.S. Currency, 672 F.3d 629, 635 (9th Cir. 2012).

55. United States v. One-Sixth Share Lottery Ticket No. M246233, 326 F.3d 36, 40 (1st Cir. 2003).

56. Nearly every court dealing with this issue undergoes some examination of personal jurisdiction because understanding the actual meaning behind in rem jurisdiction will lead courts to accurately understand that in rem jurisdiction is still another way to exert control over individuals through their property. *See, e.g.,* United States v. All Funds in Account Nos. 747.034/278, 295 F.3d 23, 25 (D.C. Cir. 2002) (observing that "[c]ivil forfeiture actions are brought against property, not people," but that "[t]he owner of the property may intervene to protect his interest"); Michael B. Mushlin, *The New Quasi in rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1067–68 (1990) (identifying quasi-in rem jurisdiction as a way to overcome the limitations that the physical presence doctrine of personal jurisdiction imposed).

57. *See* Jack B. Harrison, *Registration, Fairness and General Jurisdiction*, 95 NEB. L. REV. 477, 483 (2016); *see also* Mushlin, *supra* note 56, at 1067–68.

58. *See supra* note 53; *see also, e.g.,* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 38 (2010) (analyzing why personal jurisdiction problems have puzzled courts over the years due to problems that arise from state borders and federalism).

59. *See supra* notes 53–54; *see also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction*: *From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990) (analyzing the role of the Due Process Clause in the Supreme Court's gradual development of the personal jurisdiction doctrine).

60. Harrison, *supra* note 57, at 481–82 (citing Pennoyer v. Neff, 95 U.S. 714, 719 (1877)); Galpin v. Page, 85 U.S. 350, 354 (1873); Stephen Higdon, Comment, *If It Wasn't on Purpose, Can a Court Take It Personally?: Untangling* Asahi's *Mess that* J. McIntyre *Did Not*, 45 TEX. TECH. L. REV. 463, 467 (2013); Erbsen, *supra* note 58, at 96; Borchers, *supra* note 59, at 25; Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569 (1958).

Pennoyer v. Neff first established this crucial element of control.[61] In *Pennoyer*, an attorney sued his client in Oregon for unpaid fees.[62] Without ever personally serving Neff, the attorney entered for a default judgment and received it.[63] Subsequently, the attorney moved to seize Neff's property, purchased it at sheriff's auction, and then sold the property rights to Pennoyer.[64] Neff brought suit to quiet title, arguing that the original judgment against him was invalid because he was never served in the state of Oregon.[65] Recognizing that states only had jurisdiction over that which laid within its borders, the Supreme Court, in an opinion by Justice Field, held that Oregon could only exercise personal jurisdiction over a person if that person was personally served within its borders—in personam jurisdiction.[66] The Due Process Clause compelled this result because "proceedings in a court of justice to deter mine [sic] the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[67]

In doing so, Justice Field wrote that jurisdiction over the property, known as in rem jurisdiction, provides a different analysis.[68] If property fell within the state's boundaries, the state could necessarily exercise control over it because the state possessed that crucial element of control over the property.[69] Thus, the state where the property was located had the power to institute a proceeding to adjudicate the rights of the party instituting a suit of ownership of the property compared to the property rights of the rest of the world.[70] And in

61. 95 U.S. at 714.

62. *Id.* at 719.

63. *Id.* at 719–20.

64. *Id.*

65. Neff v. Pennoyer, 17 F. Cas. 1279, 1280 (C.C.D. Or. 1875), *aff'd*, 95 U.S. 714 (1877).

66. *Pennoyer*, 95 U.S. at 722.

67. *Id.* at 733. Sarah R. Cebik, *"A Riddle Wrapped in a Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 4 (1998) (stating that "[t]he Court further held that whether a court had personal jurisdiction over the defendant was a constitutional matter rooted in the Due Process Clause of the Fourteenth Amendment"); Higdon, *supra* note 60, at 466–67 (noting that personal jurisdiction initially was a function of state-by-state common law before developing constitutional roots, but in *Pennoyer*, the Court also utilized the Due Process Clause to check the states' use of personal jurisdiction); Kurland, *supra* note 60, at 571–72.

68. *Pennoyer*, 95 U.S. at 733.

69. 4A WRIGHT & MILLER, *supra* note 28, § 1070.

70. *See* United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1309 (10th Cir. 1994) ("Traditionally, a court could obtain in rem jurisdiction only over property situated within its territorial borders." (citing Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 272 (1917))); Mushlin, *supra* note 56, at 1068.

Pennoyer, Justice Field acknowledged the legal fiction that proceedings in rem are "against property," rather than the person.[71]

Over time, stances shifted, and a different test developed for determining personal jurisdiction, aside from solely fixating on physical service within the state.[72] This occurred with the Supreme Court's decision in *International Shoe Co. v. Washington.*[73] There, the State of Washington sued the International Shoe Company in state court over state unemployment fund payments.[74] International Shoe had no office or stock being held in Washington and only had a small sales office in the state.[75] Nonetheless, in Chief Justice Stone's comprehensive opinion, the Court distanced itself from *Pennoyer*.[76] It established a framework whereby a defendant's "minimum contacts" with the forum state along with "traditional notions of fair play and substantial justice" determine whether a state can exercise in personam jurisdiction over the party.[77] While the test was imprecise and amorphous, it declared "continuous activity . . . within a state" that is "substantial" would provide a basis for personal jurisdiction.[78]

Over time, the Court has gradually developed personal jurisdiction. There is "specific" personal jurisdiction, following the minimum contact requirement of *International Shoe*, which requires the following: that the defendant directed activities to the state; that the cause of action arose from those contacts; and that jurisdiction is reasonable and fair to the defendant.[79] "General" jurisdiction

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71. 95 U.S. at 734; *see also* Tyler v. Judges of Ct. of Registration, 55 N.E. 812, 814 (Mass. 1900) (Holmes, C.J.) ("All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected.") (italicization omitted).

72. *See* 4 WRIGHT & MILLER, *supra* note 28, § 1064 ("The philosophy underlying *Pennoyer v. Neff* may well have been adequate at a time when the average person's mobility was limited, commerce was local in character, and territorial notions did not represent too great an impediment on a plaintiff's ability to institute his action."); *see also* SAMUEL ISSACHAROFF, CIVIL PROCEDURE 93–94 (2005) (documenting the shift to the minimum contacts approach and away from *Pennoyer*); Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice Over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1506–07 (2006) (citing Hanson v. Denckla, 357 U.S. 235, 250–51 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957)) (noting that "[t]he twentieth century's sea change in transportation and communication technologies" lead to changing the test for personal jurisdiction).

73. 326 U.S. 310 (1945).

74. *Id.* at 311.

75. *Id.* at 313.

76. *Id.* at 316 (citing Pennoyer v. Neff, 95 U.S. 714, 719 (1877)).

77. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

78. *Id.* at 317–18 (citations omitted).

79. *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1785–86 (2017) (Sotomayor, J., dissenting); U.S. Bank Nat'l Ass'n v. Bank of Am. N.A., 916 F.3d 143, 150 (2d Cir.

arises from a defendant's general and systematic contacts with the state, which provides that the defendant is "essentially at home" in the forum.[80] While there is significant debate about the role of fairness in general jurisdiction[81], it remains a constant factor that courts take into consideration when judging personal jurisdiction.[82]

How does this affect civil forfeiture? Civil forfeiture is an in rem proceeding, after all, but in rem jurisdiction shifted dramatically after *International Shoe* with *Shaffer v. Heitner*.[83] *Shaffer v. Heitner* involved a Delaware statute that allowed Delaware courts to exercise jurisdiction over a lawsuit by sequestering the defendant's property located in the state.[84] In the suit, a shareholder filed a derivative action against corporate directors, but filed

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2019); Morrill v. Scott Fin. Corp., 873 F.3d 1136, 1142 (9th Cir. 2017); Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28, 35 (1st Cir. 2016); Polar Electro Oy v. Suunto Oy, 829 F.3d 1343, 1348 (Fed. Cir. 2016); Shrader v. Biddinger, 633 F.3d 1235, 1239–40 (10th Cir. 2011); Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., 593 F.3d 1249, 1260 (11th Cir. 2010); Fortis Corp. Ins. v. Viken Ship Mgmt., 450 F.3d 214, 218 (6th Cir. 2006); Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 96–99 (3d Cir. 2004); Mitrano v. Hawes, 377 F.3d 402, 407 (4th Cir. 2004); Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006); Romak USA, Inc. v. Rich, 384 F.3d 979, 984 (8th Cir. 2004).

80. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (citing Int'l Shoe Co. v. Wash., 326 U.S. 310, 317 (1945)).

81. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion) ("Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."); Kidston v. Res. Planning Corp., No. 2:11-cv–2036–PMD, 2011 WL 6115293, at *3 n.2 (D.S.C. Dec. 8, 2011) ("After *McIntyre*, the relevance of fairness as part of the jurisdictional inquiry is unclear."); *see also* Linda J. Silberman, Goodyear *and* Nicastro: *Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 595 (2012) ("Perhaps the reasonableness prong does not emerge in either *Goodyear* or *Nicastro* for the same reason it was not part of the discussion in *Helicopteros*: the Court determined that the requirement of minimum contacts was not met, and thus had no reason to proceed further."). *But see* Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1177 (2015) (arguing that despite recent Supreme Court decisions that did not explicitly mention "fairness" in its personal jurisdiction jurisprudence, there was no need to "jettison a fairness analysis" where it was not necessary to deciding the case.).

82. *See, e.g.,* Daimler AG v. Bauman, 571 U.S. 117, 139 n.20 (2014) (noting that while fairness is something courts can consider "to assess the reasonableness of entertaining [a] case," this step is "superfluous" if there is already a basis for personal jurisdiction in a party's status as "at home" in the forum); Plixer Int'l, Inc. v. Scrutinizer GMBH, 905 F.3d 1, 12 (1st Cir. 2018) ("Though Plixer has satisfied the first two prongs of the analysis, we must still see whether the exercise of jurisdiction here is fair and reasonable."); Freestream Aircraft (Bermuda) Ltd. v. Aero Law Group, 905 F.3d 597, 607–09 (9th Cir. 2018); Creative Calling Solutions, Inc. v. LF Beauty Ltd., 799 F.3d 975, 982 (8th Cir. 2015); Adam N. Steinman, *The Meaning of* McIntyre, 18 SW. J. INT'L L. 417, 430 (2011) (citations omitted); Silberman, *supra* note 81, at 594–95.

83. 433 U.S. 186 (1977); *see also* Burnham v. Superior Ct. of Cal., 495 U.S. 604, 630 (1990) (Brennan, J., concurring) ("The critical insight of S*haffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process.").

84. *Shaffer*, 433 U.S. at 188.

motions sequestering their stock as an excuse for Delaware to exercise in rem jurisdiction over the shares, as property.[85] The Delaware Court of Chancery rejected defendants' arguments that they lacked minimum contacts with the forum, emphasizing that the lack of contacts was unimportant to an in rem proceeding.[86]

The Supreme Court reversed the Court of Chancery's decision.[87] First, it recognized *Pennoyer*'s long-standing rule that the state had "exclusive sovereignty" over the property within its borders and could adjudicate property rights over it absent its owner.[88] It admitted that this rule made it easy for resident plaintiffs to sue non-resident defendants seeking to avoid jurisdiction by simply attaching whatever property the defendant owned and proceeding in rem.[89] But the Court further recognized that justification for in personam jurisdiction starkly shifted in the wake of *International Shoe* and minimum contacts, yet recognized that a similar result had not occurred for in rem proceedings.[90]

Notably, the *Shaffer* Court recognized that in rem proceedings necessarily involve property owners and their rights because an adverse decision directly impacts their property rights.[91] Thus, while the Court in *Shaffer* did not totally discount in rem jurisdiction, it saddled it to *International Shoe* as a necessary corollary to exercising jurisdiction over a defendant because where the defendant's personal rights in property are affected, the court needs some fair justification for exercising jurisdiction over that defendant's rights.[92] The Court noted that usually, the presence of property in the state and the fact that an injury arose from that property will provide the necessary contacts for a court to exercise jurisdiction over that defendant.[93] Yet, the Court acknowledged that

85. *Id.* at 192–93.

86. *Id.* at 196.

87. *Id.* at 195.

88. *Id.* at 199–200.

89. *Id.* at 200 (citation omitted).

90. *Id.* at 205.

91. *Id.* at 206 (citing Schroeder v. City of New York, 371 U.S. 208, 213 (1962) (requiring property owners receive notice of in rem actions because of their property interest)).

92. *Id.* at 207; *see also* Michael P. Allen, *In Rem Jurisdiction From* Pennoyer *to* Shaffer *to the Anticybersquatting Consumer Protection Act,* 11 GEO. MASON L. REV. 243, 258 (2002) (noting that even "[t]he narrowest conception of *Shaffer's* holding must include the rule that *quasi in rem* II jurisdiction is to be judged by the *International Shoe* minimum contacts standard.").

93. *Shaffer*, 433 U.S. at 207–08.

mere presence of the property in the state alone that did not satisfy the minimum contacts threshold would not serve as a basis for personal jurisdiction.[94]

So, *Shaffer* acknowledges that the modern principles of personal jurisdiction, as rooted in substantive fairness and requiring some connection between the property, the defendant, the cause of action, and the forum state, means that defendants have some adjudicatory rights in an in rem proceeding.[95] For example, Rule 13 of the FRCP allows counterclaims in in rem cases.[96] But courts have recognized that in rem jurisdiction may be limited only to the property at issue in the case.[97] This comports with the bedrock principles of jurisdiction that courts have authority over something that or someone who has a connection to that state, the cause of action, and fairness.[98]

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94. *Id.* at 209. Furthermore, the Court has soundly rejected the ancient notion that jurisdiction over the property meant that the court must have continuous possession over the property itself. *See* Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 85–87 (1992) (finding that continuous possession of the property involved in civil forfeiture suits is unnecessary provided that the court was able to exercise jurisdiction when an in rem forfeiture was filed). Indeed, in *Republic Nat'l Bank,* the Court recognized that the historical purposes behind characterizing in rem forfeiture as a suit against the property was merely "to expand the reach of the courts and to furnish remedies for aggrieved parties," rather than "to provide a prevailing party with a means of defeating its adversary's claim for redress." *Id.* at 87 (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960); Harmony v. United States, 43 U.S. 210, 233 (1844)). Even though that may only apply to the narrow window of whether an appellate court can maintain jurisdiction over a civil forfeiture claim after the property has been removed from the state, the lasting principle that the presence of the property alone does not determine jurisdiction can apply in a variety of jurisdictional contexts. *See also* Stevedoring Servs. of Am. v. Ancora Transp., 59 F.3d 879, 882 (9th Cir. 1995) (finding that the appellate court still had jurisdiction despite the physical relocation of maritime property for a maritime attachment because maritime "attachment procedure[s] provide[] aggrieved parties an opportunity to gain satisfaction against defendants they might not be able to reach through ordinary in personam proceedings." (italicization omitted) (citations omitted); SCHOENBAUM, *supra* note 39, 894–96.

95. *Shaffer*, 433 U.S. at 209–12; *see also* Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982) (stating that personal jurisdiction's limit on a court's authority is "a matter of individual liberty.").

96. FED. R. CIV. P. 13. *But see* Paul S. Grossman, Note, *Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of the Res*, 59 FORDHAM L. REV. 679, 695–96 (1991) (arguing that jurisdiction for counterclaims in in rem proceedings is not in rem because in rem is against the property, but the plaintiff consents to in personam jurisdiction for counterclaims when she initially brings the action).

97. *See* United States v. Sum of $70,990,605, 991 F. Supp. 2d 144, 150 (D.D.C. 2013) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994)) (noting that courts in in rem only have the power to adjudicate the property before it).

98. *See supra* Part II.B (discussing *International Shoe*). *But see* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 218–19 (2004) ("History does not tell us much, however, about whether a nonterritorial conception of jurisdiction—such as one based on convenience rather than 'minimum contacts'—is unconstitutional. In short, a normative inquiry . . . is needed to explain why the minimum contacts requirement is mandated by the Due Process Clause.").

Still, certain types of in rem actions may severely limit a litigant's right to assert something within that case. For instance, condemnation proceedings are exceedingly limited.[99] A condemnation proceeding is in rem because it is an action asserting the rights of the United States over the property in comparison to the entire world.[100] Specifically, Rule 71.1 only allows a defendant owner of the property to assert his answers and defenses alone.[101] Thus, courts find that this means that defendants in a condemnation proceeding have no right to assert counterclaims or other motions.[102] However, this may be distinguishable because of the very limited requirements governing counterclaims under FRCP 71.1.[103] Unlike other in rem proceedings, Rule 71.1 seems to totally eclipse the possibility for defendants to assert motions or levy claims outside of the defenses and answers only allowed under FRCP 71.1.[104] Yet, the Rule does not foreclose all other procedural rights and requirements for a defendant in a condemnation proceeding, as she can still assert answers and defenses.[105]

III. COUNTERCLAIMS: ORIGINS AND APPLICATIONS IN MARITIME LAW

To fully understand why courts should allow a claimant's counterclaim in a civil forfeiture case, it is important to first understand the history and purpose behind counterclaims and their development over time. At common law, a counterclaim was known as a "recoupment," which could only arise in the same transaction or occurrence as the plaintiff's claim and was only defensive without providing a plaintiff for affirmative relief.[106] These early provisions

99. United States v. Certain Land Situated in Detroit, 361 F.3d 305, 308 (6th Cir. 2004); United States v. 38.60 Acres of Land, 625 F.2d 196, 199 (8th Cir. 1980).

100. A.W. Duckett & Co., Inc. v. United States, 266 U.S. 149, 151 (1924).

101. *Id.*; *see also Certain Land Situated in Detroit*, 361 F.3d at 308.

102. *Certain Land Situated in Detroit*, 361 F.3d at 308; United States v. 79.20 Acres of Land, 710 F.2d 1352, 1354 (8th Cir. 1983); *38.60 Acres of Land*, 625 F.2d at 199; Atlantic Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455, 458 (4th Cir. 1963).

103. FED R. CIV. P. 71.1.

104. *See, e.g., Atlantic Seaboard Corp.*, 318 F.2d at 458; City of Davenport v. Three-Fifths of an Acre of Land, 147 F. Supp. 794, 796 (S.D. Ill. 1957) (stating that the unique purpose behind limiting defendants in condemnation proceedings was to prevent delay).

105. *See* FED R CIV. P. 71.1(d)(3)(A) (requiring personal service to comport with Rule 4); United States v. Easement & Right-of-way Over 1.58 Acres of Land, 343 F. Supp. 3d 1321, 1337 n.5 (N.D. Ga. 2018) (stating that Rule 26 discovery applies for condemnation proceedings because Rule 71 is silent on discovery); *Atlantic Seaboard Corp.*, 318 F.2d at 458; Gale Realty Corp. v. United States, 249 F.2d 522 (D.C. Cir. 1957) (applying substantial rights to condemnation appeal); United States v. Certain Parcels of Land, 215 F.2d 140, 145 (3d Cir. 1954) (applying Rule 52 to findings of fact and law because Rule 71 did not affect its application in condemnation cases); *see also* United States v. Merchants Matrix Cut Syndicate, 219 F.2d 90, 95–96 (7th Cir. 1955) (rejecting the argument that crossclaims were barred under Rule 71 because Rule 71's drafters had not prohibited them).

106. 6 WRIGHT & MILLER, *supra* note 28, § 1401.

could be quite harsh to defendants. For example, in some instances, early counterclaims needed to defeat or diminish the plaintiff's claim for courts to allow defendants to assert it.[107]

Gradually, the United States Code eased the restrictions and provided defendants with the chance to assert a claim for affirmative relief, yet it still imposed the same transaction requirement.[108] The Federal Equity Rules provided Equity Rule 30, an early predecessor of FRCP 13, which stated that a defendant can bring an unrelated counterclaim only if that claim arose in equity.[109] When the FRCP unified law and equity, this distinction became irrelevant.[110]

The Federal Rules redefined the counterclaim. Under the modern counterclaim rule, a party either must assert her counterclaim that is "compulsory" because it arises out of the same transaction or occurrence of her original claim, or she may assert a "permissive" counterclaim—one that is unrelated to the action but that a claimant has against an opposing party.[111]

The precise definition of "opposing party" has confounded many legal scholars and experts.[112] In the initial draft of Rule 13, only a defendant could assert a counterclaim against a plaintiff and the defendant needed to assert her counterclaims in her answer.[113] Yet with the change of language in the drafts, defendants were not the only ones who could assert counterclaims and did not need to do so in the answer.[114] Rather, Rule 13 embodied something more open and liberal because the FRCP were designed to streamline the entire process of litigation.[115] Thus, as opposed to hanging on to the distinctions between equity

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107. *Id.* (citing 3 SEDGWICK, DAMAGES § 1049 (9th ed. 1912); 3 STORY, EQUITY JURISPRUDENCE § 1878 (14th ed. 1918).

108. *Id.*

109. *See* Am. Mills Co. v. Am. Sur. Co., 260 U.S. 360, 364–66 (1922).

110. Teamsters Loc. 404 Health Servs. & Ins. Plan v. King Pharm., 906 F.3d 260, 264 (2d. Cir. 2018) ("Rule 2 of the Federal Rules of Civil Procedure provides that: 'There is one form of action—the civil action,' eliminating the distinction between suits in law and equity."); Blondet v. Hadley, 144 F.2d 370, 372 (1st Cir. 1944).

111. FED R. CIV. P. 13; *see also* 6 WRIGHT & MILLER, *supra* note 28, § 1403 (describing the purpose and scope of Rule 13).

112. *See* 6 WRIGHT & MILLER, *supra* note 28, § 1401.

113. Arthur F. Greenbaum, *Jacks or Better to Open: Procedural Limitations on Co-Party and Third-Party Claims*, 74 MINN. L. REV. 507, 520 (1990).

114. *Id.* at 521.

115. For instance, the original draft of the counterclaim rule provided that "[a] party may in one complaint or counterclaim state . . . as many different claims . . . as he may have against an opposing party." UNITED STATES SUPREME COURT ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA 43 (May 1936).

and law or limiting counterclaims to certain parties through certain pleadings only under certain circumstances, Rule 13 became far more open.[116]

And this openness included giving more individuals than just the named parties the right to assert claims in litigation if an adversarial relationship existed between the parties.[117] In fact, "[t]he federal courts have not given a definitive answer to the question of who is an opposing party for purposes of a counterclaim, but the point has caused relatively few difficulties."[118] Courts have found that "[w]here parties are functionally equivalent . . . where an unnamed party controlled the litigation . . . or where . . . an unnamed party was the alter ego of the named party, they should be treated as opposing parties within the meaning of Rule 13."[119] Courts have also found that there are a few other instances where a party can file a counterclaim against a plaintiff.[120] If a plaintiff sues as a representative but will get individual recovery from the suit, courts permit counterclaims against her.[121] Secondly, courts allow counterclaims "against a plaintiff in a capacity different than that in which he sued if principles of equity and judicial economy support such a counterclaim."[122]

As previously mentioned, unifying admiralty and civil rules overcame any attempts to limit the counterclaim beyond the broad scope granted under the new FRCP.[123] For a long time, the distinction between admiralty and civil

116. *See* Mass. Cas. Ins. Co. v. Forman, 600 F.2d 481, 485 (5th Cir. 1979) ("Rules 13 and 56 in particular, . . . are designed to 'expedite the resolution of all the controversies between the parties in one suit.'" (citation omitted)); Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973) ("The objective of the Federal Rules with respect to counterclaims is to provide complete relief to the parties, to conserve judicial resources and to avoid the proliferation of lawsuits.").

117. *See* Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc., 292 F.3d 384, 392–93 (3d Cir. 2002) (interpreting "opposing party" broadly to give meaning to the liberal policy allowing claimants to assert all of their claims in a single action); Avemco Ins. Co. v. Cessna Aircraft Co., 11 F.3d 998, 1000 (10th Cir. 1993) (applying Rule 13 to insurance company acting through subrogation to the named plaintiff); Banco Nacional de Cuba v. First Nat'l City Bank of N.Y., 478 F.2d 191, 194 (2d Cir. 1973).

118. 6 WRIGHT & MILLER, *supra* note 28, § 1404.

119. *Transamerica Occidental Life Ins. Co.*, 292 F.3d at 391; *see also* Pace v. Timmermann's Ranch & Saddle Shop Inc., 795 F.3d 748, 753 (7th Cir. 2015); Crosby Yacht Yard, Inc. v. Yacht Chardonnay, 159 F.R.D. 1, 4 (D. Mass. 1994) (stating that the owner of a yacht could bring a counterclaim as an intervenor in an in rem action regardless of whether the action was in rem or in personam).

120. Chambers v. Cooney, 537 F. Supp. 2d 1248, 1253 (S.D. Ala. 2008).

121. Blanchard v. Katz, 117 F.R.D. 527, 529 (S.D.N.Y. 1987).

122. *Id.* (quoting Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 886–87 (2d Cir. 1981)).

123. *See generally* Stern, Hays & Lang, Inc. v. M/V Nili, 407 F.2d 549, 551 (5th Cir. 1969).

proceedings affected a party's remedy.[124] However, the FRCP's unification gave litigants the chance to assert either legal or equitable counterclaims in admiralty suits.[125] The plaintiff in *Alaska Barite Co. v. Freighters Inc.* attempted to argue against this conclusion, but to no avail.[126] The suit concerned an antitrust counterclaim filed in an admiralty claim, when the plaintiff argued that the counterclaim was improper because the suit was filed in admiralty.[127] Acknowledging the unification between the civil and admiralty rules, the court found that the antitrust counterclaim could proceed.[128] The court dismissed plaintiff's reliance on pre-unification Supreme Court cases that compelled a different conclusion because those cases were based on the clear distinction between civil and admiralty law that had vanished upon unification.[129]

So, the Supplemental Rules emerged from the unification of the FRCP and admiralty procedural rules.[130] When making the decision to unify the rules, several interested groups, scholars and experts in the maritime legal community discussed and recognized that there was a significant deal of overlap between the admiralty rules prevailing at the time and the new FRCP.[131] Naturally, this made unification easier.[132]

But there were some notable differences in admiralty law that needed to stay exclusive, as indicated by the creation of the Supplemental Rule. Namely, the Supplemental Rules preserved four types of remedies involving property seizure that were unique to maritime law and not present in the FRCP.[133] These were: maritime actions in rem; maritime attachment and garnishment; maritime actions for partition, possession, or trying title; and maritime actions for exoneration or limiting liability.[134] The distinctive treatment of these types of remedies in the maritime context arose from the "body of distinctive substantive

124. *See, e.g.,* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 152–53 (4th Cir. 1995) (discussing the consequences from the unity of law and equity and their effect on previous divergence between these two types of claims).

125. *See Stern, Hays & Lang, Inc.*, 407 F.2d at 551 ("The melding of the civil with admiralty . . . . invests the Judge with all of the statutory powers, whether their genesis be formerly at law, in equity, or in admiralty.").

126. 54 F.R.D. 192 (N.D. Cal. 1972).

127. *Id.* at 195 n.1.

128. *Id.*

129. *Id.* (citing United States v. Isthmian Steamship Co., 359 U.S. 314 (1959)).

130. *See* Leavenworth Colby, *Admiralty Unification*, 54 GEO. L.J. 1258, 1258 (1966).

131. *Id.* at 1259.

132. *Id.*

133. 12 WRIGHT & MILLER, *supra* note 28, § 3201.

134. Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 8 (1965).

law and out of the exigencies of maritime commerce," justifying their existence.[135]

The distinctive in rem rule procedure in Rule C comes from the distinctive maritime concept of personifying a ship for the purposes of enforcing a maritime lien.[136] Thus, a plaintiff brings his maritime action against the ship itself for the purposes of executing a lien—a concept wholly foreign to the FRCP.[137] Again, this concept is tied to the older conception of jurisdiction over the property where there is no jurisdiction over the person.[138] As far as the other three provisions, these all existed out of how the maritime common law developed to afford litigants a remedy against nonresident debtors.[139]

The Supplemental Rules do not exclusively govern every known procedure in one of the four remedies within its ambit, as the FRCP still applies in instances where the Supplemental Rules do not apply.[140] Even if the Supplemental Rules speak to a procedure, there can be a number of instances where the other Civil Rules fill in the gaps and flesh out the scope of certain proceedings.[141]

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135. *Id.*

136. *See* SCHOENBAUM, *supra* note 39, at 849–59.

137. *Id.*

138. As Brainerd Currie describes:

> Attachment and garnishment have historically been the creditor's most reliable remedy against the nonresident debtor—a person frequently encountered in admiralty. Disputes between co-owners are no doubt less important than they were in the days when entrepreneurs typically owned fractional shares of merchant vessels, but they still occur, especially with respect to fishing vessels. The rules on limitation of liability implement a valued statutory right given to vessel-owners exclusively. Because the rules relating to these remedies grow out of a body of distinctive substantive law and out of the exigencies of maritime commerce they should be preserved; but because they do not concern nonmaritime litigation they have been collected in a set of Supplemental Rules for convenience. The existing Admiralty Rules, except in so far as they have been amended to incorporate portions of the Civil Rules, are in the main concerned with these remedies.

Currie, *supra* note 134, at 8.

139. *Id.*; *see also* SCHOENBAUM, *supra* note 39, at 849–59.

140. *See* United States v. $5,372.85 U.S. Coin & Currency, 283 F. Supp. 904, 906 (S.D. N.Y. 1968).

141. *See* United States v. One 1966 Chevrolet Pickup Truck, 56 F.R.D. 459, 461 (E.D. Tex. 1972) ("A motion to set aside a default judgment is governed by Rules 55 and 60 of the Federal Rules of Civil Procedure. These Rules are applicable to proceedings in rem except to the extent they are inconsistent with the Supplemental Rules.") (italicization omitted); United States v. Two Hundred and One, Fifty Pound Bags of Furazolidone, 52 F.R.D. 222, 223 (D.N.D. 1971) (applying Rule 56 motion for summary judgment to forfeiture proceeding because it was not inconsistent with other provisions of the Supplemental Rules).

The Supplemental Rules contain some reference to counterclaims, at least in regards to whether a plaintiff needs to provide "security" to meet a counterclaim.[142] So, the Supplemental Rules clearly retain provisions from the rest of the FRCP and contemplate counterclaims for in rem forfeiture actions in particular instances.[143] Under Supplemental Rule E(7), a plaintiff must give security for damages arising under a counterclaim.[144] This Rule arose out of the comparable Admiralty Rule 50 within the 1921 Supreme Court's Rules of Practice in Admiralty and Maritime Cases, which provides the same rule steeped in maritime terminology.[145] The purpose of the Rule was to allow both plaintiff and counterclaimant to stand on equal footing if the court required the counterclaimant to provide security in the original action.[146]

IV. THE GOVERNMENT AS SOVEREIGN: FROM ANTIQUITY TO MODERNITY

Since civil forfeiture proceedings involve the government's role as plaintiff, an important question arises: When can someone sue the government or levy claims against it? Normally, "[a]bsent a waiver, sovereign immunity shields

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142. *See* FED. R. CIV. P. SUPP. E(7).

143. *Id.*

144. *Id.*

> (7) Security on Counterclaim.
>
> (a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given unless the court directs otherwise.
>
> (b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

Id.

145. Pan Am. Shipping Corp. v. Maritima Columbiana Limitada, 193 F.2d 845, 848 n.1 (5th Cir. 1952). The Fifth Circuit stated that the old rule said:

> Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

Id.

146. *See* E. Transp. Co. v. United States, 98 F. Supp. 36, 38 (E.D.N.Y. 1951) (citing Washington S. Nav. Co. v. Baltimore & Phila. Steamboat Co., 263 U.S. 629, 638–39 (1924)).

the Federal Government and its agencies from suit."[147] This concept comes from another ancient tradition rooted in the English common law; the Crown was immune from suit within its own courts unless it allowed suit.[148] Why would American common law embrace something so seemingly aristocratic?[149] Some have noted that it is deeply rooted in the political and economic realities surrounding the Revolutionary War.[150] Because "[m]any of the States were heavily indebted as a result of the Revolutionary War," the states "were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the 'higher' sovereign."[151]

Over time, this meant that the United States enjoyed immunity from suit unless it expressly waived that immunity.[152] This became consistent with several public policies, including the strong public policy for the United States to continue working for the community without hindrance from individual plaintiffs.[153] Thus, absence of such consent to a suit is considered a complete

147. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) (citing Loeffler v. Frank, 486 U.S. 549, 554 (1988); F.H.A. v. Burr, 309 U.S. 242, 244 (1940)); Cohens v. Va., 19 U.S. 264, 411–12 (1821) (Marshall, C.J.) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.").

148. *See* Alden v. Me., 527 U.S. 706, 715 (1999) (citing Chisholm v. Georgia, 2 U.S. 419, 437–46 (1793) (Iredell, J., dissenting); Nev. v. Hall, 440 U.S. 410, 414 (1979), *overruled by* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019)).

149. *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 42–43 (1992) (Stevens, J., dissenting) (criticizing the doctrine of sovereign immunity's "reliance on the notion that a divinely ordained monarch can 'do no wrong'" as "thoroughly discredited") (citation omitted); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (arguing that sovereign immunity is inconsistent with federal constitutional law and has no originalist basis because there is no evidence the Framers supported it and it frustrates the purpose of the Supremacy Clause).

150. *Hall*, 440 U.S. at 418.

151. *Id.*

152. *See Meyer*, 510 U.S. at 475.

153. Chief Justice Vinson addressed this issue in the following manner in *Larson*:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. . . . But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. . . . [I]n the absence of a claim of constitutional limitation, the necessity of

defect in a suit against the government that totally destroys the court's jurisdiction over that action.[154] However, Congress can waive sovereign immunity expressly and clearly within the text of a statute that it enacts.[155]

There are a few different schools of thought when it comes to determining if the federal government waived sovereign immunity, although the dominant view is the most important for the issue of civil forfeiture counterclaims. The most popular approach is the strict constructionist approach, which finds that only an explicit and express waiver in the text is sufficient, regardless of the statute's legislative history or purpose.[156] Following both from the fundamental principle of textual interpretation to not look at extraneous material to discern Congressional intent where the plain meaning of the statute's text is apparent[157]

> permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.

Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 703–04 (1949).

154. *See* 14 WRIGHT & MILLER, *supra* note 28, § 3654 ("Nevertheless, considered as a 'prerequisite for jurisdiction,' the absence of consent by the United States to suit has been treated by courts as a fundamental defect that deprives the district court of subject matter jurisdiction.").

155. United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (citations omitted) (finding that the federal government's consent to suit must be "unequivocally expressed"); Franconia Assocs. v. United States, 536 U.S. 129, 141 (2002); Lane v. Pena, 518 U.S. 187, 189 (1996).

156. *Lane*, 518 U.S. at 192 (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992)).

157. *See Nordic Vill. Inc.*, 503 U.S. at 37 (citing Hoffman v. Conn. Dept. of Income Maint., 492 U.S. 96, 104 (1989); Dellmuth v. Muth, 491 U.S. 223, 228–29 (1989)). In discussing the role of judges in interpreting statutes, Justice Kavanaugh provides helpful guidance in how this problem should be addressed by courts:

> But in most statutory cases, the issue is one of interpretation. To assist the interpretive process, judges over time have devised many semantic and substantive canons of construction—what we might refer to collectively as the interpretive rules of the road. To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application. In other words, if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary.
>
> With that objective in mind, I will advance one overarching argument in this Book Review. A number of canons of statutory interpretation depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity. Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that

and the repeated application of this principle to the Eleventh Amendment context[158], strict constructionists find that Congress must explicitly waive federal sovereign immunity.[159]

The Federal Tort Claims Act (FTCA) controls tort actions against the United States and remains the exclusive remedy for wrongful acts or omissions by the federal government's employees.[160] Thus, operating under the doctrine of sovereign immunity, whatever the FTCA says about suing the federal government for its employees' wrongful acts serves as the waiver necessary to undermine the government's sovereign immunity.[161] The FTCA acts as a way for victims of the government's negligence to hold it responsible just like any other negligent individual.[162] And typically, courts find that the federal government is liable if it can analogize the government's behavior to a private citizen acting in the same manner as the government under similar circumstances.[163]

> way, they can depart from that baseline if required to do so by any relevant substantive canons—for example, the absurdity doctrine.
>
> To be clear, I fully appreciate that disputed calls will always arise in statutory interpretation. Figuring out the best reading of the statute is not always an easy task. I am not a modern-day Yogi Berra, who once purportedly said that there would be no more close calls if we just moved first base.
>
> But the current situation in statutory interpretation, as I see it, is more akin to a situation where umpires can, at least on some pitches, largely define their own strike zones. My solution is to define the strike zone in advance much more precisely so that each umpire is operating within the same guidelines. If we do that, we will need to worry less about who the umpire is when the next pitch is thrown.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION 13–14 (Amy Gutmann ed., 1997)).

158. *See Hoffman*, 492 U.S. at 104; *Dellmuth*, 491 U.S. at 230 ("If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile . . . .").

159. *See* F.A.A. v. Cooper, 566 U.S. 284, 304 (2012) (finding that absent a clear, unequivocal waiver of sovereign immunity, the Privacy Act did not allow "damages for mental or emotional distress").

160. 28 U.S.C. § 2679.

161. *See* Richards v. United States, 369 U.S. 1, 6 (1962) ("The Tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort . . . .").

162. Indian Towing Co. v. United States, 350 U.S. 61, 68–69 (1955) (Frankfurter, J.) ("The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.").

163. 28 U.S.C. § 2674; *see also* United States v. Olson, 546 U.S. 43, 46 (2005).

There are clear limits to this principle. For example, the federal government has not waived its sovereign immunity to claims arising under federal law.[164] The rationale for this position comes from 28 U.S.C. § 1346(b)(1), which limits the scope of liability to the United States where it "would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[165] This means that the FTCA excludes constitutional torts.[166] Under the FTCA, an individual can only assert claims arising under "state law" against the federal government and may not assert claims that arise exclusively under federal law.[167] While constitutional torts, such as seeking tort damages for unconstitutional takings under the Fifth Amendment, might be relevant to mechanisms for recovery under the comparable Tucker Act, courts generally do not see it as a recognizable means of suit for an individual plaintiff under the FTCA.[168]

And section 2680 of the FTCA might further aid this conclusion. There, Congress has explicitly waived the application of section 1346(b) to claims that arise from several discrete categories.[169] Thus, the government retains its sovereign immunity for claims arising out of these categories. The list includes certain fundamental government functions, including taxation, national defense, and law enforcement detention of certain property.[170] Thus, the government generally cannot be sued from claims arising from these categories because of the purpose of "ensuring that 'certain governmental activities' not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available."[171]

In section 2680, suits arising from civil forfeiture fall under this waiver exemption.[172] However, after it passed CAFRA, Congress "re-waived" claims

164. *See* Coleman v. United States, 912 F.3d 824, 835 (5th Cir. 2019).

165. 28 U.S.C. § 1346(b)(1).

166. F.D.I.C. v. Meyer, 510 U.S. 471, 477 (1994).

167. *Id.*

168. *See, e.g.,* United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 664–65 n.17 (5th Cir. 2019) ("The Tucker Act provides a judicial avenue for 'any claim against the United States founded . . . upon the Constitution.'" (quoting 28 U.S.C. § 1491(a)(1)) (citing United States v. Bormes, 568 U.S. 6, 11 (2012))).

169. 28 U.S.C. § 2680(a)–(n) (exempting causes of actions arising out of "discretionary function[s]," postal errors, forfeiture or detention of goods, admiralty, national defense, "quarantine," intentional torts, Treasury actions, military actions, foreign countries, actions by the Tennessee Valley Authority or the Panama Canal Company, or banking actions).

170. *Id.*

171. Kosak v. United States, 465 U.S. 848, 858 (1984).

172. 28 U.S.C. § 2680(c).

arising from federal civil forfeiture proceedings.[173] Essentially, Congress placed an express carve-out for suits arising from civil forfeiture, if certain circumstance are met, to waive the federal government's sovereign immunity.[174] This applies to:

> [A]ny claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
> (2) the interest of the claimant was not forfeited;
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[175]

These elements seem rigid in application. For example, in *Pearson v. United States*, the Seventh Circuit rejected a prisoner's argument attempting to assert a claim against the government for damages to his property under the FTCA.[176] It noted that because the state convicted the prisoner and that it never instituted a formal forfeiture proceeding, the exception did not apply.[177] Notably, the Seventh Circuit adhered to strict application of the requirements; if the government did not seize the property "only for the purpose of forfeiture," a claimant could not assert a claim through CAFRA.[178] And, importantly, CAFRA seems to have kept the language of 1346(b), which required claims against the government to arise under state law and not federal law.[179]

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173. *See* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008) ("The amendment canceled the exception—and thus restored the waiver of sovereign immunity—for certain seizures of property based on any federal forfeiture law." (italics omitted)).

174. *Id.*

175. 28 U.S.C. § 2680(c)(1)–(4).

176. 373 F. App'x 622 (7th Cir. 2010).

177. *Id.* at 624.

178. *Id.*

179. *See* United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 664 (5th Cir. 2019); Art Metal–U.S.A., Inc. v. United States, 753 F.2d 1151, 1158 (D.C. Cir. 1985) ("Duties set forth in *federal law* do not, therefore, automatically create duties cognizable under *local tort law*. The pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under local tort law." (citing Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955))).

Furthermore, CAFRA enumerates the type of relief a party can seek in the civil forfeiture context.[180] If the claimant prevails in a civil forfeiture action, then she is entitled to receive "(1) reasonable attorneys' fees and litigation costs, (2) post-judgment interest, and (3) actual and imputed interest earned by seized currency while in the possession of the United States."[181] Notably, section 2465(b)(2)(A) states that "[t]he United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection."[182]

If a cause of action falls within the narrow window of sovereign immunity for civil forfeiture under section 2680, then a plaintiff must establish additional requirements to assert a cause of action. For instance, there is an administrative exhaustion requirement. Under 28 U.S.C. § 2675, any claimant under the FTCA must first file a claim with whatever federal agency is responsible for the alleged wrong.[183] Additional limitations include when a claimant may file a suit and unique procedures governing military-based claims.[184]

Nothing strictly forecloses counterclaims against the United States, provided that the United States actually waived sovereign immunity with regard to the particular claim asserted in the counterclaim.[185] And courts have found that this extends to recoupment within the same transaction or occurrence as the original claim—the right of a party to reduce the United States' recovery.[186]

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180. 28 U.S.C. § 2465.

181. United States v. 662 Boxes of Ephedrine, 590 F. Supp. 2d 703, 708 (D.N.J. 2008) (citing 28 U.S.C. § 2465(b)(1)).

182. *Id.*

183. *Id.*

184. *See* 28 U.S.C. § 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ."); Feres v. United States, 340 U.S. 135, 138 (1950) (holding that the FTCA did not apply to negligence to military members and the government retains its sovereign immunity for such actions).

185. *See* United States v. Agnew, 423 F.2d 513, 514 (9th Cir. 1970) ("Although a counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absence of consent."); Frederick v. United States, 386 F.2d 481, 488 (5th Cir. 1967) (quoting FED. R. CIV. P. 13(d)); United States v. One 1971 Volvo 2-Door Sedan, 393 F. Supp. 843, 847 (C.D. Cal. 1975) (finding that claimant's counterclaim in civil forfeiture proceeding was barred only because the United States did not waive sovereign immunity and there was no administrative exhaustion required under the FTCA).

186. *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512–14 (1940); Berrey v. Asarco Inc., 439 F.3d 636, 644–45 (10th Cir. 2006); United States v. Intrados/Int'l Mgmt. Group, 277 F. Supp. 2d 55, 63 (D.D.C. 2003) ("In this case, the government's affirmative act of filing this suit represents its waiver of sovereign immunity as to the defendants' compulsory counterclaim of recoupment.") (citing United States v. Dalm, 494 U.S. 596, 611 (1990); *Agnew*, 423 F.2d at 514; EEOC v. First Nat'l Bank of Jackson, 614 F.2d 1004, 1007 (5th Cir. 1980))).

V. CASES ADDRESSING COUNTERCLAIMS IN CIVIL FORFEITURE

Each circuit that has addressed this issue seems to have handled it differently. While some have seemingly said very little on counterclaims in civil forfeiture cases specifically, others have said more about the scope of sovereign immunity and whether the government retains it for a civil forfeiture claimant's suit. At the same time, others have solely focused on whether counterclaims are even permissible in civil forfeiture in rem proceedings, regardless of how courts generally treat counterclaims or claimants' procedural rights in in rem proceedings.[187]

A. The Majority View on Counterclaims in Civil Forfeiture Proceedings as Developed by the United States Court of Appeals for the First Circuit

The Court of Appeals for the First Circuit established what is widely regarded as the majority view on how to handle counterclaims in civil forfeiture proceedings in *United States v. One Lot of U.S. Currency ($68,000)*.[188] In this case, the United States instigated an in rem civil forfeiture proceeding over property allegedly used in cocaine transportation.[189] In particular, the United States sought forfeiture over an automobile used in transporting cocaine and $68,000 allegedly paid for the cocaine.[190] This carried from the prior case, *United States v. Castiello*.[191]

Essentially, Mr. Castiello was arrested after a confidential informant identified him to the Drug Enforcement Administration (DEA) for his involvement in a major drug-smuggling operation in the Boston area.[192] A DEA officer contacted Castiello with the information and set up a time to speak with each other.[193] Upon meeting one another and sitting together at a restaurant, Castiello told the undercover officer that he "could sell roughly ten kilograms of cocaine per month, hinted that he needed a new source of supply, and quoted the price he was willing to pay ($17,000 per kilogram)."[194] In particular,

187. *See* United States v. Sum of $70,990,605, 991 F. Supp. 2d 144, 150 (D.D.C. 2013); *see also* United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372, 1377 (11th Cir. 1981) (finding that claimant in civil forfeiture in rem proceeding "could have asserted a counterclaim"); United States v. All Funds in Account Nos. 747.034/278, 295 F.3d 23, 25 (D.C. Cir. 2002) ("In exercising in rem jurisdiction, the court has authority over the property (the res) and may adjudicate claims of ownership.") (italics omitted); Grossman, *supra* note 96, at 695.

188. 927 F.2d 30 (1st Cir. 1990).

189. *Id.* at 31.

190. *Id.* (citing 21 U.S.C. §§ 881(a)(4), (6)).

191. 915 F.2d 1 (1st Cir. 1990).

192. *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 31–32.

193. *Id.*

194. *Id.* at 32.

Castiello indicated that he had "about sixty grand to play with right now" and would purchase "four kilograms of cocaine from [the officer] for $68,000."[195]

Eventually, Castiello and the officer arranged for Castiello to meet the officer to attempt to purchase $68,000 worth of cocaine after Castiello finally amassed the necessary amount of money for the purchase.[196] Driving the same Lincoln town car that the federal government would later seize, Castiello arrived at their prepared rendezvous.[197] The officer placed Castiello under arrest after catching him red-handed.[198]

After proceeding to charge Castiello with attempted possession of cocaine with intent to distribute, the United States instituted an in rem proceeding for the forfeiture of the property.[199] In reply, Mr. Castiello filed an answer to claim the property.[200] At the district court level, the government filed a motion for summary judgment, which Castiello opposed.[201] The district court granted summary judgment in the government's favor without offering any explanation.[202] This prompted Castiello's appeal.[203]

On appeal, the First Circuit briefly noted that nothing opposed the initial charge for drug trafficking nor the prima facie requirement to obtain civil forfeiture—that there was probable cause to believe that the property had a "requisite nexus to a specified illegal purpose."[204] Without any evidence opposing the government's affidavit, the First Circuit found that the district court had properly awarded the government summary judgment.[205]

The appellant filed nothing to contest the government's affidavit, which became a point of contention on appeal.[206] Based upon his lawyer's alleged inability to consult with him to flesh out a defense for his case, Castiello argued that this lack of communication meant that he was unable to prepare an adequate defense.[207] But the First Circuit rejected this argument and cited to

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 31.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 32 (citing United States v. Parcel of Land, Etc. (28 Emery St.), 914 F.2d 1, 3 (1st Cir. 1990); United States v. Parcels of Real Property, 913 F.2d 1, 3 (1st Cir. 1990); United States v. $250,000 in U.S. Currency, 808 F.2d 895, 897 (1st Cir. 1987)).

205. *Id.* at 32–33. (citing Kelly v. United States, 924 F.2d 355, 358 (1st Cir. 1991)).

206. *Id.* at 33.

207. *Id.*

FRCP 56(f).[208] For the First Circuit, this FRCP provided the necessary course of action for a litigant deprived of time in a civil forfeiture case—a chance to delay until the litigant could assemble facts to oppose an affidavit.[209]

With regard to Castiello's counterclaim, the opinion is notably sparse, but it offers some important rationale that other courts have used in analyzing the same issue.[210] Castiello asserted a counterclaim, demanding return of the personal property seized along with the truck—namely, a telephone that was in the car when the government seized it.[211] First, the First Circuit began by analyzing the structure of a counterclaim.[212] It 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." A forfeiture action is in rem, not in personam. The property is the defendant. Since no civil claim was filed by the government against Castiello—indeed, rather than being dragooned into the case as a defendant, he intervened as a claimant—there was no "claim" to "counter." Thus, Castiello's self-styled counterclaim was a nullity, and the court below appropriately ignored it.[213]

Looking at the in rem nature of the proceeding, the First Circuit found that Castiello was merely a claimant because the government asserted no claim in the civil action against him.[214] Thus, it found that the property itself was the

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208. In rejecting the appeal to a lack of adequate time to prepare, the First Circuit stated:

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Id. at 33 n.4 (quoting FED. R. CIV. P. 56(f)).

209. *Id.* at 33; *see also* United States v. Two Hundred and One, Fifty Pound Bags of Furazolidone, 52 F.R.D. 222, 223 (D.N.D. 1971) (court could consider Rule 56 motion for summary judgment in a civil forfeiture proceeding because the FRCP applied where the Supplemental Rules were silent).

210. *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34–35; *see also* United States v. 8 Luxury Vehicles, 88 F. Supp. 3d 1332, 1336 (M.D. Fla. 2015) (citing *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34)); United States v. Assorted Comput. Equip., No. 03-2356V, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004).

211. *One Lot of U.S. Currency ($68,000*), 927 F.2d at 34.

212. *Id.*

213. *Id.* (italics omitted). *But see* Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc., 292 F.3d 384, 392–93 (3d Cir. 2002) (finding that judicial economy and res judicata compelled a liberal interpretation of "opposing party" under FRCP 13, which allowed unnamed parties in privity to assert counterclaims).

214. *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34.

defendant.[215] Because the property was the defendant, the First Circuit found that this meant that Castiello could assert no claim against the government, as he was not the defendant.[216] The First Circuit acknowledged that there may be a stronger argument if Castiello sought return of the property actually seized.[217] Certainly, modern forfeiture statutes seem to contemplate claims for return of seized property.[218]

Most jurisdictions have followed the First Circuit's position, but this has mostly been reflected at the district court level.[219] For instance, the United States District Court for the Middle District of Florida dealt with this precise issue recently in *United States v. 8 Luxury Vehicles*.[220] The case arose out of the seizure of thirty-four luxury vehicles from the defendant, which were allegedly purchased with "proceeds of wire fraud, money laundering, and mail fraud . . . ."[221] The vehicles belonged to JITCO Group Limited, a company that

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215. *Id.*

216. *Id. Contra Transamerica Occidental Life Ins. Co.*, 292 F.3d at 392–93; Title Cap. Mgmt., LLC v. Progress Residential, LLC, No. 16-21882-Civ-WILLIAMS/TORRES, 2017 WL 5953287, at *3 (S.D. Fla. Aug. 8, 2017) (stating that unnamed parties in privity with plaintiff qualify as "opposing parties" to prevent waste of "resources and time . . . spent litigating essentially one issue"); Crosby Yacht Yard, Inc. v. Yacht Chardonnay, 159 F.R.D. 1, 4 (D. Mass. 1994) (finding owner of a yacht entitled to bring counterclaim regardless of the in rem status of a lawsuit).

217. *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34 n.7 (citing United States v. Castro, 883 F.2d 1018 (11th Cir. 1989); Goodman v. Lane, 48 F.2d 32 (8th Cir. 1931)).

218. 28 U.S.C. § 2465(a)(1) (governing civil forfeiture claimant's return of property claims).

219. *See* United States v. 8 Luxury Vehicles, 88 F. Supp. 3d 1332, 1337 (M.D. Fla. 2015) ("Thus, based on the persuasive cases from other jurisdictions, counterclaims are not generally permitted in civil forfeiture proceedings."); United States v. Funds From Fifth Third Bank Account # 0065006695, No. 13–11728, 2013 WL 5914101, at *12 (E.D. Mich. Nov. 4, 2013) (finding that a claimant in an in rem forfeiture proceeding is not entitled to file counterclaims); United States v. $22,832.00 in U.S. Currency, No. 1:12 CV 01987, 2013 WL 4012712, at *4 (N.D. Ohio Aug. 6, 2013) ("Claimants in an in rem civil forfeiture action generally may not file counterclaims against the government." (italics omitted) (citing *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34)); United States v. $43,725.00 in U.S. Currency, No. 4:08–1373–TLW, 2009 WL 347475, at *1 (D.S.C. Feb. 3, 2009) ("[T]he true defendant in a civil forfeiture action is the property that has been seized, rather than the claimant of that property, and the claimant of the seized property is not entitled to pursue a counterclaim against the Government or individuals within the limited scope of the in rem civil forfeiture action.") (italics omitted); United States v. 1866.75 Bd. Feet, No. 1:07cv1100(GBL), 2008 WL 839792, at *1 (E.D. Va. Mar. 25, 2008) ("The Court dismisses all of Claimants' counterclaims because as claimants in an in rem civil forfeiture action they are not entitled to file counterclaims.") (italics omitted); United States v. Assorted Comput. Equip., No. 03-2356V, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004) ("Counterclaims are generally not allowed by third parties in civil in rem forfeiture proceedings.") (italics omitted) (citations omitted). *But cf.* United States v. $10,000 in U.S. Funds, 863 F. Supp. 812, 816 (N.D. Ill. 1994) (barring counterclaim solely because sovereign immunity forbade such claims against the United States, although these cases relied on pre-CAFRA interpretations of the FTCA).

220. 88 F. Supp. 3d at 1332.

221. *Id.* at 1333 (citing 18 U.S.C. § 981(a)(1)(C)).

sells and exports newly purchased vehicles that it purchases from American dealers and sells to customers in foreign countries.[222] In response to the in rem complaint, JITCO filed a counterclaim alleging tortious interference with JITCO's property rights in the vehicles along with several Georgia state law property and tort claims.[223] JITCO also alleged that the United States was liable under the FTCA.[224]

The court analyzed the United States' motion to dismiss for failure to state a claim.[225] First, it addressed the United States' arguments that counterclaims were unavailable to claimants in a civil forfeiture proceeding, based upon the First Circuit's analysis.[226] Particularly, the United States argued that there is no in personam jurisdiction over it because the lawsuit is an in rem proceeding and because counterclaims required in personam jurisdiction, there cannot be a counterclaim against the government in an in rem forfeiture.[227] Next, the United States pointed to the Federal Rules as proof that claimants cannot assert counterclaims in a civil forfeiture proceeding because Federal Rule 13(d)[228] exempts the United States from counterclaims.[229] The federal government then asserted that Rule G of the Supplemental Rules did not offer any express provision allowing in personam counterclaims in a civil forfeiture action.[230] Finally, the United States claimed that the large number of potential claimants would deter the "orderly administration of justice" in civil forfeiture.[231]

In reply, JITCO asserted that Rule G in the Supplemental Rules allows for counterclaims because it states that the FRCP apply if the Supplemental Rules do not address something.[232] It pointed to Eleventh Circuit cases allowing for

222. *Id.* (addressing claimant's Rule 11 motion for sanctions).

223. *Id.*

224. *Id.*

225. *Id.* at 1333–34.

226. *Id.* at 1334 (citing United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 34–35 (1st Cir. 1991)).

227. *Id.* (citing United States v. Assorted Comput. Equip., No. 03-2356V, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004) ("Because the government has not asserted a claim against [the claimant], there can be no counterclaim.")). *But see* United States v. All Funds in Account No. 747.034/278, 295 F.3d 23, 25 (D.C. Cir. 2002) ("Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest.").

228. FED. R. CIV. P. 13(d) ("These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.").

229. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1334–35.

230. *Id.* (citing FED. R. CIV. P. SUPP. G.). *But see, e.g.*, Alaska Barite Co. v. Freighters Inc., 54 F.R.D. 192 (N.D. Cal. 1972).

231. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1335. *But see* BRIAN D. KELLY, FIGHTING CRIME OR RAISING REVENUE? TESTING OPPOSING VIEWS OF FORFEITURE 1, 3 (2019) (finding that civil forfeiture proceedings do not meaningfully deter crime rates or drug use rates).

232. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1335.

a counterclaim in a civil forfeiture action and holding that the United States waived immunity from them as proof that claimants could assert them against the government.[233] Furthermore, JITCO argued that it was seeking return of the property at issue in the forfeiture, which is among the limited examples allowed under the First Circuit's logic in *One Lot of U.S. Currency ($68,000)*.[234]

The Middle District of Florida inevitably rejected JITCO's claims.[235] First, it noted that the cases JITCO cited did not directly endorse a claimant's ability to levy counterclaims in a civil forfeiture action.[236] Again, it cited to *One Lot of U.S. Currency ($68,000)* for persuasive support that a claimant cannot bring a counterclaim in an in rem action because an in rem proceeding is against property, rather than a person.[237] Recognizing that a claimant still might have claims against the government, the court cited cases suggesting that the claimant could simply file other claims in a separate action.[238] Ultimately, the court found that "JITCO does not have in personam jurisdiction to [initiate] its counterclaim."[239]

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233. *Id.* (citing United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir. 1988), *abrogated by* World Wide Supply QU v. Quail Ship Cruises Mgmt., 802 F.3d 1255 (11th Cir. 2015) (finding that in a maritime in rem action, jurisdiction over the property does not vanish because the *res* leaves the court's continual control); United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981)).

234. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1335 (citing United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 35 n.7 (1st Cir. 1991)); *see also* 28 U.S.C. § 2461 ("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."); 18 U.S.C. § 983(a)(4)(A) (allowing claimants to "file a claim" to assert an interest in forfeited property).

235. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1336.

236. *Id.* at 1335 (citing P.R. Ports Auth. v. Barge KATY-B, 427 F.3d 93, 100 (5th Cir. 2005); United States v. One (1) 1984 Nissan 300 ZX, 711 F. Supp. 1570, 1574 (N.D. Ga. 1989)).

237. *Id.* (citing *One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34). *But see* United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 660 (5th Cir. 2019) (A claimant "may also file: (1) an answer to the government's complaint; (2) a Rule 12 motion; (3) objections to government interrogatories; (4) a motion to suppress use of the seized property as evidence; and (5) a motion raising a defense under the Excessive Fines Clause of the Eighth Amendment.") (citations omitted)).

238. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1337 (citing United States v. Funds from Fifth Third Bank Account, No. 13-11728, 2013 WL 5914101, at *11–12 (E.D. Mich. Nov. 4, 2013)). *But see* FED. R. CIV. P. 13(a)(1) ("A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .").

239. *8 Luxury Vehicles*, 88 F. Supp. 3d at 1337. *But see $4,480,466.16 in Funds Seized*, 942 F.3d at 660; Crosby Yacht Yard, Inc. v. Yacht Chardonnay, 159 F.R.D. 1, 4 (D. Mass. 1994) (holding that owner of yacht could bring a counterclaim as an intervenor in an in rem action regardless of whether the action was in rem or in personam); Grossman, *supra* note 96, at 696.

The Sixth Circuit followed the First Circuit's rationale in *Zappone v. United States*.[240] The counterclaim was not the focal point of the case, but the situation arose when IRS Special Agents seized assets that the Zappone family made from their scrap-metal recycling business.[241] The Zappones asserted counterclaims as claimants in the civil forfeiture proceeding regarding the money seized from their illicit operations.[242] While the Sixth Circuit addressed the Zappones' subsequent complaint against the federal government and pondered the issues of sovereign immunity raised by their suit, it also addressed whether the Zappones were able or obligated to assert these claims in the initial forfeiture action.[243] Essentially, the Sixth Circuit held that because civil forfeiture actions are against the property, the Zappones were unable to assert counterclaims in the initial property seizure action.[244] The Sixth Circuit found it inappropriate to pursue damages in a civil forfeiture proceeding because "while the purported owner of the property may intervene in the action, he may not assert counterclaims against the United States."[245]

B. Enter the Fifth Circuit—Support for Counterclaims in Civil Forfeiture

The Fifth Circuit has most recently taken a strong stance on counterclaims in civil forfeiture proceedings in *United States v. $4,480,466.16 in Funds Seized*.[246] The claimant was Retail Ready Career Center (RRCC), a private Texas school that trained students to become HVAC technicians.[247] The majority of these students were military veterans using their GI bill to pay for their education.[248] At some point in 2017, the Department of Veterans Affairs investigated whether RRCC did not comply with the "85–15" rule, which "prohibits the VA from approving a veteran's enrollment in a course 'for any period during which more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees or other charges paid for them by the educational institution or by VA[.]'"[249] The 85–15 rule prevents predatory

240. 870 F.3d 551 (6th Cir. 2017).

241. *Id.* at 553–54.

242. *Id.* at 554.

243. *Id.* at 561–62.

244. *Id.* at 561 (quoting United States v. All Funds in Account No. 747.034/278, 295 F.3d 23, 25 (D.C. Cir. 2002)).

245. *Id.* (citing United States v. One Lot of U.S. Currency ($68,000), 927 F.3d 30, 34 (1st Cir. 1991)).

246. 942 F.3d 655 (5th Cir. 2019).

247. *Id.* at 657.

248. *Id.*

249. *Id.* (quoting 38 C.F.R. § 21.4201).

"charlatans" from enticing veterans to waste their money on useless programs.[250]

The federal government received warrants and filed a complaint for the forfeiture of over $4.6 million that RRCC earned, which RRCC subsequently filed a claim for return under 18 U.S.C. § 983(a)(4)(A).[251] RRCC also filed two "constitutional counterclaims" against the government, seeking damages for the government's alleged violations of RRCC's Fourth and Fifth Amendment rights.[252] Specifically, RRCC claimed that the government made "an unreasonable seizure of the property . . . by seizing the claimed property without an indictment, notice and hearing, or admissible evidence supporting a claim of forfeiture, and that the government violated the Fifth Amendment by depriving RRCC of its property without due process of law."[253] The district court addressed the federal government's motion to dismiss these claims.[254]

The district court acknowledged the government's argument that RRCC could not file a counterclaim due to the in rem posture of the case.[255] In reply, RRCC argued that the Fifth Circuit never suggested counterclaims were impermissible and pointed to the Supplemental Rules for proof.[256] But the district court took the government's position, citing to persuasive authority rejecting counterclaims.[257] Without "binding Fifth Circuit authority to the contrary," the district court soundly rejected RRCC's counterclaim and granted the government's motion to dismiss.[258]

On appeal, Judge Duncan confronted the First Circuit's rationale that in rem claims forbid counterclaims from a civil forfeiture claimant, the scope of CAFRA, and sovereign immunity.[259] The court noted that the First Circuit based its conclusion on the wrong premise that in rem jurisdiction somehow robs a claimant of a procedural right to assert a counterclaim.[260] The court pointed to the numerous procedural rights in the Supplemental Rules and federal statutes that allowed claimants to file answers, motions to dismiss, and

250. *Id.* (quoting Cleland v. Nat'l Coll. of Bus., 435 U.S. 213, 219 (1978)).

251. *Id.*

252. *Id.*

253. United States v. $4,480,466.16 in Funds Seized, No. 3:17-CV-2989-D, 2018 WL 1964255, at *7 (N.D. Tex. Apr. 26, 2018).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* (quoting United States v. One Lot of U.S. Currency ($68,000), 927 F.3d 30, 34 (1st Cir. 1991)).

258. *Id.* at *8.

259. United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 656 (5th Cir. 2019).

260. *Id.* at 660.

other procedural mechanisms.[261] "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 rem and not in personam.'"[262]

Next, the Fifth Circuit noted that other jurisdictions rejecting counterclaims in civil forfeiture proceedings ignored "the rules governing intervenors."[263] In fact, the Fifth Circuit pointed to case law treating claimants in a civil forfeiture proceeding identically to intervenors.[264] Intervenors stand on equal footing to "original" parties, in the Fifth Circuit's analysis, which makes them able to litigate matters pertaining to the claim at hand.[265] In a brief footnote, the Fifth Circuit quickly addressed the argument brought up in *8 Luxury Vehicles* that Rule 13(d) forecloses counterclaims against the United States in a forfeiture proceeding.[266] Accurately dismissing this concern, the Fifth Circuit acknowledged that Rule 13(d) only limits instances where someone can counterclaim against the United States without running afoul of sovereign immunity.[267]

Furthermore, the Fifth Circuit acknowledged that counterclaims are permissible in admiralty in rem claims.[268] Indeed, the Fifth Circuit noted that

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261. *Id.* (stating that a claimant can file "an answer to the government's complaint; (2) a Rule 12 motion; (3) objections to government interrogatories; (4) a motion to suppress use of the seized property as evidence; and (5) a motion raising a defense under . . . the Eighth Amendment.") (citations omitted)).

262. *Id.* (italics omitted).

263. *Id.*; *see also* FED. R. CIV. P. SUPP. G advisory committee's note; *id.* at G(5)(a)(i), (G)(1); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 861 F.3d 1278, 1293 (11th Cir. 2017); United States v. 60 Auto. Grilles, 799 F. App'x 693 (11th Cir. 2020); Reedsburg Bank v. Apollo, 508 F.2d 995, 1000 (7th Cir. 1975).

264. *$4,480,466.16 in Funds Seized*, 942 F.3d at 661 n.9. (citing United States v. Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 981 (5th Cir. 1984)); United States v. 110 Bars of Silver, 508 F.2d 799, 801 (5th Cir. 1975) (per curiam); Westfall Oldsmobile, Inc. v. United States, 243 F.2d 409, 411 (5th Cir. 1957)); *see also* United States v. All Assets Held in Account No. 80020796, 299 F. Supp. 3d 121, 127 (D.D.C. 2018) (establishing that claimants "must intervene" in a forfeiture action to assert defenses and procedural rights).

265. *$4,480,466.16 in Funds Seized*, 942 F.3d at 661 (quoting Brown v. Demco, 792 F.2d 478, 480–81 (5th Cir. 1986)).

266. *Id.* at 661 n.10 (citing United States v. 8 Luxury Vehicles, 88 F. Supp. 3d 1332, 1334–35, 1337 (M.D. Fla. 2015)).

267. *Id.*; *see also* 6 WRIGHT & MILLER, *supra* note 28, § 1427 (collecting cases addressing that Rule 13(d) only limits the right to sue the United States with a counterclaim to instances where the government waived its sovereign immunity).

268. *$4,480,466.16 in Funds Seized*, 942 F.3d at 661–62 (citations omitted); Incas & Monterey Printing & Packaging, Ltd. v. M/V Sang Jin, 747 F.2d 958, 963–64 n.16 (5th Cir. 1984); *Treasure Salvors, Inc.*, 569 F.2d at 335; Ellis Diesel Sales & Serv., Inc. v. M/V On Strike, 488 F.2d 1095, 1096 (5th Cir. 1973) (per curiam); Compania Naviera Vascongada v. United States, 354 F.2d 935,

when the admiralty rules unified with the FRCP, the term "libel" in admiralty was merely replaced with "counterclaims," recognizing that the FRCP filled in the gaps where the Supplemental Rules did not provide a procedural mechanism.[269] Particularly, the court pointed to the instances in the Supplemental Rules referencing a counterclaim, including Supplemental Rule E(7), which requires security on a counterclaim asserted in either an in rem or quasi in rem proceeding.[270] "Given those textual cues," the court was unwilling "to say that counterclaims are always out-of-bounds in in rem proceedings."[271]

But the Fifth Circuit still affirmed the district court's decision based on sovereign immunity.[272] The court recognized that the United States must waive sovereign immunity clearly and without ambiguity.[273] And while the court acknowledged RRCC's argument that the federal government "re-waived" its sovereign immunity under the FTCA "for certain property damages claims arising out of forfeitures," this never meant that the federal government waived its immunity for claims based in federal law, which would include RRCC's constitutional tort claims.[274] Indeed, the Fifth Circuit noted that a plaintiff cannot recover for constitutional tort damages against the United States because of sovereign immunity.[275]

Desperately, RRCC argued that in maritime in rem claims, the United States waives its sovereign immunity simply by filing a forfeiture claim.[276] The Fifth Circuit rejected this argument, noting that this only applies in the narrow instance of suing to recover damages to a vessel and cuts against Congress' purpose to put in the FTCA the specific instances where the federal government

940 (5th Cir. 1966)); SCHOENBAUM, *supra* note 39, § 21-6; *see also* Hawkspere Shipping Co., Ltd. v. Intamex, S.A., 330 F.3d 225, 228 (4th Cir. 2003); Afram Lines Intern., Inc. v. M/V Capetan Yiannis, 905 F.2d 347, 349 (11th Cir. 1990) (considering counterclaim in in rem admiralty proceeding).

269. *$4,480,466.16 in Funds Seized*, 942 F.3d at 662 n.12 (citing Titan Nav., Inc. v. Timsco, Inc., 808 F.2d 400, 403 (5th Cir. 1987); 3A BENEDICT ON ADMIRALTY § 306 (2019)); *see also supra* notes 25–35.

270. *$4,480,466.16 in Funds Seized*, 942 F.3d at 662 (citing FED. R. CIV. P. SUPP. E(7)).

271. *Id.* at 662–63 (italics omitted).

272. *Id.* at 663.

273. *Id.* (quoting Doe v. United States, 853 F.3d 792, 796 (5th Cir. 2017)).

274. *Id.* at 664.

275. *Id.* (quoting Spotts v. United States, 613 F.3d 559, 565 n.3 (5th Cir. 2010)); *see also* F.D.I.C. v. Meyer, 510 U.S. 471, 477 (1994); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008) ("The amendment canceled the exception—and thus restored the waiver of sovereign immunity—for certain seizures of property based on any federal forfeiture law." (italics omitted)).

276. *$4,480,466.16 in Funds Seized*, 942 F.3d at 665 (citing United States v. Shaw, 309 U.S. 495, 502–03 (1940)); *see also* United States v. The Thekla, 266 U.S. 328 (1924); United States v. The Paquete Habana, 189 U.S. 453 (1903); The Siren, 74 U.S. 152 (1868)).

waives its sovereign immunity for wrongful forfeiture claims.[277] The court left the door open for potential counterclaims against the government in a civil forfeiture proceeding if a claimant can show that the federal government has waived its sovereign immunity.[278]

Ultimately, the Fifth Circuit correctly held that a claimant may assert a counterclaim in an in rem civil forfeiture proceeding.[279] First, a claimant can file many proceedings in an in rem proceeding because provided that the court can exercise personal jurisdiction over that claimant, then there is no jurisdictional bar to asserting a counterclaim.[280] Second, the unification of the FRCP and Admiralty Rules, as well as the scope of the Supplemental Rules, support allowing counterclaims in civil forfeiture cases.[281] But finally, the Fifth Circuit accurately noted that sovereign immunity will bar these counterclaims absent a statutory waiver.[282] However, sovereign immunity will not totally bar counterclaims because certain counterclaims will arise under CAFRA for the federal government's wrongful forfeiture of the property.

VI. COUNTERCLAIMS SHOULD BE ALLOWED IN CIVIL FORFEITURE PROCEEDINGS

A. In Rem Jurisdiction Alone Does Not Bar a Counterclaim in a Civil Forfeiture Proceeding

Despite the First Circuit's contention in *One Lot of U.S. Currency ($68,000)*, in rem jurisdiction does not totally refer to jurisdiction over just the property itself. Rather, it is jurisdiction over individuals with an interest in the property.[283] Therefore, individuals have rights at stake and claims to make within an in rem proceeding, even though the named litigant is the property.[284] Indeed, "the fictions of in rem forfeiture were developed primarily to expand

277. *$4,480,466.16 in Funds Seized*, 942 F.3d at 664 (citing 28 U.S.C. § 2680(c)(1)–(4) (2). The court also rejected RRCC's arguments that the court should dismiss the appeal because the government never raised the issue at the district court and that it would "convert a without-prejudice dismissal below into a with-prejudice dismissal on appeal, which would be inappropriate without a cross-appeal." *Id.* at 665 (citing Jennings v. Stephens, 574 U.S. 271 (2015)).

278. *Id.* at 665 n.17 (noting that the Tucker Act might provide an avenue for a claimant's counterclaim for damages from a Takings Clause violation).

279. *Id.* at 656.

280. *Id.* at 660.

281. *Id.* at 662–663, 662 n. 12.

282. *Id.* at 665 n.19.

283. Shaffer v. Heitner, 433 U.S. 186, 207 (1977) ("'[J]urisdiction 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 (AM. L. INST. 1971)).

284. *Id.*

the reach of the courts and to furnish remedies for aggrieved parties, not to provide a prevailing party with a means of defeating its adversary's claim for redress."[285]

The reason that the property is named in an in rem suit is not to designate the property as the only party at issue, but it is to designate what is within the jurisdiction's borders that the court can adjudicate.[286] This was a convenient alternative to in personam jurisdiction, but it arose during a time where technology and means of travel severely limited a court's ability to assert physical control over litigants within its territorial boundaries.[287]

This is precisely the conclusion that the Supreme Court reached in *Shaffer*. There, the Court recognized that "'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."[288] Thus, the Supreme Court endorsed the modern understanding that a court can exercise personal jurisdiction where the party meets the modern "minimum contact" standard.[289] This satisfies the singular requirement of in rem jurisdiction, which is to ensure that the court ruling on the case actually has authority over the property and the parties at issue.[290] And looking to both *Shaffer* and the purpose of in rem jurisdiction, even as reflected in maritime liens, a court adjudicating the forfeiture of the property would be able to exercise personal jurisdiction over the claimant's counterclaims.[291]

Even further, CAFRA itself recognizes that claimants could assert defenses and utilize procedural mechanisms in order to assert their interest within a case.[292] The clear statutory intent from this is that claimants must have an avenue with which to litigate their claims.[293] And countless courts have accepted motions to dismiss, summary judgment, discovery motions, and other

285. Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 87 (1992) (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960); Harmony v. United States, 43 U.S. 210, 233 (1844)).

286. *See* Alitalia-Linee Aeree Italiane S.p.A. v. Casinoitalia.com, 128 F. Supp. 2d 340, 345 n.10 (E.D. Va. 2001) (citing 4A WRIGHT & MILLER, *supra* note 28, § 1070 (4th ed. 2020)).

287. *See, e.g.,* 4 WRIGHT & MILLER, *supra* note 28, § 1064 (documenting the history of personal jurisdiction and its connection to geographic control over a person).

288. *Shaffer*, 433 U.S. at 207 (citations omitted).

289. *Id.*

290. *See, e.g.,* United States v. All Funds in Account No. 747.034/278, 295 F.3d 23, 25 (D.C. Cir. 2002).

291. *See supra* notes 127–33.

292. *See* 18 U.S.C. § 983(d)–(g); United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 660 (5th Cir. 2019).

293. *See, e.g., $4,480,466.16 in Funds Seized*, 942 F.3d at 660; *see also* FED. R. CIV. P. 1 (stating that the FRCP shall "be construed . . . to secure the just, speedy, and inexpensive determination of every action").

motions allowed under the FRCP in civil forfeiture cases without decrying their applicability for a lack of personal jurisdiction.[294] If courts only had jurisdiction over the property, then it would foreclose all of these other actions by a claimant. But it does not, because that it not how in rem jurisdiction works, as *Shaffer* shows.[295] This view accords with the general understanding that in rem jurisdiction is not an austere, unyielding command that the court only exercise control over the property without regard to the person who owns the property.[296]

This reality exposes the fatal flaw that the First Circuit followed in *One Lot of U.S. Currency ($68,000)* because the First Circuit dismissed a counterclaim because it thought that "[a] forfeiture action is in in rem, not in personam."[297] The First Circuit failed to acknowledge that the modern personal jurisdiction doctrine has its basis in fairness and that courts always look to see if exercising personal jurisdiction over the defendant is "reasonable under the circumstances."[298] Ironically, the First Circuit chose to ignore fairness entirely because its position is manifestly unfair, since it would deny a civil forfeiture claimant's counterclaim that helps litigate her right in the property, while allowing the federal government to assert its right in the property. The First Circuit's rationale misses the underlying purpose of in rem jurisdiction to adjudicate the rights of people to the property, as a simple shortcut that courts employ to give aggrieved parties their redress.[299] And if the court can exercise

294. *See* United States v. Sum of $70,990,605, 4 F. Supp. 3d 209, 211 (D.D.C. 2014) (acknowledging civil discovery rules apply along with CAFRA's specific provisions on discovery); United States v. 630 Ardmore Drive, 178 F. Supp. 2d 572, 580 (M.D.N.C. 2001) (analyzing Rule 12(b)(6) motion using CAFRA's heightened standard); United States v. One 1966 Chevrolet Pickup Truck, 56 F.R.D. 459, 461 (E.D. Tex. 1972) ("A motion to set aside a default judgment is governed by Rules 55 and 60 of the Federal Rules of Civil Procedure. These Rules are applicable to proceedings in rem except to the extent they are inconsistent with the Supplemental Rules.") (italics omitted)); United States v. Two Hundred and One, Fifty Pound Bags of Furazolidone, 52 F.R.D. 222, 223 (D.N.D. 1971) (applying Rule 56 motion for summary judgment to forfeiture proceeding because it was not inconsistent with other provisions of the Supplemental Rules).

295. *See* Shaffer v. Heitner, 433 U.S. 186, 207–209 (1977).

296. *See, e.g.,* Republic Nat'l Bank of Miami v. United States, 506 U.S. 80 (1992) (rejecting the argument that a court may only exercise personal jurisdiction of civil forfeiture assets if the assets remain in the geographic boundaries of the court).

297. United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 34 (1st Cir. 1990) (italics omitted).

298. *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1786 (2017) (citing Asahi Metal Industry Co. v. Superior Ct. of Cal., 480 U.S. 102, 113–14 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477–78 (1985) (Sotomayor, J., dissenting)).

299. *Republic Nat'l Bank of Miami*, 506 U.S. at 87 (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960); Harmony v. United States, 43 U.S. 210, 233 (1844)).

jurisdiction over the seized property, then it can hear and deliberate on the property owner's claims.[300]

B. The Purpose and History Surrounding Counterclaims and Intervenors Support Allowing Claimants to Assert Them in Civil Forfeiture Cases

As a matter of policy, allowing claimants to assert counterclaims would further the liberal purpose behind the modern counterclaim rule.[301] There was a period in history where courts refused to entertain counterclaims from a litigant if certain arcane requirements were not met, such as if the litigant attempted to recover in equity when the proceeding was at law.[302] Similarly, any requirement that the claimant in civil forfeiture cases should not be allowed to assert a counterclaim is analogous to these prior unnecessary rules because it would forbid claimants from pursuing a counterclaim—a purposefully liberal instrument that may be permissive—solely because he is not the named party in the case. This cuts against the goal behind FRCP 13 for courts to expediently resolve all claims at interest in a case.[303]

The Fifth Circuit properly recognized the fact that named defendants are not the only ones who can assert counterclaims, so other courts should adopt the court's conclusions.[304] Whether as an intervenor or a special kind of litigant, many parties can assert counterclaims without being the named litigant.[305] Most courts have developed some way of determining whether a party should be able to assert a counterclaim, regardless of whether the counterclaimant is the named defendant.[306]

Claimants are naturally parties in a case, at least according to how courts now interpret who it can deem a "party" for the sake of asserting a counterclaim.

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300. *See* United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 660 (5th Cir. 2019); *see also, e.g.,* United States v. 662 Boxes of Ephedrine, 590 F.Supp.2d 703, 707 (D.N.J. 2008) (hearing civil forfeiture claimant's counterclaims but dismissing based on sovereign immunity).

301. *See supra* Part III.

302. *See* Am. Mills Co. v. Am. Sur. Co., 260 U.S. 360, 364–66 (1922).

303. *See* Mass. Cas. Ins. Co. v. Forman, 600 F.2d 481, 485 (5th Cir. 1979) ("Rules 13 and 56 in particular, . . . are designed to 'expedite the resolution of all the controversies between the parties in one suit.'" (quoting 6 WRIGHT & MILLER, *supra* note 28, § 1403)); Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973) ("The objective of the Federal Rules with respect to counterclaims is to provide complete relief to the parties, to conserve judicial resources and to avoid the proliferation of lawsuits.").

304. *See $4,480,466.16 in Funds Seized*, 942 F.3d at 660–61.

305. *Id.; see also supra* notes 112–115; *Forman*, 600 F.2d at 485; *Montecatini Edison, S.P.A*, 486 F.2d at 1282; Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc., 292 F.3d 384, 392–93 (3d Cir. 2002); Avemco Ins. Co. v. Cessna Aircraft Co., 11 F.3d 998, 1000 (11th Cir. 1993); Banco Nacional de Cuba v. First Nat'l City Bank of N.Y., 478 F.2d 191, 194 (2d Cir. 1973).

306. *See, e.g., $4,480,466.16 in Funds Seized*, 942 F.3d at 660–61.

First, CAFRA treats civil forfeiture claimants as a party to an action.[307] A claimant receives notice,[308] files a responsive pleading,[309] and has several procedural mechanisms at her disposal.[310] She can move to suppress evidence,[311] motion to dismiss the claim,[312] object to government interrogatories,[313] and raise defenses.[314] But why do courts like the First Circuit and the Middle District of Florida find that it is so ludicrous to assert that a claimant could also levy a counterclaim if she has nearly every other procedural right afforded to a party at her disposal?[315] A claimant's ability to assert a counterclaim is consistent with any other action she can take under the Supplemental Rules and CAFRA.[316]

Second, and more obviously, a civil forfeiture claimant has "an adversarial relationship" with the federal government because a claimant likely seeks to prevent forfeiture in the first place.[317] As understood in the various procedures in CAFRA, the civil forfeiture claimant has many tools at her disposal to challenge a forfeiture.[318] Thus, she stands in a similar place to any other named litigant. Finally, it promotes judicial economy to allow a claimant to assert a counterclaim in a civil forfeiture proceeding because it furthers the liberal mission of the FRCP for judicious and expedient resolution of all claims at interest in a case.[319] Thus, courts should consider claimants "parties" able to assert a counterclaim because this accords with the practice to construe Rule 13

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307. *See id.* at 660.

308. FED. R. CIV. P. SUPP. (G)(4).

309. FED. R. CIV. P. SUPP. (G)(5).

310. *See* FED. R. CIV. P. SUPP. (G)(8), (G)(8)(b), (G)(6); 18 U.S.C. § 983(d)–(f); United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 32 (1st Cir. 1991); United States v. 8 Luxury Vehicles, 88 F. Supp. 3d 1332, 1334 (M.D. Fla. 2015). *Compare* FED. R. CIV. P. SUPP. (A)(2), *with* FED. R. CIV. P. SUPP. (G)(4)–(6), (8), (8)(b).

311. FED. R. CIV. P. SUPP. (G)(8).

312. FED. R. CIV. P. SUPP. (G)(8)(b).

313. FED. R. CIV. P. SUPP. (G)(6).

314. 18 U.S.C. § 983(d)–(f) (allowing civil forfeiture claimants to assert an "innocent owner" defense, set aside the proceeding because of lack of notice, and release the property).

315. *See One Lot of U.S. Currency ($68,000)*, 927 F.2d at 34; *8 Luxury Vehicles*, 88 F. Supp. 3d at 1336.

316. *Compare* FED. R. CIV. P. SUPP. (A)(2) ("The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."), *with* FED. R. CIV. P. SUPP. (G)(4)–(6), (8), (8)(b), *and* 18 U.S.C. § 983(d)–(f).

317. 6 WRIGHT & MILLER, *supra* note 28, § 1404.

318. *See* FED. R. CIV. P. SUPP. (G)(4)–(6), (8), (8)(b); 18 U.S.C. § 983(d)–(f).

319. *See* Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc., 292 F.3d 384, 391 (3d. Cir. 2002) (interpreting "opposing party" broadly "to give effect to the policy rationale of judicial economy underlying Rule 13").

liberally in order to promote quickly resolving all claims between all parties involved in the case.[320]

But even if a claimant is not like a named defendant who can assert a counterclaim, the Fifth Circuit accurately noted that claimants act more like intervenors, who can assert counterclaims.[321] Like counterclaims, courts take a liberal stance on intervention and favor it so as to have expedient resolution of all cases that come to court.[322] Courts find that intervenors have the same standing as an original party in the case.[323] If claimants and intervenors are analogous, then the claimant ought to have the same tools as the intervenor at her disposal.[324]

Supplemental Rule G(5) allows the claimant to intervene in the case, so as to assert her right in the property.[325] If the claimant can assert her right in the property, it only makes sense to allow her to assert a counterclaim because intervenors have these similar rights and it would be expedient for a court to

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320. *Id.*

321. United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 660–661 (5th Cir. 2019). *But see* 7C WRIGHT & MILLER, *supra* note 28, § 1921 (finding "that 'the authorities are in disagreement as to the proper treatment to be accorded counterclaims asserted by an intervenor.'" (quoting Exchange Nat'l Bank of Chi. v. Abramson, 45 F.R.D. 97, 103 (D. Minn. 1968))). The confusion regarding this rule arose under *Chandler & Price Co. v. Brandtjen & Kluge*. 296 U.S. 53 (1935). This case came about prior to the unified FRCP yet limited an intervenor's ability to assert a counterclaim. However, the case is distinguishable from civil forfeiture because it was based on the notion that the intervenor "is limited to the field of litigation open to the original parties." *Id.* at 58. Seeing as the property at issue does not assert claims, present defenses, or issue motions, it merely serves as a placeholder for claimants to assert their own claims. Still, authorities split on whether an intervenor "of right" or a "permissive" intervenor can bring counterclaims. *Compare* Dickinson v. Burnham, 197 F.2d 973, 980 (2d Cir. 1952) (allowing intervenors to serve a permissive counterclaim because they act as original parties), *with* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 754–755 (1968) (dismissing the "erroneous premise that one entitled to become a party for a given purpose necessarily becomes a party for every purpose, whether related to his right to intervene or not."). If a civil forfeiture claimant brings a counterclaim while following CAFRA and the cause of action arises out of the forfeiture, then there is no problem. This would likely satisfy the requirements for an intervenor "of right" or a "permissive" intervenor.

322. *See* Barnes v. Sec. Life of Denver Ins. Co., 945 F.3d 1112, 1121 (10th Cir. 2019) (quoting Utah Ass'n of Cntys. v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001)); Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011); South Dakota *ex rel*. Barnett v. U.S. Dept. of Interior, 317 F.3d 783, 785 (8th Cir. 2003).

323. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531, 541 n.15 (1970) (affording intervenors the right to jury trials on issues they present); *see also* United States v. Jim, 891 F.3d 1242, 1244 (11th Cir. 2018); League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997); Alvarado v. J.C. Penney Co., Inc., 997 F.2d 803, 805 (10th Cir. 1993); Schneider v. Dunbarton Devs., Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985).

324. *$4,480,466.16 in Funds Seized*, 942 F.3d at 660–61.

325. FED. R. CIV. P. SUPP. G(5); *see also* United States v. $133,420.00 in U.S. Currency, 672 F.3d 629, 635 (9th Cir. 2012).

hear all of these cases from the outset.[326] Provided that nothing in the Supplemental Rules nor the FRCP forbid an intervenor from asserting a counterclaim in the property at issue, then courts should favor this interpretation that provides for expedient resolution of civil claims. Rather, the Supplemental Rules and CAFRA treat civil forfeiture claimants analogously to intervenors, who can also assert counterclaims.[327]

The analysis from courts who reject this contention is threadbare. These courts find that because the property is the defendant, then no other party could assert a claim as a "pleader" under Rule 13.[328] But this ignores rules governing both intervenors and other parties' counterclaims.[329] A literal interpretation of who is the pleader in these cases leads to confusing results that are inapposite to the FRCP's command to expediently deal with all claims in a single civil action.[330]

And worse still, these courts mistakenly think that "because the government has not filed a complaint against the claimants, they are not in the position to file a counterclaim."[331] That conclusion ignores both how the law treats

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326. *See $4,480,466.16 in Funds Seized*, 942 F.3d at 660–61; *see also, e.g.,* Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973) ("The objective of the Federal Rules with respect to counterclaims is to provide complete relief to the parties, to conserve judicial resources and to avoid the proliferation of lawsuits."); Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 827 (2d Cir. 1963) ("The whole tenor and framework of the Rules of Civil Procedure preclude application of a standard which strictly limits the intervenor to those defenses and counterclaims which the original defendant could himself have interposed.").

327. *Compare* FED. R. CIV. P. 24(a) (allowing "intervention of right" for "anyone . . . who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."), *with* 18 U.S.C. § 983(a)(4)(A) (permitting "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property"), *and* FED. R. CIV. P. SUPP. G(5) ("A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending.").

328. *See* United States v. 8 Luxury Vehicles, 88 F. Supp. 3d 1332, 1334 (M.D. Fla. 2015) (citing United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 34–35 (1st Cir. 1991)).

329. *See* FED. R. CIV. P. SUPP. G(5); United States v. $133,420.00 in U.S. Currency, 672 F.3d 629, 635 (9th Cir. 2012).

330. Ross v. Bernhard, 396 U.S. 531, 541 n.15; United States v. Jim, 891 F.3d 1242, 1244 (11th Cir. 2018); League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997); Schneider v. Dunbarton Devs., Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985); *$4,480,466.16 in Funds Seized*, 942 F.3d at 660–61; FED. R. CIV. P. SUPP. G(5); *$133,420.00 in U.S. Currency*, 672 F.3d at 635.

331. United States v. $22,832.00 in U.S. Currency, No. 1:12 CV 01987, 2013 WL 4012712, at *4 (N.D. Ohio Aug. 6, 2013); *see also* United States v. Funds from Fifth Third Bank Account, No. 13-11728, 2013 WL 5914101, at *12 (E.D. Mich. Nov. 4, 2013) ("This action was not brought against

intervenors and the countless procedural rights that a claimant in a civil forfeiture case has under CAFRA which are similar to intervenors, including the ability to file a response to a claim.[332] If it were a requirement that only those against whom a specific claim is asserted in litigation have the ability to assert a counterclaim, then intervenors would also be unable to assert counterclaims.[333] Because intervenors can, in fact, still assert counterclaims, the Fifth Circuit's analogy holds stronger than other court's rationale.

C. Admiralty Practice and the Supplemental Rules Allow Civil Forfeiture Claimants to Make Counterclaims

If civil forfeiture proceedings must "conform as near as may be to proceedings in admiralty," then courts must allow claimants to assert counterclaims.[334] While the Supplemental Rules apply fully and exclusively to admiralty actions, the FRCP apply to forfeiture proceedings under CAFRA unless "inconsistent" with the Supplemental Rules.[335] Thus, as a matter of simple interpretation, FRCP 13 would apply to civil forfeiture actions by default.[336]

Scouring both the Supplemental Rules and CAFRA leads to nothing explicitly or implicitly barring a claimant's counterclaim. Instead, Rule G clearly states that Rule E applies to civil forfeiture actions.[337] Looking at Rule E, it applies to all in rem actions and has a deliberate reference to counterclaims.[338] Therefore, a claimant following the text of the Supplemental Rules would find that she is able to assert a counterclaim because of this deliberate reference.[339]

[claimant] and the Government has not asserted any claims against [claimant]. Rather, [claimant] chose to intervene as a claimant to the in rem defendant funds. As such, it is not entitled to file counterclaims in the instant action.") (italics omitted)). *But see* Barnes v. Harris, 783 F.3d 1185, 1190–91 (10th Cir. 2015); Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003) ("As an intervenor, the United States 'participates on an equal footing with the original parties to a suit.'") (quoting Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994))).

332. *See $4,480,466.16 in Funds Seized*, 942 F.3d at 660–61.

333. *See* Fredericks v. Shapiro, 160 F.R.D. 26, 28 (S.D.N.Y. 1996) (allowing intervenor to bring counterclaim because he would be liable for attorney's fees).

334. 28 U.S.C. § 2461.

335. FED. R. CIV. P. SUPP. A(2).

336. *See $4,480,466.16 in Funds Seized*, 942 F.3d at 661 n.10.

337. FED. R. CIV. P. SUPP. G(1) ("To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.").

338. FED. R. CIV. P. SUPP. E(1), (7).

339. *$4,480,466.16 in Funds Seized*, 942 F.3d at 662–63.

As mentioned, the unification between the FRCP and the Admiralty Rules lead to the Supplemental Rules.[340] However, where the Supplemental Rules differ from the FRCP, then the Supplemental Rules apply.[341] Yet this does not foreclose the FRCP from "filling in the gaps" where the Supplemental Rules are silent.[342] So, in the case of a counterclaim, nothing in the Supplemental Rules forbids counterclaims.

Furthermore, the Supplemental Rules act as if counterclaims are present for litigants in in rem proceedings.[343] The main evidence of this comes from Supplemental Rule E(7), which explains when a plaintiff needs to give "security" for counterclaim damages.[344] Supplemental Rule E(7) is the modern equivalent of Admiralty Rule 50.[345] Admiralty Rule 50 applied for all admiralty suits, including forfeitures, and its purpose was to put the plaintiff and counterclaimant on equal footing.[346] Indeed, claimants in admiralty forfeiture proceedings could file a counterclaim for wrongful seizure.[347] This may have

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340. *See supra* Part II.A.

341. *See supra* Part II.A.

342. *See supra* note 330.

343. *See supra* note 330–32.

344. *See supra* note 330–32.

345. *Compare* FED. R. CIV. P. SUPP. E(7)(a):

> When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

with Wash. & S. Navigation Co. v. Balt. & Phila. S.B. Co., 263 U.S. 629, 631 (1924)

> Rule 50. Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

346. FED. R. CIV. P. SUPP. E(7); Pan Am. Shipping Corp. v. Maritima Columbiana Limitada, 193 F.2d 845, 846 n.1 (5th Cir. 1952); E. Transp. Co. v. United States, 98 F. Supp. 36, 38 (E.D.N.Y. 1951) (citing *Baltimore & Phila. Steamboat Co.*, 263 U.S. at 638–39).

347. *See* P.R. Ports Auth. v. Barge KATY-B, 427 F.3d 93, 99 (1st Cir. 2001) (permitting intervenor to assert interest in in rem naval forfeiture); Hawkspere Shipping Co., Ltd. v. Intamex, S.A., 330 F.3d 225, 230 (4th Cir. 2003) (allowing counterclaim from claimants in naval forfeiture); Teyseer Cement Co. v. Halla Mar. Corp., 794 F.2d 472, 478 (9th Cir. 1986) (considering counterclaim from in rem forfeiture intervenor); Ocean Ship Supply, Ltd. v. MV Leah, 729 F.2d 971, 973 (4th Cir. 1984); Koch Fuels, Inc. v. Cargo of 13,000 Barrels, 704 F.2d 1038, 1039 (8th Cir. 1983).

even included a state tort law claim for conversion.[348] Thus, when applied to civil forfeiture, which is a proceeding intended to be as close to admiralty as possible, a claimant can assert a counterclaim.

Notably, this evidence supports the Fifth Circuit's view that the in rem nature of a proceeding did not mean that counterclaims are extinguished.[349] In the admiralty context, counterclaims persisted regardless of the in rem nature of a proceeding because many admiralty suits acknowledged that claimants could make counterclaims in admiralty forfeitures.[350] And where civil forfeiture falls under the Supplemental Rules governing admiralty actions and resembles an admiralty action, nothing about its in rem character extinguishes the counterclaim.[351] Rather, the clear reference in Rule E(7) to counterclaims for an in rem proceeding shows that even in a civil forfeiture proceeding, a claimant can levy a counterclaim.[352]

D. Sovereign Immunity Serves as a Weighty Barrier for Most Counterclaims Unless Those Counterclaims Seek Remedies That CAFRA Permits

The most prominent barrier to any claimant's counterclaim in civil forfeiture is sovereign immunity, rather than jurisdiction or the scope of the FRCP.[353] Sovereign immunity clearly limits the government's tort liability to actions where it has explicitly consented to jurisdiction.[354] Prior to CAFRA, this meant that counterclaims arising out of "any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer" were not allowed in federal court because the United States did not consent to jurisdiction.[355] Yet looking at 28 U.S.C. § 2680[356], the United States is not immune from a claim if:

> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of

348. *See* Goodpasture, Inc. v. M/V Pollux, 602 F.2d 84, 87 (5th Cir. 1979).

349. *$4,480,466.16 in Funds Seized*, 942 F.3d at 660–63.

350. *P.R. Ports Auth.*, 427 F.3d at 99; *Hawkspere Shipping Co., Ltd.*, 330 F.3d at 230; *Teyseer Cement Co.*, 794 F.2d at 478; *Koch Fuels, Inc.*, 704 F.2d at 1039.

351. *P.R. Ports Auth.*, 427 F.3d at 99; *Hawkspere Shipping Co., Ltd.*, 330 F.3d at 230; *Teyseer Cement Co.*, 794 F.2d at 478; *Koch Fuels, Inc.*, 704 F.2d at 1039; *see also $4,480,466.16 in Funds Seized*, 942 F.3d at 660 (citation omitted).

352. *See supra* note 345.

353. *See supra* Part IV.

354. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994).

355. *See* United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1490–91 (10th Cir. 1984) (dismissing FTCA counterclaim from claimant in civil forfeiture case).

356. 28 U.S.C. § 2680(c)(1)–(4).

> a criminal offense;
> (2) the interest of the claimant was not forfeited;
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[357]

This was the "re-waiver" of the United States' sovereign immunity for certain property damages in a wrongful civil forfeiture.[358] If nothing bars a counterclaim under the FTCA based on jurisdiction and the FTCA itself opens the possibility for civil forfeiture claimants to assert a claim, then nothing would necessarily mean that a civil forfeiture claimant could not assert a very specific counterclaim.[359]

But what does matter is whether the claim arises under federal or state law. As noted, the United States only waives tort damages for claims arising under the "law of the state" where the harm occurred.[360] For the Fifth Circuit, this meant that the claimant could not assert constitutional counterclaims because these arose under federal law.[361]

Potentially, one can argue that the federal government waived sovereign immunity by bringing the suit in admiralty to begin with.[362] Remember, civil forfeiture claims on land fall under the Supplemental Rules and "[u]nless otherwise provided by Act of Congress . . . shall conform as near as may be to proceedings in admiralty."[363] There is a great deal of admiralty law stating that the United States waives sovereign immunity through simply bringing an in rem admiralty proceeding.[364] Yet anyone arguing that sovereign immunity is

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357. *Id.*

358. United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 664 (5th Cir. 2019) (citing Smoke Shop, LLC v. United States, 761 F.3d 779, 782 (7th Cir. 2014); Foster v. United States, 522 F.3d 1071, 1075 (9th Cir. 2008)).

359. *See $4,480,466.16 in Funds Seized*, 942 F.3d at 664 n. 17.

360. F.D.I.C. v. Meyer, 510 U.S. 471, 478 (1994) (citing Miree v. Dekalb Cnty., 433 U.S. 25, 29 n.4 (1977); United States v. Muniz, 374 U.S. 150, 153 (1963); Richards v. United States, 369 U.S. 1, 11 (1962); Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957)).

361. *$4,480,466.16 in Funds Seized*, 942 F.3d at 664 (citing Spotts v. United States, 613 F.3d 559, 565 n.3 (5th Cir. 2010)).

362. *See* Petition for Writ of Certiorari, Retail Ready Career Ctr. v. United States, (No. 19–970), 2020 WL 564731, at *16–17 ("[T]his Court repeatedly held that, when the United States initiates an in rem proceeding in admiralty, the United States opens itself up to liability for all claims related thereto.") (italics omitted) (citations omitted).

363. 28 U.S.C. § 2461(b).

364. *See, e.g.,* United States v. The Thekla, 266 U.S. 328, 339 (1924) ("When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.").

necessarily waived because a civil forfeiture proceeding arises in admiralty brushes against a few glaring inconsistencies.

First, there is an Act of Congress that interferes with this theory—CAFRA. Notably, CAFRA was "superimposed upon, the existing procedures in the customs laws, the Supplemental Rules, and the forfeiture statutes themselves."[365] So, necessarily, this suggests that CAFRA acts as "an Act of Congress" under section 2461, which governs waiver of sovereign immunity without resorting to traditional admiralty proceedings.[366] Thus, the government likely only waived sovereign immunity in a civil forfeiture context to the extent that the statute covers it.[367] Reading section 2680 shows that the government waived sovereign immunity for property seized from forfeiture.[368] However, section 2465 limits liability from wrongful seizure to attorney's fees, litigation costs, and interest, while preventing government liability from "intangible benefits . . . not specifically authorized by this subsection."[369]

To conclude otherwise would lead to more strangeness. The four express requirements in CAFRA for waiver of sovereign immunity would be toothless because if any time the United States instituted civil forfeiture, a court would be forced to find that it waived its sovereign immunity entirely, despite there being clear parameters in CAFRA as to the extent that a claimant can recover from the government for wrongful forfeiture.[370] This would contrast with both statutory construction[371] and any requirement that a waiver of sovereign immunity is complete and unequivocal as to what extent the government has

365. Stefan D. Casella, *The Civil Asset Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 103 (2001).

366. *Id.*; *see also* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992), *superseded by statute*, Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505 (1992) (stating that any sovereign immunity waiver must be "unequivocal").

367. *See* United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 665 (5th Cir. 2019) (rejecting the claim that the United States waives sovereign immunity by instituting a civil forfeiture action because Congress enacted a specific waiver in CAFRA); *see also* United States v. $277,000 U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995) (rejecting general counterclaim for damages in a civil forfeiture suit pre-CAFRA because claimant could not demonstrate that the government waived sovereign immunity for that specific claim); United States v. 662 Boxes of Ephedrine, 590 F. Supp. 2d 703, 708 (D.N.J. 2008).

368. 28 U.S.C. § 2680.

369. *Id.* at § 2465(b)(2)(A).

370. *See, e.g.,* N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017) (explaining the "'interpretive canon, *expressio unius est exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned."'" (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002))).

371. *Id.* ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health.") (citation omitted).

waived it.[372] Why bother analyzing a potential claim against the United States through the procedures laid out in the amendment to section 2680 if the government simply waived sovereign immunity through bringing suit? This would vastly exceed whatever purpose Congress had in mind when it designed the statute.[373]

Potentially, one can argue that CAFRA only explicitly covered certain property damages but did not totally foreclose claimants from asserting comparable claims not covered. But that still ignores the express language in CAFRA and Congress' careful attempt to distinguish between claims that merit waiving the government's sovereign immunity when instituting forfeiture and those claims that do not.[374] The analysis aligns with the Fifth Circuit's application of the FRCP where the Supplemental Rules did not provide otherwise because it only covers the silence so as to "ensure that the statutory scheme is coherent and consistent."[375] And it is undisputed that sovereign immunity is waived only through "explicit congressional authorization."[376]

If CAFRA covers when and how a claimant can assert a counterclaim, then what must the claim seek? At least one court has argued that, according to CAFRA, the only thing a claimant can seek are attorney's fees, litigation costs, and interest.[377] So, CAFRA and the FTCA provide only a very narrow window for a claimant to assert claims.[378] While a litigant might argue that state law tort claims, such as conversion, are the kinds of claims that arise under state law which would ordinarily fall within the general waiver in the FTCA, the United States did not waive sovereign immunity for these claims.

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372. *See* Dep't. of Energy v. Ohio, 503 U.S. 607, 615 (1992).

373. *See* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)) (providing a limiting construction to the government's waiver of sovereign immunity for property forfeiture); *see also, e.g.,* Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("[C]ourts ought not add to what the legislature has said is the law. . . . Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them.").

374. *See, e.g.*, *Ali*, 552 U.S. at 222; (finding that Congress' intentional inclusion of the CAFRA waiver of sovereign immunity meant that all officers and claims arising out of civil forfeiture were covered by the original exception to that waiver in § 2680); Badaracco v. C.I.R., 464 U.S. 386, 398 ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.") (citing T.V.A. v. Hill, 437 U.S. 153, 194–95 (1978)).

375. *Ali*, 552 U.S. at 222; *see Badaracco*, 464 U.S. at 398; *see also Wright*, 278 F.3d at 1255.

376. United States v. 317 Nick Fitchard Rd., 579 F.3d 1315, 1320 (11th Cir. 2009) (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 n.7 (1983)).

377. United States v. 662 Boxes of Ephedrine, 590 F. Supp. 2d 703, 708 (D.N.J. 2008) (quoting 28 U.S.C. § 2465(b)(1)–(2)(A)).

378. *See* United States v. $4,480,466.16 in Funds Seized, 942 F.3d 655, 665 n.17 (5th Cir. 2019).

The United States waived sovereign immunity over that narrow category of claims falling under 28 U.S.C. § 2680(c)(1)–(4).[379] And CAFRA explicitly requires that the United States only pay for anything authorized under this section.[380] Damages are not authorized under CAFRA. Rather, it holds a systematic list of what damages the United States must pay for.[381]

Plainly, this does not foreclose every claim that a civil forfeiture claimant may assert as a counterclaim in a civil forfeiture proceeding. For example, recoupment would fall within the narrow waiver of sovereign immunity contained in CAFRA and the FTCA.[382] Recovering the fees incurred in litigation or interest earned post-judgment is remarkably considerable to recoupment, so it makes sense to classify the recovery permitted under CAFRA as such.[383] Courts have even suggested that such recoupment claims might be compulsory, although more importantly, courts recognize that parties have every right to assert these claims where the sovereign waives its immunity.[384]

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379. *Id.*; *see also $4,480,466.16 in Funds Seized*, 942 F.3d at 666.

380. 28 U.S.C. § 2465(b)(2)(A) ("The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.").

381. *See 662 Boxes of Ephedrine*, 590 F. Supp. 2d at 708. Also, it is important to note that anyone asserting a claim under the FTCA might need to comply with the administrative exhaustion requirements under the FTCA. 28 U.S.C. § 2675. Still, there is a split in authority as to whether this requirement is jurisdictional and cannot be waived. *See* Smoke Shop, LLC v. United States, 761 F.3d 779, 786 (7th Cir. 2014) (finding that § 2675's "exhaustion requirement" only "delineat[es] the classes of cases . . . falling within a court's adjudicatory authority" (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004))); *see also* Herr v. United States, 803 F.3d 809, 822 (6th Cir. 2015) ("Unless Congress 'clearly state[s]' its intention to deprive courts of subject-matter jurisdiction, as explained, 'courts should treat the [procedural] restriction as nonjurisdictional.'" (quoting United States v. Kwai Fun Wong, 575 U.S. 402 (2015))). *But see* D.L. *ex rel.* Junio v. Vassilev, 858 F.3d 1242, 1244 (9th Cir. 2017) ("The FTCA's exhaustion requirement is jurisdictional and may not be waived." (citing Jerves v. United States, 966 F.2d 517, 518 (9th Cir. 1992))); Lopez v. United States, 823 F.3d 970, 976 (10th Cir. 2016); Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir. 2011). Depending on the court reviewing this issue, this may provide a barrier for a claimant's ability to levy a counterclaim against the government in a civil forfeiture proceeding.

382. *See* 28 U.S.C. § 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ."); Feres v. United States, 340 U.S. 135, 137 (1950) (holding that the FTCA did not apply to negligence to military members and the government retains its sovereign immunity for such actions); 28 U.S.C. § 2465; *see also 662 Boxes of Ephedrine*, 590 F.Supp.2d at 708 (citing 28 U.S.C. § 2465(b)(1)).

383. *See supra* note 382. *Compare* 28 U.S.C. § 2465, *with Recoupment*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The getting back or regaining of something, esp. expenses.").

384. *See* Frederick v. United States, 386 F.2d 481, 488 (5th Cir. 1967) (finding that if sovereign waives immunity, then a counterclaim that meets the "same transaction or occurrence test" and limits the government's claim sounds in recoupment and is permissible); *see also, e.g.,* U.S. Dep't. of Health & Human Servs. v. Mylan Pharm. Inc., Civ. No. 10–5956, 2011 WL 13238650, at *2, *3 (D.N.J. July 13, 2011).

This reflects the understanding that claimants have a narrow window to assert recovery allowed under the FTCA and CAFRA in a counterclaim. And such a claim may prove formidable for claimants who wish to recover what they feel is owed to them for a wrongful forfeiture and could serve as a mild deterrent for wrongful forfeiture.[385]

But are there any other feasible claims that a claimant can assert in a counterclaim if the claimant's "property [has been] seized for the purpose of forfeiture"?[386] For instance, while the CAFRA re-waiver still limits a *federal* constitutional claim, a *state* constitutional claim arises under the "law of the State," and may incorporate claims for property damage.[387] Traditionally, courts have found that the federal government never waived its sovereign immunity for state constitutional tort claims under the FTCA.[388] However, CAFRA's re-waiver applies "for tort actions stemming from law-enforcement detentions of property" in certain instances, if those tort claims arise under state law.[389] Thus, a state constitutional claim arises under state law, so if the state has a constitutional provision protecting this interest, then the FTCA does not necessarily bar a claimant from asserting it.[390]

Yet these claims may crumble in the face of statutory interpretation.[391] CAFRA's narrow list of what claimants can recover if they successfully prove that the government wrongfully seized their property may foreclose any creative claim beyond what CAFRA expressly allows. Furthermore, current principles of statutory interpretation related to sovereign immunity may affect CAFRA's interplay with the FTCA.[392] Opening the United States up to state

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385. *See* 28 U.S.C. § 2401(b); *Feres*, 340 U.S. at 135; 28 U.S.C. § 2465; *662 Boxes of Ephedrine*, 590 F .Supp. 2d at 708.

386. Foster v. United States, 522 F.3d 1071, 1078 (9th Cir. 2008) (citation omitted).

387. F.D.I.C. v. Meyer, 510 U.S. 471, 478 (1994) (citing Miree v. DeKalb County, 433 U.S. 25, 29, n.4, (1977); United States v. Muniz, 374 U.S. 150, 153 (1963); Richards v. United States, 369 U.S. 1, 6–7 (1962); Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957)).

388. *See* Hernandez v. United States, 939 F.3d 191, 205 (2d Cir. 2019); *see also* Ramirez v. Reddish, No. 2:18-cv-00176-DME-MEH, 2020 WL 1955366, at *69 n.26 (D. Utah Apr. 23, 2020) (collecting cases finding that absent an express waiver, the FTCA does not waive state constitutional tort claims).

389. Smoke Shop, LLC v. United States, 761 F.3d 779, 782 (7th Cir. 2014).

390. *See* Rosario v. United States, 538 F. Supp. 2d 480, 491–493 (D. P.R. 2008); Villarrueal v. United States, No.: 16-CV-2885-CAB-BGS, 2017 WL 2733930, at *2 (S.D. Cal. June 26, 2017) (finding that where private actors are liable under California's constitution for privacy violations, the government could also be liable and sued under the FTCA); *see also, e.g.*, Papa v. United States, 281 F.3d 1004, 1010–11 (9th Cir. 2002) (treating state Constitution claims as FTCA claims that were only barred by time limitation provisions); 28 U.S.C. § 1350.

391. 28 U.S.C. §§ 2680, 2465; *see, e.g.,* N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017); Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008).

392. Kosak v. United States, 465 U.S. 848, 858–60 (1984).

constitutional claims or even tort claims beyond the enumerated provisions of § 2680(c) could disrupt the government's ability to conduct forfeiture proceedings without fear of suit.[393]

While sovereign immunity may be a dilapidated concept intrinsically linked to the antiquated notion that the government is an infallible entity, the law is the law, and it is here to stay.[394] A clever claimant cannot catapult CAFRA to strange interpretations foreign to its text and purpose (but why not try?).

VII. CONCLUSION

The Fifth Circuit properly held that a civil forfeiture claimant can assert a counterclaim in a civil forfeiture proceeding. In rem jurisdiction does not prohibit a claimant from asserting a counterclaim, provided that she can meet the modern personal jurisdiction requirements. And both the purpose and history surrounding counterclaims—to allow litigants to resolve their claims before a court within one civil action—support this expedient practice. Furthermore, admiralty practice and the Supplemental Rules implicitly endorse counterclaims in forfeiture. Thus, courts should adopt the Fifth Circuit's approach.

Even though a claimant can assert a counterclaim in an in rem civil forfeiture proceeding, sovereign immunity likely serves as a mostly impregnable bulwark to his recovery. Any claims arising out of the forfeiture must coincide with the narrow grounds for recovery under CAFRA, which only allows a claimant to recover attorney's fees, litigation costs and various forms of interest. While this may eclipse a claimant's constitutional torts or state law torts claims, the claimant can still recover those costs as laid out in CAFRA.

This is the correct result because it balances competing interests—the FRCP's goal to provide an efficient mechanism for litigants to assert their claims and CAFRA's reform to civil forfeiture. The FRCP obviously contemplates liberal counterclaim rules that extend to civil forfeiture claimants, under both the Supplemental Rules and the history and scope of Rule 13. If the purpose of the FRCP and the Supplemental Rules are to give litigants an expedient way to dispose of all of their claims at once that they have against each other, then allowing counterclaims in a civil forfeiture proceeding that arises out of the forfeiture falls within that. This result protects the FRCP's purpose and promotes judicial economy.

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393. *See* Foster v. United States, 522 F.3d 1071, 1079 (9th Cir. 2008) (finding that a "narrow reading" of § 2680(c) conformed with Congress' purpose in enacting both CAFRA and the FTCA).

394. *See supra* note 144; *see also* Pan Am. Shipping Corp. v. Maritima Columbiana Limitada, 193 F.2d 845, 848 n.1 (5th Cir. 1952).

However, the purpose and scope of CAFRA limits to what extent claimants can assert counterclaims. This is the proper result because it is not a court's place to totally disturb the legislature's will that CAFRA embodies. Even though Congress passed CAFRA to make the civil forfeiture process fairer for claimants to prevent wrongful forfeiture of their property, it never exposed the federal government to needless litigation beyond that which it waives sovereign immunity over. Thus, allowing counterclaims in civil forfeiture only to the extent that CAFRA permits aligns with CAFRA's purpose to give claimants a chance to terminate wrongful forfeiture and recover to the extent that the statute allows without exposing the government in excess of its sovereign immunity. Therefore, courts should allow a civil forfeiture claimant to assert a counterclaim against the government to the extent allowed under CAFRA because this accords with the FRCP, the Supplemental Rules, and CAFRA.